



Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0041

Freedom of Information Act 2000 (FOIA)

Decision Promulgated: 26th July 2007

BEFORE

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN
David Farrer Q.C.**

and

LAY MEMBERS

Jaqueline Clarke

And

Roger Creedon

Between

HER MAJESTY `S TREASURY

and

Appellant

INFORMATION COMMISSIONER

and

Respondent

TIMES NEWSPAPERS LIMITED

Additional Party

Application for costs by the Additional Party

Decision

The Tribunal refuses the application by the Additional Party that the Appellant pay its costs of this appeal.

Reasons for Decision

The Request, the Decision Notice and the Appeal

- 1 On 16th. February, 2005, Helen Nugent, a reporter working for the Additional Party (“TNL”) made a request to the Appellant (“HMT”) under FOIA for information regarding the advice received by the Chancellor of the Exchequer as to the probable effects of the withdrawal of tax credits from pension schemes, which he announced in his 1997 budget and which was enacted in the Finance (No.2) Act, 1997.
- 2 HMT refused the request and maintained that refusal following a review. By e mail dated 1st. August, 2005, it asserted that the qualified exemption provided by section 35(1)(a) of FOIA applied and that the public interest favoured withholding such information. It became apparent that four documents were involved in the request.
- 3 Ms. Nugent complained to the Information Commissioner (the “IC”) who upheld her complaint by a Decision Notice dated 7th. June, 2006. HMT appealed to this Tribunal against that decision. TNL was joined as an additional party on 13th.February, 2007. Following reported decisions of this Tribunal, TNL`s solicitors wrote to HMT on 12th. March, 2007, drawing attention to those decisions and inviting an abandonment of the appeal. On 30th. March, 2007, very close to the date for exchange of witness statements, HMT disclosed the information requested on its website and gave notice of withdrawal of the appeal then or very shortly afterwards.
- 4 We have considered the Appeal Notice, the Reply of the IC, a verified statement from Mr. Rupert Earle, a solicitor of Addleshaw Goddard, L.L.P, solicitors to TNL, exhibiting a number of documents, written submissions from both HMT and TNL, in accordance with agreed directions, a submission in reply from TNL and a letter dated 6th. July, 2007 from TSol representing HMT. It is unnecessary to rehearse in detail the arguments advanced on both sides.
- 5 Essentially, TNL argues that HMT should have recognised long before it did that the information must be disclosed, that it dragged its feet

when it knew the likely approach of this Tribunal, as demonstrated by earlier decisions, and that TNL incurred substantial costs which could have been avoided by a timely decision to abandon the appeal and supply the requested information.

- 6 HMT argues that the request raised fundamental issues as to the public interest in budget advice, that the IC `s decision challenged long – held views as to the position of civil servants and that HMT responded reasonably and in a timely fashion to decisions of the Tribunal in withdrawing the appeal when it did.
- 7 The Tribunal `s powers to award costs are set out in Rule 29 of the Information Tribunal (Enforcement Appeals) Rules, 2005, which, so far as material, reads :

Costs

29. - (1) *In any appeal before the Tribunal, including one withdrawn under rule 12 above, the Tribunal may make an order awarding costs -*

(a) against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable;

(b) against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable;

(c) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of any other.

(2) The Tribunal shall not make an order under paragraph (1) above awarding costs against a party without first giving that party an opportunity of making representations against the making of the order.

(3) An order under paragraph (1) above may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed).

- 8 Rule 29(1)(c) is plainly the material provision. TNL characterises the conduct of HMT, as from receipt of Ms. Nugent `s request as “unreasonable”, given its obligations under FOIA and argues that such unreasonableness continued in the face of decisions of the Tribunal published in January, February and March, 2007. It further complains

that most of the withheld material was inaccurately described so that its classification within the s.35(1)(a) exemption appeared clearer than it was.

Our Decision

- 9 This Tribunal `s jurisdiction as to costs, like that of most other tribunals, is much narrower than those of the High Court and the County Court. Costs do not “follow the event”. They are awarded only where a party `s conduct has been clearly blameworthy. No doubt, that reflects a desire that members of the public should not be deterred from challenging decisions in this Tribunal or others through fears of ruinous awards of costs, if they lose. Such a policy must, however, be applied even-handedly to the large corporation and the impecunious individual. Provided that any party, public authority, IC, national newspaper or private citizen has behaved sensibly and fairly, it, he or she will not be penalised in costs simply for being wrong. That applies to a government department as much as to a pensioner. That is the effect of Rule 29(1).
- 10 We use the term “blameworthy” to embrace several opprobrious adjectives contained within the Rule. “Manifestly unreasonable”, “frivolous”, “vexatious”, “improper”, “unreasonable” – these are strong words of condemnation clearly reserved for conduct going well beyond a simple misjudgement. They are coupled with disobedience to a direction and unnecessary delay.
- 11 TNL `s submission clearly implies a belief that the Tribunal can look at conduct preceding the launch of an appeal when adjudicating on an application under Rule 29(1)(c). Certainly, the wording of paragraph (c) is wider than (a), which restricts scrutiny to the lodging of the appeal and subsequent events and (b) which focuses on the Decision Notice. We incline to the view that (c) does indeed permit consideration of any action subsequent to the original request. Unlike (a) and (b), it is a provision which applies to all parties to an appeal .
- 12 We turn to the facts of this appeal. We find nothing unreasonable in HMT `s decision to invoke the exemption under s.35(1)(a) in the first place and think it would have been hard to argue that it did not apply to all the requested material. How it was described is therefore irrelevant.
- 13 The questions whether, since FOIA, budget advice should be disclosed and, if so, when and with what, if any, redaction, are matters of great public importance, witness the publicity which the disclosure of this requested material attracted on and after 30th. March, 2007, not least, we recall, in the pages of the Times. We see nothing unreasonable in the decision of HMT to test the IC `s decision before this Tribunal.
- 14 Three relevant decisions of the Tribunal are referred to in submissions. They are :

- (i) *Brooke and Guardian Newspapers v IC (BBC joined)* *EA/2006/0011 and 0013* promulgated in January, 2007 (“The Guardian appeal”)
- (ii) *Department for Education and Skills v IC (Evening Standard joined)* *EA/2006/0006* promulgated 19th. February, 2007. (“DFES”)
- (iii) *Secretary of State for Work and Pensions v IC EA/2006/0040* promulgated 5th. March, 2007 (“DWP”)

15 Whilst acknowledging the relevance of certain principles adopted by the Tribunal in the Guardian appeal, we agree with HMT that DFES was concerned with principles virtually identical to those in issue here, had this appeal been heard. Unless DFES was successfully appealed, HMT would have had a difficult task indeed to make its case. DWP reinforced the DFES approach and the same comment applies.

16 Accordingly, we are not in the least surprised that HMT reviewed its position when DFES was published and that its decision was largely dependent on the decisions by the other appellant departments as to whether those rulings should be challenged.

17 Those departments were entitled to consider their positions carefully, in consultation with leading counsel, indeed to use the time allowed for appealing, before deciding to accept the rulings.

18 In all the circumstances, it seems to us inevitable that there should be some delay after the publication of the DFES decision, before HMT decided to withdraw its appeal. We remind ourselves anyway that the test is not, could HMT have taken a decision any earlier, but was its conduct unreasonable ?

19 We conclude that it is quite impossible to characterise HMT`s conduct of this appeal and its response to those decisions as “unreasonable”. On the contrary, it did what we should expect of any responsible authority and it did it within a reasonable time. Rule 29(1)(c) sets the bar high for an award of costs and we do not consider that TNL comes anywhere near clearing it.

20 This application is therefore refused.

D.J.Farrer Q.C.
Deputy Chairman
26th. July, 2007