First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0067

Before

<u>Judge</u>

David Farrer Q.C.

<u>Tribunal Members</u>

Anne Chafer

and

Malcolm Clarke

Between

Michael Nisbet

<u>Appellant</u>

and

The Information Commissioner ("The ICO")

<u>Respondent</u>

This appeal was determined on written submissions.

Decision and Reasons

The Tribunal orders The Independent Parliamentary Standards Authority ("IPSA") to communicate the disputed information to the Appellant within thirty – five days of publication of this decision.

1. Pursuant to provisions of the Parliamentary Standards Act, 2009, the Independent Parliamentary Standards Authority ("IPSA") is required to undertake a full review of the remuneration of Members of Parliament in the first year of every Parliament.

2. Its task includes the determination of additional salaries payable to Chairs of Select Committees ("SCCs") and members of the Panel of Chairs ("MPCs"), consisting of MPs who, more or less frequently, chair a range of other committees of the House of Commons[1]. Whereas the basic salary of MPs and the additional salary of SCCs were (and are) set at a flat rate, the remuneration of individual MPCs depended, before 2016, on length of service on the Panel.

3. Before reaching a decision on pay, IPSA holds a public consultation for which purpose it publishes a paper containing proposals and options. That paper is the product of research by IPSA staff and preliminary reports to monthly meetings of the IPSA Board, which approves its content.

4. A preliminary report on the pay of both classes of Chair was presented to the meeting of the IPSA Board in January, 2016. It noted that there might be a case for raising the pay of SCCs and commented on the current four – tier pay structure for MPCs based on length of service. Members of the Board agreed that such a

[1] General Committees, Delegated Legislation Committees, the European Committee, The Welsh Grand Committee, Westminster Hall Debates.

structure was hard to justify[2]. Further information and evidence were required for the February Board meeting at which the content of the consultation paper would be agreed.

5. That meeting took place on 24th. February, 2016. As promised, a further report ("the February report") on the pay of Chairs was submitted to the Board. It included evidence and findings as to the role of MPCs in the form of an Annex B. The Board took the provisional view that the evidence as to work done by MPCs might provide grounds for setting their pay at a lower rate than SCCs. The rationale for the current tiered structure for MPCs' remuneration based on length of service was called into question by the absence of any correlation between that length of service and the workload undertaken.

6. The Board agreed the questions to be included in the Consultation Paper, which was launched on 11th. March, 2016. The consultation ended on 18th. April, 2016. It seems that only three disinterested members of the public responded. They included Mr. Nisbet. The other responses were from MPs.

7. The IPSA Board meeting of 18th. May, 2016 discussed, apparently at some length, the results of the consultation. It decided that –

   (i) as from 1st. June, 2016 the pay of SCCs should remain at the current level and
   (ii) all MPC remuneration should be at a flat rate equal to that of SCCs, regardless of length of service.
   (iii) as from 1st. April, 2017, all such additional salaries should be adjusted in accordance with the annual change in public sector average earnings

   Its final report was issued on 25th. May, 2016.

[2] References to the views of Board members are based on Board Minutes exhibited in the OB.

8. The following day Mr. Nesbit requested information from IPSA, namely a copy of the February report presented by the Director of Regulation to the IPSA Board. He correctly described it as briefing Board members on the consultation and "factual background data on the roles and activities of the Committee Chairs". Those data evidently referred to the MPCs, since the role and activities of SCCs are clearly defined.

9. IPSA responded on 30th. August, 2016. It invoked the exemptions provided by FOIA s.36(1)(b) and (2)(b) and (c), which provide -

S.36 This section applies to-

(1) (a) - - - - -

(b) information which is held by any other (than central government) authority.

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

(c) would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs.

10. The qualified person ("the QP") was Sir Robert Owen, a member of the Board. For the purposes of his opinion he was provided with a concise statement of IPSA's concerns as to the likely effects of disclosure and the perceived public interests for and against it. Put summarily, his opinion was that disclosure of the report, in so far as it included information not already accessible to the public, would be likely to inhibit the free and frank provision of advice to the Board, particularly quite extreme or radical solutions to the problems posed by the determination of pay

levels. This is the ubiquitous "chilling effect". The disclosure of strategic risks involved in changing or not changing the status quo, as identified in the February report, especially so soon after its presentation to the Board, would be likely to damage the quality of future assessments. He stressed the timing of the request and the familiar need for a safe space for advice and debate away from the spotlight of media intrusion. He noted how much information on this issue IPSA had already disclosed to the public. Finally, he made it clear that the inhibition related to the future content of reports to the IPSA Board and the advice which they might provide. Plainly, it could not affect advice given three months before the request, fresh though that advice might be.

11. The QP further expressed the view that the balance of public interests favoured maintaining the exemption. He was, of course perfectly at liberty to do so and had received submissions on this issue in the presentation seeking his opinion. However, the statute neither requires nor invites his opinion on it.

12. Mr. Nisbet was out of time for requesting an internal review. He complained to the ICO on 17th. October, 2016.

13. For the purposes of the ICO's investigation, IPSA put its case succinctly in a letter of 3rd. January, 2017, to which were attached the QP's opinion and the submission and covering letter, which prompted it. That letter, as was to be expected, mirrored closely the opinion of the QP.

14. The Decision Notice ("the DN") upheld IPSA's reliance on s.36(2)(b) but not s.36(2)(c). The inclusion of "otherwise" before "prejudice" required some prejudice additional to the inhibition required by s,36(2)(b) and none was shown. As to s.36(2)(b), the inhibition foreseen by IPSA was to the advice given to the Board (s.36(2)(b)(i)), not the discussions of Board members (s.36(2)(b)(ii)).

15. The ICO found that the opinion of the QP was reasonable and that the balance of public interests required the withholding of the disputed report. There was no

discussion of disclosure of a redacted version and, if redaction would merely have excluded what was not in the public domain, which seems likely, it is hard to see what public interest the residual disclosure would serve.

16. Her conclusion that Sir Robert Owen's opinion was reasonable, had regard to his acceptance that the inhibition, the "chilling effect" would be likely to apply only to future advice to the Board. She found that disclosure so soon after the tendering of advice was more likely to produce that effect upon future advisers than disclosure after a substantial period. She was impressed by the breadth of information preceding publication of the final report, that had been disclosed by IPSA and concluded that withholding the February report was, on balance, in the public interest.

17. Mr. Nisbet appealed. His diligence in pursuing and researching this appeal and drafting very lengthy, detailed and often repetitive submissions is beyond question but his criticisms of IPSA and of the ICO and his unsubstantiated attacks on the integrity of those involved in preparing IPSA's final report are deplorable and do nothing to advance his case. The result is a bundle of documents swollen far beyond what was needed for a fair and informed determination of this appeal. We do not examine further in this decision his charges of arrogance, lawlessness, manipulation, falsification and so forth. Suffice it to say that the submission to Sir Robert Owen and Sir Robert's opinion are models of fairness, recording, as they do, powerful and specific arguments in favour of disclosure.

18. His grounds of appeal did not spell out any clearly arguable respects in which the DN was said not to be in accordance with the law. His claim that disclosure was in the public interest by the time of the DN or of the Tribunal's decision did not assist him, if that was not the case at the date of the public authority's refusal (see *Appger v ICO and FCO [2016] AACR 5).* It is not surprising that the ICO applied to strike out the appeal, framed as it then was. However, his profuse additional submissions can be construed as a challenge to the DN's findings as to the public interest. They

raised, among much irrelevant material, the significant issue whether all the important information in the February report was indeed in the public domain already.

19. The ICO's responsive submissions to the Tribunal reinforced the DN findings.

The reasons for our decision

20. We are required to assess this request as at the date of the refusal, namely 30th. August 2016 (see *Appger)*

21. Sir Robert Owen was undoubtedly a QP. We readily accept that his opinion was a reasonable opinion based on a fair and balanced appraisal of the relevant circumstances. A reasonable opinion is one within the spectrum of differing views that a reasonable person may hold.

22. Section 36 provides a qualified exemption so that, if, as we find, that exemption is engaged, we must then consider whether the public interest in withholding the requested information, the February report, outweighs the interest in disclosure.

23. The fact that we find that the QP's opinion is reasonable does not mean that we agree with it, rather that we respect it as rational and arguable on the evidence. In so far as we disagree with it, that is relevant to our assessment of the balance of public interests because it involves a different judgement of the risk that disclosure is likely to deter free and frank advice in the future. That does not result in a finding that the exemption is not engaged.

24. The argument as to disclosure producing a "chilling effect" upon future advice or discussion has been ceaselessly presented to this Tribunal since it began its work in 2005. It is regularly advanced by government departments and other public authorities. Of course, each case must be scrutinised on its particular facts.

Nevertheless, after thirteen years, no public authority has adduced before this Tribunal Judge or members evidence of research or even anecdotal evidence demonstrating that disclosure of advice or expressed opinions by civil servants or administrative staff has had or is likely to have had such an effect. Indeed, we are unaware of any published research supporting that contention. That does not mean that no such effect can occur, rather that it cannot be plausibly assumed as an unproven axiom of the behaviour of responsible advisers or officials dealing with sensitive and momentous public issues. They may well be more resilient and independent – minded than such arguments assume.

25. IPSA very fairly acknowledged that no such effect had been observed following an order for disclosure in an earlier case.

26. A second feature of the February report relevant to the risk of inhibition on future advice resulting from disclosure is the content of that report. It contains very little, if any, direct advice. It provides the background to the current review, offers a range of options and sets out the predicted financial implications. It includes, in Annex B, a very detailed analysis, drawn, it says, from public sources of information, of the statistical background to the review of pay for MPCs. It is difficult to discern sensitive advice on the issues involved. The report sets out relevant background facts, a range of options and leaves the choice to the Board.

27. The identified strategic risks are such as many well informed members of the public could infer for themselves.

28. Disclosure of the whole February report would have no impact upon its content nor its implementation.

29. We believe furthermore that it would have little influence on the content of future reports. Each case must be considered with a proper regard for its particular facts. It may well be that disclosure of a future report containing highly sensitive advice, for example, advice relating to the payment of a particular SCC or MPC based on

an assessment of the value of his/ her work might well be regarded as contrary to the public interest. Our decision in this appeal does not set a benchmark for all future requests to IPSA for comparable information. We do not believe that the risk of future inhibition on advice resulting from disclosure of the February report is substantial.

30. On the other hand, there is a powerful and legitimate public interest in how public funds are spent and, more specifically, how and why MPs' remuneration is fixed at a particular figure.

31. We consider that there is a significant and specific public interest in disclosure of Annex B, which contains relevant and detailed information as to the work done by MPCs, hence what taxpayers are getting for their money. The February report states that such statistics are derived from public sources of information. Nevertheless, the value of Annex B is that it collates such information in a relatively concise and digestible form. We have no reason to doubt its substantial accuracy, though that is not a test for disclosure anyway. Annex B may be a valuable piece of objective evidence against which to appraise the decisions in the final report relating to MPCs. Whether it is, and if it is, what judgement of such decisions the public should form, are not, of course, matters on which the Tribunal expresses an opinion.

32. For these reasons the Tribunal orders disclosure of the February report. We see no reason to exclude any part of it from that order.

33. This is a unanimous decision.

Date Promulgated:
21 March 2018

D.J Farrer Q.C.
Tribunal Judge,
9th. March, 2018