Formulation or development of government policy s.35(1)(a)
Audit Functions s33(1)(a) & (4)
Meaning of Prejudice s.33
Public Interest Test s.2
Personal Information and Redaction s.40

Office of Government Commerce v Information Commissioner
EA/2006/0068 and 0080
.. February 2009

Cases:	OGC v Information Commissioner and HMH-G [2008] EWHC 774(Admin) Secretary of Work & Pensions v Information Commissioner EA/2006/0040 John Connor v Information Commissioner EA/2005/0005 Guardian & Brooke v Information Commissioner & BBC EA/2006/0011 and 0013 Hogan & Oxford CC v Information Commissioner EA/2005/0030 DfES v Information Commissioner and the Evening Standard EA/2006/0006 Re H and others [1996] AC563 Three Rivers DCV Governor and Company and Bank of England (No.4) [2005] 1 WLR 210 Scotland Office v Information Commissioner EA2007/0128

Facts

The Tribunal considered a remitted application from a decision of the High Court (see OGC case reference above). The Appellant public authority conducts short and extremely robust independent investigations into a wide variety of government projects. It was set up in the wake of the Gershon Report. At the end of each review, which takes three to four days, a Gateway Review report sets out the conclusions of the independent team of interviewers (following interviews with representatives of the department involved) as to how the project is progressing. The subject of the project in the present case related to the Identity Cards Scheme, now part of the Identity Cards Act 2006. The request which was dated 3 January 2005 sought the disclosure of two so-called Gateway Stage Zero Reports produced in mid 2003 and early 2004. The reference to Stage Zero was to the fact that Gateway Reviews can be conducted at any one or more stages of the five stage process throughout the life of any particular project. Sometimes reports can be conducted at the same stage on more than one occasion. Although

Gateway Reviews were conducted across a wide variety of government projects and programmes, they are regarded as particularly valuable and important both by the team carrying out the review as well as by the interviewees. They are regarded as critical to the success or failure of the project or programme in question. The Gateway Process is claimed to have saved a billion pounds or so in terms of trimming excess costs and otherwise reducing the costs and expenses attached to any particular project. The teams employed by the OGC consist of existing past civil servants, usually of a very high standard, from departments other than those being interviewed, as well as outside consultants, e.g. from industry.

In his Decision Notice, the Commissioner was not satisfied section 33 was engaged. He was not persuaded that the information in the reports was of such a nature that their disclosure would discourage further cooperation by those presenting information to the OGC. In particular, he stressed that interviewees were under a degree of compulsion with regard to their participation in the process. He therefore found that there was no risk that interviewees would cease to perform their duties if disclosure was ordered.

He found it was arguable that section 35 was engaged. However, on balance, he accepted that it was engaged. He found in favour of disclosure stating that the reports in question did not contain any information which caused or prompted participants to be any less willing to contribute fully in further reviews. In any event, the two reports were followed by a Home Office press release in April 2004 confirming that the Gate Zero Review of the IDs Card programme had been successfully completed in January of 2004.

The present judgment contains a lengthy description of the Gateway Process which had been extensively described by the documentation in the appeal, as well as in the earlier remitted appeal. Three witnesses were put forward by the OGC, but none by the Commissioner. The judgment also referred to the previous High Court decision which remitted the appeal. The only ratio of that decision was with regard to the unwarranted application of the principle parliamentary privilege which vitiated the prior Tribunal decision. Also referred to in many other passages in the High Court decision, which although obiter had been relied on by the OGC. In particular, the High Court had noted:

(1) FOIA embodied an “assumption” that disclosure would be of value;

(2) once section 35 was engaged, there was not necessarily a public interest in maintaining the exemption; the public interest balancing test was also involved;

(3) the earlier Tribunal had failed to identify a public interest justifying disclosure;

(4) section 33 contemplated a forward-looking exercise, ie, what would happen if disclosure were ordered?

(5) the earlier Tribunal could have found that the present reports should be disclosed whilst in future only a very few would be disclosed but in similar exceptional cases, or it could have found, in general, all reviews be disclosed, or it could have found that each application would depend on the individual circumstances; and

(6) a so-called Working Assumption employed by the OGC which stated that in general terms disclosure should be made within two years of any request being made, save in respect of Stages 4 and 5 reports was not, in the words of the court, “objectionable”.

In its evidence which was both closed and open, the OGC stressed the following principal factors in favour of non-disclosure, namely:

(1) the need for candour in the review and interview process, coupled with the privacy that attended upon the giving of advice when the report was made; and

(2) the need for the review team to be objective.

These factors in turn meant that if disclosure were ordered:

(1) interviewees would be more guarded;

(2) reviewers would be less inclined to participate; and

(3) there would be bland and anodyne reports.

The OGC had in any event published the various documents on its website and elsewhere which it had claimed sufficiently described the development of the ID Cards scheme. On the whole, however, the witnesses accepted that even though the earlier Tribunal had ordered disclosure and despite the fact of the remitted appeal, the way in which reviews were conducted as presently constituted remained very much the same. Therefore, no deterioration in the quality of the reports had been noted. However out of a pool of some 1,500 reviewers, only two had expressed their wish to refuse to continue acting as such reviewers.

The issues were therefore:

(1) was s33 engaged and in particular was the prejudice test satisfied;

(2) if yes to (1), did the public interest in maintaining the exemption outweigh the public interest in disclosure?

(3) in any event, did the public interest contained in the s35 exemption outweigh the public interest in disclosure? and

(4) to what extent was s40 involved.

As to prejudice, the Tribunal applied the approach in the earlier Tribunal decisions, see especially the John Connor case, that what needed to be shown was the existence of a significant and weighty chance of prejudice. The Tribunal added that this approach was informed by a practical consideration, namely whether a FOIA compliance officer would understand how to apply that test in his or her everyday application of FOIA. Moreover, the words used, namely “would or would be likely to” did not read as was argued by the OGC, “would or might”. With regard to this appeal, the Tribunal determined that it was reasonable for the OGC to take the view that there was here a strong and weighty chance of prejudice should the two reports be disclosed, ie, the OGC in this case as the decision-maker had shown to the Tribunal’s satisfaction that some causal relationship existed between a potential disclosure and the prejudice and that such prejudice was real and weighty.

As for the second and third issues, the applicable considerations overlapped as between ss33 and 35. The basic principles were:

(1) if, after assessing all the factors for and against disclosure, the factors were equally balanced, disclosure should occur;

(2) there is the assumption inbuilt into FOIA that the disclosure necessarily entailed a public interest;

(3) often the age of the information was an important factor.

There were at least three preliminary observations which had to be taken into account, namely:

(1) whether disclosure would improve transparency;

(2) what other means were available to the public for the public to assess the same information; and

(3) the fact that a scheme such as the ID Card scheme was high profile was not enough: it was merely a factor.

The Tribunal noted that with regard to (1) above by way of preliminary observation, the public interest in analysing the benefits, financial and otherwise, had to be carefully considered. In relation to (2), there was clearly a benefit in seeing how a scheme such as the ID Card scheme evolved. Ideally (2) should be further broken down into considerations such as considering the scope of the programme, the objectives to be achieved, etc.

The fact that the report might not be self-contained was not relevant: the reports would be of interest to an interested and educated observer.

The 2003 report preceded a White Paper in November 2003. The second report in 2004 preceded the draft Bill which led to the Act. That was in many cases a very important stage which would normally generate extensive public debate and concern. In addition:

(1) the ID Cards remained an exceptional, if not a unique, case;

(2) the reports were not really concerned with technical deliverability: the debate concerned not only the merits of the scheme, but also the means of

implementation of the entire ID project: in any event, the 2003 report was said to be "atypical" of a normal Gateway Zero report;

(3) no comparison could be made with a National Audit Office report which was entirely different, being a public audit and retrospective; and

(4) disclosure would inform the debate about the Gateway Review Process as a whole.

The OGC claimed that there were three questions, namely:

(1) whether the Gateway Process as a whole delivered a public benefit;

(2) whether the basic candour and confidentiality in the process was going to be diminished by disclosure; and

(3) whether disclosure would be contrary to the Working Assumption.

The Tribunal answered (1) by saying definitely that it would be, ie, yes. As for (2) and (3), the witnesses clearly endorsed the need for candour and confidence. There were however serious qualifications, e.g. the fact that the process, even after the High Court decision, remained apparently unaltered and therefore undamaged in its efficacy. As for (3), FOIA had clearly featured in the OGC's overall thinking and as reflected in its continuing dealings. The Tribunal felt that the overall reaction to the present appeal was, on the whole, not satisfactory. The two year period which was established by the Working Assumption was arbitrary. The Working Assumption had to yield to the facts in each case. In any event, 18 months or so, which was not very far from two years, had elapsed since the date of the first report which was sought to be disclosed and the request. The Tribunal was satisfied that the reports here sought did not attribute specific views to specific parties: only an insider might infer that, and even then that was not certain. The Tribunal was shown various anonymised reports which were perhaps more outspoken than the present reports, but felt that of necessity, could not go outside the confines of the particular request. The risks that interviewees might not in future cases speak out in an unguarded way was "minimal".

Conclusion

The Tribunal stresses that not all Gateway Reviews should be disclosed. The Tribunal made a number of specific recommendations which should find reflection in the Working Assumption now set out at the end of the judgment.

As for s40, the Tribunal found that identification of individual civil servants, other than senior ones, did not assist. Subject the above points, the Tribunal upheld the decision to disclose the two reports.