Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0035
Information Commissioner's Ref: FS50078514

Determined on the papers
10 September 2009

Decision Promulgated
20 November 2009

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

ROGER CREEDON
JOHN RANDALL

Between

ALASDAIR ROBERTS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

Additional Party

Subject matter: - Prejudice to effective conduct of public affairs s.36(2)(c)

Cases:
Student Loans Company Limited v ICO (EA/2008/0092)
The Department for Business Enterprise and Regulatory Reform v ICO and Friends of the (EA/2007/0072).
McIntyre v ICO and MOD (EA/2007/0068)
MOD v ICO and R Evans (EA/2006/0027),

Decision

The Tribunal decides that the public authority was not entitled to rely on the exemption from disclosure provided by section 36(2)(c) of the Freedom of Information Act 2000 and that a further hearing will be required to determine whether or not the exemption provided by section 40 was available to it

Reasons for Decision

Introduction

1. The public authority involved in this case is the Department of Business, Innovation and Skills. At the time of the original request for information out of which this Appeal arises it was called the Department for Trade and Industry and at one stage during the inordinately long period of time that this matter has taken it was called the Department for Business, Enterprise and Regulatory Reform. In this decision we refer to it simply as "the Department".

2. The Appeal arises from the Department's refusal to release to the Appellant ("Professor Roberts") certain data held by it on a computer database/document management system called "Matrix". In the Decision Notice from which the Appellant appeals Matrix was described in these terms:

   "Matrix" is the [Department's] *department-wide electronic record and data management (ERDM) system. It incorporates folders, which group together documents that relate to the same task or transaction. Matrix stores documents and emails, scanned items and a metadata record of physical documents and items such as books, maps and CDs. It captures some metadata about a folder or document automatically (e.g. date registered and user login), but can also be used to add metadata (such as title, author, folder, physical format, access controls) to describe a document or to describe a folder (e.g. protective marking, access*

controls, notes). Creators/authors of records on Matrix are not only DTI officials but may also be external individuals."

The request for information

3. On 22nd April 2005 Professor Roberts sent an email to the Department in the following terms:
"For the purpose of clarifying issues relating to the application of section 40 to the Creator.PersonalName field, I wish to make the following request under the Freedom of Information Act
The following metadata for all [Department] documents and folders in MATRIX created between December 1, 2004 and December 8, 2004.
I have kept the date range narrow so that the file will remain manageable while raising the relevant policy question. I would be happy to limit the range further if it makes the request more manageable while still raising the policy question.
DOCUMENTS
Identifier.RegistrationID
Creator.PersonalName
FOLDERS
Identifier.RegistrationID
Creator.PersonalName
I wish to receive this data in electronic form as a tab-delimited text file"

4. The effect of the Request was to seek, in respect of each document created between the dates mentioned, the document reference number and the name of the person who appeared to have written it. The opening paragraph of the request was expressed in the terms set out above because Professor Roberts had previously requested a wider range of data from MATRIX during the same two dates, but in discussion with the Department limited it to exclude any information that might have led to delay while the Department considered whether it gave rise to any issue under section 40 of the Freedom of Information Act 2000 ("FOIA") i.e. the exemption provision covering personal data. Professor Roberts has carried out research into the use and value of metadata within public bodies and he had

previously made it clear to the Department that he wished to have the data in order to carry out some analytical work on the workflow within the Department. He seems to have agreed the restriction on the earlier request in order to avoid delaying that exercise. But he made it clear that he would come back to what he referred to as the "policy question" as to whether or not section 40 prevented information about the creator of the documents covered by the earlier disclosure being disclosed. He did so by means of the Request.

5. The Department responded to the Request in an email dated 5th May 2005, the relevant part of which reads:
"…I am unable to provide part of the information you requested, ie the creator's names. The data is being withheld as it falls under the exemption in section 40 [FOIA]. I presume that you do not want the document/folder identifiers without the creator's names"
Professor Roberts confirmed that this was the case but asked for an internal review of the decision in respect of the names.

6. The refusal was maintained after internal review, the decision being communicated to Professor Roberts in an e mail from Mr David Evans, Director-General, Services Group of the Department dated 9th June 2005. He expanded on the reasons given previously in these terms:
"The decision was taken on the basis that this data falls under the exemption in section 40 [FOIA] in that the information in question constitutes personal data and that disclosure of the data would be unfair processing and would thereby breach the first data protection principle of the Data Protection Act"

The complaint to the Information Commissioner

7. On 9 June 2005 Professor Roberts filed a complaint with the Information Commissioner about the refusal of his request. It took the Information Commissioner no less than 13 months before it contacted the Department (on 27 July 2006) to ask for relevant papers and comments on the complaint. And it was not until 16 August 2007, a further year later, that the Department finally responded substantively to that request. It then took the Information Commissioner a further

17 months to complete his investigation and publish a Decision Notice, which it did on 21st April 2009. The Information Tribunal has criticised delay within the Information Commissioner's office in several of its decisions, but we cannot recall any case in which the delay has extended to almost four years from the date when the complaint had first been lodged. We add that, while the Decision Notice included criticism of the Department's delays in responding to requests for clarification, it said not a word about the very extensive delays that had occurred within the Information Commissioner's own office. In his written submissions to us Professor Roberts drew attention to the fact that a study released by the Campaign for Freedom of Information in July 2009 had reported that the investigation in this case was the third longest in the history of the Information Commissioner's office, falling short of the longest by a mere 25 days. Although he did not formally seek to argue delay as a ground of appeal Professor Roberts did float the possibility that the delay had been such as to defeat his fundamental right to a determination of his civil rights "within a reasonable time" as required by Article 6§1 of the European Convention on Human Rights. The point was not, of course, addressed by the other parties and we make no comment on the potential strength or weakness of the argument beyond saying that we have every sympathy with Professor Robert's wish to air the possibility that an occasion may arise in the future where delay might result in a more serious consequence for the Information Commissioner than just one more statement of criticism from the Tribunal.

8. During the course of the Information Commissioner's protracted investigation the Department changed the basis for resisting disclosure on at least two occasions. First it modified its case under section 40, and then it abandoned it completely, relying instead on the section 36 exemption (prejudice to the effective conduct of public affairs). However, by the time that the Information Commissioner came to issue his Decision Notice it had revived the section 40 point. In the event, the Information Commissioner decided that the requested information did fall within the section 36 exemption and that it was not therefore necessary for the section 40 issue to be decided. These various changes in the stance adopted by the Department were not communicated to Professor Roberts and we will deal later with his complaint that he was not therefore given any opportunity to comment on the Department's case under section 36 before the Decision Notice was issued.

9. The relevant parts of FOIA section 36 read:

"(1) This section applies to –

(a) information which is held by a government department …

(2) 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 –

…

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

The section 36(2)(c) exemption is a qualified exemption (FOIA section 2(3)(e)) with the result that information falling within it should still be disclosed in response to a request unless *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"* (FOIA section 2(2)(b))

10. In his Decision Notice the Information Commissioner stated that in order to decide whether the exemption applied he should:

a. Establish that an opinion was given;

b. Ascertain who was the qualified person or persons;

c. Ascertain when the opinion was given; and

d. Consider whether the opinion was objectively reasonable and reasonable arrived at.

11. Applying those tests he concluded that:

a. the qualified person at the time of the request had been the Minister of State for Energy;

b. a submission had been put to him on 14 August 2007 on the applicability of section 36;

c. he had then concluded that disclosure would be likely to result in the kind of prejudice to the effective conduct of the Department's affairs envisaged by section 36; and

d. he gave his opinion on 15 August 2007 to the effect that the release of the information would be likely to prejudice the effective conduct of public affairs.

The Information Commissioner went on to conclude that the opinion of the qualified person appeared to him to be both reasonable in substance and reasonably arrived at, with the consequence that the section 36(2)(c) exemption was engaged. He also concluded that the public interest in maintaining that exemption outweighed the public interest in disclosure and that the Department had therefore acted lawfully when it refused the request. Having reached that conclusion the Information Commissioner took the view, as we have said, that it was not necessary for him to consider whether any part of the requested information might also be exempt under FOIA section 40.

The appeal to the Tribunal

12. On 27 April 2009 Professor Roberts filed a Notice of Appeal to which was annexed a document headed "Statement Regarding Appeal". This was treated by the Tribunal and the Information Commissioner as his Grounds of Appeal. It invited the Tribunal to:

a. Find that the Information Commissioner erred in upholding the application of section 36(2)(c);

b. Remit the case to the Commissioner for a determination on the application of section 40

c. Find that DTI erred in withholding information under section 40.

13. We can say, straight away in relation to the second of those issues that the Tribunal does not have the power to remit to the Information Commissioner an issue which he chose not to deal with. It will be for us to determine the application of section 40, if it arises. But it will only arise if we decide that Professor Robert's arguments in respect of section 36 succeed.

14. After the parties had submitted to us their suggestions on how they each thought the section 40 issue should be dealt with the Tribunal directed that it would, in the first place, consider only the section 36 issue. This would be on the basis that, if it decided to order disclosure notwithstanding the claim to exemption under that section, the parties would be given an opportunity to make further submissions as to what other directions should be made to enable the section 40 issue to be determined at a later date. The Appeal has accordingly proceeded on that basis, with all parties agreeing that it should be determined, without a hearing, on the basis of written submissions and an agreed bundle of documents.

15. Late in the process of preparing the Appeal for determination Professor Roberts asked to be permitted to amend the Grounds of Appeal. He pointed out that, up that time, he had not challenged the application of 36(2)(c) directly, but had challenged only the Commissioner's subsequent application of the public interest test. He made the point that he had already made the assertion, in the context of the public interest test, that the Information Commissioner had found that no harm would arise from disclosure and he wished only to add the conclusion that section 36(2)(c) could not, therefore, be regarded as appropriately applied. The Tribunal directed that a decision on whether to allow the late amendment should be adjourned to the substantive determination but that, in the meantime, the parties should include in their written submissions both their arguments in opposition to the amendment being allowed and their case in response to the matter raised in the proposed amendment. In the event the Department consented to the proposed amendment and the Information Commissioner complained only softly about it. We concluded that the amendment should be allowed and therefore took into consideration the question of whether the section 36 exemption had been engaged as part of our determination.

The questions for the Tribunal

16. As a result of the events described above the only issues we expected to be required to determine at this stage of the Appeal were:

    a. Whether the requested information was exempt information under FOIA section 36(2)(c); and, if so

    b. Whether the public interest in maintaining that exemption outweighed the public interest in disclosure.

17. In the event, when the parties lodged their written submissions, shortly before the panel was due to meet in order to make its determination, it became apparent that Professor Roberts wished to raise a new ground of appeal, albeit one that arose out of earlier criticisms he had voiced regarding the Information Commissioner's handling of his complaint. This was that the failure by the Information Commissioner to notify Professor Roberts that the Department intended to rely on section 36(2)(c) constituted a procedural error which had the effect of a "denial of natural justice". Although Professor Roberts sought to create a connection between this complaint and FOIA section 17 (obligation on public authority to explain to those who have made a request the basis for refusal), the essence of the complaint was his perception that his rights had been denied without adequate explanation or an opportunity to reply. We make no comment on whether he may have a remedy in another forum for any unfairness in the freedom of information regime or the way that it has operated in this case, save to say that we would hope that the existence and operation of this appeal process within that regime (including our ability to consider both section 36 and section 40 in the manner described above) would ameliorate any apparent unfairness. But we must remind ourselves that:

    a. our role, determined by FOIA section 58, is limited to considering whether the Information Commissioner's decision was in accordance with the law; and

b. his decision is in turn itself limited to a determination of whether the request for information was "dealt with in accordance with the requirements of Part 1 [of the FOIA]" (section 50(1)).

18. We see no scope, in those circumstances, for the Tribunal to base an appeal decision on any procedural irregularity or unfairness during the course of the Information Commissioner's investigation. Accordingly, we would have rejected this ground of appeal, even if it had been raised at the appropriate time. However, we would add that, self evidently, the quality of decision-making within the Information Commissioner's office is likely to be better (and therefore the likelihood of its decisions being overturned on appeal decreased) if the original requester is given an opportunity of commenting on significant new points raised by a public authority in opposition to the request. Evidence for that exists in this case. Professor Roberts was able to present to us information about the use that could be made of the requested information in research activities, which he claimed supported the public interest in disclosure, but which had not been available to the Information Commissioner when he formulated the Decision Notice.

19. We will now deal, in order, with each of the grounds of appeal mentioned in paragraph 17 above.

<u>Was the Information Commissioner correct in concluding that the requested information was exempt information under section 36(2)(c)?</u>

20. We have summarised in paragraph 11 above the route by which the Information Commissioner reached his decision on this issue. We have also described how the Department initially relied solely on section 40, only introducing section 36 during the course of the Information Commissioner's investigation. After it had done so the Information Commissioner asked for information in support of the claim. On 15 August 2007 a member of his staff telephoned the Department for a progress report. The file note of the conversation records that he was informed by a Mr Rowlinson that "he now had the section 36 opinion and hoped to get it, and [the Department's] comments to us within the next few days". On the following day, 16

August 2007, Mr Rowlinson sent an email to the Information Commissioner the relevant part of which read:

> *"…we sent a submission addressed to the Secretary of State (or if unavailable the duty Minister) to take the decision on our recommendation as regards the applicability of s.36. The submission was passed to Malcolm Wicks, Minister of State for Energy, acting in his capacity as duty Minister and who is hence the qualified person in this case."*

The e-mail then summarised the points that Mr Rowlinson said had been raised in the submission, including the Department's recommendation that section 36 should be applied, before continuing:

> *"The formal notification that Mr Wicks had seen the submission and agreed the recommendations was received on 15 August."*

Neither the Information Commissioner nor the Tribunal was provided with a copy of the submission delivered to the Secretary of State, let alone the opinion itself.

21. Professor Roberts' challenge on the application of section 36 was stated in his Amended Grounds of Appeal to be that the Department had "…failed to establish that the prejudice to public affairs was more than a hypothetical possibility, or that it was real, actual, and of substance". The other parties argued that this was an incorrect approach to adopt in that the only issue requiring to be determined was whether the opinion was a reasonable one for the Secretary of State to have formed.

22. After the panel had met in order to determine the Appeal its members became aware of the recently promulgated decision of a differently constituted Tribunal in the case of *Student Loans v ICO (EA 2008/0092).* In that case the argument that section 36(2)(c) was engaged was rejected, not because the reasonableness of the opinion was open to challenge, but because the panel concluded:

    a. that the information in question did not fall within the exemption until the relevant opinion had been issued; and

b. it clearly had not been completed by the date when the request for information was refused.

The relevant part of the decision, at paragraph 36, reads:

> *"Accordingly, in this case the facts required to engage the exemption were not in existence at the time when the request was originally dealt with. Thus, even with the benefit of hindsight and a review of the Commissioner's findings of fact, there is no possibility of our holding that the Commissioner's decision was* not *in accordance with the law on the ground that it did not give effect to the s36 exemption. We conclude that it is not open to us under the Act to take the s36 exemption into account on this appeal."*

23. As this aspect of *Student Loans* had not been raised in any of the submissions filed by any of the parties to this Appeal the Tribunal postponed further consideration of the Appeal and invited the parties to provide further submissions as to whether the fact that the qualified person had not given an opinion prior to the date on which the original request had been refused, had the effect of preventing the public authority from relying on the exemption at all. With respect to the authors of the submissions which we subsequently received from the Information Commissioner and the Department they seemed to us to have missed the point, in that they concentrated on the question of whether the Tribunal should or should not allow the parties to an appeal to introduce a new ground of exemption late in the process, even though their attention had been drawn explicitly to the paragraph quoted above. It seems to us that the issue is not one of procedural flexibility at all. It is simply a question as to whether, on a proper reading of the statute, the exemption is capable of being applied in the facts of this case. We do not think it does, for the following reasons:

a. The effect of FOIA section 1(1), read with section 1(4), is that a person making a request for information held by a public authority at the time of the request is entitled to have it disclosed to him.

b. Under section 2(2) the entitlement to disclosure does not arise if the information "is exempt information" (provided, in the case of a qualified exemption, that the public interest test is also satisfied);

c. It follows that a public authority is not entitled to refuse a request unless, at the time when it makes its decision to refuse disclosure, the information falls within one or more of the available exemptions.

24. The only way that information may be said to fall within the exemption provided by section 36(2) is by a qualified person forming the reasonable opinion that disclosure would (or would be likely to) prejudice the effective conduct of public affairs ("Information …is exempt information if, in the reasonable opinion of a qualified person…" (emphasis added)). If that state of affairs did not exist at the time when the public authority refused disclosure then the exemption may not be invoked. An opinion formed later cannot justify the refusal, because the information was not exempt at the time when the challenged decision not to release it was made.

25. The focus on the state of affairs existing at the time when the public authority makes its decision to refuse disclosure is reinforced by reading FOIA sections 50 and 58 together. The Tribunal's task is to consider the lawfulness of the Information Commissioner's decision. And his decision goes to whether or not the "request for information …has been dealt with in accordance with [the FOIA]" i.e.(in this context) whether the requested information was exempt information when the refusal decision was made. An opinion formed by a qualified person after the public authority had concluded the process of dealing with the request cannot form part of the Information Commissioner's investigation, or decision.

26. The issue arising in a case where the qualified person gives his or her opinion after disclosure has been refused is different from cases where a public authority is late in raising an argument that a particular exemption applies. In those cases it relies on facts that were in existence at the time of the refusal and says that those facts support an argument for exemption not previously relied on. It says, in effect, that the information was exempt at the time when disclosure was refused; the public authority just did not realise or assert the exemption at that time. As it was said in Student Loans – "*Where the Tribunal has given effect to an exemption belatedly*

claimed, … the facts which engage the exemption have been facts which were in existence at the time when the request was originally dealt with by the public authority."

27. We are not, of course, bound to follow the reasoning set out in *Student Loans* and we are aware that the Tribunal reached a different conclusion in *The Department for Business Enterprise and Regulatory Reform v ICO and Friends of the* (EA/2007/0072). In that case the qualified person's opinion was obtained during the course of the Information Commissioner's investigation. It was accepted as sufficient to engage the exemption, without any challenge apparently having been made on the basis that the information could not acquire the attributes of exempted information at that stage. With respect to our colleagues on the Tribunal that decided that case we prefer the reasoning set out in *Student Loans,* which seems to us to reflect a correct interpretation of the language of the section.

28. In two other cases the Tribunal has accepted that an opinion given during the period when the public authority's initial decision was being subjected to an internal review does cause the section 36 exemption to be triggered. In *McIntyre v ICO and MOD* (EA/2007/0068) the qualified person's opinion had been obtained before the request for information was refused, but the manner in which the issue had been submitted to the qualified person had been flawed. A new opinion was sought during the course of the internal review of the refusal decision. The Tribunal accepted the opinion as being sufficient to engage the exemption and did not comment specifically on the fact that it was only provided between the original decision and the review decision. *"…we take a broad view of the way the opinion is reasonable arrived so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review."* In *MOD v ICO and R Evans* (EA/2006/0027), section 36 was again raised at the internal review stage and no point was taken during the subsequent appeal on whether it was permissible to accept a qualified opinion provided between the original refusal and the internal review refusal.

29. We find it easier to reconcile our decision with the views expressed in those two cases because the Information Commissioner's duty to investigate does not arise

until the complainant has "*exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45*" (FOIA section 50(2)(a)). We think that it is therefore appropriate to decide whether the facts to support an exemption were in existence at the date when the public authority makes a decision at the end of any internal review process it provides, even if they were not in existence at the date of the original refusal. But it is, of course, a consequence of our decision that any opinion formed during the course of either the Information Commissioner's investigation or the Tribunal's appeal process is not capable of triggering the engagement of section 36.

30. It follows from our decision on this point that we do not need to consider either the reasonableness of the qualified person's decision or the public interest balance. We intend to do so, however, on the basis that our conclusion may be of assistance, were we found on appeal to have reached an incorrect decision on whether a post decision opinion must be ignored.

31. As to the reasonableness of the decision we were troubled by the fact that the only evidence of the opinion and its logical basis was the e-mail summary referred to in paragraph 20 above. It seems to us that if we are required by the statute to decide whether an opinion is reasonable we should do so on the basis of better evidence than was provided to us in this case. We were also concerned that the e-mail in question included references to the perceived weakness of the public interest arguments in favour of disclosure – a factor that is irrelevant to the issue upon which the qualified person is required to opine. However, on balance we were satisfied that the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs was a conclusion to which a person in the position of the qualified person could reasonably reach. Had the opinion pre-dated the refusal decision, therefore, the exemption provided by section 36(2)(c) would have been engaged, in our view.

Was the Information Commissioner correct in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure?

32. Our view on this issue, in a nutshell, was that the public interest factors put forward by the Department in support of maintaining the exemption were not overwhelming, but that they nevertheless outweighed the public interest factors in support of disclosure. On behalf of the Department Ms Karen Pile, the Department's Director of Information Strategy and Services, provided a witness statement which gave evidential support for the Department's argument that disclosure of the names of those recorded as having a connection with a document held in Matrix, together with information about the business unit in which they worked and the policy areas with which they might be involved, would be likely to result in them receiving e-mails or telephone calls from members of the public who believed that they were the appropriate person to contact on a particular issue. The impact on workloads and efficiency of such inappropriate contact could, it was said, be particularly great in high profile areas of the Department's business and could even put individual's at risk if, for example, the requested information indicated that they were working in areas such as vivisection or nuclear security. It could also lead to a loss of faith in Matrix by individual employees, leading them to either not use it at all, or to do so in a way that undermined its value. It was also said that in some cases the name recorded on Matrix in connection with a document may not be that of the author or the person having overall responsibility for its creation and content. It could be that of a relatively junior employee who happened to have been the individual who saved the relevant document into the system at the time but was not the author. In those circumstances, it was said, the problems associated with inappropriate contact would be even greater and could lead to members of staff declining to use Matrix, which would further undermine departmental efficiency.

33. It was said by the Department that in other cases the recorded name may be that of a third party who had communicated with the Department in understandable ignorance that his or her association with a particular document or subject matter might become public knowledge. It was said that he or she may become reluctant to communicate with the Department in writing, once this has become apparent.

34. We feel bound to say that we felt that the Department was guilty of over stating the difficulties that disclosure of the requested information would cause. However, we did have some concern for individuals, possibly quite junior ones, who might become publicly associated with documents or activities for which they were not responsible as authors or decision makers. Our sense that the fears expressed by the Department in this connection merited consideration was reinforced by material produced to us by Professor Roberts himself. In order to illustrate the sort of research work on which he planned to use the requested information he included sample data released to him by the Government of Canada, which included metadata associating a named individual with a bilateral Canada-US task force established after the September 2001 attacks on the World Trade Centre in New York. In the political and security climate that currently exists we can understand the concern of individuals and the government departments that employ them, at the release of data that may include information of that nature. We were also influenced the use of thesaurus terms relating to animal rights and the consequential exposure to attack by extremists of those perceived to have been involved in decision making in that area.

35. The public interest in favour of disclosure was said by Professor Roberts to lie in the research work which the requested information would enable him to carry out and thereafter to publish for the benefit of the public generally. His written submission on this part of the case included a significant body of evidence which should have been made available to the other parties at an earlier stage of the process in order that they could take it into account when preparing their own submissions. Had we reached the conclusion that Professor Robert's case on this was likely to succeed we would have felt bound to give the other parties an opportunity of at least commenting on the evidential aspects of the submission. However, having carefully considered what he has said about the value of metadata in research in the area of organisation-environment relationships, and having read an earlier research paper he provided to us, we have to say that, with great respect to Professor Roberts, we were not convinced that it would be of such value in terms of the public interest as to outweigh the factors in favour of maintaining the exemption, as summarised in the previous paragraphs. It would not have been proportionate for us to call for expert evidence on the potential impact of research work in this field and we have

therefore had to base our decision on this aspect of the case on our own experience as individuals who have each spent some parts of our careers in management positions within organisations of some size within the public or private sector. We should add that we reach this conclusion notwithstanding that the Department did concede that there was, in very general terms, a public interest in openness and transparency within Government departments.

Conclusion and remedy

36. For the reasons we have set out above we have concluded that the exemption provided by FOIA section 36(2)(c) is not engaged in this case and may not be relied upon by the Department to support its argument that it was entitled to refuse Professor Robert's original request for information. If we were found to have been wrong on that issue then we would conclude that the opinion relied on by the Department was one that could reasonably have been reached and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

37. In light of our decision it will be necessary for us to consider whether the requested information should nevertheless be withheld from disclosure under FOIA section 40 and we will invite the parties to make their submissions (initially in writing, but if necessary in a subsequent pre-hearing review) on the steps needing to be taken in order to bring that issue back before the Tribunal.

38. Our decision is unanimous.

Signed:

Chris Ryan
Deputy Chairman

Date: 20 November 2009