

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

## ***The Secretary of State for Work and Pensions v IC***

**EA/2006/0040**

**5<sup>th</sup> March 2007**

### **Cases:**

Department of Education and Skills v IC & The Evening Standard [2007] UKIT

EA\_2006\_0006

### **Facts**

Mr Mark Oaten MP requested that the feasibility study undertaken by the DWP to “establish the full impact, costs and benefits of the introduction of identity cards” be disclosed. This was by way of a PQ in November 2004 and although before the introduction of the Act it was accepted by the parties as a valid request under FOIA. DWP refused to disclose the information on the basis the s.35(1)(a) exemption was engaged and that the public interest balance favoured the exemption being maintained.

The IC found that although s.35 was engaged, that the public interest in maintaining the exemption did not outweigh the public interest in disclosure and ordered the disclosure of the requested information to Mr Oaten. The DWP appealed against the notice.

### **Findings**

#### Section 35

The Tribunal confirmed that it agreed with the parties that the exemption was engaged and that the information was within the “scope” of the exemption – see *DFES*. Then the Tribunal had to consider whether there was any “factual information” under s.35(4) which would have obliged the Tribunal to have regard to the particular public interest in such information. There was no such finding. The Tribunal then considered whether there was any “statistical information” under s.35(2) as such information would be required to be disclosed “once a decision as to government policy has been taken”. The Tribunal approved the definition of statistical information in the DCA’s guide which requires “mathematical operations performed on a sample of observations or some other factual basis.” Because there was no factual information the Tribunal found there was no statistical information although a decision had been taken to introduce ID cards. The Tribunal was then able to consider the public interest test.

#### Public Interest

The Tribunal considered that although there is not an express presumption in favour of disclosure as under Regulation 12(2) EIR 2004, there is such an assumption because:

- The duty to confirm or deny and disclose information are expressed in general terms – unless there is a relevant exemption then the duties apply;

- The “default setting” under the Act is in favour of disclosure – information under the Act must be disclosed on request unless the Act permits it to be withheld;
- For a qualified exemption the public interest in maintaining the exemption must outweigh the public interest in disclosure - s.2(1)(b);
- In relation to s.35(1)(a) there is nothing in the description of the subsection in itself that urges non-disclosure and it requires the government department to steel itself and where required find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Tribunal rejected the DWP’s argument that because s.35 is a class exemption it should automatically be assumed that disclosure of the information would be harmful and that the factors in favour of maintaining the exemption should be given greater weight. However the Tribunal accepted that there needs to be a “safe space” for government to consider ideas but that in this case as a decision had already been taken to introduce ID cards it was not an important factor.

The Tribunal found that the public interest in maintaining the exemption did not outweigh the public interest in disclosure and ordered the information be disclosed, but with the name and details of the official who signed off the feasibility study redacted. The Tribunal was not prepared to accept that named officials should always be protected because in many cases it will do no harm to disclose their names. In this case the official was a member of a team and it would be unnecessary for this person to be identified with the study.

### **Conclusion**

The Tribunal ordered the disclosure of a feasibility study prepared by the DWP for the Home Office in October 2004 relating to the introduction of ID Cards. The Tribunal upheld the IC’s decision notice and dismissed the appeal, finding that the formulation and development of government policy exemption was engaged (s.35(1)(a)), but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.