IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2015/0258

BETWEEN:

LAWRENCE SEREWICH

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

Before

Brian Kennedy QC
Michael Hake
Mike Jones

Date of Hearing: 19 May 2016 and 7 June 2016, at Field House, London.

DECISION

Subject matter: Application of section 36(2)(b)(ii) (inhibition to the free and frank provision of advice) , section 36(2)(c) (other prejudice to the effective conduct of public affairs) and section 40(2) (personal information), of the Freedom of Information Act 2000 ("FOIA").

The Tribunal dismisses the appeal.

REASONS

Introduction:

1. The decision concerns an appeal of a Decision of the respondent ("the Commissioner") dated 7 October 2015, reference: FS50581473 ("the DN").

2. In the DN the Commissioner held that the Public Authority, in this case the Home Office ("the HO"), (later joined as the second Respondent herein) had correctly withheld requested information from the appellant pursuant to s 36(2)(b)(ii) with the applicable public interest test favouring the maintenance of that exemption.

3. The Tribunal is provided with a bundle of documents refereed to herein as the Open Bundle, ("OB") pages 1 – 86, and a bundle including the requested information referred to as the Closed Bundle ("CB") pages 1 – 20.

4. **Factual Background to this Appeal:**

Full details of the background to this appeal, Mr Serewicz's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether disclosure of a letter sent by Professor Graham Smith to the Home Secretary explaining why he would not take up his post on the Daniel Morgan Independent Panel engages the exemptions in ss36(2)(b)(ii), 36(2)(c), and 40(2) FOIA .

5. **History and Chronology:**

21st January 2015	Appellant's Request
10th February 2015	Home Office refusal, citing s40(2)
11th February 2015	Appellant requests an internal review

7th May 2015	Appellant complains to ICO *re* delay in internal Review.
10th June 2015	HO refuses, citing s36(2) *withdrawing reliance on s40(2)**)***
	Appellant complains to ICO
7th October 2015	Commissioner's Decision Notice

6 The Daniel Morgan Independent Panel was established by the Home Secretary in 2013 to investigate the murder of Daniel Morgan, failed investigations and allegations of police collusion. The process was modelled on the Hillsborough Panel, focusing on academic research into documentary material, private examination of witnesses and special emphasis placed on the wishes of the victim's family. Graham Smith was appointed to DMIP in September 2013. In March 2014 he wrote to the Home Secretary, raising concerns about how the panel process had developed. At that stage he remained a member of the panel but was not actively working on it, and his appointment did not continue.

7. **Relevant Law:**

S36(2) Prejudice to effective conduct of public affairs:

(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) would, or would be likely to, prejudice –

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the Cabinet of the Welsh Assembly Government.

(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 for the purposes of deliberation, or

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

S40 Personal Information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the M1Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the M2Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the M3Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

8 **First Respondents Decision:**

Exemption Section 36(2)

The Commissioner reasons that the s36(2)(c) exemption should only be cited where the prejudice identified could not be covered by any other subsection of s36 nor by any other Part II exemption. S36 can only be cited on the basis of a ***reasonable opinion from a specified qualified person*** i.e. Minister of the Crown. This opinion does not need to be the most or only reasonable opinion. In this case Mike Penning, Minister for Criminal Information acted as QP submitted an opinion to the Commissioner that disclosure would result in panel members questioning whether their exchanges with the Home Office would remain confidential and thus inhibiting those exchanges. The Commissioner found that the disputed information was of a free and frank nature, which is a relevant consideration, and accepts that it is reasonable to believe that disclosure would have an inhibitory effect on future panel members' discussions with the Home Office. This Tribunal agree with and adopt this analysis.

Public Interest

The Home Office (Second Respondent) argued that disclosure would inhibit not only DMIP but also other panels beyond the instant issue. The Commissioner accepted the considerable importance of frank panel discussions, and the severity of the consequences if that were impeded. There is, the Commissioner argues, significant and legitimate public interest in this information as it relates to the proper conduct of police murder investigations. However, the effective operation of DMIP is also a matter of public interest.

On the other hand, the Appellant argues that the timescale of matters (i.e. resignation in December 2013, letter in March 2014, replacement of chair and some members) means that there is little risk of prejudice, especially as the Home Office reports that the panel is now working well. The Commissioner states that the concerns recorded within the disputed information would actually have rendered the public interest in disclosure *stronger* had they related to the current state of DMIP. As such the public interest lies in non-disclosure, and it is not necessary to consider ss36(2)(c) or 40(2).

NB the Commissioner criticised the Home Office for not approaching a Qualified Person until 15th May 205, over three months after the internal review was requested, stating that the matter of delay may be revisited in future cases involving the Home Office should the need arise.

9. **Appellant's Notice of Appeal:**

Ground A – cannot raise s36(2) at an internal review

The appellant argues that Commissioner should not have allowed the late application of s36(2). The constant changing of the Home Office's position has rendered the process "arbitrary and uncertain". The Home Office admitted its response to the request for the internal review that s40(2) was the "wrong exemption". In *Roberts v ICO and DBIS* EA/2009/0035 the Tribunal stated that the issue to be considered in an internal review in a case applying s36 was whether the underlying context to the information or situation had changed. As the underlying situation had not changed, the Appellant argues that the Home Office's first position (i.e. s40(2) only) is binding and they should not be entitled to add a late reliance on s36(2).

Ground B - S40(2) does not apply

The Appellant states that he has discussed the release of the letter with the author through email, and the author has no objections to its release. As such, the information cannot be deemed personal under s40(2) if it does not run contrary to the privacy and wishes of the data subject. In its initial rejection under s40(2) the Home Office did not mention any of the three factors in the ICO Guidance; namely, consequences of disclosure on the individuals, their reasonable expectations and the legitimate interests of the public in having access to the information.

As all panel members and the Home Secretary are public figures, there is limited impact on them through disclosure. As for reasonable expectations, the author has not indicated that he wants his letter to be confidential, and indeed has given a public interview on the subject. Whilst the Home Office stated in the internal review that the correspondence was marked correspondence, they abandoned this approach following the internal review and chose to rely solely on s36. There is a legitimate interest in disclosure as Professor Smith indicated that there was a

difference in opinion as to how the panel was run leading to the replacement of two initial appointees. The different philosophies are important for the public to understand when the panel is examining an issue as important as police corruption, and there is a potential risk that the victims and families will be marginalised when the approach is judicial and inquisitorial rather than collegial and consensual. The Home Office did not consider whether redactions could resolve any concerns.

Ground C – public interest

The Appellant argues that neither Respondent has fully explained how the public interest is best served by prohibiting disclosure. As Mr Smith was not taking up his post, the nature of his communications with the Home Office are of a completely different character to the interactions it will have with the panel members, and the Respondents have not explained how disclosure would prohibit free and frank discussions. As DMIP was set up using the template of the Hillsborough Inquiry, the contents of the letter are necessary to allow the public to hold this panel and its workings to account. The idea that panel members will shirk their public duties and that other public inquiries will grind to a halt is "dystopian" and unrealistic given that they function perfectly well in the event of unauthorised 'leaks'.

10. **The Commissioner's Response:**

Ground A – s36

The Commissioner argues that the Tribunal should only consider whether the Qualified Person's opinion was reasonable, and should not substitute its own view for that of the Qualified Person if the view is objectively reasonable: *Guardian Newspapers and Brooke v IC and BBC* IT, 8 January 2007 at [54]. The Tribunal should give weight to the opinion of the Qualified Person but form its own view of the severity, extent and frequency of the inhibition that is likely to occur.

A public authority may rely on new exemptions for the first time before the Commissioner or Tribunal: *Birkett v DEFRA* [2001] EWCA 1606. There are conflicting decisions of the First-Tier Tribunal however regarding s36:

- *Sugar v IC and BBC* EA/2005/0032 at para.10: the opinion of the QP does not need to have been obtained at the time of the request, only obtained before the exemption is claimed.
- *Student Loans Company v ICO* EA/2008/0092 at para.36: in that case the facts relied upon in the QP were not in existence at the time of the request and so s36 cannot be relied upon. This was followed in *Roberts*,
- *University of Central Lancashire v IC and Colquhoun* EA/2009/0034: the Tribunal expressly declined to follow *Student Loans* and *Roberts* and allowed the public authority to rely upon s36.

None of these cases preclude a public authority from changing its stance between initial refusal and its own internal review: this was permitted in *MOD v ICO and Evans* EA/2006/0027 and also in *Roberts* at para.29. There is no justification to treat s36 differently to any other exemption and create a trap for public authorities.

Ground B – s40(2)

The Commissioner did not address the s40(2) exemption.

Ground C – public interest

The Commissioner considers that the Qualified Person formed a reasonable opinion that disclosure would inhibit the sharing of view from other panel members. The main body of the disputed information cites "what was surely intended to be private correspondence between panel members". The Commissioner also considered that the inhibition could extend to members of future panels. Whilst acknowledging that prejudice diminishes with the passing of time (but has not extinguished), the public interest in disclosure of this information is reduced as new members have been appointed, matters have moved on and the panel is 'working well'. Having seen the disputed information, the Commission considers that the concerns raised in that information have largely been addressed. As DMIP may set a precedent for future panels, there is an imperative that its proper functioning not be unnecessarily impeded by damaging disclosure of confidential communications.

The Commissioner also disputes the Appellant's contentions that Mr Smith was not yet a member of the panel, noting that he signed the covering letter "Graham Smith/ Member: DMIP". Nothing turns on this in any event, as the correspondence expresses views formed from confidential internal discussions and decisions of the panel, provided in confidence to the Home Secretary and family of the deceased.

11. **Appellant's Response:**

Ground A – s36(2)

The Appellant does not assert that s36 cannot be relied upon at an internal review; rather he argues that it has been applied incorrectly as it is dependent upon the caprices of a public authority deciding whether or not it is reasonable, and that the authority's characterisation of reasonableness is unchallengeable. He cites *CC Surrey Police v IC* EA/2009/0081 at para.55 for the proposition that if a particular exemption was not considered or even alluded to, the Commissioner can assume that that exemption is not the subject of a Qualified Person opinion as contemplated by the legislation.

He raises the point that the delay that has caused the public interest to diminish has largely been caused by the Home Office itself, and it should not be allowed to rely upon a detriment of its own making with the tacit permission of the Commissioner. He again highlights that many resignation letters have been made public either by their authors or through leaks, and neither government nor review panels have "ground to a halt".

Regarding Mr Smith's 'resignation' letter, it is clear from correspondence that he never took up his post for the way the panel was constituted and conducted. There is a clear public interest in knowing why DMIP did not operate successfully if it was constituted on the basis of the successful Hillsborough Model, and whether the government is abandoning the collaborative Hillsborough Model.

He questions why the Commissioner has not answered the s40(2) points to confirm that the Appellant is correct in asserting that this exemption does not apply. He sees it as material to his argument that the Home Office only switched its reliance to s36(2) when it realised that it could not sustain an argument under s40(2).

12. **Home Office Response:**

If the Tribunal allows a public authority to rely on new exemptions at appeal stage, then *a fortiori* it must be permitted to add additional exemptions before the matter has even reached the Commissioner, citing *Bickett* and *Dransfield.*
Disclosure would be likely to prejudice the administration of justice or the exercise of the public authority etc., and would prejudice the effective conduct of public affairs. It maintains as well that the information contains personal data, as it is personal correspondence providing personal opinions.

13. **The Evidence:**

The Tribunal has had the benefit of reading and considering the written evidence as submitted on behalf of the Home Office by its witness, Ms Cecilia French. The Tribunal has also had the benefit of hearing oral evidence given by Ms French, who was cross-examined by the Appellant at the hearing of this appeal.

Ms French submitted a fairly brief and focussed witness statement dated 5 April 2016. In it she states that she is now the Senior Responsible Officer for the DMIP. Much of the witness statement deals with the general factual background behind the DMIP and describing the circumstances in which the closed material, which forms the subject of this appeal, came about. The Tribunal does not consider that these elements of Ms French's evidence should be substantially in dispute.

At section "D" of her statement, Ms French goes on to outline the reasons why the report should not be disclosed. The reasons given by Ms French are consistent with those outlined in submissions by the Respondents and therefore do not need to be rehearsed in great detail.

Briefly, Ms French makes the following observations: -

a) The report from Dr Smith was written specifically for the Home Secretary's attention and was not intended to be distributed more widely;
b) Panels such as the DMIP need a "safe space" in which panel members are able to communicate with each other and with Ministers on the understanding that they will be able to do so freely and frankly without the worry that anything they say will be subject to premature disclosure;
c) Disclosing this report now may have a "chilling effect" on future panels, which would be prejudicial to the proper and effective functioning of those panels;
d) Since the DMIP is still current, any premature disclosure may prejudice its work

In her witness statement, Ms French also questions whether the public interest would best be served by disclosure of a report drafted by a former panel member, which contains his personal views on the operation of the DMIP. She maintains that the public interest is best served by the DMIP being able to function effectively and conclude its deliberations without the distraction and other prejudice which disclosure would cause.

Mr Serewicz cross-examined Ms French and explored a number of avenues of questioning with her.

Mr Serewicz questioned whether the public interest was best met by releasing the report. He put it to Ms French that the Home Office was worried that releasing the report would damage its own reputation. The Appellant placed emphasis on the fact that the QP was involved with the Home Office and that the QP could not be independent of the Home Office's interests. Mr Serewicz also suggested that it is possible that the author of the report may consent to it being published.

Ms French was resolute in her response that the Home Office wanted the panel to succeed and that that aim would best be met by keeping the report private. She denied that the Home Office was concerned about its own reputation and stressed that they were anxious for the DMIP to be successful.

The Appellant questioned the extent to which the Home Office were influenced by press releases. Again, Ms French maintained that the Home Office's greatest concern was that the DMIP was successful.

The Appellant placed a great deal of emphasis on the fact that the justification for seeking to withhold the information had changed from s.40 (2) to s.36 between the internal review and the appeal. He sought reasons for why this had changed. Ms French was frank in her admission that the Home Office had originally considered s.40 (2) to be the apposite mechanism, but that it had now transpired that this was a mistake.

The Appellant also went into some detail about the decision-making process behind deciding which justification would be used to attempt to withhold information.

Throughout the cross examination, Ms French maintained that the public interest was not best met by releasing the report. She maintained that the panel needed to operate in a "safe space" so that panel members could be frank and open with each other. She furthermore maintained that the preservation of the "safe space" was important to future panels, which might deal with highly sensitive topics. She said that releasing the report would likely lead to media speculation which would be damaging to the DMIP.

All in all the Tribunal found Ms French to be a highly reliable and credible witness. She was forthright in her responses and gave consistent evidence that releasing the report was not in the public interest. The Tribunal has no reason to question the factual veracity of the evidence she has presented and is satisfied with the responses she gave in cross-examination.

14. **Discussion:**

There are in effect three areas of dispute: -

i) Is s.36(2)(b)FOIA engaged;

ii) Does the public interest in maintaining the exemption outweigh the public interest in disclosing the disputed information;

iii) If s.36(2)(b)(ii) is not engaged, is there another justification for non-disclosure under the provisions of FOIA

Is the exemption in s.36(2)(b)engaged

The ICO found that this exemption was engaged. The reasons for so finding were twofold. Firstly, the QP had given an opinion that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation. Secondly, they found that that opinion was reasonable.

The Appellant contends that the s.36 exemption is not engaged. He essence of this contention is that he claims it was raised at too late a stage. The Appellant contends that, since s.40(2) was the original exemption relied upon, the Home Office cannot change their position and rely on a different exemption at the internal review stage.

In effect, the Appellant's argument is that something substantial happens between the original decision and the internal review. He claims that the purpose of the internal review is simply to decide whether the original decision was correct on its own terms; not whether the decision was correct in all the circumstances.

Turning first to the statutory scheme, it is apparent that the IC is only intended to become involved when the internal complaints procedure, which is provided by the public authority, has been exhausted. This is provided for specifically at s.50(2)(a) FOIA.

Parliament's intention is clear from the face of FOIA, namely that the IC is intended to review a public authority's final decision. If the public authority has an internal complaints procedure, then the IC will consider its final decision, not its initial decision. This system allows the public authority to correct its decision if it has made an initial error.

In light of this, it must be the case that a public authority can change its position – including adding or omitting a justification for non-disclosure – between the initial decision and the internal review. Accordingly, it is not material that the HO originally sought to justify non-disclosure on the basis of s.40 (2), because in its final decision it relied upon s.36 (2)(b) instead.

It is then important to turn to the case law. A number of cases have been brought to our attention, which look at whether a s.36 exemption may be relied upon at the Tribunal or Commission stage, which is to say, after the internal review stage. Notably, in the case of *Birkett v. Defra* [2011] EWCA Civ 1606 it was held that, subject to the Tribunal's case management powers, a public authority may rely on new exemptions for the first time before the Commission or the Tribunal.

The Tribunal considered in *Sugar v. IC* and *BBC* IT, 14 May 2009 (EA 2005/0032) that, upon the proper interpretation of s.36 (2), it is only necessary that "the reasonable opinion is obtained […] before the exemption is claimed." Therefore, provided the QP's opinion engaged s.36 (2), whether expressly or not, it could be relied upon at the Tribunal stage notwithstanding that it was not expressly referred to in the original decision.

In *Student Loans Company v. ICO* IT, 17 July 2009 (EA/2008/0092), it was considered that s.36 could not be relied upon at the Tribunal stage. The Tribunal's reasoning in that case was that the QP's opinion had not been obtained either during initial consideration or the internal review. Therefore, the Tribunal reasoned, "the facts required to engage the exemption were not in existence at the time when the request was originally dealt with."

Although one case allowed a late reliance on s.36 (2) and the other did not, the reasoning is consistent. If the QP had formed an opinion that disclosure would prejudice the effective conduct of public affairs, whether his opinion was framed in those terms or not, he could rely on s.36 at a later stage, provided he had formed that opinion before he intended to rely on the s.36 exemption.

If a new exemption is permitted to be brought at the Commission or Tribunal stage, it must *a fortiori* be permissible to do so at the internal review stage. This is particularly so in light of the interpretation of statute discussed above.

In light of the above, the Tribunal finds that the Appellant's argument that s.36 (2) is not engaged is without merit. There is nothing in the authorities or in statute, which precludes a public authority from relying on one exemption in its original decision and a different exemption at the internal review stage. On the contrary, allowing the public authority an opportunity to come to the correctly reasoned conclusion is a central principle in avoiding unnecessary complaints or litigation.

For these reasons, the Tribunal finds that s.36 (2) is engaged.

Reasonableness of the Opinion:

The Appellant claims that the QP's opinion was not "reasonable" because it does not consider the public interest for disclosure in sufficient detail. The Appellant states in his grounds of appeal that the Commissioner's decision "did not address how the disclosure would harm the public interest."

It is important to note that the wording of s.36 (2) does not require the QP to carry out the public interest test himself. The Statute provides only that: "*information […] is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information […] would, or would be likely to, inhibit the free and frank provision of advice […]*"

What is required, therefore, is that the QP must decide whether disclosure would inhibit the free and frank exchange of views. To this extent, the QP does not need to concern himself with applying the public interest test; he must only decide whether disclosing the information would inhibit the frank exchange of views.

In *Guardian Newspapers and Brooke v. IC and BBC,* IT, 8 January 2007, the Tribunal made clear:

> *the first condition for the application of the exemption is not the Commissioner's or the Tribunal's opinion on the likelihood of inhibition, but the qualified person's "reasonable opinion." If the opinion is reasonable, the Commissioner should not under s.36 substitute his own view for that of the qualified person. Nor should the Tribunal.*

In light of this, it is clear that it is not for this Tribunal to substitute its own views on the likelihood of inhibition, but rather to examine whether the QP's opinion is "reasonable" in respect of that inhibition. The Commissioner must only consider whether the QP's opinion was one that a reasonable person could hold, however the Commissioner was entitled to form his own view of the severity, extent and frequency of the inhibition.

The reasons for the QP's opinion that publication would result in inhibition are contained in the submissions made to the Commissioner and are discussed in the Commissioner's decision. They do not need to be extensively rehearsed here, although they can be summarised briefly.

The QP's opinion is formed in the context that the Disputed Information was shared with the then Home Secretary and the Morgan family and was not intended for wider publication. The QP concluded that members of the DMIP, and any members of future panels, would not be so free and frank if they feared that their communications with the HO on sensitive issues would be disclosed.

Another concern relates to the fact that the DMIP is currently on-going and that any disclosure would prejudice its proper and effective functioning. The QP noted that the DMIP is now working well, and it would not be in the public interest to disrupt its work by allowing information relating to former members, which may prove controversial, to disrupt from its current focus.

The QP's reasoning is consistent with the evidence the Tribunal heard from Ms French. Ms French explained in her evidence in some detail that panels like this need to operate in a "safe space" and that prematurely disclosing information of

this nature would both disrupt the “safe space” in the DMIP, but would also prejudice the operation of future panels.

Having considered the submissions, in tandem with the evidence of Ms French, this Tribunal is satisfied that the QP’s opinion is within the range of reasonable responses. He has considered relevant information and drawn a logical conclusion from it. It is not the QP’s responsibility to undertake the public interest test, nor is it his responsibility to consider whether the author of the report would consent to the information being released. He had only to consider whether publishing the Disputed Information would have an inhibiting effect, and concluded that it would. We see no reason why this conclusion falls outside the range of reasonable responses.

For these reasons, the Tribunal considers that the QP’s opinion was “reasonable” and therefore sees no reason to disturb the QP’s finding that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

In light of the above findings, it is not necessary to consider whether any other exemptions apply. The findings in relation to question (i) and (ii) above are sufficient grounds to dismiss the Appeal.

15. **Conclusions:**

It is clear from the above that the Tribunal is satisfied with the reasons and arguments put forward by the public authority and by the commissioner. Insofar as is not already made clear above, the Tribunal is entirely satisfied that s.36 (2) is engaged and that the QP’s opinion was within the range of reasonable responses.

The main ingredients of the relevant public interest in favour of maintaining the exemption have been outlined above. They relate largely to the safeguarding of the panel investigation process. More particularly, they include the protection of a safe space for panel decision-making, and the preservation of confidentiality,

without which the entire panel method of investigation would be prejudiced. The emphasis on the importance of the confidence of families or persons engaged in the process carried particularly great weight on this Tribunals decision that the public interest was best served by non-disclosure. These matters have a very substantial weight, and the QP was entitled to find them determinative when he formed his opinion.

For the reasons outlined above, the Tribunal dismisses the Appellant's appeal and upholds the decision of the Information Commissioner.

16. The Tribunal apologies for the delay in promulgation of this decision due to circumstances beyond our control.

Brian Kennedy QC 21 November 2016.