

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

Ian Edward McIntyre v IC & Ministry of Defence

EA/2007/0068

11th February 2008

Cases:

Guardian Newspapers Ltd & Brooke v Information Commissioner & British Broadcasting Corporation [2007] UKIT EA_2006_0013

Evans v Information Commissioner and Ministry of Defence [2007] UKIT EA_2006_0064

Facts

In late 2002 the Appellant applied for promotion to a senior civil servant grade. As part of the assessment process he attended a MoD Assessment and Development Centre (A&DC) in March 2003. During the assessment there was a procedural error in the conduct of one of the assessment exercises that resulted in him having less time to complete a concurrent one and may as a consequence have affected his performance in subsequent exercises. He failed, appealed and was given the opportunity to resit in 2004. He was still unhappy as he wished the A&DC result to change into a pass and in the course of taking up a formal grievance he requested the marking rubric for the assessment. The MoD refused claiming that the s.36(2) exemption was engaged and the public interest balance was in favour of maintaining the exemption.

The IC upheld the refusal in the decision notice.

Findings

Effective conduct of public affairs

On first glance it was difficult to understand how the disputed information was covered by s.36(2)(c) exemption. There is no definition of public affairs in the Act. The Tribunal found that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure. The Tribunal found that public service will be more effectively delivered and its objectives more effectively met if the right people are employed by government departments and that the s.36(2)(c) exemption did apply in this case.

Effective Conduct of Public Affairs

The Tribunal adopted the test in *Guardian Newspapers Ltd & Brooke v Information Commissioner & British Broadcasting Corporation*, EA/2006/0011 & 0013, 8.1.07 (see paragraphs 54-64) that the opinion must be both reasonable in substance and

reasonably arrived at but with two caveats. Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion. Secondly, a broad view of the way the opinion is reasonable arrived was taken so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review.

Also the Tribunal found that where the qualified person does not designate the level of prejudice (would, or would be likely otherwise, to prejudice the effective conduct of public affairs), that Parliament still intended that the reasonableness of the opinion should be assessed by the IC but in the absence of designation as to the level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.

The Tribunal also found that the minister can if he so chooses not only give his reasonable opinion that there would or would be likely to be prejudice but undertake the public interest test. The minister can complete the exercise on his own provided he is in possession of all the necessary facts and information. However the Tribunal remarked that in most cases it is preferable that both tests are seen to be undertaken separately because they are two separate tests with different standards.

Conclusion

The Tribunal found that the exemption was engaged, that the qualified person's opinion was reasonable despite the flaws in the process and that the balance of the public interest favoured maintaining the exemption and upheld the decision notice.

Observations

The Tribunal commented that in the light of this case they recommend that the IC provides guidance as to the way the opinion of the qualified person is sought. It would be helpful if public authorities used a more appropriate and consistent format which reflected more closely the requirements of s.36. If in the qualified person's reasonable opinion there is prejudice to one of the interests in s.36(2) the qualified person should state clearly which limb of prejudice (would or would be likely to) is being put forward and the reasons for it. If the qualified person is also undertaking the public interest test then he/she should set out which factors he/she has taken into account and the weight given to them in undertaking the balancing act. Where the submissions are disclosed such a clear and transparent process will hopefully reduce the number of complaints to the IC and ultimately appeals to this Tribunal.