

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

**FOIA s.2(2)** – Public interest test

**FOIA s.16** – Duty advise and assistance

## ***Her Majesty's Treasury v IC & Times Newspapers Ltd***

**EA/2007/0001**

**7<sup>th</sup> November 2007**

### **Cases:**

Department for Education and Skills v IC [2007] UKIT EA\_2007\_0001

Guardian Newspapers Ltd v Information Commissioner [2006] UKIT EA\_2006\_0011

### **Facts**

The appeal concerned whether Her Majesty's Treasury should disclose information consisting of the content of certain budget submissions made to the Chancellor of the Exchequer in the lead up to the 1999 Budget. HMT relied on the qualified exemption contained in FOIA s.35(1)(a) (information held by a government department relating to the formulation or development of government policy). There was also an issue under s.16 (advice and assistance).

The IC required HMT to release information which it held.

### **Findings**

#### **The Public Interest**

The Tribunal accepted that the following were relevant matters for consideration in weighing the balance of public interest (what, if any, weight they carried in a particular case depended upon the particular information and circumstances):

- (1) Whether the information requested bears on a Budget or PBR (pre-budget report) announcement, or on options considered but not taken forward.
- (2) Where the information requested includes options not proceeded with, whether the options concerned remain "live" from the point of view of continuing consideration of tax and welfare policy in future Budgets and PBRs or can be regarded as "dead" because a change of administration renders them politically unacceptable or because they have been clearly superseded by changes in tax policy or law.
- (3) Where an issue remains "live", what the risks of economic damage through forestalling behaviour, or prejudice to the Budget/PBR process through premature disclosure, would be likely to be.

The Tribunal rejected as fanciful the Treasury's evidence that inward investors in 2005 and onwards would be deterred by the fact that in 1999 certain options for

personal taxation, which were not adopted by the Chancellor, were put up by Civil Servants for consideration.

Before weighing the balance of public interest the Tribunal observed, as preliminaries, that-

- (1) The assumption underlying the Act is that the disclosure of information held by public authorities is in itself of value and in the public interest (*Guardian Newspapers Ltd*). The overall policy objective of the Act was to change the relationship between government and the public, by introducing a statutory right to government information.
- (2) The s.35(1)(a) exemption is qualified. Parliament has therefore recognised the possibility that the balance of public interest may favour disclosure of information relating to the formulation or development of government policy.
- (3) The fact that the exemption is qualified means that no Civil Servant or Minister can expect that all information relating to the formulation or development of government policy will necessarily remain confidential. If the possibility of disclosure has of itself a chilling effect on the giving and receiving of open and frank policy advice, such effect is inherent in the Act.
- (4) In considering the factors that militate against disclosure, the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.
- (5) As was stated by the Tribunal in *Department for Education and Skills* the central question in every case under s.35(1) is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.
- (6) As was further stated by the Tribunal in the same decision in relation to senior Civil Servants, “in judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions”.
- (7) Although the information in issue in this case was generated in 1999, which was before FOIA was passed, the White Paper which led to the Act had been published in 1997. The fact that the information was generated prior to the Act had no effect on the balance of public interest.

The Tribunal identified the following factors in favour of disclosure in the public interest:

- (1) Policy formulation and decision-making can be improved by transparency, because it provides an incentive to the participants to ensure that conclusions are reached after consideration of an appropriate range of options, are soundly based on appropriate evidence and on public rather than private interests, and are able to stand up to public scrutiny. Disclosure can encourage careful and detailed consideration by Civil Servants and Ministers so that, if information is released pursuant to an FOI request, they will not be embarrassed.

- (2) In the particular context of fiscal policy, as the Treasury stated in its refusal letter, “there is a strong public interest in being open about policy development”. This is further recognised, subject to qualifications, in the Code for Fiscal Stability.
- (3) While the Budget process in general terms is well publicised and well understood, there is value in the public having information illustrating the workings of the process in particular instances.
- (4) The particular information in this case may help inform the public’s understanding of the issues that arose in relation to the 1p change in basic rate, both in regard to the substance of change and in regard to the process of making it (albeit the quantity of information at issue was small, so that its usefulness to the public would accordingly be modest).
- (5) Disclosure of the range of options considered would enable the public to promote a public debate and lobby in favour of options not taken up, if they think they are a good idea. Such debate could itself inform future policy-making.
- (6) The fact that HMT has placed a substantial quantity of information in the public domain in regard to the change in the basic rate of tax, in the Red Book and elsewhere, does not mean that there is no value in the disclosure of further information. In the case of voluntary publication, both the content and the timing of the disclosure are wholly within the control of Government. That is not the case when an FOI request is made. When information is disclosed pursuant to an FOI request, that enables the public to make a comparison with the information published voluntarily. This provides an incentive to proper conduct and proper decision-making. It is, or should be, conducive to public confidence in the processes of Government.
- (7) In broad terms the age of the information makes it easier for it to be disclosed without impinging unduly on the safe space that is required during policy development. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within Government. But the older the information is, the less sensitive it is likely to be, as an indication of the Government’s current thinking. While the possible annual reiteration of policy options affects the weight of the age factor in respect of certain elements of the information, it does not wholly negate it. Moreover, if disclosure is made of an option as something that was considered in 1999, the public will know only that it was considered in that year. This does not involve revealing whether it was considered either by officials or by Ministers in any subsequent year or, if it was, what was said about it.
- (8) Disclosure of the withheld information is unlikely to lead to false conclusions about the thinking of the Chancellor. As at 2005, the Chancellor had a long track record of the conduct of the public finances, against which the possible impact of inferences about his thinking, based on options put up by officials in 1999 and not adopted by him, must be very small indeed.
- (9) Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process. It was not an objection that many of the factors listed above are broad-ranging and operate at a relatively high level of abstraction.

The Tribunal identified the following public interest factors in favour of maintaining the exemption:

- (1) The very existence of the exemption indicates a need for caution, and is an acknowledgment of the desirability of a 'safe space' for policy formulation and development. In this case, particular caution is needed because of the high public importance and sensitivity of the Budget process. There is a significant public interest in ensuring that Budget decisions are made carefully after a full and proper process of consideration, and therefore a corresponding interest in taking care to avoid significant damage to the integrity of the policy process.
- (2) There need to be weighty reasons for public disclosure if the confidence attaching to formulation of taxation policy for the Budget is to be invaded. In this case, the specific usefulness of the information to the public will be modest, as acknowledged in factor (4) above.
- (3) The withheld information related in part to options that were not proceeded with. This calls for an assessment of the particular risks which the Treasury was concerned about in the case of options that were not adopted. If the risks should properly be regarded as serious, this would weigh heavily against disclosure. In relation to one element within the withheld information, the Tribunal considered that (approaching the matter as at 2005, when the request was considered) there was a significant risk of damage to the policy process if it was disclosed. This was explained in the closed confidential annex to this decision. In regard to the remaining elements, the Tribunal was unpersuaded by Mr Neale's assessment of the potential dangers.

It was asserted that, if rejected options were revealed, this could lead to Ministers being put under political pressure to rule out such options for the future, and this could narrow the range of options for consideration. It could also lead Ministers to restrict the range of options on which they asked for advice, which would reduce the quality and depth of the decision-making process. The Tribunal were not overly impressed with the concern about political pressure to rule out options. In most circumstances Ministers are adept at keeping options open. The Tribunal had slightly more concern over the risk that too ready disclosure of policy advice covering unadopted options, some of which might be of considerable sensitivity, might encourage Ministers to seek advice on only a restricted range of options, thereby reducing the quality of the policy formulation process. Hence, its acceptance of a risk of detriment if one particular element of the withheld information were disclosed in this case.

The Tribunal was wholly unpersuaded by the Treasury's further point, that the public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a working assumption for the provision of advice, whereas the Minister's actual reason for adopting or rejecting it might be different, and that this would lead to difficulties. Any Minister in that position would be able to explain the status of the official's assumption and what his own thinking was.

The Tribunal was also unpersuaded by the submission that, if Civil Servants' advice could routinely be used as a basis for criticism of Ministers, Ministers would be wary of asking for it. No one was suggesting that disclosure of officials' policy advice

should be routine. Such disclosure would only be made after consideration of the balance of public interest.

Weighing the respective public interests in disclosure or in maintaining the exemption, the Tribunal's judgment was that the public interest in disclosure was stronger, except in relation to one element of the information. In relation to that element, it considered the risk to the process of proper formulation of policy to be sufficient (viewed as at 2005) to justify maintaining the exemption and to outweigh the public interest in disclosure. The reasons for distinguishing between that element of the information and the remainder of the withheld information were contained in the closed and confidential annex. Accordingly, applying the test in FOIA s.2(2)(b), the whole of the withheld information had to be released, except the one element identified in the confidential annex.

#### Advice and assistance

The duty under s.16 arises in relation to a particular applicant in particular circumstances, and is conditioned by what it is reasonable to expect the authority to do. When the applicant applied to the Commissioner by letter of 2 November 2005, his letter contained no complaint concerning any lack of advice and assistance. It was reasonable to infer that, given his position and the resources available to him as an MSP, he was not in need of assistance in relation to finding the publicly accessible material on the Treasury's website. It would have been good practice for the Treasury to indicate where the public material was to be found, but in these particular circumstances it was not reasonable to expect the Treasury to offer that assistance.

#### **Conclusion**

The Tribunal allowed the appeal to the extent that it substituted a Decision Notice permitting the redaction of one element of the information.