

**FOIA** Exemption under FOIA s36(2)(c) – prejudice to the effective conduct of public affairs – late claim – opinion of qualified person formed after time when request was dealt with – whether evidence of authorisation of qualified person pursuant to FOIA s36(5)(o)  
Exemption under FOIA s43 – prejudice to commercial interests – meaning of ‘commercial interests’  
Public interests under FOIA s2(2)(b) - nature of balance which Tribunal is required to consider

## **STUDENT LOANS CO LTD v INFORMATION COMMISSIONER**

**Case Number: EA/2008/0092**

**17 July 2009**

### **Cases:**

*Guardian Newspapers Limited v Information Commissioner* EA/2006/0011

*Hogan v Information Commissioner* EA/2005/0026

*Home Office v Information Commissioner* [2009] EWHC 1611 (Admin), on appeal from

*Home Office v Information Commissioner* EA/2008/0062

*Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin)

*Scotland Office v Information Commissioner* EA/2007/0128

### **Facts**

SLC administered student loans. The entire system of student finance in the UK is built upon an assumption of repayment, so that the money repaid to the Government can be used to fund future student finance. SLC challenged a decision of the Information Commissioner that it had to disclose under FOIA a training manual used for staff who dealt with defaulting borrowers. It feared that disclosure would help borrowers to delay or avoid complying with their obligations.

Before the Commissioner SLC relied on s43. He determined that the Manual did not relate to SLC’s commercial interests within the meaning of s43. The Commissioner therefore ordered that the Manual be disclosed.

On appeal to the Tribunal SLC contended that the Commissioner had taken too narrow a view of the meaning of “commercial interests” in s43(2), and that the balance of public interest was against disclosure.

The Tribunal also permitted late reliance upon s36(2)(c) (prejudice to effective conduct of public affairs).

### **Findings**

The questions for the Tribunal’s decision were-

- (1) whether the s36 exemption applied (prejudice to effective conduct of public affairs),

(2) whether the s43 exemption applied (prejudice to commercial interests),

(3) under s2(2)(b), whether in all the circumstances of the case the public interest in maintaining any applicable exemption outweighed the public interest in disclosing the information.

On the evidence, the Tribunal considered that SLC was right to contend that the Manual contained information which would be useful to defaulting borrowers to help them to delay or avoid payment. If the full Manual were disclosed, it would be likely to have the effect of delaying and reducing collections and of increasing the costs of collection, to the detriment of the public purse. However, the extent of the sensitive material was small, and the risk could be avoided by redacting certain passages.

### Section 36(2)

The Chief Executive of SLC gave a certificate that disclosure of the information under FOIA would have the effect set out in section 36(2)(c). The Tribunal expressed concern over the ambiguity and the timing of the certificate, and over whether it was adequately demonstrated that the Chief Executive was the qualified person for the purpose of s36(2). The Tribunal noted the absence of a letter or other document issued by a Minister, granting the authorisation, as required by s36(5)(o).

Where in other cases the Tribunal had given effect to an exemption belatedly claimed, there had been reasonable justification for permitting it to be raised late, and the facts which engaged the exemption had been facts which were in existence at the time when the request was originally dealt with by the public authority. SLC's Chief Executive had not been involved in the original refusal of the information request and had only formed his opinion under s36(2) shortly before the appeal to the Tribunal was heard. Since the facts required to engage the exemption were not in existence at the time when the request was originally dealt with, there was no possibility of the Tribunal holding that the Commissioner's decision was not in accordance with the law on the ground that it did not give effect to the s36 exemption. The Tribunal concluded that it was not open to them under the Act to take the s36 exemption into account on the appeal.

### Section 43

The Tribunal considered that the Commissioner's interpretation of the word "commercial" in s43 was too narrow. The commercial interests in view in that section included the commercial interests of public authorities. It was not appropriate to tie its meaning to competitive participation in buying and selling goods or services and to exclude all other possibilities. It was not a misuse of ordinary English to describe debt collection as a commercial activity, even when carried on by a company supported by public funds. Rather than applying the Commissioner's Guidance, the Tribunal considered it preferable to take the unvarnished words of the Act and ask whether a detriment to SLC, from the delay and reduction of debt collections and increasing the costs of collections, could fairly be described as prejudicing SLC's commercial interests. The answer was yes. The likelihood of prejudice was such that the exemption in s43(2) was engaged by the sensitive information in the Manual. It was not engaged by the remainder of the Manual.

## Public interest

The assessment of the public interest factors had to be carried out only in relation to the sensitive information.

The Tribunal drew attention to the nature of the public interest balance which section 2(2)(b) required the Tribunal to consider in all the circumstances of the case. “The public interest in disclosure has by its nature a wide ambit, since it includes the high level reasons why Parliament passed the Act and why disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods. The other side of the balance is more narrowly defined. The statute directs us to consider whether the public interest in disclosing the information is outweighed not by *the public interests in withholding it*, but by *the public interest in maintaining the exemption*. The latter is focused not on generalised reasons why it would be good to keep the information private but on the aspects of public interest which relate to the particular exemption or exemptions defined by the Act and relied upon in the particular case. (We think this is what a differently constituted Tribunal may have intended to convey in paragraphs 63-64 of its decision in *Home Office v Information Commissioner* EA/2008/0062, which, on appeal, Keith J found to have been expressed with insufficient clarity: [2009] EWHC 1611 (Admin) at paragraphs 33-35.)”

The Tribunal found that the public interest factors in favour of disclosure of the sensitive information were not weighty, and that there was a strong public interest in maintaining the exemption, in the interests of taxpayers.

## **Conclusion**

The Tribunal required the training manual to be disclosed subject to certain redactions which the Tribunal specified.

In its decision the Tribunal also commented adversely on the delays by the Commissioner in dealing with the case.