

FOIA s35(1)(a) – Qualified exemption: formulation and development of government policy

Department of Education and Skills v IC & The Evening Standard

EA/2006/0006

19th February 2007

Cases:

Facts

As a result of changes in the funding arrangements for local authorities, a number of schools found that they faced budgetary shortfalls in the year 2003 – 2004. Following questions to the Secretary of State at a teachers' conference in March, 2003, there was considerable publicity regarding a perceived schools funding crisis. Statements were made to the House of Commons regarding DFES funding policy later that year and in 2004.

In early 2005 the ES requested disclosure of the minutes of meetings held within DFES before and during the period of the crisis, if such it was. It argued that there was a public interest in seeing whether DFES had foreseen what would happen and what advice – if any – the minister had received.

DFES initially refused the request entirely, invoking s.35(1)(a) and contending that disclosure of such minutes would be contrary to the public interest because the discussion of policy and advice to ministers should take place without the fear of publicity, subject to the 30 – year rule. It later modified that position in relation to particular material in two stages, plainly on advice, so that a significant amount of the material sought was disclosed, in redacted form, with all officials' names deleted, before and after the IC's Notice. That material was very routine and contained little of any significance to the public debate.

The IC found that s.35(1)(a) was engaged by all but a few of the minutes sought but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He ordered the disclosure of the requested information to the complainants. DFES appealed against the notice.

Findings

The Tribunal ruled that the background general concerns raised by DFES were part of “ the circumstances of the case”. under s.2(1)(b).

Was s.35(1)(a) engaged?

The Tribunal had to first consider whether s.35(1)(a) was engaged by the material exempted by the IC. DFES argued that the exemption should be broadly interpreted. ES argued that such an approach would ignore the purpose of FOIA.

The Tribunal ruled in favour of the broad approach since potentially exempt material of a trivial or harmless nature would not satisfy the public interest test anyway. It ruled that minutes and other documents should be looked at as a whole when deciding whether s.35 was engaged. There was no place for picking out one sentence and leaving another. If, looked at sensibly, a minute, a section of a minute or a memorandum did relate to formulation or development of policy then the whole fell within the provision.

Public Interest Test

It rejected the argument of DFES that categorisation under s. 35 or any other qualified exemption marked out information disclosure of which involved some damage to the public interest. It simply identified classes of information as to which the public interests in disclosure and secrecy must be weighed, one against the other. Unless that balance favoured a refusal to disclose, disclosure followed.

The Tribunal rejected the DFES blanket approach to the categories of information under consideration. It recognised that disclosure at a time when a Department needed space and freedom to debate policy in initiatives or development was essential. However, s.35 itself recognised that policy – making was not, as DFES argued, a continuing seamless process. Policies were formulated and announced, as here. Once that happened, the argument for non – disclosure greatly weakened. Timing was a vital factor. Here the request came after government announcements and some time after the crisis had subsided.

The Tribunal rejected the warnings as to undermining of civil service independence, as had the courts on occasions when faced with the different but related issue of P.I.I.. It was also unimpressed by the plight of ministers faced with criticism of their decisions on policy through disclosure of past advice. The solution of the problem of victimisation of officials by incoming ministers or administrations was education of politicians not suppression of information. High – calibre civil servants would continue to serve the public independently and loyally, even with the knowledge that their advice might see the light of day some time in the future when the present crisis was past. Redaction of names was unjustified.

Conclusion

The Tribunal ordered the disclosure of a number of minutes of meetings of senior civil servants within DFES in 2002 and 2003. The Tribunal upheld the IC's decision notice and dismissed the appeals, finding that the exemption for the formulation and development of government policy (s.35(1)(a)) was engaged by all the material requested but that the public interest in maintaining the exemptions did not outweigh the public interest in disclosure.