

# Section 36 – Reasonable opinion

## Section 36

### Line to take

This document explains our change of approach to the definition of a 'reasonable opinion' in section 36 FOIA. It sets out the problems with our previous approach, the options for change we considered and the reasons for our new approach. It is intended as a background document for case workers and others who require a further explanation of how we have arrived at our new approach. It should be read in conjunction with the guidance document itself and the internal guidance for caseworkers on common problems and issues.

### Further information

#### Introduction

Our previous approach was that, in order to be reasonable, the qualified person's (QP's) opinion must be both reasonable in substance and reasonably arrived at. This is taken from the Tribunal in [Guardian & Brooke](#) (at §64), which was endorsed in [McIntyre vs Information Commissioner and MoD](#) (at §31) with the caveat that even where *'the method or process by which that opinion is arrived at is flawed in some way'* (i.e. it is not reasonably arrived at) the opinion may still be reasonable if it is *'overriding reasonable in substance'*.

However, this approach creates problems of interpretation and terminology and problems in practice.

#### Problems with our previous approach

##### 1. Problems of interpretation

The basis for the two-part test is not entirely clear. The Tribunal in [Guardian & Brooke](#) appear to have derived the requirement that the opinion be reasonably arrived at from a 'golden rule' interpretation of the Act ('we

*derive this conclusion from the scheme of the Act and the tenor of s36' – at §64). They said that the fact that the reasonable opinion of the QP is required for the exemption to be engaged "is a protection which relies on the good faith and proper exercise of judgment of that person." The QP is therefore "required by law to give proper rational consideration to the formation of the opinion". Finally, because the opinion is a judgement about what will happen in the future, if the basis of the opinion (i.e. the process) could not be examined it would in many cases be effectively unchallengeable - to which they added 'we cannot think that that was the Parliamentary intention.'* The question is whether this finding (which in any case is not binding on us) warrants the establishment of a rigid two-part test, both parts of which must be 'passed', unless the *McIntyre* caveat applies.

Furthermore, there is a question as to what extent the [Guardian & Brooke](#) Tribunal's approach is influenced by, if not derived from, judicial review (JR) criteria. They made a point of saying (at §56) that they had not been referred to [Lord Falconer's references to judicial review](#) during the passage of the Freedom of Information Bill and so had not taken account of them. Nevertheless, their comments at §64 on '*taking into account only relevant matters and ignoring irrelevant matters*' reflect the *Wednesbury* test of reasonableness and JR criteria.

## **2. Problems of terminology**

Secondly, the terminology is still not clear. The Tribunal in [Guardian & Brooke](#) did not define what they understood by 'reasonable in substance'. When they considered it (at §60) they were mainly concerned with dismissing the reference in our earlier guidance document to an opinion within '*a range of reasonable opinions*'.

Similarly, the Tribunal in [McIntyre vs Information Commissioner and MoD](#) did not define what they meant by an opinion that was 'overridingly reasonable in substance' as opposed to one that was merely 'reasonable in substance', yet this is an important distinction as it provides a way of finding that the QP opinion is reasonable when it does not satisfy the two part test. Our own suggested criteria in LTT35 are admitted not to be definitive.

### **3. Problems in practice**

An analysis of DNs, together with feedback from case workers, shows the practical problems that flow from the interpretative issues. Despite ostensibly having a two-part test, we are reluctant to find that an opinion was not reasonable purely on the basis that it was not reasonably arrived at. If we find that an opinion was not reasonably arrived at, we will consider whether it was nevertheless reasonable in substance; if it is, we are likely to class it as 'overridingly reasonable' in order to overlook the flaws in the reasoning process.

Case workers have suggested that we should either have a more prescriptive approach, insisting on reasonably arrived at and being willing to find that s36 is not engaged where this is lacking, or concentrate solely on whether an opinion is reasonable in substance.

#### **Options considered**

Three options for resolving these problems were considered:

##### **Option 1: Base our understanding of 'reasonable' on JR criteria**

This had the advantages of providing well established criteria and requiring consideration of the reasoning process and evidence of how the decision was reached.

However, this overlooks a fundamental difference between the two areas of law. Where the court in a JR case finds that an administrative decision was unreasonable, the outcome is that the decision is remitted back to the authority concerned; where we find that the QP opinion is unreasonable, the outcome is that the information is released (unless of course another exemption applies or the DN is appealed).

A rigid application of the two-stage test based on JR criteria creates the risk of locking us in to an outcome that may not be appropriate, simply because the authority and the QP had not approached the decision-making process properly.

Moreover, while Lord Falconer's comments can be read as a general statement about reasonableness, it is not clear that there is a [Pepper vs Hart \(external\)](#) justification for relying on them as an aid to interpretation.

### **Option 2: Develop our own definition of reasonable opinion**

This has the advantage of allowing us to use elements of other approaches without being bound by them, in order to develop a definition, we consider logical, clear, robust and workable. It also allows us to define the evidential requirements we are looking for. The disadvantage is that we are developing a definition by force of argument, against a background of Tribunal decisions which have largely accepted the Guardian & Brooke and McIntyre approach

[This was the option chosen.](#)

### **Option 3: Continue and develop our current approach**

This means accepting the current Guardian & Brooke and McIntyre approach but doing more work to clarify and strengthen it. It is essentially the status quo but with more explanation. This has the advantage that it follows the approach followed by most Tribunals Guardian & Brooke and McIntyre. The weakness of this approach is that it does not address the fundamental problems outlined above.

### **Our new approach to reasonableness**

The new guidance document on section 36 is intended as a clear public statement of what we consider to be a reasonable opinion. The following comments support this and provide some further explanation.

We are basing our understanding of 'reasonable' on the plain meaning of the word. We will avoid adopting other definitions drawn from other areas of law or inventing a new meaning. For convenience, the definition in the Shorter Oxford English Dictionary can be used: "*in accordance with reason; not irrational or absurd*".

The opinion only has to be *a* reasonable opinion. An opinion that *a* reasonable person could hold is a reasonable opinion. It does not have to be the *only* reasonable opinion that could be held, or the 'most' reasonable opinion. We do not have to agree with the opinion; we only have to recognise that a reasonable person could hold it.

An opinion either is or is not reasonable. We should not say that the opinion is within a range of reasonable opinions. The term 'range' is misleading as it implies that some opinions are more reasonable than others. For this reason, it was rejected by the [Guardian & Brooke Tribunal](#) at §60.

While an opinion that is absurd is not reasonable, that is not the same as saying that any opinion that is not absurd is reasonable. That was essentially the position we adopted before [Guardian & Brooke](#) and we should avoid saying it now because it is misleading. Rather, we should be asking whether the opinion is in accordance with reason, i.e. is it an opinion that a reasonable person could hold?

We are looking at the substantive opinion itself. The substantive opinion is simply whether the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. We are not assessing whether the process by which this opinion was reached was reasonable (i.e. whether it was reasonably arrived at). The guidance says that PAs should document the process by which the opinion was reached, the factors considered and the reasons for the final opinion. This is in order for us to decide whether the final, substantive opinion was reasonable. The guidance makes the point that there may be situations where an opinion may appear on the face of it not to be reasonable, but when the background to it is explained it may be accepted as a reasonable opinion to hold. If PAs do not record and provide this, they run the risk that we may find the exemption is not engaged.

All of this implies that reasonableness is not intended to be a high hurdle. Provided the criteria are met we can accept that the opinion is reasonable. We still have scope in the PIT to consider whether the exemption should be maintained. The main focus of our consideration is likely to be on the PIT rather than on the engagement of the exemption

