EIR Reg 12(4)(e) – Exemption: internal communications

EIR Reg 12(1)(b) – Public interest test

Rt Hon Lord Baker of Dorking CH v IC & Department for Communities and Local Government

EA/2006/0043
1st June 2007

Cases:
Department of Education and Skills v IC & The Evening Standard [2007] UKIT EA_2006_0006

Facts
A Government Minister had been provided with advice from his officials before he made a decision rejecting the recommendation of a planning inspector in respect of an important planning issue. The Appellant requested disclosure of the advice and opinions of the officials. The Department rejected the request on the basis that the information requested was excepted from disclosure under EIR regulation 12(4)(e) as disclosure would involve the disclosure of internal communications and the public interest in maintaining the exception outweighed the public interest in disclosure.

The IC had decided that the submissions as a whole should have been disclosed but that the advice of the officials, and any opinions expressed by them, should be redacted and not disclosed. The Department accepted the IC's decision as to the disclosure of the rest of the material and the Appellant volunteered that he did not require the identity of the officials concerned to be disclosed.

Findings
The only issue to be decided was whether or not the IC had been right to decide that, once the Minister's decision had been promulgated, the public interest still supported the withholding of the advice and opinions of the officials making the submissions. The Tribunal recognised that it had to decide that issue against the background of a presumption in favour of disclosure (regulation 12(2)) and taking account of all the circumstances of the case before us (regulation 12(1)(b)).

Although the Tribunal acknowledged that there were dangers in applying too rigorously principles developed in respect of FOIA s.35 to the quite different language of regulation 12 EIR, it considered that the principles set out in *The Department for Education and Skills v Information Commissioner and The Evening Standard* did provide broad guidance which it would follow. In particular it believed that the evidence presented to it regarding the quality of decision making at local authority level, where all officials' advice was made publicly available, reinforced the confidence that it believed could be placed in the resilience of the civil service. The Tribunal believed that, should a requirement to disclose advice to a Minister generate a tendency to adopt bad practice in the way that advice was given or recorded, effective management guidance should deal with the problem in the same way that it

appears to have done at local authority level. It thought the DfES case to be a more reliable basis for its decision than the authority of *Conway v Rimmer* ([1968] 1 All E R 874) to which it had been referred. It did not think that comments on the likely response of civil servants 40 years ago to the risk of their internal communications being revealed in the rather different context of the disclosure process in civil litigation provided any significant assistance on the particular facts of the case in hand.

The Tribunal found that there was significant inconsistency between the practice of publishing all advice at local authority level and the withholding of advice when a planning matter fell to be determined by a Minister. The fact that the announcement of a Minister's decision took the form of a fully reasoned justification did not justify the inconsistency. Although it accepted that there were differences in that the Minister's decision was the final step in the process and frequently involved the most complex cases, it did not accept that this justified the public being given full disclosure of the advice given to those making the decision at one level, and not at the other. The fact that the Secretary of State's decision represented the final stage (subject to appeal to the courts or judicial review) seemed to the Tribunal to increase the desirability of full disclosure, rather than to decrease it. Similarly, it considered that full disclosure of the deliberations underlying a decision on a complex matter was arguably more important than in the case of a simple one, where the issues may be more immediately evident.

The Tribunal made it clear that it did not approach its decision with any suspicion or cynicism as to the Minister's attitude towards his officials' advice or the precision with which the reasons for his decision had been recorded in the letter recording his decision. It said that it should not make its decision on the basis of suggestions that the decision letter in this case may have avoided or obscured any of the reasons that led the Minister to reach his decision. One reason for having a freedom of information regime was to protect Ministers and their advisers from suspicion or innuendo that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way "spun". Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. The strength of the argument in favour of disclosure and against maintaining the exemption was that disclosure would enable the public to form a view on what actually happened and not on what it could otherwise only guess at.

The Tribunal concluded that, on the particular facts of the case, the disclosure of the advice and opinions of the civil servants in question, after the date when the Minister's decision had been promulgated, would not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future. The public interest in the maintenance of the exception did not therefore outweigh public interest in disclosure of the information.

Conclusion

The Tribunal found in favour of the Appellant and ordered disclosure of the information.