Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2006/0064
Information Commissioner's Ref: FS50102714

Heard at Employment Appeals Tribunal, London, EC4Y 0DS	**Decision Promulgated**
On 2 – 4 October 2007	**26 October 2007**

BEFORE

Deputy CHAIRMAN

Mr H FORREST

and

LAY MEMBERS

MR D WILKINSON
MS M SAUNDERS

Between

Mr R Evans

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

Ministry of Defence

Additional Party

Representation:

For the Appellant: Mr A Hudson, barrister
For the Respondent: Mr J Cornwell, barrister
For the Additional Party: Mr A MacLean, barrister

Decision

1. The Tribunal upholds the decision notice dated 25 July 2006 in relation to the request for information contained in the manuscript notes of a meeting and subsequent telephone conversation; the Tribunal agrees with the Commissioner that the balance of public interest under section 36(1) (b) (i) is in favour of maintaining the exemption from disclosure, but for different reasons to those advanced by the Commissioner.

2. The Tribunal allows the appeal against that part of the Decision Notice which relates to the disclosure of a background note, since the public interest in maintaining the exemption is outweighed by the public interest in disclosure. However, the Tribunal has not, for the moment, issued a substitute decision notice requiring disclosure since the application of further exemptions to this information remain to be considered.

Reasons for Decision

Introduction

1. Mr Evans is a reporter for The Guardian. The Guardian, along with other newspapers, has run stories about the relationship between the Government and the arms industry, focusing in particular on the role of lobbyists. On 25 July 2005, Mr Evans requested information from the Ministry of Defence about a meeting on 23 June 2005 between Lord Drayson, the then Minister for Defence Procurement and representatives from Whitehall Advisers Ltd, a lobbying company.

2. The Ministry's initial reply, on 22 August, explained that the meeting "was an introductory meeting for the new Minister. The Minister met with two individuals and was briefed on the company and its customers across the defence industry. In the discussion the Whitehall Advisers spoke about the Defence Industrial Strategy. There was some follow up discussion about the same issues in a telephone call on 28 June. No formal minute was produced of either discussion by a MOD official, but manuscript notes were taken by the Private Secretary at the time."

3. After further correspondence and an internal review, Mr Wray of the Ministry of Defence (MoD), confirmed on 22 November that the Ministry held three relevant documents: manuscript notes of the meeting, and of the subsequent telephone call, and a short background note prepared for the Minister before the meeting. He gave the name of one of the two representatives from Whitehall Advisers, who had both requested and attended the meeting: Lord Hoyle.

4. Mr Wray's letter considered various exemptions under the Freedom of Information Act (FOIA) that might apply to the information requested. He disclaimed the earlier

intention to rely on section 27 (international affairs). Since the meeting provided an opportunity for Whitehall Advisers to put their opinions to the Minister, Mr Wray claimed the information therefore fell within section 36(2) (b) (i) (provision of advice). The Minister who agreed the use of section 36 was the Armed Forces Minister, Adam Ingram. In the alternative, 35(1) (a) (formulation of government policy) applied. Mr Wray applied a public interest test to the release of the information and decided that although there was a public interest in the meeting and the advice given, to make the advice public could inhibit those meeting Ministers in the future from expressing their views frankly and giving candid advice. On balance, he decided that the public interest lay in maintaining the exemption.

5. Other exemptions were also claimed: the background note contained personal information about the other representative from Whitehall Advisers who attended the meeting and was therefore withheld under section 40 (personal data). Section 41 (information provided in confidence) was also relied on for the background note. Section 43 (commercial interests) was relied on for two sentences in the background note.

The complaint to the Information Commissioner

6. Mr Evans was dissatisfied with this reply and appealed to the Information Commissioner (IC). In his Decision Notice, dated 25 July 2006, the Commissioner stated that, having examined the disputed information, section 35 did not apply: "it is difficult to see how the notes themselves relate to the development or formulation of policy". However, section 36(2)(b)(i) did apply: "It is likely that those providing advice, comment or background information to ministers would be inhibited in doing so and that those taking notes of meetings would be much more selective about what was recorded. In making this judgment, the Commissioner distinguishes between the aide memoire produced in this case and more formal minutes of meetings which form part of the official record". Applying the public interest test, the Commissioner decided, having inspected the documents, "that the public benefit to be gained from disclosure would be slight and that the public interest in maintaining the exemption is significantly stronger."

7. The IC decided that the information in the background note could be withheld under section 40 (data protection), and that it was not practicable to separate the information provided about the company from that provided about the individual representative. The IC decided that section 41 (information provided in confidence) did not apply to the background note since the information had been provided by a civil servant to the minister, and had not therefore been provided by "another person"

The appeal to the Tribunal

8. Mr Evans appealed to the Tribunal on the ground that the IC "did not attach sufficient weight to the public interest in the disclosure of the information." He appealed against the application of section 40 on the ground that some of the information would relate to the adviser's role and relationship to government, and would therefore not be personal data, and could be disclosed, in a redacted form.

9. The MoD was joined as a party to the appeal. In their replies, both the IC and MoD discussed the application of the public interest test in section 36, (and the application of section 40), and noted that there was no dispute that section 36 applied: that the opinion of the qualified person (Adam Ingram MP) was a reasonable one. As well as claiming that section 36(2)(b)(i) was engaged, both the Commissioner and the MoD argued that, in the alternative, the information sought fell within the exemption in 36(2)(c).

10. The MoD also argued that section 41, (information supplied in confidence) applied to the background note and the telephone note. The MoD did not seek to argue that the information was supplied in confidence because (as was the case with the background note) the information had been supplied in confidence by a civil servant, but advanced a fresh argument: that the information at the meeting had been supplied by the representative from Whitehall Advisers in confidence to the Minister. Section 43 was also relied on for a limited portion of the information.

11. A directions hearing was held on the 9 February 2007, at which all parties were legally represented. It was agreed that the issues relating to the balance of the public interest under section 36 should be heard first, and that the applicability of the other exemptions claimed, sections 40, 41 and 43, would be determined subsequently, (depending on the outcome of the first hearing. To assist the parties and the Tribunal prepare for that first hearing, the Tribunal, after discussion, set out the issues to be considered:

    6.1 Whether the Commissioner correctly applied the public interest test under s2(2)(b) of the Freedom of Information Act 2000 in determining that the MoD was entitled to rely on the exemption under section 36(2)(b)(i) of the Act in relation to the Meeting Notes and the Telephone Notes.

    6.2 Whether, in the light of the Commissioner's and the MoD's Replies, the Meeting Notes, the Telephone Notes and the Background Note:
    (a) contain information that is exempt information pursuant to s36(2)(c) of the Act; and
    (b) if so, whether, pursuant to section 2(2)(b) of the Act, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 36 of the Freedom of Information Act provides:

Prejudice to effective conduct of public affairs

36(1) this section applies to –
(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
(b) information which is held by any other public authority.

(2)Information to which this section applies is exempt information if, in the 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 the purpose of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(5) in subsections (2) and (3) "qualified person" –

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

The questions for the Tribunal

12. The direction set out above was subsequently repeated on 30 March; no party applied to vary or add to the list of issues to be determined, and it was those issues therefore, that we convened to consider at the hearing on 2 October. At the start of the hearing, Mr Hudson, counsel for Mr Evans, indicated that he also wished to argue that section 36 was never engaged at all: that the opinion of the qualified person had been arrived after a process that was procedurally flawed, and was therefore unreasonable, as well as being objectively unreasonable in substance. He referred us to an earlier decision of this Tribunal, Brooke (Guardian Newspapers and Heather Brooke v IC and BBC EA/2006/0011 and EA/2006/0013). In Brooke, the Tribunal held that the opinion of the reasonable person (in that case, the BBC itself) had to be objectively reasonable, and also that it must in addition be reasonably arrived at. That second question was described by the Tribunal as a much more difficult question.

13. Mr MacLean and Mr Cornwell, counsel for the MoD and IC, both objected to the point being raised at this stage of the proceedings. In order to pursue the point, particularly the question of the process by which Mr Ingram had arrived at his opinion, it would be necessary to examine the evidence and issues as they were put before Mr Ingram. Some of that evidence was before the Tribunal, in the form of a second witness statement from Mr Wray. In that he set out what Mr Ingram had had before him: the disputed information, a submission setting out "the applicable public interest factors", and a recommendation that he approve the use of the section 36 exemption. Mr Hudson indicated that he wished to question whether the Minister had taken into account relevant public interest factors, and had not taken into account irrelevant factors. We did not have the submission before us (it was said to be exempt under the Act); Mr Hudson argued that no consideration had been given to the applicability of section 36(1) (c) (as opposed to 36(1) (b) (ii)); and that to be satisfied that the opinion had been reasonably arrived at we needed to know which parts of section 36 the opinion applied to.

14. These are weighty issues. The question of whether the process of arriving at the opinion can be challenged is itself not without doubt. If we agreed with the decision in Brooke (and it is open to argument) the opportunity to call further evidence, and possibly witnesses, would have to be given. It would substantially lengthen and change the nature of the hearing.

15. After hearing submissions, we decided that we would not allow the issue of how the opinion had been arrived at to be pursued. The only prior indication that the point was a live one had been in Mr Hudson's skeleton argument dated 24 September. That baldly stated: "for the avoidance of doubt, the Appellant does not accept that the decision of Adam Ingram MP was a reasonable one", but the point was not developed at all: there was no explanation of why it was said to be unreasonable, on substantive or procedural grounds. To allow the point to be taken now would set at nought all the Tribunal's case management and the parties elaborate preparations; it would incur further costs; it would probably require an adjournment to allow for further evidence, and possibly witnesses to be called; it would prejudice the interests of those parties waiting their turn for scarce tribunal hearing time. However, we did allow Mr Hudson to argue that the Minister's opinion was, in substance, unreasonable. That was unlikely to require any further evidence, and the arguments involved were similar to the arguments on the public interest test.

Evidence

16. We heard evidence as to the public interest in favour of disclosure from Mr Evans. He told us that Whitehall Advisers represented companies "that receive contracts worth billions of pounds from the MoD. It is crucial in a democracy that the public is allowed to see whether and how commercial pressures influence the formulation of public policy." He stressed the need for transparency in dealings with such lobbyists, pointing to the extent to which contacts between lobbyists and government are regulated: for example, meetings between Ministers and outside interest groups should be recorded (Ministerial Code of Conduct, 8.16) and the Rules on the acceptance of Outside Appointments govern when civil servants and others in public service may take up business appointments on leaving office. Further, The House of Lords Code of Conduct requires all consultancy agreements for parliamentary advice or services to be registered in the Register of Interests (12(a)); similarly, any relevant interest must be declared when communicating with Ministers: (8(b)). The public had a particular reason in seeing records of this meeting to ensure that Lord Hoyle had declared his interest as a representative of Whitehall Advisers Ltd to the Minister.

17. To counter the general argument put forward that release of such information would have an inhibiting effect; Mr Evans said that he had regularly requested notes of such ministerial meetings and background notes, and had regularly received them, though sometimes with redactions. He produced examples of 5 such requests, where various ministries had provided information on meetings between: the Secretary of State for Culture, Media and Sport with the chief executive of the Football Association; the Minister for Foreign Trade and the President and CEO of the Saudi Arabian Oil Company (ARAMCO); the Parliamentary Under Secretary of State in the Department for International Development with representatives of Starbucks UK; the Secretary of State for International Development and representatives of Shell UK; the Parliamentary Secretary of State for International Development with the Timber Trades Federation.

18. We heard evidence in support of maintaining the exemption of the information from disclosure from Mr Baker, currently Director General of Service Personnel Policy in the MoD, who had at the time of the request been Private Secretary to the Secretary of State for Defence, and as such Head of the Private Office and in

charge of the Assistant Private Secretary (one of 4) who had taken the notes of the meeting and phone call in dispute. We also heard from Mr Wray, the Director of Information (Exploitation) in the Ministry of Defence, who had conducted the internal review of Mr Evans' request for information. Mr Baker told us that Ministers were extremely busy, constantly involved in a range of meetings over the working day, often a dozen or more. A Private Secretary would be present to takes notes of any meeting, usually in longhand, in notebooks, as the meeting progressed. Depending on the style and speed of the meeting, the notes might be a fairly full, but not verbatim, record of what was said, but they could often be "terse, in the form of prompts or key phrases, grammatically incoherent and of poor legibility: they are often therefore difficult for anyone save the note taker to interpret." The main purpose of the notes is to form the basis for the construction, soon after the meeting, of a formal record of the meeting. This happened in the vast majority of ministerial meetings: it had not been done in the instant case as there was no information in the rough notes which would have been of value to others in the MoD. A second purpose of the notes is to enable a check to be made if later there is a dispute or query over what was said, or the accuracy of any formal record.

19. Background notes generally contain information on the people or organisations taking part, a summary of the issues to be discussed at the meeting, and an indication of possible lines for the Minister to take.

20. Both witnesses stressed the inhibitory impact on those taking part in ministerial meetings (including on the Minister and civil servants) if disclosure were to be regularly obtained through FOIA requests. Ministers would not be given confidential or sensitive information or advice for fear of publication, yet that was just the information that ministers needed to hear if they were to be properly informed. If the flow of information were restricted this would, over time, have a serious impact on the quality of decision-making and hence on the efficiency of government. In addition, concern over publication might inhibit those charged with recording the meeting from recording the most sensitive or confidential pieces of information: yet it was precisely this information that it was most important to record, so that those who needed to see it could be reliably informed, and a proper record kept. Again, such self-censorship would have a serious impact on the business of government: accurate and comprehensive record keeping was vital to good government.

Legal submissions and analysis.

Was the qualified person's opinion that section 36 was engaged reasonable?

21. All three representatives had submitted written skeleton arguments (Mr Hudson twice), which they amplified before us. We considered first the question of whether Mr Ingram's opinion could be said to be reasonable. Mr Ingram's opinion was that the disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice. All parties accepted the guidance in Brooke over the meaning of "would or would be likely to": "It means that inhibition would probably occur (ie, on the balance of probabilities, the chance being greater than 50%) or that there would be a "very significant and weighty chance" that it would occur. A "real risk" is not enough; the degree of risk must be such that there "may very well be" such inhibition, even if the risk falls short of being more probable than not." The views expressed by Mr Baker and Mr Wray as to the inhibitory effect of disclosure

provide support for the view that there was, at the least, a very significant and weighty chance that inhibition would occur; Mr Wray went much further: he said that it was almost certain to occur. It is also the view taken by the Information Commissioner, quoted above, in the decision notice. On the particular facts of this case, we take a different view from the Minister of the inhibitory effects of disclosure, but that does not mean that his view is unreasonable. We place greater weight than the Minister did on the role and interest of the person providing the advice, but the opinion expressed by the Minister is a perfectly reasonable one, and is supported by evidence.

The public interest test: timing

22. We moved to consider the public interest test. Mr Hudson argued a preliminary point: that we should consider the public interest not just at the time of the request, but also at the time of the hearing. The point is an important one. Several tribunals have commented on the time of disclosure as having a crucial bearing on where the public interest lies. In Brooke, for example, one of the general principles applicable, which all parties agreed we follow, was: "(3) the passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time." Mr Hudson argued that the Tribunal's powers on appeal are wider than simply to review the Commissioner's decision. The Tribunal can hear fresh and fuller evidence, for example, including evidence of matters occurring since the date of the request or the Commissioner's decision. Moreover, if consideration is confined to the date of the request, then the necessity for a further request (perhaps more than one, repeated at regular intervals) might give rise to further appeals and unnecessary duplication of litigation.

23. We cannot accept that argument. The Tribunal's jurisdiction on appeal is set out in sections 57 and 58 of FOIA. We have to consider whether the notice against which the appeal is brought is wrong in law. The Commissioner's power to issue the notice is set out in section 50: it arises when a complainant applies "to the commissioner for a decision whether, in any specified respect, a request for information made by the complainant has been dealt with in accordance with the requirements of part 1 [of FOIA]". Part 1 of FOIA sets out a timetable for dealing with requests for information: "promptly and in any event not later than the twentieth working day following the date of receipt." Moreover, section 1(4) defines the information which is to be communicated in response to a request as "the information held at the time when the request is received …". In deciding whether to communicate information which falls within section 36, the public authority must itself apply the public interest test in section 2(2). Clearly, that must be applied at the time of the request. It was that decision of the MoD which was the subject of Mr Evans' complaint to the Commissioner; and it was the Commissioner's decision that the complaint had been dealt with in accordance with the requirements of Part 1 (at least in so far as the application of section 36 was concerned) that was then appealed to this Tribunal. We have to consider the public interest test as it applied at the time of the request.

24. Mr Hudson's point about avoiding duplication of litigation is attractive but misguided. FOIA allows for repeated requests of an "identical or substantially similar" nature, provided that a reasonable interval has elapsed between compliance with the

previous request and the making of the current request: see section 14(2). Indeed, the making of a repeat request, after a reasonable interval has elapsed, may well avoid the need for any litigation at all, since " as a general rule, the public interest in maintaining an exemption diminishes over time" (Brooke, cited above). In our view, whatever inhibitory effect there may be is likely to be at its strongest at the time the advice is given. The prospect of publication at some point in the future will have a lesser inhibitory effect, and one that will diminish with the passage of time. Indeed, such a prospect may not deter some advice givers at all. From the perspective of a lobbyist, whose clients are looking to them to exercise influence on their behalf during the decision-making process, what counts as the distant future might be measured in months rather than years. This request was made just 4 weeks after the meeting; the meeting was an introductory one, made to brief a Minister preparing for a Defence Industrial Review, whose outcome was announced some months later. We express no view on the outcome, but clearly the weight given to the various factors in the balancing exercise would be different once that Review had been completed.

The public interest test

25. We separated consideration of the public interest test in relation to the notes of the meeting and subsequent telephone conversation from consideration of the background note, to which different considerations apply. Section 2 of FOIA sets out the public interest test which must be applied where a qualified exemption, such as section 36 applies: in all the circumstances of the case does the public interest in maintaining the exemption outweigh the public interest in disclosing the notes of the meeting and the telephone conversation?

Factors in favour of disclosure

26. Two general arguments in favour of disclosure were set out in the Decision Notice :

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the government.

- promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and their officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.

27. In the context of this particular request, Mr Evans pointed to a public interest in scrutinising the role and activities of lobbyists generally; a public interest in ensuring the proper observance of the various checks on contacts between Ministers, members of the House of Lords and lobbyists; and a public interest in the employment of former members of government by firms of lobbyists.

28. We accept that there is a public interest in seeing the record of meetings between Ministers and lobbyists. Publication of the record would tend to increase public understanding of the role and influence played by lobbyists in the formulation of public policy; and that is a matter of real public interest and concern; publication would assist the public in contributing to debates around the subject of the meeting,

though that factor diminishes the longer the delay between publication and the meeting.

29. We accept that there is a public interest in scrutinising the probity of those in public positions, but we but we do not attach much weight to that factor in the particular circumstances of this request. Despite Mr Evans' best efforts to persuade us that there is public concern about the propriety of those attending the meeting, (particularly around the question of whether Lord Hoyle has or has not properly declared his interest at various times, or whether and how representatives of Whitehall Advisers have obtained passes to the Houses of Parliament) we are not persuaded that disclosing the handwritten notes of meetings of this sort would shed light on these issues. The correct application of the various Codes governing contacts between Ministers and lobbyists may be addressed through other avenues.

Factors in favour of maintaining the exemption

30. All the witnesses before us accepted that there is a strong public interest in Ministers being as fully informed as possible, and receiving information from a wide range of sources; and that meetings with Ministers should be recorded efficiently and accurately, so that information can be disseminated to those who need to know about it, and a record kept in case of subsequent queries for clarification. What was disputed was whether the risk of disclosure would inhibit either the provision of advice, or its efficient recording.

31. We have set out above Mr Baker's and Mr Wray's evidence that there would be a strong inhibitory effect both on those giving advice and on those recording the meeting if disclosure became a real possibility. However, on questioning neither witness could provide much in the way of example of how such inhibition would take effect in practice. Mr Baker could give us no examples. He told us that there had been no general inhibitory effect since the passage of FOIA as the exemptions, and the operation of the public interest test, were wide enough and sensible enough to enable the previous practice of frank exchanges of information and full recording to continue. Should the public interest test be applied in future so as to favour disclosure in such cases as the present, he would still advise candour in meetings and full recording. He would not himself, and knew of no one else who would, advise an Assistant Private Secretary not to record a sensitive piece of information for fear of disclosure. Nevertheless, he feared the corrosive effect a fear of disclosure might have on practice over time. Mr Wray gave an example of a recent memo he had written where he had provided factual information, but not his critical personal view of a proposed course of action. One of the factors which had dissuaded him from including this was the possible potential for disclosure should a FOIA request be made. He agreed that civil servants would (and should) still be able to record meetings properly in future, even if disclosure were regularly ordered: however, they might use blander phrases when recording, given a risk of disclosure.

32. In closed session, Mr Wray gave a detailed exposition of just how the lobbyist at the meeting in question might have been inhibited from giving the advice recorded if he had thought that there was a risk of publication. We were not persuaded by his reasoning. It seemed to us to give little weight to the role of the lobbyist : to lobby,

to gain the necessary access and to get his clients' point across. A reputation for straight talking, for not tempering to the wind, must be a crucial part of a lobbyist's reputation. A lobbyist who pulls his punches and avoids controversy may come to exert little influence and enjoy little access, with consequent effects on his business. There was little or no hard evidence before the Tribunal to back up Mr Baker's and Mr Wray's assertions about the corrosive effect for the future of disclosure of such information. Neither had contacted any lobbyist, or discussed any potential inhibitory effect with them. No lobbyist was called to give evidence.

33. It seems to us that similar considerations are likely to apply to others from whom the Minister seeks advice: the opportunity to give advice to Ministers is sought after: those with an interest in the outcome are unlikely to be inhibited by fear of disclosure from getting their point across; those with particular expertise called on for advice have their personal and professional interest in their subjects to bolster the frankness of their views from the inhibitory effect of fear over disclosure. Of course, there may be particular situations where a real risk of inhibition can be detected, and we stress that each case must be considered individually. In many cases, the risk of inhibition will come from factors given protection by other exemptions in the Act, such as commercial interest, or personal information. Where such factors are present, disclosure will be considered under those exemptions. We agree with the guidance given in Brooke on this point: para 87(4):

> In considering factors that militate against disclosure, the focus should be on the particular interest which the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views by public officials for the purposes of deliberation.

(Brooke was a case considering the exemption in section 36(2)(b)(ii) – the free and frank exchange of views, rather than (i) – free and frank provision of advice, which we are concerned with.)

34. The Tribunal had the benefit of an informative and wide ranging survey from Dr Michael Varney of the position under Freedom of Information legislation in other jurisdictions. However, their experience did not directly assist us with the position under FOIA, and Dr Varney does not refer to any empirical study of the inhibitory effect, or otherwise, following the introduction of disclosure provisions. At its highest, he gave as his conclusion: "there is little evidence that the disclosure of information by third parties has had a negative impact on government in these jurisdictions or, for that matter, has had an impact on the recording practices of civil servants." If the corrosive consequences which Mr Baker eloquently argued for had occurred in other jurisdictions, and there has been time for them to show themselves by now, then the absence of evidence of those effects is significant.

35. We accept that there may be some inhibitory effect from concern over disclosure on those providing advice, and those recording meetings at which advice is provided, but in our view it is nowhere near as strong as suggested by the Ministry of Defence; and in the context of this particular meeting, an introductory meeting with a lobbyist to inform the Minister, any inhibitory effect would be slight and, of itself, would not have persuaded us to maintain the exemption.

36. Nor do we attach much weight to the Minister's opinion in itself as a factor in the balancing exercise. It is a necessary threshold to show that the exemption is engaged, and without it there would be no balancing exercise to conduct. For this reason we do not see the logic of then placing the Minister's opinion in the scales as a factor to be weighed in favour of maintaining an exemption whose engagement has been triggered by that very opinion. This seems to us like double counting the opinion which is a necessary safeguard to prevent inhibition being claimed without due cause. In the scheme of the Act, we regard the opinion as a threshold condition, required to engage section 36, rather than a major piece of evidence in its own right. We note that in this aspect we take a different view from that expressed in Brooke.

37. However, we do regard as a significant inhibition the particular form of the recorded information. There is a considerable public interest in seeing a formal record of the meeting. But the Private Secretary's contemporaneous, handwritten, illegible and incomplete note is not such a record. It was made to enable the Secretary to create such a record. It contains several single words, for example, which have no context to explain their meaning. Some of these could be read as pejorative: who or what is being referred to is unknowable, yet it is easy to see that disclosure of such information could have an inhibitory impact since it would give rise to speculation, and unfair and ill informed comment. The impact of disclosure of such raw data would be experienced by those taking part in the meeting, and those taking the note. Read by the Secretary who made the record, the single word may trigger a recollection of the context and substance of the discussion: literally, an aide memoire: the note assists the Secretary to produce from memory a full and formal record. Read by anyone else, the single word is at best meaningless, and at worst, misleading.

38. Some insight into the unfinished nature of the notes is provided by the two forms of assistance provided for us when we considered the notes in closed session. Firstly, a typewritten transcript was provided (necessary on occasion to understand the handwritten scrawl); secondly, no less than 65 footnotes were provided to the transcript (whose typed length took up less than 3 pages of A4 paper). These explain acronyms and abbreviations used, explain who the various organisations referred to are, and in some cases give background, contextual information. This helped us understand what is written in some cases; but the notes do not expand on what is written; for example, where the original note contains no clue as to what a single word refers to, neither do the footnotes. Without these aids, we would have struggled to interpret or understand the notes; even with them, significant parts of the notes have little or no meaning. Mr Baker's description is apt: "terse, in the form of prompts or key phrases, grammatically incoherent and of poor legibility: they are often therefore difficult for anyone save the notetaker to interpret."

39. Although we accept there would be some, small benefit from disclosure of the raw notes, even as they stand, that benefit in our judgement is outweighed by the benefits of maintaining the exemption. The public benefit from disclosure of the raw data is greatly reduced by the lack of intelligibility of much of the recorded information, at least to a reader who was not present at the meeting; and by the significant inhibitory effect on those attending the meeting of publication of raw notes. We agree with the Information Commissioner in his Decision Notice: in

making our judgment, we distinguish "between the aide-memoire produced in this case and more formal minutes of meetings which form part of the official record".

40. Mr Wray drew the same distinction in evidence before us: in all the cases relied on by Mr Evans to show that disclosure of such notes was routinely made, and therefore any general inhibitory effect could be discounted, it was the official record that had been disclosed, not the raw note.

41. The question of timing of the request is also affected by the raw nature of the data. The public interest in not disclosing information in a raw, unfinished form is less likely to diminish quickly with the passage of time, since the potential to mislead would remain undiminished. Moreover, the public interest in disclosing the information would remain less powerful, because the information is not in a fair or accessible format, than if the information were in a final, considered form. We endorsed the proposition from Brooke above, that "as a general rule, the public interest in maintaining an exemption diminishes over time". We add a rider: "where the information is in a raw, unconsidered form, the public interest in maintaining the exemption is likely to diminish more slowly than where the information is in a finished, considered form."

The public interest test: the background note

42. Our discussion above relates to the two notes, of the meeting itself and of the subsequent telephone conversation. Different considerations apply to the background note. This also falls within the category of provision of advice. Although in substance factual information, the purpose of such notes is to advise the Minister on the people he is to meet, the background to the issues to be discussed, and to suggest the general approach he might take at the meeting. The background note was produced in a finished form, and so the arguments for not disclosing raw or unconsidered information do not apply to it.

43. Where does the balance of the public interest lie? How real is the likelihood that the civil servant who produced the note would be inhibited from providing his Minister with a full and frank picture if he knew there was a real risk of disclosure of the note under FOIA? We found above that the inhibitory effect of fear of disclosure on lobbyists had been over stated by the Ministry and the Information Commissioner. Similar reasoning applies, in our view, to civil servants who are under a positive public duty to advise ministers fully and frankly. In our view, the imperative of preparing a busy Minister properly would count for much more with a civil servant in that position than the possibility at some future time of publication under FOIA. Mr Baker confirmed that in evidence.

44. However, the timing of the request seems to us crucial. Where a background note offers briefing on approaches that might be taken, disclosure would reveal the Ministry's thinking publicly. Requiring publication under FOIA would require the Ministry to disclose interim positions, expressed for example for the purpose of negotiation or stimulating debate. In the context of this meeting, called for a new Minister, where "the Whitehall Advisers spoke about the Defence Industrial Strategy", there would be a significant inhibitory impact if the approaches suggested for the Minister to take at the meeting were disclosed before the Strategy was concluded.

45. However, having considered the content of this background note in closed session, we find that disclosure of its particular content would not have that inhibitory effect.

46. There is a clear public interest in disclosure of the briefing note since it would throw light on the nature of the meeting between the Minister and lobbyists; and on how that relationship is viewed and developed. We accept it is in the public interest to increase transparency in this way. That public interest is present regardless of whether the meeting is viewed as routine and unremarkable, or as highly sensitive and exceptional. The public interest is served by disclosure of the information regardless of whether, in terms of what sells newspapers, it is interesting to the public.

47. We find, therefore, that in this particular occasion, the public interest in favour of maintaining the exemption is not outweighed by the public interest in disclosing the information. However, since exemption is claimed for the briefing note under other sections of the Act, we do not order disclosure until those exemptions can be considered.

The impact of the duty to advise and assist

48. Section 16 of FOIA imposes a duty on public authorities "to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it". Given that our decision that the exemption should be maintained in the case of the manuscript notes rests heavily on the raw form of the data, we have considered whether the duty to provide advice and assistance could extend to producing a formal note, which would then remove the force of that objection.

49. Section 16 is usually taken as imposing a duty to assist those seeking information to identify what records are held, so that they may formulate their request in such a way as to obtain relevant information within the Act. However, there is nothing in the wording of section 16 to restrict the duty in that way. Under section 7 of the Data Protection Act, where an individual has the right to access information, they are entitled to have the information "communicated … in an intelligible form". Although there is no equivalent express provision in FOIA, could section 16 be interpreted so as to oblige the Ministry, in this case, to provide either the transcript and footnotes we were provided with, so as to assist with legibility and intelligibility, or a formal, considered record of the meeting? Is it reasonable to expect the Ministry of Defence to provide at least this level of assistance to those seeking information, when releasing it? In this case, a considerable amount of time would have been required to produce the transcript and the 65 footnotes, when compared to the original note and the brevity of the meeting itself. Indeed, production of a formal record by the Secretary who took the original note may not have taken so long.

50. However, quite apart from questions of reasonableness, on which we heard little evidence and no argument, there is a more fundamental objection. "Information" under FOIA means "information recorded in any form": see section 84. The duty under FOIA is to provide recorded information, not information as such. To interpret section 16 as imposing a duty to create a new document, setting out either explanatory notes or a formal, considered record of a meeting, would come close to

creating a duty to record information. Such a duty is imposed in many statutory contexts, but not by FOIA. We cannot see that the duty under section 16 to provide advice and assistance could be stretched to include a duty to produce a formal record of the meeting, where none exists, or to provide footnotes or a transcript. Nevertheless, these may be steps which a public authority, faced with a request for raw data, may consider taking voluntarily.

Would disclosure otherwise prejudice the effective conduct of public affairs: section 36(2)(c) ?

51. Since we have concluded that the Commissioner's decision that the public interest in maintaining the exemption from disclosure under section 36(2) (b) (i) outweighs the public interest in disclosing the information, we strictly do not need to consider the alternative ground for upholding the exemption argued before us, section 36(2) (c): that disclosure of the information "would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

52. We allowed the Information Commissioner and Ministry of Defence to argue this point in the alternative, even though it had not been advanced before or considered in the Decision Notice. The appellant was not taken by surprise by the point, since it was taken in the Replies to the appeal, and set out as an issue to be considered at the directions hearing. It seems to us that it can be artificial and potentially unfair to restrict the parties on appeal to points not taken initially by the public authority, at least where the nature of the exemption claimed is, as here, sufficiently close to the exemptions relied on before. It would have the undesirable effect of encouraging public authorities to take every conceivable exemption, lest a point be missed, rather than a robust and realistic approach.

53. However, in our view, consideration of the exemption does not assist the Commissioner or the MoD. The principle arguments in favour of this exemption advanced by the MoD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not "otherwise". Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2) (b) (ii) is concerned) has to be shown for section 36(2) (c) to be engaged.

Conclusion

54. In summary, we find that the Decision Notice should be upheld in relation to disclosure of the notes of the meeting and telephone conversation, though for different reasons to those that persuaded the Commissioner. We accept that had there been a formal record of the meeting there would have been a much stronger public interest in disclosing the information, since it could throw light on the relationship between Ministers and lobbyists, an issue of real interest to the public. We take a different view from the Information Commissioner of the likely inhibitory effect of the prospect of disclosure under FOIA on those providing advice to Ministers, at least where, as in this case, they are lobbyists. We do not feel this is a major risk, or one which on its own would outweigh the public interest in disclosure.

However, because of the raw nature of the recorded information, the public interest in disclosing the information is reduced because much of the information is meaningless and potentially misleading, and the public interest in maintaining the exemption is correspondingly increased since the raw note is not a fair or considered record of the meeting. In these circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosure.

55. However, different considerations apply to the public interest in maintaining the exemption for the background note. This is in a finished form, and we are not persuaded that there is a sufficiently significant risk of inhibition on the civil servants who prepare such notes for Ministers that they would be deterred from providing full and frank background material by the risk of publication, at least after an appropriate lapse of time. We take a different view of the balance of public interest in this respect from the Commissioner: the public interest in maintaining the exemption is outweighed by the public interest in disclosure. The Decision Notice is wrong in law in relation to this information. However, until the application of other exemptions can be considered, we do not substitute a Decision Notice requiring disclosure for the moment.

56. The final outcome of this appeal is adjourned pending consideration of the other exemptions claimed, in the light of this decision on the applicability of section 36(2)(b)(ii).

57. Our decision is unanimous.

Signed

Humphrey Forrest

Deputy Chairman Date: 26 October 2007