Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2006/0046

FREEDOM OF INFORMATION ACT 2000
(Determined without a hearing)

Heard at	**Decision Promulgated**
On	
Prepared	……16.11.06

Before

Mr. David Marks
INFORMATION TRIBUNAL DEPUTY CHAIRMAN

And

Paul Taylor and Pieter de Waal
LAY MEMBERS

Between

DR CHRISTOPHER LAMB

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. The Tribunal finds that the Information Commissioner was wrong in law in issuing a Decision Notice upholding the Cabinet Office's determination that the Cabinet Office did not hold any information of the type purportedly requested, on account of a failure on the part of

the Information Commissioner to take into account properly or at all the admitted lack of clarity in the complainant's original request.

2. The Tribunal substitutes a new Decision Notice requiring disclosure within 28 days of the date of this Decision in the following terms, namely:

On consideration of part (ii) of the complainant's request of 31 March 2005 the Cabinet Office should have asked the complainant to particularise the said request in order to identify the precise information requested, asking in particular whether the said request sought information with regard to the author or authors of any legal advice or opinion provided to the Cabinet Office (other than by the Attorney General) irrespective of whether the said legal advice or opinion was provided by governmental or non-governmental source.

Reasons for Decision

1. The Freedom of Information Act 2000 ("FOIA") entitles an applicant to seek the disclosure of "information" that is "recorded in any form" (see section 84) by a public authority. Section 16(1) of the FOIA imposes a duty upon a public authority to provide advice and assistance but only "so far as it would be reasonable to expect the authority to do so". However, paragraph 8 of the Code of Practice issued under section 45 of FOIA in relation to the discharge of functions under Part I of the Act states clearly that "authorities should, so far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested." This case concerns certain issues arising out of a request which could reasonably be regarded as being vague or imprecise and raising in turn a consideration as to what extent a duty to advise and assess should arise. The parties have been content for this Decision to be dealt with without an oral hearing and on the papers alone.

2. There is nothing to prevent an authority volunteering advice and assistance: an applicant does not have to ask for it. Moreover, nothing on the face of the section restricts the duty to advise and assist only to those cases when some form of request has been made. In the Tribunal's view, the duty must include at least one to advise and assist

an applicant with regard to the formulation of an appropriate request. These principles are reflected in the relevant Code of Practice which the Tribunal does not feel it necessary to recite in any further detail for this purpose.

3. A "request for information" under FOIA must in the words of section 8(1)(c) "describe" the information requested. In the Tribunal's view it is sufficient to observe that the subject matter of the information must be set out and described as precisely as possible. If a request does not describe the information with sufficient detail in a case where its terms are otherwise ambiguous or vague, the public authority should consider whether to exercise its duty to offer advice and assistance; in the alternative it should, in an appropriate case, ask for further details or particulars of the request. These simple propositions do no more than reflect the various means of clarifying requests which are set out in the relevant code of practice already mentioned and which points out that if despite the assistance offered the applicant remains unable to describe the information sought sufficiently clearly, then the public authority is not expected to seek further clarification. The above matters are reflected in the terms of section 1(3) of FOIA which provides that:

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the Applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information".

4. The Information Commissioner (the "IC") has published an Awareness Guidance (No.2) in relation to the duty to advise and assist. The Tribunal notes that the following answer to question 2 reads as follows beginning with the question itself, namely

"In order to offer advice and assistance to an applicant, is it permitted to enquire into the reasons why the request is being made? No. The purpose of providing advice and assistance is to help an applicant to exercise his rights under the Act; it cannot be the means by which a public authority seeks to discover the reasons for a particular, or potential, application. However, public authorities should bear in mind that section 1(3) of the Act does allow them to request further information from the Applicant if this is needed in order to identify and locate the information requested.

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While it will be good practice to make contact with the applicant as soon as possible after the request is made, public authorities should be sensitive to the circumstances of the applicant when considering the appropriate method of contact. For example, requests for information will often be made in the context of complaints against the public authority. In such cases it may be inappropriate to contact an applicant by telephone - which would otherwise be the preferred means of establishing early contact - if this would give the impression of the public authority exerting undue pressure on the applicant."

Although it is true that in general an applicant's reasons, in the sense of his or her motives should not be material in the manner in which a public authority responds to the request, insofar as it is suggested that the factual context in relation to which the request is made is not relevant, the Tribunal respectfully disagrees. The Tribunal feels that it should perhaps be clarified either in the Code of Practice or in the Awareness Guide or perhaps in both that if a request is ambiguous then the public authority should invariably seek not only further details of the request but also seriously consider formulating its own motion questions designed to elicit the true and precise nature of the request.

The facts

5. The recent Iraq invasion and subsequent military engagement of that country, sometimes described as the war on Iraq, has been the topic of much well-publicised controversy. A number of requests have been made seeking disclosure of the legal advice and related material produced prior to the invasion.

6. By a request in writing dated 31 March 2005 the complainant sought disclosure of three items of information relating to advice given by the Attorney General to the Government between late February 2003 and about 17 March 2003, in the following terms, namely:

> "(i) information relating to meetings between the Attorney General and 10 Downing Street personnel during the first two weeks of March 2003 at which Iraq was discussed;
>
> (ii) information in relation to the retention of a greater balance of legal advice than Christopher Greenwood QC on the legality of war in Iraq; and
>
> (iii) any form of document produced for, or possessed by, the Cabinet Office from Lord Goldsmith on [sic] war with Iraq".

The present appeal is concerned with only request (ii). However, the background is important.

7. With regard to request (i) the Cabinet Office replied in early July that some of the requested information was already in the public domain, eg in the form of the so called Butler Report whilst the balance of the information sought was held but exempted under two particular sections of FOIA which need not be further mentioned for present purposes.

8. With regard to request (ii) the Cabinet Office contended that it did not have any information in relation to this request. It relied on the content

of a series of Parliamentary written answers given between March 2004 to March 2005 which, put shortly, stated that Professor Greenwood did not contribute to the drafting of the Attorney General's advice on the legality of the use of force against Iraq further confirming that:

"No non Governmental experts or lawyers were asked to advise the Attorney General on whether the conflict in Iraq was lawful. Professor Greenwood was instructed to assist in relation to legal issues arising from the Iraq conflict including the preparation of the Attorney General's statement to Parliament on 17 March 2003". (See statement by the Solicitor General of 8 March 2005).

In relation to (iii) the Cabinet Office again referred to information that was already available in the public domain but also relied upon similar exemptions to the remainder of the information sought as were relied on in relation to request (i).

9. By an email dated 25 June 2005 to the IC's office the complainant reiterated his request in the following terms, namely:

"… (a) the disclosure of non exempt information in the hands of the Cabinet Office, relating to meetings, reports, memos or emails, which have a bearing on the dropping of caveats in the legal advice of the Attorney General in March 2003 toward war with Iraq;

(b) whether the Cabinet knew that the legal advice clearing war with Iraq centred on the opinion of 1 external source of international law, and whether it was concerned about this given dissent of other reputed sources, including legal staff at the Foreign Office. I asked if the Cabinet sought for more balance of opinions in its understanding of the international legalities of military intervention in Iraq."

10. Pausing here the Tribunal feels that the original request (ii) as well as the passage cited in the preceding paragraph, particularly paragraph (b) of the citation are far from clear. The terminology and the grammar

leave much to be desired so that in the end one can only guess at the true ambit of the request. The original request would seem to be referring to and therefore seeking first details of other relevant legal advice (presumably apart from that provided by the Attorney General) received by the Cabinet Office (ie the author or authors of the same) not being limited to so called "non Governmental" advisers such as Professor Greenwood and arguably secondly the content of any such advice although this second limb may be more debatable. The email suggests in part that what was being sought was something even wider, ie the authority in the sense of legal authorities and sources as well as perhaps details of other legal advice as interpreted in the Attorney General's advice itself. In his reply of 26 July 2005 the Cabinet Office informed the complainant merely that it did not hold "any information in relation to your second request", again referring to written answers provided to Parliament by the Solicitor General and the Attorney General.

11. It appears that in an email of 31 July 2005 (a copy of which the Tribunal has not in fact seen) the complainant sought an internal review. In subsequent correspondence with the IC he explained that he was in particular asking whether the absence of information relating to request (ii) meant that the Cabinet was unaware of differences and disputes on the legality of the use of force in Iraq, eg reflecting as he believed, a view expressed by persons within the Foreign Office.

12. Unfortunately, the complainant in his further exchanges at this time, in the Tribunal's respectful opinion, did little to pinpoint to the precise nature of the information he was seeking. In his email to the IC on 2 August 2005 he stated:

"I have also refined some questions from the second part of my original request, which referred to the Cabinet's response to Lord Goldsmith's advice being based overwhelmingly on Christopher Greenwood's legal opinion. These focus [sic] on what meanings might be drawn from "no information" being held on this by the Cabinet Office."

Apart from this passage suggesting that the complainant was apparently content to assume that the Cabinet relied on advice other than the Attorney General's advice, the Tribunal assumes that reference to "no information" was a reference back to the Cabinet Office's answer of 27 July 2005 in which it had denied holding "any information in relation to" request (ii). At the end of this email he confirms his request for a Cabinet Office's internal review.

13. The Cabinet Office responded with the result of its internal review by letter addressed to the complainant of 7 October 2005. In a short letter with apparent reference to request (ii) it simply stated:

"The Attorney General provides the definitive legal advice to the Government. It is a matter of public record and was widely reported in the media at the time that there were serious legal arguments (as with many legal issues) on both sides of the debate".

14. In November or December 2005 the complainant contacted the IC and again the Tribunal feels it appropriate to revisit the Complainant's own words at this stage, namely:

"Firstly, the Cabinet Office's response to my initial request stated that it held no information on the Cabinet's view toward retention of a greater balance of legal advice than the opinions derived from Christopher Greenwood QC which underpin the Attorney General's legal advice. I asked, in the review, for clarification of whether this absence of information meant (a) that the Cabinet were unaware of differences and disputes of legal opinion - with the Foreign Office - over legality of war with Iraq and thus achieving a greater balance of opinion was not an issue, or (b) that the Cabinet were aware of differences and disputes of legal opinion but did not regard retaining a greater balance of views as an issue in accepting the Attorney General's legal advice. I am not satisfied that the review's "answer" of general serious legal arguments appearing in the Press and being a matter of public record really answer the question. I consider this a serious question because

it impinges upon whether the cabinet knew all it should have regarding legal opinions before taking a decision and/or whether it was negligent in fully taking these into account."

Apart from the continuing and somewhat confusing use of the expression "greater balance" either as to opinion or views this paragraph does not in the Tribunal's view cast any useful light, if any, on the precise nature of the request. It would be idle to speculate further on what this passage might or might not mean, particularly in the light of the earlier exchanges quoted above.

15. A change in tone, if not in content, was indeed remarked on by the IC in his reply of 6 December 2005 where the following passage appears, namely:

"Although some aspects of your request are slightly different to those that have been under consideration until now, it would be impracticable to consider your complaint in isolation from the others being investigated. Therefore your complaint is being considered in conjunction with those currently being considered by the team".

Decision Notice

16. Eventually a Decision Notice was issued dated 7 July 2006, following a passage of time in which it seems the IC had to take into account other requests relating to questions arising out of advice given in relation to the Iraq conflict. At paragraph 5.4 of the Decision Notice the IC stated:

"The Commissioner has also considered the Cabinet Office's reply to part (ii) of the request. In the Commissioner's view this part of the request is slightly unclear. However, it appears to have been interpreted by the Cabinet Office as a request for information about advice given by non Government advisers, other than Christopher Greenbank [sic] QC, on the legality of war in Iraq. As mentioned …

above, in the reply to the complainant dated 27 July 2005, the Cabinet Office referred to various written answers given in Parliament by the Solicitor General. These answers explain that no non Government advisers were asked to advise the Attorney General on whether the conflict in Iraq was lawful. In light of this the Commissioner is satisfied that the Cabinet Office does not hold information relevant to the second part of the request".

Consequently the IC accepted that the Cabinet Office did not hold information relevant to request (ii).

Notice of Appeal

17. The Tribunal requests to say that the Complainant's handwritten notes constituting his Notice of Appeal did little to dispel any former ambiguities and vagueness. In these notes he said that part (ii) of his request:

"… is on the grounds that the Cabinet Office misread (in my view) the original question put to it and thus failed to answer acceptably. The Information Commissioner decided on the basis of the Cabinet Office's interpretation. My original question addressed whether the Cabinet have sought to retain a greater balance of legal advice than that represented by Sir Christopher Greenwood QC who had been instructed to advise [sic] with the Attorney General's legal advice and prepare his Parliamentary Statement (Kampfner: Blair's Wars 2004 p 378)."

The bracketed reference at the end of that passage is a reference to a book published bearing the name referred to. The word "advise" which has been indicated above represents a guess at the original handwritten word which the Tribunal finds indecipherable. Even if the word in question is not "advise" the Tribunal finds no evidence in the papers to suggest that Christopher Greenwood QC was ever instructed

by the Cabinet Office, if such was the interpretation of the passage quoted above. The complainant then goes on as follows:

"The sort of response I was expecting would have addressed whether, in meetings deciding upon the legality of war, the Cabinet had been briefed and was fully conversant with the differences of legal opinion within Government and between at least one Government department and an external advisor. Also, whether the Cabinet was aware that Sir Christopher Greenwood had been instructed and what his remit was. I was hoping to ascertain from the response whether the Cabinet considered the balance of advice it was receiving an issue of concern or not. The type of information I was hoping would be disclosed included Cabinet minutes and/or records over these decisive meetings in which it considered legality of war without a second UN Resolution."

18. Although in fairness to the Complainant it might still be said he was continuing to request disclosure of legal advice or opinions imparted to the Cabinet other than by the Attorney General and Sir Christopher Greenwood (if such in fact was the case in the case of Sir Christopher Greenwood) it could equally be said that he was in fact seeking disclosure of all Cabinet minutes and other documents relating to the decision the Government eventually took to utilise force so far as those minutes and other documents reflected legal advice received. On any basis this was a far cry from any interpretation or interpretations which could have been imparted to the original request (ii).

Conclusion

19. The present case shows the dangers necessarily inherent in a public authority failing to address the true nature of a request allowing it to be transformed into something other than what may have been thought to be its original ambit and purpose. It also shows the danger in not alerting a complainant to the need to specify his request at the earliest possible reasonable opportunity. Particularly in view of the IC's finding that the request was "slightly unclear", in the Tribunal's view the

Decision Notice should have concentrated upon the need to extract from the complainant, if necessary by asking all relevant question, the precise nature of the request, as well as the intention of the Complainant's request.

20. In exercising its responsibility as reflected in section 58 of FOIA which entitles it to substitute its own Decision Notice for the one before it, the Tribunal finds that the Notice in fact sent was not provided in accordance with the law and duly determines that the following Notice should have been sent instead, namely:

"On consideration of part (ii) of the complainant's request of 31 March 2005, the Cabinet Office should have asked the complainant to particularise the said request in order to identify the precise information requested, in particular whether the said request sought information with regard to the authors or author of any legal advice or opinion provided to the Cabinet Office (other than by the Attorney General) irrespective of whether the said legal advice or opinion was provided by Governmental or non Governmental source."

21. For all these reasons and subject to the terms of the preceding paragraph the Tribunal allows the appeal.

Signed Date 16th November 2006

David Marks
Deputy Chairman

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