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

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

FOIA s.40(2) – Absolute exemption: personal data

FOIA s.41 – Absolute exemption: confidential information

EIR Reg 2 – definitions: Environmental information

EIR Reg 12(4) – internal communications

EIR Reg 12(5) – confidential information

EIR Reg 13 – personal data

Department for Business, Enterprise and Regulatory Reform v IC & Friends of the Earth

EA/2007/0072
29th April 2008

Cases:
Coco v A N Clark [1969] RPC 41;

Durant v Financial Services Authority [2003] EWCA Civ 1746

Kirkaldie v IC and Thanet District Council [2006] UKIT EA/2006_001

Facts

In July 2005 FOE requested details of the meetings and correspondence between Ministers and/or Senior civil servants and employees from the CBI since the 5th May 2005 in the fair markets group, energy group and strategy unit of the DTI (now known as DBERR). DTI provided a list of over 30 such meetings/correspondence with dates, event, subject matter and whether a record held. Some information was disclosed but 9 documents were withheld in full or redacted claiming ss.35(1), 40(2), 41 and 43 exemptions in the refusal notice. FOE complained to the IC. During the investigation further information was found and disclosed but a further document was withheld. By this time the DTI were also claiming s.36(2) in place of s.35(1) for some information but was no longer claiming s.43. To support the new exemption DTI obtained the reasonable opinion of the minister in September 2006. The IC issued a decision notice in October 2006 ordering the disclosure of the vast majority of the withheld information having undertaken a detailed examination of the 10 documents.

From 2001 DTI started bilateral meetings with lobbyists and others in order to more fully engage with business. The CBI was given greater access than any other organization other than the TUC. The DTI and CBI assumed their meetings and

communications were in private and confidential although there was no explicit agreement as such. Other lobbyists did not make such an assumption unless expressly agreed otherwise.

Findings

Jurisdiction

The Tribunal needed to decide under which jurisdiction this case fell. They held that documents or parts of documents which dealt with energy policy and climate control were covered by EIR. It was further decided that where a document contains predominantly environmental information, it is possible to find that the whole document is subject to the EIR. However, where there are a number of purposes, none of which are dominant, a review of the whole document must take place. Therefore, in this case the IC was correct to take the approach of reviewing the documents in detail.

Where the Tribunal found that EIR applied, DBERR was able to transfer FOIA claimed exemptions to closely related exceptions under EIR.

Claiming exemptions for the first time

It was decided that despite the provisions on time limits and process, the provisions do not prevent the exemptions being claimed later; and will be decided on a case by case basis. However, it was held that there must be reasonable justifications for late exemptions. Even though s.36(2) was claimed for the first time towards the end of the IC's investigation the Tribunal held that the IC was correct to accept the late claiming of the new exemption.

Confidentiality

The Tribunal accepted that the need to protect a private or safe space for internal deliberations during policy formulation and development could be extended to outside consultants who were advising on policy and paid for their services. However the Tribunal did not accept that the same safe space should be extended to lobbyists particularly privileged ones like the CBI.

Public Interest

The public interest should be considered at the time of the request or thereabouts.

Personal Data

The Tribunal considered whether the names of the officials could be defined as 'personal data'. They held that the names of individuals attending meetings were personal data, due to the ratio in the case of *Durant*. This was because the individuals listed as attendees in the minutes and elsewhere in the Disputed Information had biographical significance for the individual which would be of personal career or business significance.

The Tribunal undertook a detailed analysis of the cases under s.40(2) in relation to the disclosure of names which resulted in the panel finding:

a. Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;

b. The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.

c. Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.

d. In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;

e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.

f. The extent of the disclosure in relation to the named official will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business.

Conclusion

The Tribunal mostly upheld the decision notice but allowed the appeal in part and substituted a new decision notice.