Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0068
Information Commissioner's Ref: FS50089779

Determined at Bedford Square, London, WC1
On 14th January 2008

Decision Promulgated
4 February 2008

BEFORE

Chairman

JOHN ANGEL

and

Lay Members

ROSALIND TATAM & JENNI THOMPSON

Between

IAN EDWARD MCINTYRE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE MINISTRY OF DEFENCE

Additional Party

Representation:

For the Appellant: In person
For the Respondent: James Cornwell
For the Additional Party: Catrin Evans

Decision

The Tribunal upholds the decision notice dated 25th June 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. Mr McIntyre joined the MOD in 1968 and occupied various management and other roles in the MoD. In March 1997 he moved into a personnel management role and in 2003 became Civilian Administration Manager acting up in the Band B2 grade for Portsmouth Naval Base and other MoD establishments in the southern region. Currently he is the HR Services Team Leader for the Naval Bases at Plymouth, Portsmouth, Clyde and Rosyth. His duties have frequently involved chairing or being a member of promotion and selection panels.

2. In late 2002 he applied for substantive promotion to Band B2. As part of the assessment process for promotion he attended a MoD Assessment and Development Centre (A&DC) over 3 days in March 2003. During the assessment there was a procedural error in the conduct of one of the assessment exercises that resulted in him having less time to complete a concurrent one and may as a consequence have affected his performance in subsequent exercises. The Assessors involved did not log the incident.

3. Following the A&DC Mr McIntyre learned that he had not been successful and was provided with a scoring matrix of his performance at the A&DC which indicated that he had only narrowly failed to gain promotion.

4. Mr McIntyre appealed and was informed by letter date 25 November 2003 that his appeal had been upheld and was invited back to attend the 2004 A&DC. The letter reflected the published policy contained within the MoD Personnel Manual at paragraph 7 of Annex B which specified that appellants whose appeals were upheld would be directed to the next year's A&DC.

5. Mr McIntyre considered that having upheld his appeal that he should have been selected for promotion and took the matter up by way of the MoD grievance procedure. During this process he was informed by letter dated 29th April 2004 that the A&DC Appeals Panel did have the right to change a fail to a pass as well as direct a candidate to the next A&DC.

6. Mr McIntyre then sought to understand on what basis such a change from a fail to a pass could be decided in order to pursue his grievance, which ultimately led to his FOIA request.

The request for information

7. On 11th March 2005 Mr McIntyre wrote to an information officer at the Royal Navy requesting the "2003 Assessment and Development Centre – Assessor Guide (in particular the section dealing 'PAR/PDRs and the Promotion Recommendation')" (the Request).

8. On 21st March 2005 Margaret Field (Ms Field) the HR Development A&DC Project Manager at the MoD responded that "We need to ensure that releasing this type of information does not jeopardise the Assessment and Development Centre process and we are currently seeking an exemption under section 36 of the Act." Another exemption was mentioned but then was no longer pursued. By letter dated 30th March 2005 Mr McIntyre requested an internal review of the response. Ms Field responded on 4th April 2005 stating among other things that her previous letter had been an interim reply and explaining that more time was required to apply the public interest test.

9. Because of the ongoing grievance the correspondence which followed related to both to the pursuance of the grievance and the FOI request. On 16th May 2005 Ms Field wrote to Mr McIntyre explaining why it had taken so long to respond to the

Request and informing him why the request was being refused and that an appropriate Minister was of the "reasonable opinion as a qualified person within the terms of section 36 of the FOIA, the Department should withhold the assessor guide you have requested. To be clear, therefore, I am withholding the information in accordance with section 36 – the exemption for information which, if disclosed, would prejudice the effective conduct of public affairs" (the Refusal Notice).

10. Mr McIntyre questioned the way the matter had been handled and requested an internal review of the decision by letter dated 17th May 2005. He then made another FOI request for a copy of the submission to the Minister which was eventually disclosed to him in confidence, on a personal basis only.

11. By letter date 21st July the MoD provided the result of the internal review. The MoD accepted that there had been procedural failures in relation to dealing with the Request and that the information requested would now be disclosed, except the "Exercise Marking Guide and the paragraph in the Assessor Booklet relating to promotion recommendations" (the Withheld Information) would be withheld under the s.36 exemption.

The complaint to the Information Commissioner

12. Mr McIntyre complained to the Commissioner by letter dated 16th September 2005. Unbelievably it was not until 8th January 2007 that his office appears to have started an investigation. We appreciate that the Commissioner's limited resources meant he had a severe backlog during this period but would remark that such a delay is not consistent with the spirit of FOIA.

13. On 25th June 2007 the Commissioner issued a decision notice (the Decision Notice) upholding the MoD's decision to withhold the Withheld Information under the s.36 exemption, although criticising some aspects of the handling of the Request.

14. In the Decision Notice the Commissioner found that there were delays in dealing with the Request and that there were procedural flaws in relation to the obtaining of the reasonable opinion of the qualified person under s.36(2)(c). There had been three attempts to obtain the opinion.

15. The Commissioner found that the delays were a clear breach of s.17 and that this merited criticism but that no further steps needed to be taken.

The appeal to the Tribunal

16. Mr McIntyre appeals to this Tribunal against the decision of the Commissioner. He submits two main grounds of appeal:

    a. firstly, that the reasonable opinion of the qualified person was unsafe, and

    b. secondly, that the Commissioner applied the public interest test balance incorrectly.

17. During the course of the appeal the Tribunal joined the MoD as an additional party and has had the benefit of hearing evidence from two MoD witnesses, namely Douglas John Looman and Paul Inman. In addition Mr McIntyre has given evidence. Because the Withheld Information must remain secret during our proceedings we have heard evidence in closed and open sessions in accordance with our normal procedure for protecting such information. However the MoD sought to keep confidential the second and third submissions to the Minister. After hearing arguments from Ms Evans representing the MoD and Mr Cornwell representing the Commissioner the Tribunal decided that these submissions and the Minister's response should be disclosed to Mr McIntyre on the same basis as the first submission. Therefore, in effect, all of the submissions were available to the parties but are not public documents in this case.

18. The Tribunal also decided that the issue as to whether all parties should be able to see submissions to Ministers and the Ministers response under s.36 (2) in investigations by the Commissioner and proceedings before the Tribunal was a matter of considerable importance and that the Tribunal should ~~issue~~ consider issuing a ruling on the matter. The parties were invited to provide written representations within 14 days of the date of the hearing for the Tribunal to take into account before ~~making~~ considering such a ruling.

19. It was agreed by all the parties that the only exemption being considered before the Tribunal in this case was the exemption under s.36(2)(c) in relation to the Withheld Information which comprised two documents:

a. *Band B2 Assessment and Development Centres Assessor Booklet 2003* but only the marking rubric in paragraph 5g (the Booklet), and

b. *MOD B2 Assessment and Development Centre 2003 Assessor Guide to the Exercises* (the Exercises Guide).

20. Only the first 32 pages of the Exercises Guide had been withheld, the rest having been disclosed to Mr McIntyre. However Mr McIntyre is no longer challenging the Commissioner's decision in relation to the Exercises Guide and therefore this Tribunal is only concerned with the marking rubric in paragraph 5g of the Booklet, which is the disputed information in this case.

The questions for the Tribunal

21. The questions for the Tribunal to determine in this case are:

a. Was the Commissioner correct to find that the s.36(2)(c) exemption (the effective conduct of public affairs) was engaged?

b. If it was engaged, then in the circumstances of this case did the Commissioner correctly find that the public interest in maintaining the exemption outweighed the public interest in disclosure of paragraph 5g of the Booklet.

The law

22. Section 36 provides, as relevant, that:

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government 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

reasonable opinion of a qualified person, disclosure of the information under this Act—

...

(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,

...

Effective conduct of public affairs

23. The Request is for information relating to the assessment centre process for promotion to Band B2, a senior civil grade in the MoD. The MoD contends, that if the Withheld Information, which covers the assessors' conduct of exercises and the marking rubric, is disclosed it would adversely affect the integrity of the promotion scheme.

24. On first glance it is difficult to understand how the Withheld Information is covered by the s.36(2)(c) exemption. There is no definition of public affairs in the Act. The Commissioner sought to define 'public affairs' in the context of this case in his Decision Notice at paras 23-25. He referred to his guidance on the section that the exemption would only be available in 'cases where the disclosure would prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose (rather than simply to function) due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.' The Commissioner concluded that that publication of the Withheld Information might have an adverse effect on the conduct of MoD's internal promotion processes. This in turn could affect the MoD's ability to ensure that the correct people are promoted and thereby offer an effective public service. Government will be carried out more effectively if the chosen promotion processes deliver the right people. Therefore, the processes by which the right people are produced can be linked to the concept of public affairs.

25. The other parties seem to have accepted the Commissioner's approach and the

Tribunal agrees that the s.36 (2)(c) exemption is applicable in this case. We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.

26. It is plainly the case that public service will be more effectively delivered and its objectives more effectively met if the right people are employed by government departments. This is particularly so when the posts in question are at a reasonably high management grade (such as Band B in the MoD). It follows that a promotion process that ensures, as far as possible, that only those with the required competences for a particular level, or if there are only a finite number of positions available the best available candidates, are promoted. A promotion system that achieves this goal will have a clear impact on the effective conduct of public affairs through the effective delivery of good government. A system that fails to achieve this goal will (conversely) adversely affect the effective conduct of public affairs.

Reasonable opinion of the qualified person

27. Therefore we need to look at the requirements of this qualified exemption. It is not a class-based exemption because it requires a prejudice or harm based test to be undertaken before applying the public interest test under s.2(2)(b). Under s.36(2)(c) this test is fulfilled by the provision of a 'reasonable opinion of a qualified person' that disclosure of the Withheld Information in this case 'would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

28. The Commissioner's role is limited to deciding whether the qualified person's opinion was reasonable.

29. A differently constituted Tribunal when considering the requirements of this test in relation to s.36(2)(b) in *Guardian Newspapers Ltd & Brooke v Information*

Commissioner & British Broadcasting Corporation, EA/2006/0011 & 0013, 8.1.07 (see paragraphs 54-64) found

> "that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at. We derive this conclusion from the scheme of the Act and the tenor of s36, which is that the general right of access to information granted by s 1 of the Act is only excluded in defined circumstances and on substantial grounds. The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s 36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention."

30. Ms Evan's contends that the finding in *Guardian and Brooke* that the opinion must be both reasonable in substance and reasonably arrived at is wrong. She argues that s.36 focuses on the likely outcome if the information is released and that what is required is that the qualified person has formed an objectively reasonable opinion that disclosure would have any of the effects specified in s.36. Neither the Commissioner nor the Tribunal needs to be satisfied that the opinion under s. 36 was "reasonably arrived at" before reaching a decision about the application of s.36 and the public interest balance. She further contends that if a substantively reasonable opinion has been reached, carelessness or inadvertent flaws in the process by which it was reached cannot operate, as a matter of law, to negate the application of the exemption. Ms Evan's gets some comfort for her contention from the Tribunal's decision in *Evans v Information Commissioner and Ministry of*

Defence [2007] UKIT EA 2006 0064 where the Tribunal raised doubts about the correctness of the decision in *Guardian and Brooke*: "The question of whether the process of arriving at the opinion can be challenged is itself not without doubt. If we agree with the decision in Brooke (and it is open to argument)…" (at [14]). In fact the Tribunal in that case did not hear full arguments on the point.

31. We are prepared to adopt the test in *Guardian and Brooke* but subject to two caveats. Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion. Secondly, 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.

"Reasonable opinion" on the prejudice to effective conduct of public affairs in this case

32. In this case three separate submissions were made to the Under Secretary of State (US of S) at the MoD. The Commissioner only saw the first submission and response but although recognising there were flaws in this submission did not find it necessary to see the other submissions but accepted the MoD's contentions that the flaws had been corrected and that the opinion was reasonable and, in effect, met the requirements of s.36(2)(c). However the Commissioner concluded that the MoD was in clear breach of s.17.

33. While still considering the Request the Director HR Development by submission dated 14th April 2005 sought an opinion from US of S for what appears to be a blanket exemption under s.36 "to protect the integrity of the Assessment & Development Centre (A&DC) promotion processes in MOD." No documents were provided and certainly not those requested by Mr McIntyre. The A&DC process was explained. Relevant exemptions under FOIA were brought to the US of S's attention and why they were being sought. The necessity of obtaining a reasonable opinion was explained and "agreement in principle for the rationale and validity of claiming the exemption" was sought and obtained in relation to what appears to be all the information relating to the A&DC, not just the Withheld Information.

34. Although the submission gave a reasonable background for why an opinion was being sought it was flawed for a number of reasons, in particular it asked for a blanket exemption in general terms without referring to a request or specifying particular documents. It did not seek a reasonable opinion in the terms of s.36(2)(c), namely that disclosure would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs. The US of S's response dated 3rd May 2005 was not in the terms required by the Act. He agreed the "Department should use s.36 .....to withhold information about specific elements of A&DC business."

35. Mr Inman, who is now Deputy Director Information (Access) at the MoD, in evidence explained that the first submission was only designed to, in effect, get the Minister's steer on disclosure so that the MoD could them deal with the Request. They then sought an opinion relating to the actual request and a second submission dated 10th May 2005 was made which we refer to in more detail in the Confidential Annex to this Decision.

36. Again we find this process flawed for the same reasons set out in paragraph 34 above although there was at least a reference to the Request.

37. Following this submission and response the MoD issued the Refusal Notice and Mr McIntyre requested an internal review. Up until this time the Request had been handled by subject matter experts. The internal review was undertaken by the policy unit. They considered that much of the information for which exemption had been sought could be disclosed, and realised that the US of S's opinion was still flawed because he had not seen the Withheld Information. As a result a third submission dated 30th June 2005 was made which again we refer to in detail only in the Confidential Annex.

38. Clearly the process in the way that the reasonable opinion was arrived at by the time of the Refusal Notice was flawed. However the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s.50. Parliament clearly intended that a public authority should have the opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made. This is what

happened in this case and the MoD realised that it could disclose much of the information for which it originally sought exemption from disclosure.

39. The review team then sought a new ministerial opinion based on its findings which largely corrected the flaws except for one major issue. The US of S did not state whether he had reached the opinion on the basis that he considered disclosure would otherwise prejudice or alternatively would be likely to prejudice the harm in s.36(2)(c). Mr Inman when asked about this gave his own opinion that it was both, but not based on any knowledge of the Minister's deliberations.

40. Not only is this an issue because this is a requirement of s.36 (2)(c) but because of the different implications of the two limbs of the prejudice test in this section. There have been a number of Tribunal decisions on the meaning of the two limbs of the prejudice test in qualified exemptions. The words "would prejudice" have been interpreted by the Tribunal to mean that it is "more probable than not" that there will be prejudice to the specific interest set out in the exemption and the words "would be likely to" have been interpreted to mean that there is a "real and significant risk of prejudice" to the interest in the exemption (see, for example, *Office of Government Commerce v Information Commissioner*, EA/2006/0068 & 0080, 2.5.07, paras.40 and 48; *Hogan & Oxford City Council v Information Commissioner*, EA/2005/0026 & 0030, 17.10.05, paras.30-35).

41. Ms Evans contends that the Tribunal has got the test wrong. We do not agree and endorse the consistent line taken by this Tribunal on the matter in other appeals.

42. Mr McIntyre argues that the third submission was flawed because both the Exercises and paragraph 5g of the Booklet were included with the submission when he was only requesting the latter. By providing both, where the former was clearly caught by the exemption but the latter in his view was not, it would adversely affect the considerations of the Minister when forming his opinion and therefore could not be relied upon. We have had the benefit of seeing the Withheld Information, which because of our procedure for keeping such information confidential Mr McIntyre has not seen. We consider that the Minister having sight of both documents together would not have the adverse affect to which Mr McIntyre alludes.

43. Referring back to the two limb prejudice test. The consequence of the Tribunal's finding is that where the reasonable opinion of the qualified person is that it would otherwise prejudice the effective conduct of public affairs, this will give greater weight to the public interest inherent (effective conduct of public affairs) in the s.36(2)(c) exemption in favour of maintaining the exemption than if the reasonable opinion was based on the lower threshold. That in turn will affect the public interest balance.

44. The problem with the Minister's opinion in this case is that we do not know which limb he has adopted and we do not feel able to adopt Mr Inman's interpretation. Also we are not assisted by the Commissioner who does not seem to have recognised the issue in the Decision Notice.

45. Does this mean that the Commissioner cannot find that the opinion of the qualified person is reasonable? We do not think so. We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level. In this case we do not find such clear evidence but the Tribunal finds that the Commissioner's decision was correct and that the lower threshold applies, namely that the Minister's opinion, that disclosure of the Withheld Information would be likely otherwise to prejudice the effective conduct of public affairs was reasonable.

46. Although Mr McIntyre requested the attendance of the Minister in this case the Tribunal considered this unnecessary because of the various submissions, responses and other evidence before us in this case. The Tribunal would remark that in such cases we would very rarely require a Minister to give evidence before us, provided sufficient other evidence was available for the Tribunal to come to a decision as in this case, particularly because we appreciate the pressures on ministerial time.

47. We would recommend to the Commissioner that in future investigations of complaints where a s.36 (2) exemption has been claimed that he should require to

see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses.

The qualified person and the public interest test

48. Where the public authority finds that the qualified exemption is engaged then it is necessary to consider the test under s.2(2)(b), namely that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

49. In this case the opinion of the qualified person seems to have been the final stage in the MoD's decision-making in relation to the Request. In other words the reasonable opinion seems to have also covered the finding by the MoD that the public interest in favour of maintaining the exemption outweighed the public interest in disclosure. Although these tests are usually carried out sequentially there appears to be nothing in the Act which prevents the qualified person from undertaking both tests.

50. Mr Inman explained in evidence that at the internal review the team considered the public interest factors for and against maintaining the exemption and concluded that the public interest in maintaining the exemption in relation to the Withheld Information outweighed the public interest in disclosure. It was only by undertaking the exercise at this stage was it then possible to conclude that it was worth seeking the Minister's opinion otherwise it might be wasting his valuable time. So if the team had concluded that the balance did not favour maintaining the exemption, as it did for much of the A&DC information, then there would be no point seeking an opinion. Therefore Mr Inman says it makes sense to undertake the public interest test at this stage and provide in the submission to the Minister the finding and the factors taken into account for and against disclosure. The Minister can then if he so chooses give his reasonable opinion that there would or would be likely to be prejudice and that the public interest in maintaining the exemption outweighs the public interest in disclosure. There is no need for the public interest test to be referred back in this case to the internal review team to undertake the exercise again. The Minister can complete the exercise on his own provided he is in possession of all the necessary facts and information.

51. We find there is no reason why the tests under FOIA cannot be undertaken in this way and it makes pragmatic sense in this case. However we would remark that in most cases it is preferable that both tests are seen to be undertaken separately because they are two separate tests with different standards.

Public interests

52. In order to understand the public interests in maintaining the exemption it is necessary to explain the A&DC process.

53. The A&DC process is concerned with the assessment of the core competences that (in this case) a Band B will be expected to demonstrate on a daily basis. It is not concerned with the one-off demonstration of knowledge or one-off attainment, but with the assessment of whether a candidate has the necessary competences that they will be required to demonstrate day in, day out in their possible promoted role, not simply on the day of the assessment.

54. The MoD contends that the release of information about the A&DC testing process potentially creates two related dangers. First, candidates who do not in fact possess the required competences could use such information to “learn to pass” the assessment or develop a “game plan” to try to play to their strengths or hide their weaknesses. A candidate who successfully learned to pass the test or deploy a game plan could score more highly than their actual competences warranted. The obvious danger is that candidates would end up being promoted who lacked the competences necessary to operate at (in this case) Band B.

55. The second danger is that otherwise competent candidates might mistakenly attempt to improve their performance in the assessment by adopting a game plan, thereby distorting their performance and not displaying effectively the competences that they actually possessed. True competence would be masked from the assessors, just as in the first case.

56. There is therefore a real risk that were information to be released that allowed

candidates to develop strategies to pass the test (or merely think that they could learn strategies to pass the assessment), the results of the assessment would be distorted and the A&DC process would not be as effective in identifying the candidates who truly possessed the necessary level of competence for promotion.

57. Mr McIntyre contends that it is not possible for the information in paragraph 5(g) of the Booklet to have this effect as it is simply an assessment marking scheme.

58. Mr Looman, who is a personnel and development professional working for the MoD and an experienced A&DC assessor, in evidence says that this is not so. Candidates could use the marking rubric as a basis for trying to target their performance at particular competences, thereby distorting both their own performance and the reliability of the assessment.

59. Mr McIntyre argues that this is not possible in the case of paragraph 5(g) of the Booklet as the candidates are not told which of the competences are tested in each exercise.

60. Mr Looman says that whist it is accepted that the candidates are not told which competences are tested in which exercises, it does not follow that candidates could not, or could not attempt to, develop a game plan on the basis of paragraph 5(g) of the Booklet. First, whilst candidates may not be able to make a complete assessment of which competences are assessed in which exercise, they are likely to be able to make (or attempt to make) an educated guess.

61. Secondly, Mr Looman says, the potential for candidates being able to do this is increased if paragraph 5(g) were put together with other information about the A&DC process that is already made available by the MoD. In particular, the MoD does release past exercises with an indication of which competences were tested in them. Further, as there are limited numbers of ways and scenarios in which competences can be assessed, the possibility of candidates making successful educated guesses about which competences were being tested in a particular exercise on the basis of past exercises is increased. Taken with the marking rubric in paragraph 5(g) there is then a significant possibility that the effectiveness of the

A&DC process at selecting only candidates who truly possess the required competences would be prejudiced, and in turn the effective conduct of good government would be prejudiced.

62. We find Mr Looman's evidence very persuasive. It amounts to a very weighty public interest in favour of maintaining the exemption, namely that disclosure of paragraph 5g of the Booklet would put the integrity of the A&DC testing process at risk which would then make it difficult to ensure that the correct candidates would be promoted.

63. However in evidence we were informed that the exercises changed each year. Therefore there was the possibility that at the time of the Request, which was after the 2004 and 2005 A&DCs, that it would not matter if paragraph 5g of the Booklet in relation to the 2003 A&DC was disclosed. This was a distinct possibility because the 2006 A&DC was based on fewer competences.

64. Mr Looman in closed session convinced us that this would not be the case and that the disclosure would still have the same risks to the integrity of the process at the time of the Request and therefore the weight to be given to this public interest would still be the same.

65. The Decision Notice recognises that there is a public interest in the transparency of the process for the promotion of civil servants. Mr McIntyre draws our attention to the guiding principles of equality of opportunity which necessitates transparency and which has been recognised by leading educational institutions such as the Quality Assurance Agency for Higher Education. However the Commissioner argues that it does not necessarily follow that the transparency or openness of the promotion process requires that all information about it be publicly available, particularly where the availability of such information serves to undermine the effectiveness of the process itself.

66. In this case the MoD has already disclosed a substantial amount of information in relation to the A&DC process, both in response to Mr McIntrye's request and on the MoD's intranet, in particular all the rest of the Booklet (save para.5(g)) and the rest of the Exercises (save for pp.1-32).

67. The Commissioner and MoD maintain that disclosure of the limited amount of information contained in paragraph 5(g) would do little further to advance the public interest in the transparency of the A&DC process given the disclosure that has already taken place.

68. Mr McIntyre draws the analogy between the A&DC marking rubric and the public availability of marking schemes for academic examinations and awards. However Mr Looman maintains this is wrong. The A&DC is not an academic examination assessing academic knowledge and attainment - it is a test by an employer of the competence of employees to perform at a higher grade day in, day out – a naturalistic approach. This is quite different from an assessment of academic attainment on a one-off basis.

69. Mr McIntyre argues that certain statistics on the differences of the age and gender of candidates who are successful in the A&DC process supports the contention that the A&DC process is discriminatory which in turn allegedly increases the public interest in disclosing paragraph 5(g) of the Booklet. Mr Looman is clear that this is not the case.

70. Having had sight of paragraph 5(g) of the Booklet we find it difficult to see how it would shed any light on the alleged discriminatory effect or otherwise of the A&DC process.

71. The Commissioner contends that clearly Mr McIntyre personally has an interest in the disclosure of paragraph 5g but that is a private interest and not something we can take into account when considering the public interest test under s.2(2)(b). We do not accept that argument because any candidate in Mr McIntyre's position would have an interest in the Withheld Information, particularly the marking rubric. As assessment and development centre processes are used widely across the civil service there would be a sizeable number of people who would have such an interest.

Conclusion

72. We have considered the various public interests raised by the parties and find that in all the circumstances of this case that the public interest in maintaining the exemption outweighs the public interest in disclosure.

73. We therefore uphold the Decision Notice and dismiss Mr McIntyre's appeal.

74. Our decision is unanimous.

Use of s.36

75. In the light of this case we would recommend that the Commissioner provides guidance as to the way the opinion of the qualified person is sought. It would be helpful if public authorities used a more appropriate and consistent format which reflected more closely the requirements of s.36. If in the qualified person's reasonable opinion there is prejudice to one of the interests in s.36(2) the qualified person should state clearly which limb of prejudice (would or would be likely to) is being put forward and the reasons for it. If the qualified person is also undertaking the public interest test then he/she should set out which factors he/she has taken into account and the weight given to them in undertaking the balancing act. Where the submissions are disclosed such a clear and transparent process will hopefully reduce the number of complaints to the Commissioner and ultimately appeals to this Tribunal.

Signed

John Angel Date: 4 February 2008

Signed

John Angel

Chairman of the Tribunal Date: 11 February 2008