

**FOIA s.58** – Tribunal’s powers

**FOIA s.36(2)(b)(ii)** – Qualified exemption: **Inhibition of free and frank exchange of views for purposes of deliberation**

## ***Guardian Newspapers Ltd and Heather Brooke v IC & British Broadcasting Corporation***

**EA/2006/0011 and EA/2006/0013**

**8<sup>th</sup> January 2007**

**Cases:**

### **Facts**

The Appellants requested the minutes of the BBC Governors’ meeting at which Greg Dyke was dismissed following publication of the report of the Hutton inquiry into the circumstances of the death of Dr David Kelly.

The BBC refused disclosure, citing FOIA s.36, opining that disclosure would or would be likely to inhibit the free and frank exchange of views for purposes of deliberation, and that the public interest in disclosure did not outweigh the public interest in maintaining the exemption.

The IC looked at the minutes and accepted the view of the BBC.

### **Findings**

#### The Nature of the Tribunal’s appellate jurisdiction

The Tribunal analysed the nature of its powers under FOIA s.58 on an appeal under FOIA s.57, contrasting its task with that of the Administrative Court and the Court of Appeal, and referring to its duty to consider relevant evidence, to review the IC’s findings, and to decide whether the provisions of FOIA were properly applied. It also set out its duty where it differed from the IC on the balance of public interest or on how the IC’s discretion ought to have been exercised.

The Tribunal also gave guidance on the proper approach to analysing the IC’s decision notice (paying close attention, but disregarding any immaterial errors of reasoning where general intent clear).

The Tribunal considered the unsatisfactory wording of s.58 and concluded that the Tribunal has power, in the case of an appeal by an applicant for information, to allow the appeal and substitute such notice as could have been served by the IC.

#### The s.36 Exemption

The BBC Governors (but not any delegate of theirs) were as “qualified person” for the purposes of s.36(2). The qualified person’s opinion (as to the likelihood of inhibition) is required by s.36(ii)(b) to be reasonable. The Tribunal decided that this meant both

reasonable in substance and reasonably arrived at. The Tribunal accepted that the BBC's opinion was reasonable and accordingly that the minutes were exempt information.

### Public Interest

The Tribunal considered in what sense there was a presumption in favour of disclosure and identified considerations material to the application of the public interest test.

What was the effect, upon the assessment of the balance of public interest, of the qualified person's opinion? The Tribunal held that the IC, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s.2(2)(b), the IC was entitled, and would need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation would or might occur.

Applying the public interest test under s.2(2)(b) the right way around (unlike the BBC and the IC), the Tribunal found that as at the date when the requests were refused (March 2005) the public interest in maintaining the s.36 exemption in the present case did not outweigh the public interest in disclosing the information contained in the minutes of the meeting.

### **Conclusion**

The notices against which the appeals were brought were not in accordance with the law, because the public interest in maintaining the s.36 exemption did not outweigh the public interest in disclosing the information contained in the minutes of the BBC Governors' meeting.

The Tribunal therefore allowed the appeals and substituted Decision Notices requiring disclosure of the minutes.