

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

**FOIA s.35(1)(b)** – Qualified exemption: ministerial communications

**FOIA s.35(1)(c)** – Qualified exemption: advice by law officers

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

**FOIA s.41(1)(a) and (b)** – Absolute exemption: confidential information

**FOIA s.43(2)** – Qualified exemption: commercial interests/trade secrets

## ***The Scotland Office v IC***

**EA/2007/0128**

**5<sup>th</sup> August 2008**

### **Cases:**

The Department for Education and Skills v IC [2006] UKIT EA\_2006\_0006

The Secretary of State for Work and Pensions v IC [2006] UKIT EA\_2006\_0040

Office of Government Commerce v IC EA\_2006\_0068

Guardian Newspapers Ltd and Heather Brooke v IC and BBC [2006] UKIT EA\_2006\_0011

### **Facts**

A request for information regarding Gaelic broadcasting policy was made to the Scotland Office. The Scotland Office replied stating that it was withholding the information on the basis that it was exempt from disclosure under ss.21, 35(1)(a), (b) and (c), 40(2)(a), 41(1)(a) and (b) and 43(2) of FOIA.

The IC concluded that,

- (a) The Scotland Office had breached s.17(3) of FOIA by
  - (i) failing to explain, in relation to the public interest test, how the general factors identified applied to the specific information requested,
  - (ii) inadequately weighing up against each other the factors in favour and against disclosure, and
  - (iii) applying an incorrect balance test.
- (b) the information to which the Appellant had applied the s.35(1)(a) exemption did properly fall within its scope;
- (c) s.35(1)(a) also applied to certain other documents in relation to which the Appellant had erroneously sought to apply s.35(1)(b), s.35(1)(c) and s.41(a) and (b);
- (d) as regards documents created prior to the date on which the Communications Act 2003 received Royal Assent (namely, 17 July 2003), the public interest in maintaining the s.35(1)(a) exemption did not outweigh the public interest in disclosure;

- (e) the public interest in maintaining the s.35(1)(a) exemption did however outweigh the public interest in disclosure in relation to documents generated *after* 17 July 2003;
- (f) some, but not all, of the documents that were said by the Appellant to fall within s.35(1)(b) properly fell within the scope of that exemption;
- (g) of the documents which properly fell within the scope of s.35(1)(b), the public interest in maintaining the s.35(1)(b) exemption did not outweigh the public interest in disclosure in relation to documents created prior to 17 July 2003, but did do so for documents created after that date;
- (h) s. 35(1)(c) did not apply to any of the documents;
- (i) s. 21 did render exempt those documents to which the Appellant had applied it;
- (j) some, but not all, of the exemptions claimed under s.40(2)(a) were upheld;
- (k) none of the documentation that was said by the Appellant to fall within s.41(a) or (b) did in fact fall within either of those provisions, although some of fell to be considered under s.43; and
- (l) many, but not all, of the exemptions claimed under s.43(2) were upheld.

In other words, the Scotland Office had inappropriately withheld other parts of it by reference to ss.35(1)(a) (b) and (c), 40(2)(a), 41(1)(a) and (b) and 43(2), and required the authority to disclose the documents listed.

The Appellants appealed against the IC's decision that with regards to ss.35(1)(a) and (b) the public interest in maintaining the exemption was outweighed by the public interest in disclosing the information and his decision in relation to some information, the exemptions claimed under ss.40, 41, and 43 were not engaged as well as challenging the IC's exercise of the public interest balancing test.

### **Findings**

The Tribunal applied the public interest test with regard to ss.35(1)(a) and (b) to each of the documents and their conclusions were recorded on the Confidential Schedules annexed to the Decision. In relation to a number of documents that were direct communications between ministers the Tribunal decided that the public interest in maintaining the exemption, having particular regard to the convention of collective Cabinet responsibility, outweighed the public interest in disclosure.

### Section 35(1)(a)

The Tribunal agreed with the assertion with regard to s.35(1)(a) in the High Court appeal of the *OGC* case of the 'rights of the citizen to be informed about the acts and affairs of public authorities'. The Tribunal observed using the case of *OGC* that the starting point with regard to considering the application of the public interest was to recognise that there is an 'assumption' built into FOIA that 'the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities'.

The Tribunal took account of the following factors in favour of disclosing the information:

- (a) it would encourage good practice and increasing public confidence that decisions have been taken properly and on the basis of the best available information;
- (b) it would promote policy-makers' accountability to the public;
- (c) it would facilitate public understanding of how government formulates policy generally;
- (d) it would facilitate a well-informed public debate on the issues;
- (e) it would encourage public participation in the development and formulation of future government policy;
- (f) it would broaden policy input beyond individuals or groups with an unduly privileged position of influence in policy-making processes.

The Tribunal rejected the Appellants' criticism that the IC applied 'formulaic' public interest considerations relying on the decision in *Guardian Newspapers* as the factors for disclosure will almost always be wide, unlike those for maintaining the exemption. The Tribunal agreed that there was considerable public interest in disclosing the information.

With regard to the arguments advanced for maintaining the exemption, the Tribunal rejected the Appellants' argument that "The preservation of private thinking space for Ministers and officials in order to facilitate the provision of candid advice and the free and frank exchange of views, and the protection of the fundamentally important constitutional principle of collective Cabinet responsibility, represent important values that further the overall public interest" as information created during this process cannot be regarded *per se* as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption.

The Tribunal agreed that the policy making process must reach a point where it can properly be regarded as having come to an end but noted that how that point is identified or categorised may vary. They opined that once an Act has received Royal Assent the policy has been enshrined in an Act of Parliament and that particular policy making period has come to an end. It is inevitable that many policy decisions, particularly if they are controversial or effecting a dramatic change, will be subject to further debates and perhaps development of a new policy to amend the existing one, but that does not mean that the policy itself is still being formulated or developed. Therefore, the Tribunal held that because there may be ancillary matters relating to the implementation of the Gaelic broadcasting policy does not mean that the policy process itself is ongoing.

Other arguments advanced for maintaining the exemption were the fact that the issue of funding had not yet been finalised, and that disclosure of some of the documents might threaten the emerging coalition with the BBC. With regard to the argument that it is necessary to protect the candour and advice of civil servants, which would otherwise result in civil servants being less keen to record their views on paper and more ambiguity in the language they used, the Tribunal were skeptical as to the extent of the 'chilling effects' predicted in relation to the impact of disclosure in relation to internal governmental deliberations. The Tribunal believed that senior civil servants have sufficient courage and independence to continue to give the robust and

independent advice they have given in the past, even in the face of potential public scrutiny.

#### Section 35(1)(b)

The Tribunal agreed that there was some force in the argument that the factors in favour of maintaining the exemption for *some* types of information in this category will, almost always, be strong and that “very cogent and compelling” reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations.

The Tribunal took into account the following factors with regard to maintaining the exemption:

- a) the exemption should be maintained where the notion of collective Cabinet responsibility applied as preserving frankness and candour in the collective deliberation of policy necessarily depends on a high level of confidentiality attaching to such deliberation. Disclosure of individual Ministerial views (whether they be contained in direct correspondence or in communications between officials), “would” mean that the Government “would” be unable convincingly to put forward a united front in relation to any policy decision reached.
- b) Ministers would be more likely to be concerned about letters written while they retained the same position in Government and that risks would be diminished by movement of individuals or a change in administration. There was a long standing practice by which papers would be released to the public at a time when the matters referred to therein would be considered historic and not relating to recent issues.
- c) there is a strong public interest in maintaining the confidentiality of Ministerial communications in supporting the principle of collective responsibility where the disclosure of the information would reveal no more than the name of the individual who expressed a particular view, rather than revealing a novel or unusual view that was being considered.

The Tribunal rejected the argument that Ministers were currently acting in the belief that s.35(1)(b) of FOIA affords a level of “protection” which the Ministerial Code assumes as they would be well aware of fact that the political landscape was due to change. The Tribunal also rejected the IC’s argument that the confidentiality of collective cabinet responsibility had been waived or eroded by letters being sent to the Scottish First Minister as having regard to the Scottish First Minister’s role and responsibilities they did not consider the fact that copies of letters were sent to him has resulted in the confidentiality of these documents being “waived”.

#### Section 40

The Tribunal accepted the arguments advanced by the Appellants and concluded that disclosure of this information would breach the first data protection principle and was therefore exempt under s.40(2) of FOIA.

#### Section 43

For the reasons given on the Confidential Schedule the Tribunal concluded that the public interest in maintaining this exemption did not outweigh the public interest in

disclosure and that the relevant document should be disclosed, with only the sentence the parties reached agreement about redacted.

**Conclusion**

The Tribunal allowed the appeal in part and substituted the Decision Notice.