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

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

The Scotland Office v IC

EA/2007/0070
8th August 2008

Cases:
DFES v IC and the Evening Standard [2006] UKIT EA_2006_0006

The Secretary of State for Works and Pensions v IC [2006] UKIT EA_2006_0040

Office of Government Commerce v the Information Commissioner [2008] EWCH 737 (Admin)

Export Credits Guarantee Department v Friends of the Earth [2008] EWCH 638 (Admin)

Guardian Newspapers Ltd and Heather Brooke v IC and BBC [2006] UKIT EA_2006_0011

Facts
A request was made to the Appellants for information in relation to the Scottish Adjacent Waters Boundary Order (the '1999 Order'). The Appellants responded stating that they were withholding the information on the basis of the ss.35(1)(a), 35(1)(b) and 42(1) FOIA exemptions and that the public interest in maintaining the exemptions outweighed the public interest in disclosure.

The IC reached the following conclusions with regard to the 18 documents in issue:

- insofar as the information requested comprised submissions and advice from civil servants to Ministers, s.35(1)(a) was engaged, but the information should be disclosed because the public interest in maintaining the exemption did not outweigh the public interest in disclosure; and
- insofar as the information requested comprised ministerial correspondence, s.35(1)(b) was engaged, but the information should be disclosed because the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

The IC also found that the Appellant was in breach of s.17 because it had not provided an adequate explanation for why the exemptions relied on applied.

The appeal was dealt with in two parts due to the fact that a large number of further documents were identified by the Appellants. Stage 1 dealt with the information addressed in the Decision Notice and Stage 2 will deal with the other information identified by the Appellant subsequent to the Decision Notice.

Findings
During the IC's investigation, the Appellant identified some additional documents as being relevant to the request and disclosed them; however, the Tribunal held that by not providing the information to the requestor or invoking the exemption under s.21 within the required period, the Appellant was in breach of s.10 and/or 17. The

Appellants also acknowledged that some of the documents required by the IC to be disclosed were not in fact exempt and so provided them to the requestor; however, the Tribunal held that they had also been in breach of s.10 FOIA in this respect.

The key issue in the appeal was how the public interest test applied to the disputed information. This required the Tribunal to consider what the correct approach is to applying the public interest test in the context of sections 35(1)(a) and (b), and whether there is any material difference in how it applies between the two sub-sections, and then to apply the test or tests on the facts and circumstances of the case.

Section 35(1)(b)

The correct approach to the balancing test in relation to s.35(1)(a) was not in dispute. However, the Tribunal had to consider the correct approach with regard to s.35(1)(b) and whether it was the same as for s.35(1)(a). The IC argued that the approach for s.35(1)(b) should be the same as for section 35(1)(a) as the drafting of FOIA suggests that Parliament considered that the exemptions in ss.35(1)(a) and (b) were closely related because *inter alia*, both are found in the same section of FOIA, both are expressed in similar terms, both are class-based exemptions, and both are restricted to information held by Government departments. The IC also asserted that in many cases there will be much overlap between information falling under ss.35(1)(a) and 35(1)(b) which weighs in favour of taking the same approach to both exemptions.

The Appellants on the other hand, argued that different considerations arise in relation to s.35(1)(b). They argued in particular that disclosure of Ministerial communications risks undermining the convention of collective Cabinet responsibility and that this principle is of such great constitutional importance that Ministerial communications should not be disclosed "unless a compelling public interest in disclosure is found to exist".

The Tribunal noted that the Appellants' submissions came close to suggesting that the threshold to be met before such information can be disclosed should be so high as to amount, almost, to an absolute exemption but this bears no support from the wording of s.35 nor the case law. To the extent that the Appellant was suggesting that because of the importance of the convention, there is some form of presumption against disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under s.35(1)(b) is inherently weighty, the Tribunal disagreed. The notion that there is a public interest against disclosure inherent in s.35(1)(a) because of the status of any such information, was rejected in both the *DFES* and *DWP* cases. Furthermore, not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Even where Ministerial communication engages the collective responsibility of Ministers that does not itself mean that the public interest against disclosure will inevitably be weighty. The maintenance of the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to be accorded to it must depend on the particular circumstances of the case.

The Tribunal held that where Ministerial communication does engage the convention, it is necessary, in particular, to assess whether and to what extent, the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent

of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context, are all matters that are likely to have bearing on the assessment of the public interest balance.

The arguments for and against disclosure

The Tribunal noted the similarities between this case and the cases of *DFES* and *DWP*. A number of the arguments the Appellant made related to indirect consequences of disclosure and were the same as those put forward by the public authorities in those cases.

To that extent, the Tribunal adopted the views expressed by the Tribunal in those cases. They also stated as regard to the Appellants' argument over the 'chilling' effects of disclosure on ministerial communications, that Parliament could have chosen to make section 35(1)(b) an absolute exemption, but did not do so. This means that Ministers cannot expect that their communications will be protected from disclosure on any blanket basis. However, FOIA does not contemplate routine disclosure of information within the scope of sections 35(1)(a) or (b), nor indeed any other qualified exemption. Disclosure is to be made only when in all the circumstances of the case, the public interest in maintaining the exemption is equalled or outweighed by the public interest in disclosing the information. The safeguard therefore, is not that information coming within the scope of these exemptions will not be disclosed, but that it will only be disclosed following a careful assessment, not only of the public interest in disclosure, but equally, of the public interest in maintaining the exemption. Also, the Tribunal noted that there is no evidence to suggest the 'chilling' effect has materialized as a result of the FOIA coming into force. Further, they rejected the idea that consequences of information being required to be disclosed by law under FOIA have parallels with the negative effects arising from leaked information as leaks are a betrayal of trust and it is to be expected that it would give rise to a more limited sharing of information and a narrower circle of persons being involved in policy decisions.

With regard to the IC's arguments surrounding 'good governance factors', the Tribunal noted that the weight to be given to such factors will vary from case to case. In assessing that weight, one of the factors that may be relevant is the extent to which the information will add to the public's understanding of the issues. If the information does not add much, it is likely to merit less weight. They also did not agree that the formality in presentation or content of the information has any real bearing on the public interest, one way or the other.

Conclusion

The Tribunal held, for the reasons stated in the confidential annexes, that for some of the information, the public interest in maintaining the exemption did not outweigh the public interest in disclosure in respect of the information and therefore ordered that the Appellant's disclose that information to the requestor. However, with regard to other information, the Tribunal held that the public interest in maintaining the exemption did outweigh the public interest in disclosure. That information, therefore, was exempt from disclosure.

They did not find that any of the disputed information was exempt under s.35(1)(a). The policy-making process that the exemption was intended to protect ended with the making of the 1999 Order, so that the disputed information was historical by the time the request for information was made. Where they did find disputed information to be exempt, it was under s.35(1)(b) where the information engaged the convention of collective Cabinet responsibility

They also agreed that the Appellant was in breach of the obligations under s.17.

Observations

The Tribunal observed that it may be more prudent for the IC not to require disclosure by reference to a list if there is a possibility that the list may not be exhaustive. They also stated that when assessing whether or not the disputed information is exempt, the IC should have considered the documents and the information they contained, individually, rather than simply by the category within which they fell.