IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2011/0267

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50363874
Dated: 18th. October, 2011

Appellant: **Angela Kikugawa**

Respondent: **The Information Commissioner**

2nd Respondent: **The Ministry of Justice**

Heard on the papers: 25th. April, 2012

Before

David Farrer Q.C.

Judge

and

Alison Lowton

and

Malcolm Clarke

Tribunal Members

Date of Decision: **20th. May, 2012**

The determination was on written submissions

Subject matter:

Freedom of Information Act 2000 s.36(2)(b)

Case: ***Thackeray v Information Commissioner* EA/2011/0069**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 18th. October, 2011 and dismisses the appeal.

Dated this 24th. day of May, 2012

Judge Farrer Q.C.

[Signed on original]

REASONS FOR DECISION

Introduction

All references in the form "s.36" are to provisions of FOIA.
Section 36(2)(b), hence the role of the "qualified person". is set out at paragraph 18

1. In 2007, Mr. Ron Tasker, a former prison governor, was commissioned by the Government to produce a report into the conduct of senior managers in the prison service, which had given rise to extensive and adverse publicity.

2. His investigation prompted a very long and detailed sequence of written parliamentary questions ("PQs") to the prison service minister by Mr. Henry Bellingham MP. Advice on responding to those questions was prepared and drafted for the minister by civil servants in the Ministry of Justice ("the MOJ"), in accordance with normal practice. The advice was frequently accompanied by briefing notes, dealing sometimes with the background to the question or the possible motive or interest of the member putting the question. Such notes are routinely preserved by the Department but not published.

The request for information

3. The Appellant had earlier requested disclosure of all briefing notes to PQs relating to the Tasker Inquiry but the MOJ calculated that a reply would breach the cost threshold provided for by s.12 of FOIA. The ICO directed it, pursuant to s.16, to provide assistance to the Appellant to refine the request. It did so.

4. As a result, the Appellant made a refined request on 30th. January, 2010, for the notes to forty - five PQs to Maria Eagle, the Prisons Minister, asked between April, 2006 and January, 2008. The MOJ provided the notes to twenty such questions on 26th. February, 2010 and indicated that it relied on the exemption enacted in s.36(2)(b) as regards parts of the notes to the remainder. Redacted notes relating to the remainder were served on 12th. April, 2010.

5. The redactions which fall to be considered on this appeal were thought to conceal expressions of opinion, speculation and suggestions as to what might lie behind a PQ or the series of which it was a part.

6. The MOJ invoked s.36(2)(b)(i) and (ii) and set out its case as to why disclosure of the redacted parts would be against the public interest. It further indicated reliance upon s.40(2) (protection of personal data) as regards one note. In later correspondence with the ICO, it transpired that that exemption was claimed for three notes. However, the Appellant has stated that she does not seek to argue the application of s.40 and the Tribunal has not considered it.

7. Following a requested review, on 9th. July, 2010 the MOJ disclosed some further notes but confirmed its stance with regard to s.36(2)(b) in relation to the rest.

<u>The complaint to the Information Commissioner</u>

8. The Appellant complained to the ICO on 25th. August, 2010.

9. A substantial delay followed, due very largely, according to the Decision Notice, to muddle and disorganisation within the MOJ, which did not know what information it had provided to the Appellant, claimed to redact what it had already disclosed, admitted to having no coherent record of its dealings with the Appellant and consequently missed deadlines and prolonged the ICO`s investigation. It proved necessary for the ICO to show the MOJ, from his records, what information it had and had not provided to the Appellant, a truly extraordinary state of affairs.

   The s. 36(2)(b) exemption had been claimed for certain notes that were unrelated to the opinion of the “qualified person” (“the QP”). The ICO identified no fewer than five substantial breaches of FOIA by the MOJ in handling this request.

10. The Tribunal strongly endorses the ICO`s strictures as to the MOJ`s failure to comply with the guidelines issued under s.46 and the unqualified requirement to keep a proper record of its handling of FOIA requests.

11. The result of this delay was that the Decision Notice was issued on 18th. October, 2011. Put shortly, it accepted that s.36(2)(b) was engaged and that Maria Eagle was a QP for that purpose. It decided that the QP did not have to read the relevant information provided that a sufficient summary was available. It concluded that the need for frank and fearless advice in the context of these questions outweighed the undoubted public interest in seeing how PQs are handled.

The appeal to the Tribunal

12. The appeal is dated 24th. November, 2011.

13. The grounds (as transcribed) were that –

(i) The QP had not formed a reasonable opinion because she had not read the notes in question but a submission prepared by her officials asking her to give her opinion that the notes should not be disclosed.

(ii) This was not reasonably arrived at because the minister could not form an objective view on the public interests involved as the notes had been prepared for her use.

(iii) There was no evidence that the submission adequately conveyed the content of the information.

(iv) The information was not sensitive nor was it frankly or freely expressed.

(v) The speculation contained in the notes was not objective.

(vi) It was probably bogus.

(vii) The possibility that publicity might inhibit frank expressions of opinion or concern was outweighed by the public interest in ensuring that bogus or unfounded speculation would be discouraged by the threat of exposure to the public gaze.

14. The ICO, supported by the MOJ, submitted that the Minister was an appropriate QP; that her opinion was reasonable and reasonably arrived at and that, with regard to the public interests engaged, the need to encourage frank and sometime sensitive

briefings of ministers clearly prevailed over the general interest in transparent government.

The questions for the Tribunal

15. They are simply these –

(i) Was this a reasonable opinion?

(ii) If so, is the public interest in maintaining this exemption greater than the interest in disclosing these notes.

Whilst the content of the particular notes is obviously relevant to our decision on the public interest, this is clearly a case where wider considerations of principle are engaged, both for and against disclosure.

Evidence

16. The evidence was the notes, redacted and unredacted, the text of the questions and the briefing submission provided to the minister, which were contained in a closed bundle.

Legal analysis

17. Section 36 applies to

"1 (a) information which is held by a government department . . . . and is not exempt information by virtue of section 35.".

This information is not so exempt.

18. The exemption relied on is set out in s.36(2)(b) (i) and (ii). It is engaged if –

(2)…"in the reasonable opinion of a qualified person, disclosure of the information under this Act-…

(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 purposes of deliberation…"

19. Whether or not her opinion was "objective", there is no doubt that the minister was a qualified person by virtue of s.36(5).

20. The opinion must be her opinion so she cannot simply sign a submission without reading it, though nobody suggests that she did so. Deciding to approve a submission by flipping a coin (an example given by the ICO) does not fail the test because the opinion adopted is unreasonable but because the minister formed no opinion at all. The same principle would apply, though perhaps less vividly, where the minister received a submission advocating this opinion which offered no reason, however slight, to form it. Nobody can truly form an opinion where he or she is deprived of any shred of information on the issues involved.

21. Provided the opinion is formed by the minister, however, it may be debatable how far the Tribunal is entitled to inquire into the mental processes adopted. A degree of caution may be appropriate when approaching the supposed requirement for a "reasonable opinion reasonably formed".

22. Like the Tribunal in *Thackeray v Information Commissione*r *EA/2011/0069,* we have no doubt that a minister can form an opinion on the basis of a properly balanced submission summarising the effect of the information in question. We have seen the submission on which the opinion was founded here and it satisfies that requirement. Indeed, the issues for the minister, important as they are, required relatively little explanation, as the brevity of this decision demonstrates.

23. The test is reasonableness, not the apparent objectivity of the QP. If the QP has formed an untenable opinion because of a conflict of interest, then the opinion does not satisfy s.36(2), not because it is the opinion of a biased QP but because it is unreasonable. In fact, the complaint that it is the minister concerned with the PQs

whose opinion is sought is unrealistic since it is she who is by far the best placed to form a judgement on the matter. Equally, it is hard to see how officials who had no involvement whatever with the PQs or the background facts could provide an informed submission.

24. We have no doubt that the minister`s opinion was reasonable. The risk that free expression of doubt, impression or surmise might be inhibited is not hard to envisage. Whether it is so substantial and the consequences of inhibition so serious as to outweigh a clear legitimate public interest in knowing what lies behind ministerial replies is quite another matter.

25. We therefore conclude that the exemption is engaged.

26. What of the public interest? Points (iv) to (vii) of the Appellant`s grounds summarised in paragraph 12 are directed to this question.

27. The meaning of the terms "bogus" and "not objective" when applied to speculation is not entirely clear. If briefing notes revealed that false information was being deliberately provided to a minister or that she was being encouraged to mislead her questioner, it is not hard to discern an unanswerable demand for disclosure in the public interest. Where a suggestion is made which seems far – fetched or a comment that sounds unkind, it is for the minister to form her own judgement as to their value. It is inevitable that, in the stream of advice and comment passed to ministers in the process of answering hundreds of PQs there will be chaff as well as wheat. Speculation may prove to be wrong but it may still be important that it be communicated, even where the official is involved in the activities the subject of the question and therefore has an interest to serve.

28. We have seen the redacted notes. They are as described to the QP. Whether they are unfailingly correct or well – judged, we cannot say. Certainly, none deserves the description "bogus", false or "deliberately misleading."

29. Perhaps a more persuasive argument for disclosure is that transparency would ensure that ministers only received notes that would survive subsequent public scrutiny (paragraph 12 point (vii)), which would encourage, if not ensure, that advice was firmly founded on verifiable evidence. The objections to that approach, however, are obvious.

30. First, it would often be very difficult to assess the quality of advice, comment or surmise without access to the sources of information available to the adviser and the opportunity to interrogate the adviser on the matter. Whilst the former might be obtained by further FOIA requests, the latter could never take place.

31. The more important objection is that advanced by both respondents in different terms, namely the suppression of any possibly astute advice that might appear risky, hostile to a member or simply indiscreet but which nevertheless, in the opinion of the official, needs to be given. It would be odd if information to ministers in Parliament flowed less freely than to important decision – makers in the commercial world. That, however, is, in this context, a foreseeable consequence of the routine exposure of such information to public scrutiny.

32. The Tribunal is frequently pressed by government departments with claims as to the "chilling effect" on frank communication of disclosure of internal discussions and reports. The Tribunal is not always impressed by them. Here, though, we are dealing with a vital and sensitive interface between minister and civil servant. This is an area of government where the need for confidentiality is clear because the points that need to be made to a minister may be based on evidence of varying strength and may involve strong criticism of the questioner or another member or third party. The official offering advice may be understandably reluctant to make them public, whilst properly concerned that they should be before the minister. It is for the minister to decide what should be used, what rejected, what is too tenuous to be relied upon.

33. As indicated above, the position might be different if, for example, the content of the advice or speculation were so unwarranted, deliberately misleading or otherwise improper as to demand exposure. It is to be hoped that such a case would be wholly exceptional. This is far from it.

34. We conclude that broad considerations as to the consequences of disclosure are important in this case. Whether or not disclosure of these particular notes would affect the way that the officials concerned perform their duties is less significant than the question whether the threat of publicity might affect briefings generally in future. We consider that there is considerable force in the contention that a very important channel of communication would be seriously inhibited.

35. That is a factor which outweighs the undoubted legitimate public interest in – so far as possible - transparent government.

36. We note that the factual content of the requested notes has been disclosed.

Conclusion and remedy

37. We are not required to decide on the application of s.40(2) and do not do so.

38. We conclude that, as to the redacted documents, the decision notice was correct.

39. This appeal is therefore dismissed.

40. Our decision is unanimous

David Farrer Q.C.

Judge

Date: 24th. May, 2012

IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS)

EA/2011/0267

BETWEEN:

ANGELA KIKUGAWA

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

And

THE MINISTRY OF JUSTICE

Second Respondent

The Tribunal`s Decision on an application for permission to appeal

1. This application is made pursuant to Rule 42 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules, 2009.

2. The Tribunal declines to review this decision pursuant to Rule 44 because it is not satisfied that an error of law is involved, as required by Rule 44(1)(b).

3. It has considered whether to grant permission to appeal, pursuant to Rule 43(2) but has decided to refuse it.

4. It is questionable whether the application raises any issue of law.

5. It assumes that the briefings to the minister were prepared, not just by officials within the Home Office involved with the Prison Service but

by those specific individuals, in particular the DDG, whose conduct was under scrutiny. The Appellant states that she believes that the DDG, or persons "within his direction or control" were the source of the briefing but there is no evidence that she is right and the Tribunal`s decision did not proceed from that assumption.

6. Her argument in paragraph 1 is founded on an unsubstantiated assertion. She did not ask for the identities of those who prepared the briefings.

7. The point raised in paragraph 2 appears to confuse "reasonable" with "objective". A decision may be within the range of reasonable decisions although taken by one with an interest to serve. A minister is not a judge. Provided she takes a decision for which a sensible explanation can be provided, the fact that she takes it with the interests of her department in mind does not render it unreasonable. Indeed, one of those interests is the preservation of a flow of candid comment and background information. Ministers must act reasonably and honestly but they are not required to act judicially. Government and politics are partisan activities.

8. Point 3 in paragraphs 3 – 5 implies that the Tribunal must conduct a detailed examination as to whether the minister was properly qualified to assess the requested information and the effect of disclosure. That is clearly not the effect of s.36(5)(a) which requires it to accept that a minister of the Crown is a qualified person. The alternative would be a requirement that the credentials of the minister be established, which is plainly not the intention of the legislature.

9. The claim that the Tribunal cannot treat a briefing as balanced because it cannot know what was omitted could be used to invalidate any judgement of any briefing to any minister. It proceeds from the assumption that relevant considerations have been deliberately suppressed, a premise for which there is no evidence whatever and

which it would be impossible either to establish or refute. No reasonable tribunal of fact can approach an issue of this kind on the footing that malpractice should be assumed unless the reverse is proved. That is not naivety but simple common sense.

10. Point 6 adds nothing. The briefings sought were written. The threat to candour posed by disclosure is obvious. The assertions of skewing the minister`s view are speculative.

11. The Tribunal is not concerned with the alleged procedural and substantive deficiencies of the Tasker investigation, simply with the disclosure of briefing notes.
    This distinction is not clearly observed in this application.

12. For these reasons this application is refused.

13. The Appellant may apply to the Upper Tribunal for permission to appeal against the
    Decision. Under rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Appellant has one month from the date this ruling is sent to her to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane, London, WD2A 1DD. Further information about the appeal process is available on the Upper Tribunal's website at *http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/aa/index.htm*

David Farrer Q.C.

Tribunal Judge

July, 16th, 2012