

FOIA s.33 – Qualified exemption: audit functions

FOIA s.35(1)(a) – Qualified exemption: **Formulation or development of government policy**

Office of Government Commerce v IC

EA/2006/0068 and 0080

2nd May 2007

Cases:

Department of Works & Pensions v IC [2006] UKIT EA_2006_0040

Hogan and Oxford City Council v Information Commissioner [2006] UKIT EA_2005_0030_

John Connor Press Associates Limited v IC [2006] UKIT EA_2006_0005

Facts

In January and February 2005 the complainants requested that the OGC disclose two Gateway Zero Reviews relating to the ID cards scheme and their traffic light status. The OGC was set up in 2000 and introduced the Gateway process in order to examine IT programmes and projects at critical stages in their cycle. There are a number of Gates, including Zero Reviews mainly at the programme stage, and a Review will also make recommendations which are prioritised and given a R(ed) A(mber) G(reen) (RAG status). The Gateway Reviews are carried out by an external team to the department involved and the review process is completed usually within one week. The team interview those involved in confidence and provide a report to the SRO who is responsible for the project. Although the SRO is offered the opportunity to correct any errors in the report, the findings and recommendations are non-negotiable. The report is not made public.

The Gateway Review process is regarded by government as very successful saving it some £1.5 billion up to 2005. There have been thousands of reviews and although mandatory in central government they have been adopted on a voluntary basis by other public authorities. The OGC argued that the principal reason for their success was the fact that the reports were not disclosed to the public which facilitated full and frank discussions with interviewees and ready acceptance of the recommendations by SROs. No Gateway Review has been disclosed. In fact, in training and induction for reviews, the OGC had maintained that there was little or no risk of the GRs being disclosed under FOIA.

The OGC refused to comply with the requests claiming several exemptions, namely that the reviews were an examination function under s.33(1)(b) FOIA and that they were held in relation to the formulation or development of government policy under s.35(1)(a) FOIA.

The IC issued two decisions in similar terms. He found that although s.33 was not engaged s.35 was but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure and ordered the disclosure of the requested

information to the complainants. OGC appealed against the notices and the Tribunal consolidated the appeals as they involved the same information.

Findings

Sections 33 and 35

The Tribunal had to first consider whether s.33 was engaged. OGC argued that the “would, or would be likely to, prejudice” test in s.33(2) had a low threshold, and that previous decisions of the Tribunal had been wrong in relation to their findings as to the scope of the test. OGC accepted the Tribunal’s finding that at the top end “would prejudice” means more likely than not but at the lower end that “would be likely to prejudice” should be no higher than “not insignificant”, “real, as opposed to fanciful”, “not insubstantial” or “not minimal”. The Tribunal rejected the submission and upheld its decision in *Hogan & Oxford* and *John Connor Press* that the correct test was that there is a “very significant and weighty chance” of prejudice although falling short of more probable than not. In other words the scope was narrow rather than wide as had been contended by the OGC.

Despite the higher threshold the Tribunal found that the IC was wrong in not finding the exemption was engaged. The Tribunal found that because of the way that the Gateway process had been set up, that the possibility of reviews being disclosed under FOIA, would require changes to the process. These changes risked harm to the process which in the Tribunal’s view would be likely to prejudice the examination function while the changes were introduced and bedded down. Therefore the Tribunal found that the exemption was engaged.

The Tribunal also held that the s.35 exemption was engaged.

Public Interest Test

As both exemptions were engaged the Tribunal then went on to consider the public interest factors for and against disclosure. The OGC argued with the support of 8 witnesses that the review process would be undermined if there was the slightest possibility of disclosure; it identified 14 areas of harm. There was a very strong public interest in maintaining such a successful system which had saved the government so much money.

The IC argued that the public interests in favour of disclosure were transparency, openness, accountability and informed public debate. The ID card scheme had been identified by the Prime Minister’s Office as a key “mission-critical” project. A bill on the introduction of ID cards had just been laid before Parliament at the time of the requests and therefore these factors were particularly important at the time. There was evidence that a PAC and Select Committee had both recommended that GRs should be published and they had heard evidence from commercial parties that they would be happy for the reports to be made public. This was in contrast to the civil servants who gave evidence before the Tribunal that there would be dire consequences to the system if there was disclosure under FOIA.

The Tribunal pointed out that as Parliament had not provided an absolute exemption for GRs under FOIA, that each request relating to a GR would be considered under s.2(1)(b) “in all the circumstances of the case” and that there could not be a blanket

exemption for GRs. The Tribunal found that the public interest in maintaining the exemption did not outweigh the public interest in disclosure and ordered the disclosure of the reports subject to suitable redactions to protect the identity of the reviewers and interviewees.

Conclusion

The Tribunal upheld the decision notices but found that ss.33 and 35 were engaged and thus dismissed the appeal.