FOIA s.36(2)(c) – Qualified exemption: prejudice to effective conduct of public affairs

FOIA s.16 – Duty to advise and assist

Mr Rob Evans v IC & Ministry of Defence

EA/2006/0064
23rd June 2008

Cases:
Guardian Newspaper and Brooke v IC & BBC [2007] UKIT EA_2006_0011

Facts
Mr Evans, a journalist with the Guardian, requested records of a meeting on 23 June 2005 between the Minister for Arms Procurement and representatives of a lobbying firm, Whitehall Advisers Ltd. The MoD confirmed the meeting had taken place, between Lord Drayson, the Minister, and, from Whitehall Advisers Ltd, Lord Hoyle and another representative. No formal minutes had been produced but an Assistant Private Secretary had taken a manuscript note of the meeting, and also of a subsequent telephone call. A typed briefing note had been prepared for the Minister in advance.

The Ministry refused disclosure of any of the three documents, citing various exemptions. Ss.35 (formulation of government policy) and s.36 (effective conduct of public affairs); and for some of the recorded information, s.40 (personal data), s.41 (information in confidence) and s.42 (commercial information). Another Minister had certified that s.36 was engaged.

The IC decided that s.35 did not apply since the information did not relate to the formulation of government policy: the meeting was to provide information to the minister, not for the Minister to discuss policy. Moreover s.35 and 36 were exclusive, and s.36 did apply. The IC decided, applying the public interest test, that the balance of public interest favoured maintaining the exemption. He agreed that the other exemptions applied in part to the information.

Findings
The Tribunal was only concerned with the application of s.36. It declined to hear argument on the difficult question of whether the certificate from the "qualified person" that disclosure "would be likely to inhibit the free and frank provision of advice" had been properly arrived at. The Guardian had only raised that issue at the last minute; neither of the other parties were prepared to deal with it; it would require Further evidence and an adjournment to consider. The Tribunal did consider whether the opinion was a reasonable one, and decided that it was: there was evidence to support it, and although the Tribunal took a different view, they could not say it was unreasonable.

<u>Public Interest</u>

In considering the public interest, the Tribunal accepted a general interest in furthering the understanding of public debate of the issues of the day, and promoting accountability and transparency by public authorities. They found a particular public interest in understanding the role and influence of lobbyists. All of these favoured disclosure.

The Tribunal were not persuaded, after hearing evidence from the Private Secretary at the time and the Director of Information in the MoD, that lobbyists or others giving advice to a Minister would be inhibited by a risk of disclosure from giving free and frank advice. That view paid insufficient attention to the pressure on lobbyists, or others giving advice, to get their point of view across. No direct evidence of inhibition was called. Nor was the Tribunal persuaded that an inhibitory effect would be felt by those responsible for recording such meetings. The Tribunal agreed there was a strong public interest in the proper recording of meetings, but there was clear evidence that civil servants would continue to record them properly, whatever the possibility of publication. The Tribunal noted that formal notes of meetings with lobbyists had been provided to the Guardian on several other occasions, without apparent adverse effects; nor had such adverse effects been noted in a survey of comparable jurisdictions prepared for the Tribunal hearing by an expert witness.

However, one particular factor did persuade the Tribunal that the balance of public interest favoured maintaining the exemption: the notes of the meeting and phone conversation (in contrast to minutes released on other occasions) were contemporaneous handwritten notes. They were illegible and incomprehensible in part, without a context. They had been taken as an aide memoire so that the secretary might later prepare a formal record; on this occasion, this had not been thought necessary.

Disclosure of notes in such a form would have only limited public benefit. Any contribution to informing debate or understanding, or to transparency, would be limited. Indeed, since the raw notes could be interpreted in a number of ways, necessarily speculative since they were not readily intelligible, disclosure could detract from public understanding. Like the IC, the Tribunal distinguished "between the aide memoire produced in this case and more formal minutes of meetings which form part of the official record". The balance of public interest therefore favoured maintaining the exemption in relation to the manuscript notes; owever, the typed background note should be disclosed, subject to the application of the other exemptions claimed.

Duty to advise and assist

The Tribunal considered the duty to provide advice and assistance to those requesting information in s.16 of FOIA. In order to assist the Tribunal to read the notes, the MoD had prepared a transcript and footnotes explaining the various acronyms and initials referred to. These were 3 times the length of the original note. The Tribunal decided that the duty to advise and assist did not extend to requiring the MoD to prepare a formal minute of the meeting, when none already existed. The duty in FOIA is to disclose recorded information, not to create a record where none exists.

Conclusion

The Tribunal upheld the decision notice in relation to the disclosure of the background note dated 25 July 2006 and dismissed the appeal.