



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2011/0277

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50361210
Dated: 26 October 2011**

Appellant: GANESH SITTAMPALAM

First Respondent: THE INFORMATION COMMISSIONER

Second Respondent: MINISTRY OF JUSTICE

On the papers

Date of decision: 5 October 2012

**Before
CHRIS RYAN
(Judge)
and
ROGER CREEDON
RICHARD FOX**

Subject matter:

**Inhibition of free and frank provision of advice s.36 (2)(b)(i)
Inhibition of free and frank exchange of views for purposes of
deliberation s.36(2)(b)(ii)**

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. In January 2010 Ms C Booth, a Recorder, made a statement in the course of sentencing a Muslim defendant at the conclusion of his trial, which a number of people considered was inappropriate. Complaints were made to the Office for Judicial Complaints (“the OJC”). For the purposes of this appeal that body may be regarded as falling within the remit of the Ministry of Justice. Although, therefore, the Ministry of Justice is the public authority whose obligations under the FOIA are under review in this case (and for that reason it has been joined to this appeal as Second Respondent), we will refer, throughout this decision, to “the OJC”.
2. Complaints against a member of the judiciary are dealt with under the Constitutional Reform Act 2005 (“CRA”). In accordance with that Act a judge nominated for the purpose investigated the complaint and then submitted his conclusions and advice to the Lord Chief Justice and the Lord Chancellor, who had responsibility for deciding, jointly, whether the conduct complained of constituted misconduct and, if it did, what disciplinary sanction was appropriate.
3. On 10 June 2010 the OJC issued a statement informing the public that it had investigated the complaint and had concluded that the Recorder’s observations did not constitute judicial misconduct. It added:

“The Lord Chancellor and Lord Chief Justice have considered the conclusions of the investigation and agree that no disciplinary action is necessary.”

On the previous day the OJC had informed the National Secular Society, one of those who had complained about the Recorder, that, although its case had been “*substantiated in part*” the OJC did not require further action and that accordingly the complaint was dismissed. The letter went on to say:

“Whilst it is acknowledged that Recorder Booth’s approach has caused some concern, the Lord Chancellor and Lord Chief Justice are of the view that her observations do not constitute judicial misconduct. (They have agreed, however, that Recorder Booth should receive informal advice from a Senior Judge about the comments she made in this particular case but that is not a formal disciplinary sanction).”

4. The OJC was criticised at the time for having issued a partial and misleading statement, leading a spokeswoman on its behalf to explain its actions in these terms:

“It is always open to the Lord Chancellor and Lord Chief Justice to give informal advice to any judicial office holder when they consider it appropriate.

“Such advice is not a formal sanction and does not constitute disciplinary action and, as a matter of course, when advice is given it is not made public.

“Having looked again at the letter sent to the complainant in this matter, which openly outlined the actions taken in response to the complaint made, we agree the difference between disciplinary sanction and informal advice was not clearly explained. We will ensure this is made clear in future.”

5. On 19 June 2010 the Appellant wrote to the OJC in these terms:

“Please could you release all information you hold about the investigation and action taken regarding the recent complaint made about Cherie Booth?”

“I recognise that some of this information may well be exempt from disclosure but I would like you to release as much of it as you can”

We will refer to this communication as “the Information Request”.

6. The Information Request was made under FOIA section 1, which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

7. After some delay the OJC disclosed some of the requested information but withheld the remainder. It relied on several of the exemptions available under the FOIA. Its refusal led to a request for an internal review and, when that led to a decision upholding the refusal, a complaint to the Information Commissioner on 23 November 2010. At that stage the OJC was continuing to rely on a number of exemptions, but the Information Commissioner considered only 2. First, he concluded that the exemption provided by FOIA section 44 (disclosure prohibited by statute) covered all of the information relating to the investigation of the complaint made about the Recorder. Having found that this exemption applied the Information Commissioner did not consider the application of the other exemptions relied on in respect of that information. However, he went on to consider the rest of the information, which related to the action taken by the OJC in light of the investigations findings. He concluded that it fell within the scope of the exemption provided by FOIA section 36(2)(b)(i) (prejudice to the provision of free and frank advice in the conduct of public affairs) and that the public interest in maintaining that exemption outweighed the public interest in disclosing the information. Again, the Information Commissioner did not go on to consider whether any of the other subsections of FOIA section 36 might apply, or whether any other exemption relied on by the OJC might be relevant to this category of information.

The Appeal to this Tribunal

8. On 22 November 2011 the Appellant filed a Notice of Appeal with this Tribunal. His grounds of appeal challenged whether FOIA section 36

could be relied on at all (on the basis that it had been first cited too late in the process by which the OJC considered the Information Request). He argued, in the alternative that, if the section 36 exemption was engaged, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. The Grounds of Appeal accepted that, to the extent that we might conclude that FOIA section 44 applied to particular information, it was appropriate for the OJC to have withheld that information. The Grounds then went on to refer to other exemptions, not referred to in the Decision Notice, in order to make the point that, if section 36 did not prevent release, the OJC should not be permitted to rely on any of them. For reasons which will become clear, we have not considered any of those other exemptions in our determination.

9. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
10. The parties were agreed that the Appeal should be determined on the papers, without a hearing. We agreed that this was an appropriate procedure to adopt and accordingly gave directions for the joinder of the Second Respondent, the preparation of an agreed bundle of documents (including a closed bundle containing the withheld information) and the filing of written submissions. We also directed that we would consider the arguments in relation to FOIA section 36 first and that, if we decided that the exemption did not justify the withholding of the requested information, we would give the parties an opportunity of addressing us on other exemptions, including FOIA section 44.

The issues to be decided

11. The questions we have to answer are:

- (i) Whether FOIA section 36 may be invoked by the OJC; and, if it may
- (ii) Whether the public interest in maintaining the section 36 exemption outweighs the public interest in disclosing the withheld information.

We will deal with each issue in turn.

Is FOIA section 36 engaged?

12. The relevant parts of FOIA section 36 read as follows:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure under this Act-

(a)...

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...

(5) In subsections (2) and (3) “qualified person” –

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown...”

13. The Appellant argued that the information could not be regarded as being exempt until the qualified person had issued his opinion. The detailed chronology of the relevant communications was as follows:

- a. The Information Request was made on 19 June 2010.
- b. The OJC acknowledged receipt of the Information Request by a letter dated 15 July 2010 and stated that it held some information falling within its scope but that it might be exempt under FOIA section 31 (Law Enforcement). Section 31 creates a qualified exemption and the letter went on to say that the OJC had not reached a decision, at that time, as to whether the public interest balance was in favour of disclosure or not. It

stated that it relied on FOIA section 10(3) to extend its time limit to conclude its deliberations on that issue.

- c. A letter updating the Appellant on the progress of the Information Request was sent by the OJC on 12 August 2010 stated that it was not yet able to respond in full.
- d. On 10 September 2010 the OJC sent the letter a formal letter of refusal. The letter confirmed that the OJC held the requested information and was accompanied by copies of some of them by way of disclosure. As to the remainder, the OJC said that disclosure was refused under FOIA sections 21 (information accessible by other means), 31(1)(c) and section 31(1)(g) coupled with section 31(2)(b) (Law Enforcement), section 32 (court records), section 36(2)(b)(i) or (ii) or section 36(2)(c) (prejudice to the conduct of public affairs), and section 40(2) (personal information), section 42(1) (legal professional privilege) and section 44(1)(a). Each exemption was then explained in detail, including the fact that the section 36 claim was supported by the opinion (which was said to be reasonable) of an unidentified qualified person.
- e. At the end of an internal review of that refusal the OJC wrote to the Appellant on 26 November maintaining the refusal. The letter stated that the qualified person had been a Minister of the Crown but did not identify him or her by name. Nor did it provide information about the date when the Minister reached the opinion relied on.

14. During the course of the Information Commissioner's investigation it was established that the Minister in question was Lord McNally, who was the Duty Minister at the relevant time, and that a submission had been submitted to him on 19 August 2010, leading to a response embodying the relevant opinion on 23 August 2010.

15. The date of the opinion was therefore after the OJC's first response to the Information Request (its letter of 15 July 2010), but before the date

of its letter dated 10 September 2010 in which it set out its reliance on, among other exemptions, the section 36 one and explained its view on the public interest balance. The Appellant argued that the key event was the first response from the OJC. However, we do not accept the argument because the letter did not constitute a refusal of the Information Request on the basis of any qualified exemptions (section 21 being an absolute exemption). So far as concerns the application of qualified exemptions, including the resulting public interest balancing exercise, it was no more than a holding reply. It was only on 10 September, which was after the date of the qualified person's opinion, that the OJC articulated those aspects of its refusal.

16. The refusal was, of course, after the date when, according to FOIA section 10, the OJC should have responded to the Information Request i.e. "*promptly and in any event not later than the twentieth working day following the date of receipt*". The Appellant argued that the opinion would have had to have become available within that period of time for the OJC to be entitled to rely on the exemption. However, it is not the case that an out of time refusal must be ignored for the purpose of FOIA section 36. The FOIA does not specify any penalty for exceeding either of the time limits and it would not be appropriate for us to infer one.

17. The Information Commissioner relied on two earlier decisions of this Tribunal, in which it had been decided that the exemption would be engaged provided the opinion became available before the end of the internal review, even if it had not been provided at the time of the public authority's initial refusal of a request for information. We are not bound by those decisions and the Appellant argued that they were wrong. However, they would only be relevant if the sequence of facts had been the same. It was in fact different. In those cases the opinion had become available after the initial refusal but before the outcome of the interior review. In this case, as we have determined, it became available prior to the date of the first refusal.

Was the public interest balance in favour of disclosure?

18. The Appellant accepted that, if he was wrong on his first ground of appeal, the section 36 exemption was engaged. However, he argued that the public interest in maintaining the exemption outweighed the public interest in disclosure.

19. The effect of FOIA section 2(3) is that the exemption is a qualified one. Section 2(2)(b) provides that, if such an exemption is engaged the requested information must still be disclosed unless:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

20. The public interest in favour of disclosure:

- a. The Appellant relied on the importance of judges maintaining high standards and thereby retaining public confidence. He said that the process of disciplining judges therefore required a high degree of transparency, a requirement that was accentuated by the appearance in the Recorder's statement of bias in favour of those claiming to have religious affiliations. He also highlighted the perceived differences between what the OJC said in its press statement and in the letter it wrote to the National Secular Society. He said that this led to a suspicion that the OJC had tried to minimise the impact of its findings because of the fact that the Recorder was the wife of the former Prime Minister, Mr Blair. The Appellant also drew attention to the options that were available when a complaint had been instigated. The options arose from regulation 26(1)(b) of the Judicial Conduct Regulations, which provide:

“Where they have considered advice from a nominated judge... the Lord Chancellor and the Lord Chief Justice may agree that –

- (a) the case is unsubstantiated and is dismissed;*
- (b) the case is substantiated wholly or in part, but does not require further action and is dismissed;*
- (c) the case is substantiated wholly or in part, but should be dealt with informally by the Lord Chief Justice;”*

- b. The Appellant drew attention to an apparent confusion arising from the fact that, although the complaint was said not to have been substantiated, nevertheless it had been considered appropriate to direct that the issue be dealt with informally, by guidance being provided to the Recorder.

- c. The Information Commissioner argued that the public interest in disclosure was tempered by the fact that the publicity given to the Recorder’s original remarks at the time indicated that a public debate had taken place about their appropriateness, without the disclosure of the information being sought. He also drew attention to the fact that the performance by a judge of his or her role is subject to public scrutiny, simply as a result of the public nature of the court processes. He argued that those factors, added to the additional information disclosed in response to the Information Request, provided substantial assistance to those with an interest in understanding the decision taken by the Lord Chief Justice and the Lord Chancellor, and the handling of the decision by the OJC.

21. The public interest in maintaining the exemption:

- a. The Appellant has, of course, acknowledged that the qualified person reached a reasonable opinion to the effect that disclosure of the requested information would give rise to some prejudice to the provision of free and frank advice. The

Information Commissioner sought to convince us that the degree of that prejudice was substantial. The advice in question would be that provided by the OCJ officials handling the complaint and the judge nominated to investigate it. He conceded that there was a potential “chilling effect” but agreed that, given the sensitivity of a complaint about a judge, the need to ensure that the Lord Chief Justice and the Lord Chancellor exercised their disciplinary function on a full and carefully considered basis, taking account of all the options, is so important that it would not be in the public interest to disclose more information than had already been made public or disclosed to the Appellant in response to the Information Request.

- b. The Appellant did not believe that the individuals responsible for giving advice about complaints of judicial misconduct would be inhibited in the performance of that task by the risk of publicity.

22. The outcome of the balancing exercise

- a. We have had the advantage of having reviewed the contents of the documents on the OJC’s file, which were provided to us in the closed bundle. Our inspection of them has satisfied us that the Appellant’s suspicions about the OJC in some way covering up the complaint or trying to minimise the impact of its conclusions were unfounded. Similarly, we do not believe that there was any inconsistency between the OJC’s press statement of 10 June 2010 and its letter to the National Secular Society of 9 June 2010. The process followed in having the complaint investigated, and then dealing with the nominated judge’s report on his investigation, gave rise to no issues that, in our view, add weight to the general public interest in transparency in this area.

- b. We are satisfied that the public interest in disclosure was not therefore sufficient to equal the public interest in maintaining the exemption.

Conclusion

23. In light of our conclusion that section 36 renders the requested information exempt from disclosure under FOIA section 1, the OJC was entitled to refuse the Information Request. In those circumstances it is not necessary, or appropriate, to consider other exemptions.

Chris Ryan
Judge

5 October 2012