Public interest arguments presented in favour of withholding information on lobbyists

Section 35. Section 36.

Regulation 12(4)(e). Regulation 12(5)(f)

Issue

Public interest arguments **presented** in favour of maintaining a relevant exemption for withholding information on lobbyists

Line to take

1) The value of lobbyists' input

- It is accepted that there is public interest in policy making being informed by stakeholders.

2) Safe Space

- Dialogue with lobbyists does not warrant the same safe space as purely internal policy thinking and there is a public interest in making the contribution of lobbyists public at the time when the policy debate is still ongoing, i.e. before policy decisions have been finalised, to allow counterbalancing views to be presented. However this is the very time at which the public interest in preserving the safe space for policy making is at its highest. Therefore the public interest test will be very finely balanced for requests that relate to ongoing policy making.
- Information which reveals the government's internal thinking it may still warrants 'safe space' protection, but where the information reveals the influence of lobbyists or the nature of government's relationship with lobbyists this will increase the public interest in favour disclosure.

3) Chilling Effects

- The overriding aim of lobbyists is to exert influence and so they will not easily be deterred from offering free and frank views in pursuit of this aim.
- There is no evidence that lobbyists have altered their behaviour with the implementation of FOI.

4) Record Keeping

- We should be sceptical of arguments the risk of disclosing information will lead to poorer record keeping.

5) Effect of the Media

- The fear of how the media may respond to the information should not damage relations with lobbyists or discourage lobbyists engaging with Government.

Further information

Introduction

The term lobbyists covers both those representing the narrow interests of a particular company and those bodies which represent a broader band of stakeholders. It should not be forgotten that campaign groups will also lobby government and although some of these groups may be considered to be acting more altruistically than, say a firm of lobbyists acting on behalf of a private sector company, the same arguments for and against disclosure will apply.

Two Tribunal decisions have considered whether information relating to lobbyists can be disclosed. The first, Evans v ICO & MoD, involved an introductory meeting between a new minister and a professional firm of lobbyists which is paid to promote the interests of its clients. The second, DBERR v ICO & FoE, involved information on a series of meetings between a government dept and the Confederation of British Industry (CBI) which, as the name suggests, is a representative body and lobbyist for British industry.

What makes the information or advice provided by lobbyists different to that provided by civil servants is that the role of civil servants is to provide neutral advice to ministers where as the primary role of lobbyists is to

influence government policy in favour of the clients or interest group they represent.

It is anticipated that a government department is most likely to apply the exemptions relating to the formulation of government policy, s35, or to the prejudice to the conduct of public affairs, s36, and therefore this line will focus on the relevance of the public interest arguments that may be presented in favour of maintaining these two exemptions and their equivalent exceptions under EIR. It is important to recognise that the line discusses the public interest arguments **presented** in favour of maintaining the exemptions by the public authorities. As discussed later, these arguments were not necessarily accepted or given much weight. Furthermore in countering these arguments the tribunal, in effect, raised public interest arguments in favour of disclosure. This is particularly evident when considering point 2 - 'safe space' and the opposing argument in favour of providing others with the opportunity to present policy makers with alternative views.

It should be recognised that the exemptions/exceptions cited work in a variety of ways with s35 and r12(4)(e) being class based, where as the engagement of s36 depends on the qualified person's opinion being reasonable and for 12(5)(f) to be engaged the 'adverse effect' test has to be satisfied before any consideration of the public interest test. The issues discussed in this line were presented by the public authority as public interest arguments in favour of maintaining **both** ss35 and s36. However they will also be relevant to assessing whether there would be any adverse effect when considering r12(5)(f). When looking at s36 these arguments are likely to be presented by the public authority as the reasons why the qualified person believed disclosure would prejudice the conduct of pubic affairs. If we accept that s36 is engaged we cannot then dismiss these arguments out of hand as this would be tantamount to finding that the opinion was not in fact reasonable. What we can do though is accept the exemption is engaged but reach our own conclusion as to the severity and frequency of that prejudice, which may well be different to that of the public authority, and weigh that against the public interest factors in favour of disclosing the information.

Although this line focuses on the public interest arguments presented in favour of maintaining these exemptions/exceptions, others may well come

into play depending on the contents of the information and it should not be forgotten that the subject matter of the actual information will obviously be an important factor in determining whether it should be disclosed. For example it is conceivable that lobbyists may disclose sensitive commercial information that would attract the exemption provided by s43. Also in Evans the Tribunal found that although the public interest did not favour maintaining s35 in relation to one piece of information, an internally prepared background note, it was exempt by virtue of s40(2).

It is also important to note that s35 can only be claimed if the dialogue with a lobbyist related to a particular policy issue. For example in Evans our original DN had rejected the application of s35 because the meeting in question was simply an introductory one and was not linked to any specific policy development. This was not contested at Tribunal. It should also be remembered that lobbyists' activities are not solely confined to central government departments, for example they may seek to influence a local authority's policy development, in which case s35 would not be available to the public authority.

1) The Value of Lobbyists' Input

- It is accepted that there is a value in lobbyists contributing to policy formulation and development.
- What needs to be considered however is whether the quality of this contribution will be diminished or whether lobbyists will be reluctant to engage with government as a consequence of disclosure.

There is clearly a public interest in having a well informed government that has benefited from the input of a wide range of stakeholders in order to develop sound, workable policies. In DBERR the department explained that civil servants, not being business men, needed to know what business' concerns are and get an indication of whether a proposed measure would have the desired effect.

All parties agreed that it was beneficial to adopt a process which allowed bodies such as lobbyists an early opportunity to influence policy (para 71 DBERR) and for the government to have a positive relationship with influencers (para 67 DBERR) and the Tribunal recognised that there was

value in government being able to test ideas with informed third parties and knowing what the reaction of a particular group of stakeholders might be in relation to a specific policy. The Tribunal stated;

> "…we do accept that there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken." (para 119 DBERR).

2) Safe Space

This section looks at the public interest factors in preserving the 'safe space' for lobbyists to contribute to policy development. The main points are bulleted below and then discussed in more detail.

- DBERR argued that as lobbyists also provided neutral advice their contribution deserved the same safe space as purely internal thinking. The Tribunal was not convinced by this argument.
- The Tribunal found that there was a strong public interest in disclosing information that revealed how lobbyists were trying to influence policy so that others could participate in the debate by presenting counterbalancing views.
- For this participation to be meaningful the information needed to disclosed whilst the policy formulation/development was still ongoing.
- The public interest in withholding internal background/briefing notes will be depend on the extent to which they reveal purely internal thinking on policy issues as opposed to the nature of the relationship between lobbyist and government.

LTT 129 explains the safe space arguments in relation to the internal thinking that goes into government policy making. In broad terms there is a public interest in the government having time to formulate policy in private so that it can reach a fully considered view without disruption and without what are merely options being taken to be decided policy. It is generally accepted that the early stages of policy formulation are best conducted in

private but once a policy decision has been reached then there is less sensitivity in disclosing information that gives an insight into how that decision was reached.

Before going any further it will be useful to explain a bit more about the role lobbyists paly in policy making. Traditionally lobbyists have sought access to government in order to argue their case on a particular issues and the government also held formal consultations with stakeholders such as representative bodies like the CBI when it considered it appropriate to do so.

In DBERR the department explained how its relationship with lobbyists had changed. Having recognised the value of their input the department now actively canvassed the views of these influencing bodies on what was characterised as an, informal basis. This could involve regular and frequent meetings with individual representative bodies, often without set agendas, during which a range of current and evolving issues might be discussed. This new informal process of exchanging ideas could involve those from the representative body/lobbyist speaking their mind and airing views that had not been approved by its members and there is even a suggestion that the advice given "did not always represent the predominant interests of their members" (para 48 DBERR). This is in contrast to more formal consultations where the representative body had the opportunity to provide a fully considered view that was agreed by its members and may well reflect what is already known to be its public position on the issue.

In DBERR the applicant made a request for information on meetings between the department and the CBI which captured discussions relating to ongoing policy issues. DBERR explained that;

"….if government is proposing acting in a particular area it needs to test its ideas with influencing bodies to see if a measure will have the desired effect or if there are any unforeseen consequences of taking that action. It can be crucially important to the Department's work to have a quick, informal steer on what the views of business might be." (para 55)

Because the dialogue with lobbyists had become an integral part of the policy process DBERR argued that its discussions with lobbyists deserved

the same safe space as that afforded to internal meetings between civil servants, and civil servants and ministers (para 53).

The Tribunal accepted that there was an argument for allowing discussions with **neutral** third parties, as opposed to lobbyists who are pursuing their own agenda, to take place in private;

"We [the Tribunal] can accept a similar private space should be extended to third parties who are genuine advisors to government such as external consultants or experts called upon to advise neutrally on policy options being considered by ministers and civil servants and whose professional services would normally be paid for. However BERR are asking us in this case to consider that the CBI, a significant lobbyist and influencer, and other similar lobbyists, can be placed in the same category.

We have more difficulty with that position. BERR argues that the CBI undertakes both roles, that of influencer and advisor, and it could be taking either role at any time in the various bilateral meetings and therefore these discussions are part of the same private space. Although there are no doubt occasions on which it can be said that CBI interests and the wider public interest coincide it should not be overlooked that it exists to promote a sectional interest." (paras 115 – 116)

The opportunity for others to raise counterbalancing arguments

That's not say that the Tribunal found there was no public interest in government having input from lobbyists such as the CBI. The Tribunal's point was that you could not divorce that input from the overriding motives of the lobbyists, i.e. that it existed to further the interests of those it represented. It is this which significantly alters the balance of the public interest in preserving the safe space. The Tribunal stated that;

"In our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy…. .This means that there is a public interest in the disclosure of information in relation to such deliberations even at the early stages of policy formulation. This to a large extent counterbalances the strong public

interest in maintaining a private space at the early stages of policy formulation… " (para 117 DBERR)

And in its conclusions the Tribunal found that;

"The interest lies not only in being able, as a matter of historical analysis, to determine 'what went on', but in being able to participate meaningfully in the debate. That can sometimes only happen at a point in time where there is still an opportunity to influence the debate; that is to say before policy is finalised. Looked at in this way, it is clear that the public interest in disclosure of communications between ministers and lobbyists may, in some circumstances, be at its highest at the time of those communications." (para 133 DBERR)

However the Tribunal and the ICO both recognised that the value in preserving private or safe space is also greatest at this very same time, i.e. whilst policy is still being developed (see LTT 43). This means that there will often be a very finely balanced public interest test which can only be decided on a case by case basis.

However there is a strong suggestion in para 117 DBERR that the Tribunal considered that the public interest in disclosure was higher where the lobbyists enjoyed "privileged access" to the government. Therefore it would seem appropriate to take account of the level of access the lobbyist had both in terms of frequency of contact and the level at which that access occurred, eg seniority of civil servants or minister, when balancing the public interest.

Information which is wholly internal

It should not be overlooked that a request for information relating to lobbyists may capture more than the records of the actual dialogue between lobbyist and government. It could also cover information that is wholly internal to government. For example it could include briefing documents on the latest internal thinking on a particular policy issue, or government's negotiating position with lobbyists. This matter was touched on briefly in Evans where one of the pieces of disputed information was a background note which briefed a new minister on a particular representative from a firm of lobbyists and his business activities. Ultimately

the Tribunal found that this note was exclusively the personal data of that individual and because of its contents was exempt under s40(2). However the Tribunal did comment at para 44 that **if** the background note had briefed on approaches that the minister may adopt on issues raised by the lobbyists;

"Requiring publication under FOIA would require the Ministry to disclose interim positions, expressed for example for the purpose of negotiation or stimulating debate. In the context of this meeting, called for a new Minister, where "the Whitehall Advisers spoke about the Defence Industrial Strategy" [this is how the request was phrased], there would be a significant inhibitory impact **if** the approaches suggested for the Minister to take at the meeting were disclosed before the Strategy was concluded." (Evans para 44) (emphasis added)

So it seems that where the information requested would disclose purely internal policy this will weigh in favour of maintaining the exemption and appropriate weight should be afforded to the public interest in preserving the safe space required for policy making in line with LTT 43. in accordance with that line the timing of the request will be a crucial factor when assessing the safe space arguments in such circumstances.

Alternatively if a background or briefing note discussed the actual negotiating positions that the government might take towards an actual lobbyists this could add weight to the public interest in favour of disclosure as it would reveal the nature of the relationship between lobbyist and government and the strength of the influence it exerted. Again the public interest would be finely balanced.

3) Chilling Effects

This section considers the weight to be given to public authorities arguments that disclosure would have a chilling effect on the contribution of lobbyists, i.e. that they would be less willing to provide free and frank views. The main points are bulleted below before being discussed in more detail.

- Lobbyists aim to influence government in the interests of those they represent and so would not easily be inhibited from making a free and frank contribution.
- Despite the arguments of some lobbyists such as the CBI that they act as both influencers and advisors (i.e. offer neutral advice to government) the tribunal found that the prevailing purpose of lobbyists is to exert influence.
- Furthermore other lobbyists provided evidence to support an alternative view, i.e. that they knew their discussions would not necessarily remain confidential but that this did not inhibit the candour of those discussions.
- Experience revealed that the risk of disclosure had not in fact altered the way lobbyists interacted with government.

The Chilling Effect

It is accepted that there is a public interest in maintaining the flow of valuable information from lobbyists to government. What then needs to be considered is whether the risk of disclosing the information in question will have a negative impact on the nature of the information provided by lobbyists so reducing its value to government, i.e would lobbyists be inhibited from discussing issues with government in a full and frank manner .

In Evans the Tribunal considered the public interest in maintaining s36 in relation to information on a meeting between a firm of professional lobbyists and a new minister. The Tribunal accepted "…that there may be **some** inhibitory effect caused by disclosure…" (para 35 Evans) (emphasis added) but that it was "…nowhere near as strong as suggested by the Ministry of Defence;" Commenting on the department's arguments it said;

"It seemed to us to give little weight to the role of the lobbyist : to lobby, to gain the necessary access and to get his clients' point across. A reputation for straight talking, for not tempering to the wind, must be a crucial part of a lobbyist's reputation. A lobbyist who pulls his punches and avoids controversy may come to exert little influence and enjoy little access, with consequent effects on his business….(para 32 Evans)

"….the opportunity to give advice to Ministers is sought after: those with an interest in the outcome are unlikely to be inhibited by fear of disclosure from getting their point across;"(para 33 Evans)

This approach is also supported by the Tribunal in DBERR in which it agreed with the ICO's argument that;

"…one could expect that a lobbyist, whose job it is to put views forward to government, would continue to do so robustly notwithstanding any fear of disclosure." (para 123 DBERR).

Informal meetings – influencing and advisory roles

In DBERR the department argued that representative bodies/lobbyists would be less willing to participate in the new informal meetings, as described under 'safe space', and exchange views in such free and frank manner if there was a threat of disclosure.

The department argued that in these informal meetings the CBI had both an 'influencing role' and an 'advisory role' i.e. that in participating in these informal discussions representative bodies/lobbyists did not always seek to influence government (para 54). **If** it had been accepted that the CBI did not always intend to influence government on behalf of its members then it follows that the incentive for expressing its opinions freely and frankly would be weakened.

However the Tribunal had difficulty in accepting this argument in relation to a body such as the CBI. Again quoting the tribunal from DBERR (para 116);

"BERR argues that the CBI undertakes both roles, that of influencer and advisor, and it could be taking either role at any time in the various bilateral meetings…. . Although there are no doubt occasions on which it can be said that CBI interests and the wider public interest coincide it should not be overlooked that it exists to promote a sectional interest. In the evidence before us the CBI describes itself as 'the voice of business' that has 'delivered for business: lobbying, campaigning and arguing the case for a better business environment.'"

And at para 118 the Tribunal found that;

"…it is not possible to distinguish between their influencing and advisory roles when its officials are meeting with government and that it would be naive to take any other view."

From this we can conclude that a representative body/lobbyist will generally be acting in the interests of those it represents and so would not easily be deterred from representing those interests as fully as possible because of the threat of FOI.

Contrary Evidence

In DBERR the Tribunal also took account of the evidence from other lobbyists, called by FoE as witnesses, who stated that they had no qualms over the disclosing information on the dialogue that they had with ministers. They explained that with the advent of FOI they did not regard the discussions as confidential. The Chief Executive of the UK Business Council for Sustainable Energy (UKBCSE) stated that;

"…he did not agree that disclosure of notes of meetings would make UKBCSE's dealings with BERR more circumspect or would otherwise reduce the value of their relationship. He was conscious that any notes of discussions that government takes may be liable to be released under FOIA or EIR." (para 67 DBERR)

Experience of FOI

Finally the Tribunal looked at evidence of whether there had in fact been any change in the behavior of the representative bodies/lobbyists since the Act came into force or the issuing of the original decision notice and concluded;

"….neither the CBI nor the EEF [Engineers & Employers Federation] appear to have altered their conduct at all in light of the Commissioner's Decision Notice. That appears to us indicative that the approach to meetings is unlikely to be substantially altered in practice, i.e. that there is unlikely to be a real chilling effect if there is a prospect of disclosure which of course there must be where a freedom of information regime is in place. There was no evidence of any actual loss of candour or frankness notwithstanding the fact that the Act had received the Royal Assent some five years before the

Request and following the Decision Notice. Therefore we are of the view that it is unlikely that the quality of information available to the Government will be substantively diminished as a result of the decision in this case." (Para 119 DBERR)

It should be noted that this line is based on two Tribunal cases where the lobbyists concerned were professional organisations whose jobs were to represents clients or members. There will be other lobbyists or pressure groups which are not professional organisations and my be campaigning on issues which they would characterise as being in the public interest rather than serving a private interest. Generally speaking such groups would have the same incentive as professional lobbyists to maximise their opportunities to influence government. It may also be that in some circumstances such lobbyists have less concern over the disclosure of information. This may be because there they have no 'private interest' to protect, or because it feels disclosure could serve to publicise its position and galavanise support for that decision.

4) Record Keeping

- Arguments that disclosure will lead to poorer record keeping should be given little if any weight.

In weighing up the public interest in maintaining s35 or 36 government departments often argue that disclosing the information would lead to poorer record keeping in the future. To date these arguments have generally related to the recording of internal advice or minutes of internal meetings and have been largely rejected see LTTs 50 & 61.

In two recent cases DBERR v ICO & FoE and Evans v ICO & MoD the Tribunal considered whether the risk of disclosure would have any impact on recording meetings with lobbyists. In Evans a witness for the department conceded that there had been no "general inhibitory effect" since the Act came into force and stated that regardless of the outcome of the case;

"…he would still advise candour in meetings and full recording. He would not himself, and knew of no one else who would, advise an Assistant

Private Secretary not to record a sensitive piece of information for fear of disclosure."(Evans para 31)

Evidence was also provided by a witness on behalf of the applicant that the experience in other jurisdictions showed little evidence that access regimes had had a negative impact on the recording practices of civil servants. However the tribunal seem to have given little weight to this evidence. (Evans para 34)

In DBERR similar arguments were raised by both the department and some lobbyists.

Ultimately the Tribunal found;

"In relation to the assertion that fewer meeting notes would be taken we recognise that the minutes clearly serve an important purpose in that they are relied upon by officials as a record of what is said by influencers to Ministers and others. However we consider it is unlikely that notes would cease to be taken or that they would become substantially less informative. Indeed the prospect of disclosure might have the beneficial effect of introducing a certain degree of rigour in drawing up notes." (DBERR para 126)

Although not a matter discussed by the Tribunal, the Commissioner considers that even before the advent of FOI there may have been occasions when civil servants avoided creating any audit trail of the involvement of lobbyists. If details of such meetings emerged and there were no records then this will only act to raise suspicion. This would support the tribunal's argument that FOI would actually encourage better record keeping as it would be in the civil servants' interests to keep a note of such meetings.

5) Effect of the Media

Arguments were raised concerning the consequences of the media misreporting the discussions between lobbyists and government if the requested information was disclosed. These were as follows;

- Misleading reporting could undermine the relationship between government and lobbyists.
- Media reports could damage a lobbyist's relationship with its members if provisional views were reported before the lobbyists had time to consult with it members and so act as a disincentive for lobbyists to engage with government.

The Tribunal in DBERR rejected these arguments. As a general rule we should give little weight to arguments that the policy process or the conduct of public affairs would be harmed by misreporting or misleading media reports

In DBERR both the department and some lobbyists, such as the CBI had placed great importance on building constructive relationships between government and stakeholders. They were concerned that biased reporting of the topics they discussed could undermine those relationships. The Tribunal concluded that;

"We find that information as to the nature and extent of relationships between lobbyists and the Government is not deserving of the same protection against media glare as express policy options being considered in the internal private space. In any case the Tribunal is entitled to assume that government departments and the CBI are capable of dealing with media intrusions." (para 129 DBERR)

Finally because of the informal nature of the meetings at which new and emerging issues were discussed, lobbyists/representative bodies often aired opinions or were asked for a 'quick steer' on matters on which they had not had the opportunity to consult their members over. It was argued that it would place the lobbyists in a difficult position if these informal positions were reported in the press before the lobbyist had discussed it with those it represented. (paras 63 – 64 DBERR).

The Tribunal commented that it was not convinced that the concern over a lobbyist's relations with those it represented was a relevant public interest consideration. The Tribunal did go onto say though, that even if it was to accept these concerns as a relevant public interest it did;

"…not believe it is beyond the capacity of the membership to recognise what has actually happened." (para 130 DBERR)

Guidance

This line has been withdrawn and incorporated into the external guidance on Government policy (section 35), Prejudice to the effective conduct of public affairs (section 36) and Interests of the person who provided the information to the public authority (reg 12(5)(f)).