

**FOIA s.36(2)** – Qualified Exemption: **Inhibition of free and frank provision of advice**

**FOIA s.40(2)** – Absolute Exemption: Personal data

## ***Roger Salmon v IC & King's College Cambridge***

**EA/2007/0135**

**17<sup>th</sup> July 2008**

### **Cases:**

Corporate Officer of the House of Commons v IC and Norman Baker [2006] UKIT

EA\_2006\_0015

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

### **Facts**

The Appellant (a former bursar of the College) made a number of requests for information with regard to the resignation of the Provost of the College. The College refused to provide the information, stating that it fell under the s.36(2)(b) qualified exemption. As such, the Acting Provost of the College replied to the Appellant's request – having received legal advice to confirm that they were a 'qualified person' who was fit to apply the balance of the public interest. They stated that the public interest in maintaining the exemption outweighed the public interest in disclosure. In particular it was stated that erosion of confidence in the system would result in actions being taken without committee discussion or sanction, thereby inhibiting College governance or disclosure might lead to undocumented decisions, both of which courses would be contrary to the public interest. They also argued that some of the information fell under the s.42 absolute exemption and thus was not disclosed.

The IC investigated into the matter of the appropriate 'qualified person' and asked for clarification on why the ss.36(2) and 40(2) exemptions were being claimed. The IC agreed that the public interest in maintaining the exemption outweighed the public interest in disclosure. He also added a number of reasons for why this was:

1. the ability to engage self-governance could be prejudiced through disclosure since confidential committee deliberation would be at risk or otherwise upset
2. Guidance notes produced by the DCA on the disclosure of committee minutes stated that if committee meetings were not properly recorded, this would be counter to the public interest
3. the Guidance notes by the DCA stressed the safe space notion already referred to
4. there would be inhibition of debate within the deliberative process should disclosure follow
5. the knock-on effect of disclosure meant that nothing would be committed to paper

## **Findings**

### Section 36(2)(b)

The Appellant raised 5 sub-issues within s.36(2)(b) which the Tribunal addressed in turn.

Firstly, as to whether the acting Provost was a 'qualified person' at the time of the request, the Tribunal held that in their opinion the acting Provost was not a 'qualified person' and thus s.36(2)(b) had never been engaged. However, the Tribunal went on to consider the position had a 'qualified person' been designated, and noted that had this been the case that s.36 would have been engaged.

Secondly, as to whether by taking into account the closed nature of certain minutes and papers the College in effect applied a blanket exemption, (ie an absolute exemption as opposed from the qualified one that s.36 entails) the Tribunal rejected the Appellant's contention. They also endorsed the IC's contention that he would have concluded otherwise had it appeared the business had been conducted on a closed basis unnecessarily.

Thirdly, as to whether the view of the qualified person was objectively reasonable, the Tribunal rejected any suggestion that the minutes do anything other than record the views of the Governing Body and the Council. They were not satisfied that the Commissioner committed an error of law when viewing the disputed information and when considering the same as related and set out in the Decision Notice. In particular the Tribunal endorsed the specific finding that the fact that the public authority is not wholly subsidised and funded by public money is not a valid argument in support of the view that transparency about the spending of public funds is necessarily thereby reduced. They stated that the test outlined in the *Guardian Newspapers and Brooke v Information Commissioner* decision is a double one, namely that the Commissioner has to consider first whether the opinion was objectively unreasonable and secondly, whether it was reasonably arrived at. The Tribunal held that the fact that they may disagree with the qualified person's opinion does not of itself mean that the qualified person's opinion was not a reasonable one for the purposes of section 36.

Fourthly, as to whether it is unnecessary to protect factual information as distinct from the advice and views which that factual information gives rise to the Tribunal rejected the invitation to make some degree of redaction. The Tribunal found that use of redaction would not of itself deal satisfactorily or at all with the requirements imposed by s.36. They stated that the aim of s.36 is to ensure that in the properly held view of a duly qualified person, there can be both a free and frank provision of advice or a similar exchange of views for the purposes of deliberation.

Finally, with regard to the public interest test, the Tribunal held that the Commissioner's decision notice could not be faulted in this respect, so that the public interest in maintaining the exemption outweighed the public interest in disclosure.

### Section 40(2)

The question for the Tribunal was to what extent the confidentiality assented to by both parties impacts upon the balance to be struck under Schedule 2 of the DPA paragraph 6(1) which entails a consideration of whether the processing is “necessary for the purposes of legitimate interests pursued by the data controller” given what are called “the rights and freedoms or legitimate interests of the data subject”. The Tribunal outlined a number of legitimate interests of the Appellant and of the ex-Provost but concluded that the Commissioner was correct in his finding that the rights of the data subject (the ex-Provost) in particular her claim to enjoy privacy as to her personal data outweighed those legitimate interests which militated in favour of disclosure.

In relation to the package in the sense that the same refers to the agreement struck between the parties here surrounding the Provost’s departure the Tribunal agreed that on balance it would be unfair to disclose the contents of that package including but not limited to the agreement. However, the Tribunal found it difficult if not impossible to reach the same conclusion with regard to other materials otherwise sought as part of the request and which do not on any view form part of the package in the sense described above. They stated that if nothing else in the absence of clearly incorporated personal data within College “papers and minutes” non disclosure of such information would be impermissible. The Tribunal considered the additional materials and concluded that they should be disclosed subject to the redaction of any and all names and identities otherwise referable to stated individuals and other parties.

### **Conclusion**

The Tribunal allowed the appeal in part and substituted the decision notice. They directed that all the materials requested be disclosed save for the terms and conditions of any agreement reached regarding the termination of her employment between the ex-Provost and the College.