IN THE FIRST-TIER TRIBUNAL **EA/2014/0195**
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50535907
Dated: 9 July 2014

Appellant: ALISTAIR MITCHELL
Respondent: THE INFORMATION COMMISSIONER
Second Respondent: CROWN PROSECUTION SERVICE

Date of Hearing:	**19 November 2014**
Date of Decision:	**15 December 2014**
Date of Promulgation:	**8 January 2015**

Before

Michael Hake
Michael Jones
Annabel Pilling (Judge)

Subject matter:

FOIA – Qualified exemptions – prejudice to effective conduct of public affairs section 36(2)(c)

Representation:

For the Appellant:	Alistair Mitchell
For the Respondent:	Clare Nicholson (did not appear in person)
For the Second Respondent	Rory Dunlop

Decision

For the reasons given below, the Tribunal refuses the appeals and upholds the Decision Notice of 9 July 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9 July 2014.

2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Crown Prosecution Service (the 'CPS') for internal correspondence which refer to a 'tick and star' brief marking system as referred to in an internal email dated 18 January 2013 and which had been 'leaked' to the press.

3. The CPS refused to disclose the information requested relying on the exemption in section 36 (2)(c) FOIA on the basis that, in the opinion of the qualified person, namely the Director of Public Prosecutions (the 'DPP'), disclosure would be likely to prejudice the effective conduct of public affairs, and that the public interest in disclosure was outweighed by the public interest in maintaining the exemption.

4. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the CPS. The Commissioner concluded that the CPS had correctly applied section 36(2)(c) to the requested information.

Background

5. The CPS prosecutes approximately 100,000 defendants each year in the Crown Court. Approximately 17% are tried before a jury. In respect of the

volume of prosecutions in the Crown Court around 70% of the cost of advocacy is associated to members of the self-employed criminal Bar, instructed by the CPS, and the remaining 30% to CPS in-house advocates.

6. The choice of using in-house advocates, as opposed to the self-employed Bar, has an impact on the CPS budget and budget savings may be made by dealing with cases in-house.

7. On 18 January 2013 a manager in CPS London sent out an email which referred to a ‘tick and star’ system to mark on case files to indicate whether the case would be retained by CPS advocates or sent out to the self-employed Bar. This email encouraged the recipients to “adopt a system” to retain higher earning cases, or cases in which witnesses would not attend for trial or where the evidence was weak, and to allocate the cases the CPS advocates did not want to do, “messy, troublesome cases with lots of complications” or “low earners”, to the self-employed Bar.

8. The email somehow came to the attention of the media and an article appeared in The Times on 25 February 2013 under the heading “CPS lawyers are rejecting tricky cases to save cash” and caused immediate controversy. The article reported that the DPP, then Keir Starmer QC, had promised an investigation and that he had issued a statement in which he said that this was categorically not CPS policy. The CPS issued a statement the same day.

9. The DPP caused an immediate investigation. He met with Bar Circuit Leaders and responded to the Chair of the Bar Council by letter dated 24 April 2013 detailing the outcome of his investigations and confirming that the “*guidance*” had been produced by a local manager without approval of the senior management team in London and without approval from CPS HQ. He went on to set out the CPS policy on allocation.

The request for information and response

10. On 14 March 2014 the Appellant made the following request to the CPS:

"With regards to the content of the 'leaked' CPS email dated 18 January 2013, as reported in The Times on 25 February 2013, please supply copies of:

1. *Any and all memos, letters and emails created by CPS personnel which refer to the 'tick and star' brief marking system, as described in the leaked CPS email of 18 January 2013; and*
2. *Any and all letters and emails from CPS Chief Crown Prosecutors or Area Directors addressed to CPS HQ, which were said by the DPP, on or after 25 February 2013, to provide 'reassurance/s' about the use, or former use, of a 'tick and star' brief marking system."*

11. The CPS issued a refusal notice on 23 July 2013, apologising for the delay; it had not complied with its duty in section 10(1) to respond within 20 working days. It refused to provide the information requested on the basis of section 36(2)(c) of FOIA, namely that in the opinion of the qualified person, the DPP, disclosure of the emails between senior managers and their staff would be likely to prejudice the effective conduct of public affairs; to disclose the emails would prejudice the whole process of establishing the CPS position with regard to its handling of the allocation of case files.

12. The Appellant requested an internal review of this decision on 19 August 2013. The CPS notified the Appellant of the result on 19 February 2014, some six months later, upholding the earlier decision. The Appellant complained to the Commissioner who upheld the CPS's decision.

The appeal to the Tribunal

13. The Appellant appeals against the Commissioner's decision. The Tribunal joined the CPS as Second Respondent.

14. The Tribunal was provided in advance of the hearing with an agreed bundle of material. We were also provided with a closed bundle which was not seen by the Appellant and which was said to contain all the information falling within the scope of the request.

15. The Appellant did not contest that a closed material procedure is appropriate in the circumstances of this Appeal. There is recent guidance for the approach to be taken by courts and tribunals in such circumstances.

16. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said inter alia at paragraphs 68-74 that:

    i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

    ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

    iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

    iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

17. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

    i) FOIA appeals are unlike criminal or other civil proceedings. The

Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

18. The Appellant was made aware that the closed bundle contained the disputed information. He was also told that it contained a significant amount of duplication and some material which we considered did not fall within the scope of his request but gave context to the request, and the public interest considerations.

19. At the start of the hearing we raised a number of queries about the content of the closed bundle and about which Mr Dunlop needed to take further instructions. As a result of his enquiries on the day of the hearing, two portions of a document which had been redacted in the open bundle were disclosed to the Appellant. The Tribunal received a further small bundle of closed material after the hearing; this had been identified to the Appellant as the underlying documentation of a summary with which we had already been provided.

20. We kept the issue of the closed material under review throughout the proceedings.

21. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

22. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

23. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.

24. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

25. The exemption provided for in section 36(2) FOIA is a qualified exemption.

26. The relevant parts of section 36 provide as follows:

> *"Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act-*
>
> > *(a)…..*
> >
> > *(b) would, or would be likely to inhibit-*
> >
> > > *(i) the free and frank provision of advice, or*
> > >
> > > *(ii) the free and frank exchange of views for deliberation, or*
> >
> > *(c) would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs."*

27. The Appellant challenges the findings of the Commissioner on the following grounds:

    i) That the qualified person did not give an opinion that the information engaged the exemption;

    ii) If he did, his opinion was not a reasonable opinion because he based it upon arguments concerned with section 36(2)(b); and

    iii) Even if the exemption is engaged, the public interest in disclosure outweighs the public interest in maintaining the exemption.

Did the qualified person give an opinion?

28. There is no dispute that the DPP is the CPS's qualified person for the purposes of section 36 FOIA.

29. The Commissioner was satisfied that an opinion had been sought by the CPS Freedom of Information Unit from the DPP on 19 July 2013 and that the DPP gave his opinion on the application of section 36(2)(c) on 22 July 2013.

30. From the papers before us, we have been able to examine the events leading up to this in close detail. The Head of Information Management Unit and another member of the team met with the DPP on 9 July 2013 regarding the use of section 36 exemption to the request from the Appellant.

31. On 22 July 2013, this was followed up by an email attaching the "*section 36 submission for the Director's approval*". The attachment was dated 19 July 2013 and sets out the issue, the background, the recommendation and the consideration/arguments. Some parts of this document had been redacted in the open bundle but included in the closed bundle. Following our review of the closed material the Appellant was provided with some of that redacted information.

32. The email was sent to the DPP's office at 1251 and at 1403 there was the following reply;

> *"This submission has been considered by the Director and the use of s.36 is approved."*

33. The name of the individual sending this email has been redacted from the open bundle. The Appellant submits that the Commissioner fell into error in finding that the DPP provided an opinion when there was and is no direct evidence that he did so; the opinion comes from the Head of Information Management who drafted the "*section 36 submission*" and there is no evidence that the DPP gave his own opinion.

34. We heard evidence from Andrew Penhale, CPS Freedom of Information Champion, who confirmed to the Tribunal and the Appellant that the email reply sent at 1403 was sent from the DPP's Private Secretary. He also confirmed that the context of the emails of 22 July 2013 was following up what had been discussed when the Head of Information Management met with the DPP to discuss the application of section 36 to the Appellant's request. While he could not say with any certainty whether the DPP had given oral approval at that meeting, he had sufficient personal knowledge of the approach of the DPP to be sure that the DPP would not have confirmed approval without reading the attached document.

35. The CPS submits that the Tribunal can be satisfied that this chain of events confirms that the DPP did give his opinion. We agree. There are no express requirements in FOIA in respect of the process by which the qualified person should give their opinion. Doing so as a mere "rubber stamping" exercise without a consideration of the issues may raise a question over whether the opinion is "reasonable". Although we have not been provided with a signed or initialled copy of the written submission dated 19 July 2013, we are satisfied on the evidence before us that the DPP gave his opinion on the application of section 36 FOIA based on a proper understanding of the disputed information and the surrounding

issues. The disputed information relates to the internal enquiries of CPS team leaders in respect of a specific concern and one with which the DPP had been intimately involved in the preceeding months since the 'leaked' email appeared in the press. He had met with Bar Circuit Leaders and provided the Chair of the Bar Council with a detailed response of the investigations he had caused to be made immediately upon the suggestion of the 'tick and star' system being accepted practice.

Was the opinion "reasonable"?

36. The Commissioner concluded that the opinion is reasonable having considered the following factors:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed;
- The nature of the information and the timing of the request;
- The qualified person's knowledge of, or involvement in, the issue;
- If the opinion is in accordance with reason and not irrational or absurd, that is, if it is an opinion that a reasonable person could hold, then it is reasonable;
- That the opinion does not have to be the only reasonable opinion, or even the most reasonable opinion, that could be held on the subject.

37. There did not appear to be any dispute that section 36(2)(c) is intended to apply to cases not covered by another specific exemption; the phrase "otherwise prejudice" notes prejudice not covered by sections 36(2)(a) or (b).

38. The Commissioner concluded that section 36(2)(b) cannot apply to the disputed information as its content would not inhibit the exchange of views or advice. The disputed information is an exchange of data or purely factual information; identifying the practice in that area as opposed to seeking any opinion in respect of the practice.

39. The Appellant submits that the Commissioner was incorrect, that the disputed information amounts to communications which would fall under section 36(2)(b).

40. We disagree with his submissions on this point. It is clear that the investigation following the 'leaked' email was in respect of whether this practice was being used in other CPS areas, not pursuant to any central policy decision or guidance. The disputed information, the responses to that investigation, concerns that issue and not any wider consideration of opinion or to seek to develop policy. We are therefore satisfied that the disputed information does not fall within the category of information covered by section 36(2)(b) FOIA.

41. We considered the written submission of 19 July 2013 prepared by Head of Information Management Unit which, at paragraph 7, says this:

> *"It is considered that these are exempt under section 36(2)(c). Whilst we appreciate that disclosure would support the CPS' commitment to openness and transparency, we consider that the disclosure of the information would likely inhibit the free and frank exchange of views for the purposes of policy formation between the CPS staff."*

42. This does suggest a conflation of section 36(2)(b) and (c). However on close reading of the document we are satisfied that it properly addresses the considerations and arguments in respect of section 36(2)(c). We also take into account the fact that the DPP had met with the Head of Information Management Unit to discuss the issue and that the refusal notice addresses the relevant issues under section 36(2)(c).

43. We accept the evidence of Mr Penhale and his personal knowledge of the way in which the DPP operated at a professional level. We are satisfied that the DPP had an in depth and personal knowledge of the disputed

information and the surrounding issues. The 'leaked' email caused immediate consternation within the CPS and at the self-employed Bar. An investigation was necessary to ascertain whether this was an isolated practice or more widespread. Timing was crucial and responses were sought from CPS team leaders very swiftly. The DPP, and the public, must have confidence that responses to urgent enquiries will be responsed to as swiftly as possible, without waiting for individuals to reflect and craft beautifully worded written replies. The disputed information also contains, as we disclosed to the Appellant, a series of emails relating to the erroneous inclusion of an individual's name as the "creator" of this controversial practice and the steps taken to ameliorate its effect.

44. We are satisfied that the opinion of the DPP was a reasonable opinion and that the exemption in section 36(2)(c) is engaged.

Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

45. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

46. The following principles, drawn from relevant case law, are material, both generally and in with particular reference to section 36 of FOIA, to the correct approach to the weighing of competing public interest factors; they do not form a rigid code or comprehensive set of rules but are helpful guidelines of the matters that we should properly take into account when considering the public interest test.

    (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.

    (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information

unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(iii) The balance of public interest factors must be assessed *"in all the circumstances of the case"* (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure.

(iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.

(v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.

(vii) Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to prejudice the effective conduct of public affairs, weight must be given to that opinion as an important piece of evidence in the assessment of the balance of public interest.

(viii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under

consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.

(ix) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority.

(x) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

The Public Interest Test: Opinion of the qualified person

47. Differently constituted Panels of this Tribunal have considered the relevance of the opinion of the qualified person in assessing the public interest test. We do not consider that when considering the balance of public interest the scales should be treated automatically as already having some weight in favour of maintaining the exemption because of the existence of the opinion of the qualified person, but that the reasoned opinion of that qualified person may help us to focus on the perceived importance of not disclosing specific information in a particular context.

48. We have seen a copy of the written submission on section 36 provided to the DPP after the meeting on 9 July 2013. We accept the evidence of Mr Penhale and are satisfied that this issue was one with which the DPP was very familiar; his opinion in respect of the likely prejudice to public affairs should therefore be given significant weight.

Public interest in favour of maintaining the exemption

49. The CPS and Commissioner submit that it is vital that senior management and their staff were able to have a discussion in private to establish the background of the email and to identify whether this "system" was more widespread. There is therefore a strong public interest in the CPS being able to carry out these internal reviews and in having an honest open dialogue without the fear that this information would be disclosed to the

public,

50. The exemption in section 36(2)(c) is not an absolute exemption and there can be no assurance to the CPS senior management that any such dialogue will remain private and would never be disclosed following a request for information under FOIA. The fact this is a qualified exemption means that there will be occasions when the public interests in disclosure will outweigh the public interest in maintaining the exemption, despite the qualified person's opinion that disclosure would cause prejudice to the effective conduct of public affairs.

51. The 'leaked' email sparking the request from the Appellant had caused immediate controversy. The CPS, directed by the DPP, needed to investigate swiftly to ascertain whether this was a more widespread practice, contrary to CPS policy. We accept the evidence of Mr Penhale on this point. We do not need to repeat the content of his witness statement in full but have accepted what he says at paragraphs 14-20. The CPS team managers responding to the DPP's investigation would have expected the DPP, as head of the CPS, to take responsibility for reporting publicly afterwards, not that their personal responses would necessarily be disclosed.

Public interest in favour of disclosure

52. The Appellant submits that the Commissioner erred in law by failing to take into account his arguments on the public interest in disclosure.

53. He referred to a previous request for information under FOIA in which the CPS had disclosed some internal emails. The Appellant submits that this shows that internal emails on similar topics, payment rates and travel allowances for self-employed barristers instructed by the CPS in the Magistrates' Court, had been disclosed which was relevant to the public interest test.

54. We agree with the Commissioner that the fact a public authority appears to have complied with a similar request would not automatically set a precedent for disclosure under FOIA, although it could be relevant to the public interest test. Each request for information is to be treated on its own merits and the public interest assessed in all the circumstances of that particular case.

55. The earlier request and some of the information disclosed was included in our hearing bundle. Although the general subject concerns arrangements through which the CPS instructs the self-employed Bar, the focus of the disputed information before us was whether a controversial 'system', reported in the press, was being widely used contrary to CPS policy. The disputed information was therefore created at a time when the DPP was conducting an urgent investigation, which is a very different context from disclosing emails in respect of agreed travel and payment rates.

56. The Appellant was clear that he did not submit that the DPP had been provided with answers other than those revealed to the Chair of the Bar Council in the open letter. His concern is that as the CPS has a history of failures to ensure all material has been fully checked and disclosed, and he referenced specific court cases, the DPP may not have been in possession of the full facts.

57. This investigation was in respect of a very discrete issue. The investigation was instigated by the DPP. The DPP personally reported the results of that investigation. We accept the evidence of Mr Penhale that the DPP had made a specific request to a small number of individuals and that, having received their responses, there is no scope for material to have been overlooked in this case.

58. There will always be public interest in openness and transparency and in particular that the CPS manages its administrative procedures in an effective and trustworthy manner. We consider that this public interest has been met by the fact that the DPP conducted the investigation and

published the results of that investigation. The underlying individual responses obtained during that investigation would not add to this public interest.

59. If the disputed information revealed different responses or suggested this ‘system’ or even a similar ‘system’ was being used contrary to the published CPS policy on instructing the self-employed Bar, this would be a relevant factor in favour of disclosure in order to correct the publicly announced outcome of the investigation. We have seen the disputed information and are satisfied that this is not the case.

Balance of the public interest

60. Weighing up the factors we consider apply in this case, we have given significant weight to the opinion of the qualified person and to the other factors identified by the CPS as set out above. We gave particular weight to the fact that, having seen the disputed information, it would not provide any additional information in respect of the use of the ‘tick and star’ system that was not already in the public domain at the time the request was refused. We do not consider that there are any particularly compelling factors in favour of disclosure of the disputed information.

61. We therefore conclude that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The CPS was entitled to withhold the disputed information under section 36(2)(c).

62. For these reasons we refuse the appeal and uphold the Commissioner’s Decision Notice. Our decision is unanimous.

Other matters

63. Although the Appellant did not pursue any complaint before us in respect of the CPS failures to deal with his request within the time required under FOIA, we are surprised that the Commissioner did not find a breach of section 10(1) of FOIA or criticise the CPS for not completing the internal review for six months. We hope that the CPS has now amended its

procedures to ensure compliance with both the letter and the spirit of the legislation.

Annabel Pilling

Tribunal Judge

15 December 2014