

FOIA s.24 – Qualified exemption: national security

FOIA s.36(2)(c) – Qualified exemption: Prejudice to effective conduct of public affairs

Ministry of Defence v IC & Rob Evans

EA/2006/0027

20th July 2007

Cases:

Office of Government Commerce v IC [2007] UKIT EA_2006_0068

Department of Education Skills v IC [2007] UKIT EA_2006_0006

Corporate Officer of House of Commons v IC and Norman Baker [2007] UKIT EA_0006_0015

Facts

DESO deals principally with the support and encouragement of arms sales by UK based manufacturers and connected organisations. The Guardian by Mr Evans required sight of the DESO 2005 Directory. DESO supplied a redacted copy omitting names and contact details save in respect of the most senior personnel. Minor changes and disclosure were effected in the wake of an internal review. Much reliance was placed on the prejudice-based exemption in s.36. The MOD contended that public interest favoured maintenance of the exemption since access would be obtained via a central switchboard in most cases and anything more would lead to unwarranted interference with DESO's activities especially at the hands of anti defence trade protestors and similar organisations. Initially the Commissioner questioned whether staff names could be released without contact details: as for s.38 the IC inclined to the view that with regard to DESO's operations in Saudi Arabia names and whereabouts should be withheld.

Findings

On s.36 the IC favoured full disclosure of the Directory particularly since public interest favoured a full understanding of the relationship between the arms industry and the MOD. With regard to s.38, however, the IC was not persuaded that disclosure of the names and contact details of all employees would be likely to endanger their physical or mental health and he also doubted whether disclosure of the directory would contravene data protection principles for the purposes of s.40.

Section 36

The Tribunal recognised that there was a strong public interest with regard to the operation of the arms industry. It noted the fact that there was wide, almost universal, distribution of the Directory and that in practice the names of senior personnel in DESO were in effect in the public domain. However, the Tribunal pointed out that information is not necessarily in the public domain because it might be inadvertently released on a website for a short period. However, the Tribunal was not satisfied that there was a substantial risk of violent or disproportionate protest at the moment based

on the evidence if heard on the facts of this case, at least levelled as against individual DESO staff members.

It noted the MOD's heavy reliance on the convention or principle that civil servants as distinct from Ministers are not accountable for their acts and omissions. The Tribunal cited *DfES v IC* in agreeing that that convention as such did not represent an argument to withhold civil servants' names. Each case, however, had to involve its own balancing test with accountability for public money, being almost certainly a factor citing *Corporate Officer of House of Commons v IC and Norman Baker*.

The Tribunal noted that even in the context of the Nolan Committee's 7 principles of public life scrutiny will vary and that there is no immutable principle that civil servants should never be held accountable in the way contended for.

Moreover, what was sought here was not the contents of any information held by civil servants but their identity and details relating to the identities. Anyone who had an interest in the affairs of DESO would unquestionably be assisted by being provided with a copy of the Directory in largely unredacted form. There was a particular interest with regard to the migration of personnel from DESO to the arms industry and vice versa. No reliance could be placed on an apparent ban being placed in allegedly analogous circumstances by a United States District Court decision which had no bearing upon the operations of FOIA and the determinations of the Tribunal.

As for disruption, the test was whether in all the circumstances disruption to the internal workings of DESO would be likely to be caused by disclosure to such an extent that it would have some "appreciable impact" on DESO's ability to meet its objectives. Overall the public interest in maintaining the s.36 exemption was heavily outweighed by the public interest in disclosure.

Section 38

The Tribunal agreed with the decision of the Tribunal in *Office of Government Commerce v IC*). That decision was to the effect (and the Tribunal agreed in this case) that prejudice based exemptions did involve a consideration of whether there was a significant and weighty chance of prejudice. The IC had not considered that s.38 was engaged but the Tribunal found that even if it was engaged the risk of endangerment was slight: With regard to Saudi Arabia staff, however, sufficient measures were already in place and overall they were satisfactory to reflect the proper balance to be struck under s.38.

Section 40

The information requested was clearly personal data and was information which pertained to the staff's public and not their personal data. Again the Tribunal found there to be no basis for suggesting that there was a real risk that disclosure would lead to harassment. Para 6(1) to schedule 2 to the Data Protection Act 1998 allowed there to be fair and lawful processing of personal data "for the purpose of the legitimate interests pursued by the data controller" except where the processing was "unwarranted" by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. The Tribunal found all the conditions in schedule 2(6) satisfied in this case.

Conclusion

The Tribunal dismissed the appeal.