

Recent Development in Freedom of Information: Parliamentary crises, Ministerial vetoes and beyond

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INTRODUCTION

1. If anyone was still harbouring doubts as to the constitutional significance of the Freedom of Information Act 2000 (“FOIA”), those doubts must surely now have been put to rest in the wake of the Parliamentary crisis wrought by the MPs’ expenses scandal. That scandal, which was of course uncovered only as a result of the application of FOIA,¹ has prompted some to question whether FOIA, rather than being a tool for furthering democratic values, has inadvertently become a malign force which is destabilising the very foundations of our democratic system. Others, who are perhaps more sanguine, tend to see the furore over MPs’ expenses as merely an example of FOIA doing precisely the work it was enacted to do: uncovering impropriety in our public institutions and increasing levels of public participation in debates on key matters affecting the constitutional health of the nation.
2. The truth is that, however one rationalises the recent events surrounding MPs’ expenses, the clear result is that FOIA is now firmly rooted in the public consciousness as a legal instrument with very real and politically significant practical applications. The implication of this result is that FOIA will continue to loom large over the information law landscape.
3. Whilst it may be hard to divert one’s attention from the wreck of the MPs’ expenses affair, this is of course not the only important development to have crossed the FOIA horizon in recent months. Other important developments include not least:
 - the first ever application of the ministerial veto afforded under section 53 FOIA;
 - the emergence of new arguments as to the application of the public interest test (*Office of Communications v IC* [2009] EWCA Civ 90 and *Office of Government Commerce v IC* [2008] EWHC 737 (Admin));
 - the handing down of an important Tribunal decision on the application of FOIA to public authority contracts (*Department of Health v IC* (EA/2008/0018));
 - a recent pronouncement by the High Court as to the approach to be taken to the legal privilege exemption in s. 42 FOIA (*DBERR v IC & O’Brien* [2009] EWHC 164 (QB)); and, finally,

¹ See the three appeals in *Corporate Officer of the House of Commons v IC & Ors* (EA/2007/0060), (EA/2007/0074) and (EA/2006/0015).

- litigation in the Tribunal and now the High Court on the question of whether information relating to the application of internal FOIA processes is itself exempt from disclosure under FOIA (*Home Office & Ministry of Justice v IC* (EA/2008/0062)).

4. It is particularly these developments which will be analysed in the course of this paper.

THE MINISTERIAL VETO

5. Under s. 50(1) FOIA, applicants who are dissatisfied with the way in which their information requests have been dealt with by a public authority may complain to the Information Commissioner. Subject to the restrictions imposed under s. 50(2) FOIA, the Commissioner is subject to a general duty to issue a decision notice in respect of any complaint which he receives (s. 50(3)).
6. If the Commissioner decides, in response to a complaint, that a public authority has failed to communicate information, contrary to the requirements of s. 1 FOIA, the decision notice must specify the steps to be taken by the public authority to comply with that requirement (s. 50(4)).
7. The Commissioner also has powers to issue enforcement notices under s. 52 FOIA. In particular, if he is satisfied that a public authority has failed to comply with any of the requirements of Part I FOIA, he may serve the authority with an enforcement notice requiring the authority to take such steps as may be specified for complying with those requirements.²
8. These enforcement functions are self-evidently central to the effective regulation of public authorities under FOIA. Moreover, they guarantee the role of the Commissioner as the primary arbiter of disputes under FOIA. However, it would be a mistake to assume that under FOIA these functions automatically operate free from any constraints which may be imposed by the executive. This is because s. 53 FOIA itself permits the executive, in certain circumstances, to vitiate decision notices and enforcement notices which have been made by the Commissioner.
9. Section 53 applies to any decision notice or enforcement notice which:
 - (1) is served on a government department; the National Assembly for Wales or any public authority designated for the purposes of s. 53 by an order made by the Secretary of State (s. 53(1)); and

² Enforcement notices are generally served following independent investigation of the public authority by the Commissioner, rather than in response to a complaint under s. 50.

- (2) relates to a failure, in respect of one or more requests for information, to comply either:
 - (a) with the s. 1(1)(a) duty to confirm or deny whether information is held or
 - (b) with the s. 1(1)(b) obligation to disclose information.
10. In essence, the decision or enforcement notice will cease to have effect if, within specified time limits:

'the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the information request or requests concerned, there was no failure falling within (1)(b)'
11. The 'accountable person' is defined in s. 50(8) FOIA and will generally be a Minister of the Crown.³ The certificate is colloquially known as the 'ministerial veto'.
12. Where a certificate has been given to the Commissioner, the accountable person shall, as soon as practicable thereafter, lay a copy of the certificate before each House of Parliament (s. 53(3)).⁴ If the certificate is in respect of a decision notice, the accountable person must also inform the person who brought the complaint under s. 50 of the reasons for his opinion (s. 53(6)).
13. With respect to the issuing of a veto under s. 53, the following principles are particularly worthy of note:
 - (1) the veto operates so as to ensure that Ministers rather than the Commissioner have the last word on FOIA disputes, particularly relating to information held by government departments;
 - (2) the certificate may not be challenged from within the appeals procedure afforded under Part V FOIA;
 - (3) the certificate may however be challenged in judicial review proceedings;
 - (4) in the context of a judicial review claim, the claimant could potentially challenge the veto:

³ There will be a different 'accountable person' where a Northern Ireland department is concerned or where the authority in question is a Welsh authority.

⁴ Save that, in cases involving a Northern Ireland department, the certificate must be laid before the Northern Ireland Assembly and in cases involving a Welsh public authority, the certificate must be laid before the National Assembly of Wales

- (a) on the ground that that the Minister did not have 'reasonable grounds' for his opinion; alternatively,
 - (b) on the basis that the Minister's 'opinion' was not *Wednesbury* reasonable or otherwise lawful.
- 14. It is obviously a major and potentially controversial step for Ministers to seek to exercise their rights under s. 53 to trump the decision of the statutory regulator under FOIA. This is doubtless why there has to date been only one instance of a ministerial veto being issued under s. 53. The veto in question was issued in respect of a decision notice requiring the Cabinet Office to disclose information relating to perhaps the most controversial decision taken by the incumbent Labour government, namely the decision to go to war in Iraq.
- 15. The decision notice was issued by the Commissioner in respect of a request for disclosure of formal minutes of two Cabinet meetings at which Ministers decided to commit forces to military action in Iraq. The Commissioner held that the exemptions afforded under s. 35(1)(a) (formulation of government policy) and s. 35(1)(b) (ministerial communications) were engaged in respect of the requested information. However, on an application of the public interest test under s. 2(2)(b) FOIA, he concluded that the public interest weighed in favour of disclosure. By a majority decision, the Tribunal upheld that decision (*Cabinet Office v IC & Lamb* (EA/2008/0024 & 0029)).
- 16. The central theme in the case before the Tribunal was whether disclosure of the disputed information would infringe the convention on cabinet collective responsibility to the point where it was not in the public interest to disclose. The majority (Mr Ryan (chair) and Dr Fitzhugh) held that: there was a strong public interest in upholding the convention of collective cabinet responsibility; however, that interest was outweighed by the strong public interest in disclosure, particularly because: 'The approach adopted during the Cabinet meetings by those who were aware of the 7 March [Attorney General's] Opinion, as well as those who were not, is of crucial significance to an understanding of a hugely important step in the nation's recent history and the accountability of those who caused it to be taken' (§79). The effect of the majority's decision was that the decision notice which required disclosure of the minutes was upheld.
- 17. Thereafter Jack Straw MP issued a ministerial veto in respect of the decision notice. In his Statement of Reasons⁵, Mr Straw emphasised that he regarded the use of the veto as warranted given the 'exceptional' circumstances of the case. He went on to state:

'...I do not accept the assumption underlying the Tribunal's decision that the momentous nature of the decision at issue increased the strength of the

⁵ A copy can be found at: <http://www.justice.gov.uk/news/docs/foi-statement-reasons.pdf>.

case for disclosure of the minutes concerned. Conventions on Cabinet confidentiality are of the greatest pertinence when the issues at hand are of the greatest sensitivity. Exceptional cases create an exceptional need for confidence in Cabinet confidentiality to be strong'.

18. Interestingly, there has been no judicial review challenge to the decision to issue the veto. It remains to be seen the extent to which the veto will in future be used as a tool to avoid disclosures under FOIA. However, it is anticipated that the Government will continue to use the veto only sparingly, not least because excessive use of the powers of veto is likely to engender concerns that the Government is using the veto not to protect the public interest, but rather to protect its own interests.

THE PUBLIC INTEREST TEST

Aggregating Public Interests

19. The public interest test under s. 2(2)(b) FOIA applies wherever information falls within the ambit of a qualified exemption under Part II FOIA. The test operates so as to require disclosure, save where:

'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure'

20. Application of this test can often be challenging for public authorities in practice. This is not least because deciding what weight should be attributed to particular public interests can be an inherently speculative exercise.
21. One question which public authorities often pose is whether, in cases where there are multiple exemptions in play:
 - (1) they can aggregate all the public interest considerations together in single compendious balancing exercise; or
 - (2) they have to conduct discrete balancing exercises under each exemption and must, in each case, apply public interest considerations which are specifically tailored to the individual exemption in issue.
22. The line which has repeatedly been taken in the Tribunal and the High Court in respect of this question is that there can be no aggregation: the public interests in favour of maintaining the exemption must be specifically tailored to and rooted in the exemption itself (see *Office of Communications v IC* (EA/2006/00280) and, in the High Court [2008] EWHC 1448 (Admin), §48; see also *DBERR v IC & O'Brien* [2009] EWHC 164 QB, per

Wyn Williams at §§57-58 and *Home Office & Ministry of Justice v IC* (EA/2008/0068), §63).

23. However, the strength of this orthodoxy has now been placed in question as a result of the Court of Appeal's judgment in *Office of Communications v IC* [2009] EWCA Civ 90 ("*Ofcom*").
24. *Ofcom* is a case which was decided not under FOIA but under the Environmental Information Regulations 2004 ("EIR"). In that case, *Ofcom* sought to claim that particular information relating to the location of certain mobile telephone base stations was exempt from disclosure under the public safety exception (r. 12(5)(a) EIR) and the intellectual property rights exception (r. 12(5)(c) EIR). Application of each of those exception called for an application of the public interest test provided for under r. 12(1)(b) EIR. That test provides that the authority may refuse disclosure of environmental information if: '*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*' (the wording is of course virtually identical to that found in s. 2(2)(b) FOIA).
25. In the course of defending its decision that the requested information was exempt from disclosure under regs. 12(5)(a) and (b), *Ofcom* argued that it was possible to aggregate all of the public interest considerations together and consider them in a single public interest balancing exercise. The Commissioner argued that this was the wrong approach and that the legislation required instead: (a) that the public authority conduct discrete public interest balancing exercises under each exception; and (b) that only those public interest considerations which arose naturally from the particular exception in question could be considered (i.e. the authority could not bundle together in a single public interest balancing exercise public interests in maintaining public safety with public interests in protecting intellectual property rights).
26. The Commissioner succeeded in these arguments before the Tribunal (EA/2006/00280). The Tribunal held that public interests applicable to other exceptions could not be aggregated in this way and 'for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception' (§§56-58). That decision was upheld in the High Court where Laws LJ held that the: 'the focus of the legislation is on the particular interests which the particular exceptions serve. It requires such interests, in effect, to be specifically justified in a context where the presumption is in favour of disclosure' ([2008] EWHC 1448 (Admin), §48).
27. However, the Court of Appeal allowed *Ofcom*'s appeal against Laws LJ's judgment. It concluded that public interests relating to different exemptions could be aggregated together in a single public interest balancing exercise. In reaching this conclusion, the

Court of Appeal relied in particular on the analysis set out below (see per Richards LJ, §§37-43).

- (1) Regulation 12(1) provides that, subject to the application of the public interest test, a public authority may refuse to disclose requested environmental information if 'an exception applies under paragraphs (4) or (5)'.
 - (2) Ordinary principles of statutory construction require the court to construe the words 'an exception' as meaning 'one or more exceptions'. That in itself suggests that exceptions may be considered together and not in isolation.
 - (3) That conclusion was reinforced:
 - (a) by the fact that the public interest test required consideration of 'all the circumstances of the case'; and
 - (b) by the number and nature of possible exceptions in regulation 12(5).
 - (4) It would be wholly artificial to look at each exception separately for the purpose of the public interest balancing exercise.
 - (5) There was nothing in the Directive, from which the EIR was derived, which required a different result.⁶ Whilst the Directive requires exceptions to be construed narrowly, it does not require each exception to be looked at separately for the purposes of the public interest balancing exercise.
28. This judgment is, with respect, controversial. This is not least because it relies on a construction which seems to be at odds with the clear language of r. 12(1)(b). Certainly, the fact that r. 12(1)(b) refers to 'public interests in maintaining the exception' would seem to suggest that public interests cannot be aggregated in the manner suggested by the Court of Appeal. An application for leave to appeal the Court of Appeal's judgment is currently pending before the High Court.
29. The fact that *O'com* was decided under the EIR rather than FOIA obviously poses questions as to whether a similar approach should be adopted under s. 2(2)(b) FOIA. However, given the similarity in language and structure of the two enactments, it is at least arguable that the same approach must be adopted under FOIA.
30. Pending a decision on the Commissioner's application for leave to appeal in *O'com*, public authorities may consider it prudent to err on the side of caution and adopt a disaggregated approach to the application of the public interest test.

⁶ Directive 2003/4/EC.

Generalised Public Interests

31. It is now fairly well established in the Tribunal that:
- (1) public interests in favour of disclosure of information may be generalised (e.g. disclosure would generally serve the public interests in improving accountability and transparency);
 - (2) public interests in favour of maintaining a Part II exemption may not be so generalised and must instead be anchored firmly in the facts of the individual case (see *DFES v IC* (EA/2006/0010), §75(i), *Secretary of State for Work and Pensions* (EA/2006/0040), §§23-24 and *Home Office & Ministry of Justice v IC* EA/2008/0062, §63).
32. This orthodoxy has also been approved in the High Court (see *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), §§26-27 and *Department for Business Enterprise & Regulatory Reform v O'Brien & IC* [2009] EWHC] 164 (QB), §§57-58).
33. However, it is arguable that a question mark has now been placed over this orthodoxy as a result of an obiter comment made by Stanley Burnton J in *Office of Government Commerce v IC* [2008] EWHC 737 (Admin). In that case, Stanley Burnton J commented, in the context of an analysis of the public interests in favour of maintaining a particular exemption, 'generalisations, admitting of exceptions, may be possible' (§87).
34. It is not clear precisely what Stanley Burnton J meant by these words. However, if he meant that a public authority does not need to tie any public interest considerations in favour of maintaining the exemption to the particular facts in issue in the particular case, his comment would be at odds with all the leading Tribunal and High Court authorities.
35. The question of whether, in fact, public authorities may rely on generalised public interests in favour of maintaining an exemption is due to be considered by the High Court in June in an appeal against the Tribunal's decision in *Home Office & Ministry of Justice v IC* (EA/2008/0062) (discussed further below).
36. It is suggested that, pending the High Court's judgment in the *Home Office* case, it would be prudent for public authorities to continue applying the public interest test on the basis that public interests in favour of maintaining the exemption must be firmly anchored in the specific facts of the case.

PUBLIC AUTHORITY CONTRACTS

37. The issue of whether and to what extent public authority contracts are susceptible to disclosure under FOIA is a particularly controversial one. This is because it is frequently assumed that such contracts will be immune from disclosure because of their confidential nature and/or because they contain commercially sensitive information which, if disclosed, may damage the commercial interests of the authority or the contractor.
38. The question of how public authorities should approach requests for disclosure of such contracts under FOIA was considered some time ago in the case of *Derry City Council v IC* (EA/2006/0014) ("*Derry*"). In that case, the Tribunal was called upon to consider whether particular financial information contained in a contract between Derry City Council and Ryanair for use of an airport run by the Council was exempt from disclosure under s. 41 (confidential information exemption) and/or s. 43 (commercial interests exemption) FOIA.
39. With respect to the application of s. 41, the Tribunal held that that section was not engaged in respect of the information in the contract because:
- (1) in order for section 41 to be engaged the information must have been 'obtained by the public authority from another person'; and
 - (2) information in the contract had not been provided to the Council by Ryanair, but instead merely reflected the terms which had been mutually agreed between the parties.
40. However, the Tribunal went on to comment obiter with respect to s. 41 that:
- 'We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party to the contract...' (§32(e))
41. This comment left open the possibility that there may be cases where information in a contract could fall within the ambit of s. 41. However, the Tribunal omitted to clarify the type of 'technical information' which might be characterised as information 'obtained by the public authority from another person'.
42. With respect to the application of section 43, the Tribunal held that: there was no sufficient evidence before it that Ryanair's commercial interests would risk being prejudiced by the

disclosure (Ryanair had not itself had an opportunity to put such evidence before the Tribunal as it was not a party to the appeal); s. 43 was nonetheless engaged in respect of the information because disclosure would have risked prejudicing the council's commercial interests; however, the public interests weighed in favour of the disclosure of the information in all the circumstances, which included not least that the information was rather old.

43. More recently, the issue of whether public authority contracts are exempt from disclosure under sections 41 and 43 was revisited in the case of *Department of Health v IC* (EA/2008/0018) ("*DOH*"). In *DOH*, the Information Tribunal considered whether a substantial and high value public procurement contract between the Department of Health (DH) and a private sector contractor had been lawfully withheld under FOIA. Under the contract, the contractor was required to set up and support a national electronic recruitment service for the NHS. The contract was likely to require some £6m of investment by the DH.
44. The DH argued before the Tribunal that the entirety of the contract was exempt from disclosure on an application of the following provisions of FOIA: s. 41 (exemption in respect of confidential information); section 43 (commercial interests exemption) and s. 44 (statutory prohibition exemption). With respect to s. 44, DH argued that the information in the contract was absolutely exempt from disclosure under FOIA because: (a) the information in the contract was information 'supplied to' the DH by the contractor; and (b) accordingly, disclosure was prohibited under regulation 30 of the Public Service Contracts Regulations 1993 ("the 1993 Regulations").
45. Having heard detailed evidence from the relevant contractor, along with evidence from a DH witness, the Tribunal decided that the contract was not generally exempt from disclosure under FOIA, although a limited amount of commercially sensitive information contained in certain schedules to the contract could lawfully be withheld under s. 43 FOIA.
46. A number of important principles emerge from the Tribunal's judgment in *DOH*.
 - (1) Information in contracts which have been agreed between a public authority and a contractor will not generally be susceptible to the application of section 41 FOIA. This is because such information cannot properly be characterised as information 'obtained from' the contractor. Instead, it is information which reveals the terms which have been mutually agreed by the parties.
 - (2) Even where particular terms or entire contracts have originally been drafted exclusively by the contractor, they become mutually agreed terms as and when the parties enter into the contract. Such mutually agreed terms cannot be said to

amount to confidential information 'obtained from' the contractor for the purposes of section 41.

- (3) Similar principles apply in respect of section 44 FOIA read together with regulation 30 of the 1993 Regulations (or what is now regulation 43 of the Public Contracts Regulations 2006).
- (4) The only exception to these general principles is that, where the contract contains highly technical information relating, for example, to chemical processes or blueprints for a machine – i.e. information which is not susceptible to negotiation, it may be possible to treat that information as having been 'obtained from' the contractor for the purposes of section 41. (This represents an important clarification of the obiter comments made in *Derry*).
- (5) Public authorities should routinely consider the principles set out in the OGC (Civil Procurement) Policy and Guidance prior to deciding whether to disclose under FOIA a contract which has been entered into following a public procurement process.
- (6) If an authority wishes to depart from these principles in a particular case, they must be prepared to explain their reasons for that departure to the Commissioner.
- (7) If an authority refuses disclosure of a contract which has been requested under FOIA and a complaint is made to the Commissioner, it will not be sufficient for the authority simply to make a blanket assert that the information in the contract is exempt under a particular section in Part II FOIA.
- (8) Instead, the authority will have to show with reference to the individual provisions in the contract why the particular exemption is engaged and, if the public interest test is in issue, why the public interest weighs in favour of the exemption being maintained in respect of those provisions.

LEGAL PROFESSIONAL PRIVILEGE

47. It is well established that the principle of legal privilege is not merely a rule of evidence but is rather a 'fundamental condition on which the administration of justice as a whole rests' (*Reg v Derby Magistrates' Court ex parte P* [1996] 1 AC 487, per Lord Taylor). In *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax & another* [2003] 1 AC 563 Lord Hoffmann described it as a 'fundamental human right'.
48. Against the background of these principles, one might have expected any exemption in FOIA relating to legally privileged information to be an absolute exemption. However, it is quite clear that the exemption in FOIA relating to legally privileged information is a

qualified, rather than an absolute exemption. Hence, where it is engaged, it calls for an application of the public interest test – see s. 42 (read together with s. 2).

49. That being said, applying the public interest test under s. 42 does require something of a unique approach which is not generally found in the context of other exemptions. This is because the starting point for applying the public interest test under s. 42 entails recognizing that there is already a strong public interest in preserving the confidentiality of legally privileged information which is effectively ‘built in’ to the exemption. In other words, in contrast with other exemptions, where the public interest scales are considered to be empty at the start, an application of the s. 42 exemption requires, at the outset, that considerable weight to be placed in the scale favouring maintaining the exemption.
50. This is an approach which was originally adopted by the Tribunal in *Bellamy v IC* (EA/2005/0023). It has now been authoritatively approved by the High Court in *DBERR v IC & O’Brien* [2009] EWHC 164 (QB), per Wyn Williams J, §§35-40.
51. In *DBERR*, the applicant (Mr O’Brien) was seeking disclosure of information which included legally privileged information relating to the proposed inclusion in the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 of a provision which stated that daily fee paid judicial office holders were excluded from the ambit of the Regulations. The Tribunal decided that this information should be disclosed. DBERR appealed that decision on the basis that, in applying the public interest test under s. 42, the Tribunal had failed to give sufficient weight to the strong inbuilt interest in protecting the confidentiality of legally privileged information.
52. The High Court accepted DBERR’s arguments on that issue. It held that the Tribunal had recognized the strong inbuilt public interest in maintaining the exemption in its analysis of the relevant legal principles but had then failed to apply this principle to the facts of the case. The High Court remitted the public interest question under s. 42 to a newly constituted Tribunal.⁷
53. However, whilst the High Court in *DBERR* was keen to emphasize the importance of the in-built public interest in maintaining the s. 42 exemption in respect of legally privileged information, care must still be taken not to treat legally privileged information as effectively automatically exempt from disclosure under FOIA. As has been made clear in a number of cases, including *DBERR* and the earlier case of *Mersey Tunnel Users Association v IC* (EA/2000/00052), there may yet be cases where, notwithstanding the strong in-built interests in maintaining the confidentiality of legally privileged information, there are equally strong public interests in favour of disclosure of legally privileged information. In

⁷ A fresh Tribunal hearing on this issue is due to take place on 25-26 June 2009.

such cases, the information, despite being privileged, will not be exempt from disclosure under s. 42.

FOIA PROCESSES IN THE SPOTLIGHT

54. Taking decisions as to how FOIA applies to particular requested information is now a routine activity within most public authorities. In *Home Office & Ministry of Justice v IC* (EA/2008/0062), the Tribunal was called upon to decide the rather novel question of whether information relating to such decision making processes was itself susceptible to disclosure under FOIA.
55. The case involved a request for disclosure of information relating to how the Home Office had applied FOIA to some 48 requests made by or on behalf of a particular media organisation. The request was made in circumstances where the applicant had expressed concern that the Home Office was discriminating against the media organisation when dealing with its FOIA requests. The Home Office refused the request on the basis that the information was exempt under s. 36(b) (disclosure inhibitive of free and frank provision of advice/exchange of views) and s. 36(c) (disclosure prejudicial to effective conduct of public affairs) FOIA. Notably, the Home Office did not refuse disclosure on the basis that the request was vexatious under s. 14 FOIA or on the basis that responding to it would exceed the cost limit under s. 12.
56. The Commissioner decided that s. 36 was engaged in respect of the disputed information (as the necessary reasonable opinion had been obtained from the qualified person so as to engage s. 36). However, he held that the public interest balance weighed in favour of disclosure of the information.
57. The Tribunal upheld that decision on appeal by the Home Office. In reaching the conclusion that the Commissioner's decision should be upheld, the Tribunal rejected generalised arguments advanced by the Home Office to the effect that requests for disclosure of information about internal FOIA processes (described by the Home Office as 'meta-requests'):
 - (1) were 'irresponsible';
 - (2) were a waste of resources;
 - (3) were designed to allow 'backdoor access; to information which had previously been held to be exempt;
 - (4) were prone to having a chilling effect on civil servants in terms of making them less free and frank in their advice;

- (5) served only private interests; and
 - (6) improperly circumvented the internal review procedure and the statutory complaints and appeal procedures provided for under Parts IV and V FOIA.
58. On the facts of the case before it, the Tribunal held that there were a number of important public interests which favoured disclosure of the requested information and those interests were not outweighed by the rather weak public interests in maintaining the section 36 exemption.
59. The Tribunal also refused to permit the Home Office to rely on a number of new exemptions which had been identified only in the context of the appeal before the Tribunal.
60. The Home Office and Ministry of Justice are now appealing the Tribunal's decision to the High Court.⁸ The appeal will require the High Court to consider in particular the following important questions:
- (1) whether special rules apply under FOIA to requests for disclosure of information about internal FOIA processes (i.e. rules which generally entitle an authority to refuse requests for disclosure of such information); and
 - (2) whether the Tribunal has any power to refuse late reliance on exemptions.

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⁸ The hearing is due to take place on 22-23 June 2009.