



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0069

**GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**The Information Commissioner's
Decision Notice No: FS50267373
Dated: 10 March 2011**

Appellant: William Thackeray

Respondent: Information Commissioner

Decision decided on the papers alone

Before

**David Marks QC
Tribunal Judge**

Paul Taylor

Darryl Stephenson

DECISION

The Tribunal dismisses the Appellant's appeal against the Decision Notice of the Information Commissioner ("the Commissioner") under reference no. FS50267373.

REASONS FOR DECISION

General

1. This appeal raises essentially two relatively short points, though one, namely the first, is not without difficulty. In relation to the first point, the issue raised is whether the opinion of a qualified person required by and referred to in section 36(2) of the Freedom of Information Act 2000 (FOIA) can be validly relied on if it is obtained after a stipulated period but before or at the time of an internal review, i.e. after the statutory twenty day period provided by the statute in relation to the response to a request made for information.
2. The second issue concerns the scope and meaning of “legal professional privilege” within the terms of section 42 of FOIA and in particular whether such privilege can be invoked in the case of so-called litigation privilege, but where judicial proceedings which have been formally instituted are subsequently withdrawn.
3. There is what could be called a third submission. It has been raised at a relatively early stage of the present proceedings although not in the Grounds of Appeal as such. Nonetheless, it gave the Commissioner and the public authority the opportunity to address it in sufficient time prior to the termination of this appeal. The question raises largely an issue of fact, but also questions of legal policy within the context of section 36 of FOIA. The issue is whether or not, and if so to what extent, a qualified person for the purposes of that expression as used in section 36, must consider a request under FOIA and the application of the exemption or exemptions presented in respect of that request and must in all the circumstances of necessity look at the disputed information before coming to an opinion as provided by that section. This matter will be dealt with towards the conclusion of this judgment.

Background

4. The Appellant made a request in writing on 3 July 2009 for information to the Home Office as the relevant public authority. The request stated:

“Please provide a copy of your papers on Scientology, including but not limited to –

- (1) Judicial review
- (2) Immigration and Nationality including passport issues
- (3) Charitable status.”

5. The Home Office sent a response on 17 June 2009. It disclosed certain information, the remainder being withheld and the Home Office relied on the exemptions in section 27(1)(a) (relations between the UK and other States, etc.), section 32(1)(a) (documents in the control of a court, etc), section 36(2)(b) (the inhibition of the free and frank provision of advice, etc), section 42(1) of FOIA (legal professional privilege). Their refusal was upheld following upon an internal review on 18 November 2009. It was at that stage that the opinion of the qualified person was obtained.
6. The Tribunal notes that in its response of 17 July 2009 the Home Office referred to the fact that there had been presented a similar request for the same information but not from the Appellant. In its letter the Home Office stressed that its “response remain[ed] unchanged”. It added that the files were “fully reviewed at the time of the original request and redactions were made in accordance with the Act”.
7. Although no mention is made in that letter of any provision of an earlier qualified person’s opinion for the purpose of section 36 the Tribunal notes from the open bundle that it has got that the submissions which are made with regard to the present request by the Appellant included a copy of the submissions made in respect of the earlier request.
8. The Tribunal will refer to additional observations stemming from these facts below. However, it is clear that to some extent the Home Office appeared to treat the Appellant’s request as a form of “appeal against” the original decision by the Commissioner. Therefore to some extent the Tribunal understands and even sympathises with the approach set out in the Home Office’s

response in relation to this case. However, the fact remains that there was in the event a delay in the provision of a qualified person's opinion with regard to the Appellant's request.

The Decision Notice

9. The Commissioner's Decision Notice is dated 10 March 2011. It is quite lengthy and contains a number of findings, not all of them directly relevant to the two principal issues in this appeal. As the Commissioner's Response in the Tribunal's view properly states, there were in effect seven findings.
10. First, there was no "real and significant risk" of the likelihood of prejudice to the relationships between UK, France and Germany (since those countries also had connections with the Church of Scientology) and therefore section 27(1)(a) was not engaged.
11. Second, one particular document, namely, a skeleton argument relating to judicial review proceedings was exempt under section 32(1)(a). Third, section 35(1)(a) was relied on in relation to extracts from three specific documents. As to two extracts, the Commissioner was satisfied that section 35(1)(a) was engaged.
12. As to the third document, the Commissioner found that section 35(1)(a) was not engaged. In relation to the first two documents, the Commissioner determined the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
13. Fourth, with the exception of certain information which was identified in paragraph 56 of the Decision Notice, the Commissioner determined that section 36(2)(b)(i) and (ii) of FOIA were engaged and that the public interest in maintaining the exemptions in question outweighed the public interest in disclosure. As for the information referred to in paragraph 56, neither subsection was engaged.
14. Fifth, the Commissioner determined that section 40(2) was engaged with regard to personal data relating to certain individuals who had been referred

to as junior officials. He did not, however, accept that personal data relating to non-junior officials in their professional capacity was so exempt.

15. Sixth, the Commissioner found that with regard to reliance having been placed on section 41(1) with regard to a letter received by the Home Office from the legal representatives of the Church of Scientology, the information set out in that letter had the necessary quality of confidence and therefore could be regarded as having been given in confidence. However, he also found that no detriment would be caused to the confider by disclosure. Section 41(1) was therefore not engaged.
16. Seventh and finally, with regard to reliance being placed on section 42(1) in relation to other specific documentation, the Commissioner found that in relation to some, but not all, of such information, section 42 was properly engaged and that with further regard to the said information as fell within the scope of section 42(1), the public interest in maintaining that exemption outweighed the public interest in disclosure.

Section 36 and 42

17. In relevant part, section 36 provides as follows, namely:

“(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 –

- (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 ...”

18. In relevant part, section 42 provides as follows, namely:

“(1) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information ...”

19. In his Response, and in dealing with section 36, the Commissioner pointed to a number of relevant factors with regard to the operation and scope of that exemption.
20. First, he pointed to the reasonably well established principle (at least at Tribunal level) that the operation of the qualified person referred to in the provision must be reasonable in substance and reasonably arrived at. See e.g. *Guardian & Brooke v the Information Commissioner and BBC* (EA/2006/0011 and 0013, especially at paragraph 64).
21. Second, the Commissioner drew specific attention to what he called caveats which were imposed in relation to the above principle in another and more recent Tribunal decision, namely, *McIntyre v IC and MoD* (EA/2007/0061) at which the following passage appears at paragraph 31, namely:

“Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is reasonable opinion. Secondly, we take a broad view of the way the opinion is reasonable [sic] arrived [sic] so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review.”
22. In the present case, the Commissioner had noted at paragraph 46 of the Decision Notice that the qualified person’s opinion was not sought until the internal review and, secondly was given on 18 November 2009, as it was put, “well outside twenty working days from the date of the request.” The Commissioner had also pointed out at paragraph 46 of the Notice that all the “flaws” in the application of section 36 had been corrected by the internal review stage.
23. Third, the Commissioner therefore rejected the submission that was made by the Appellant that the qualified person’s opinion was not “reasonable”

because it was not given “within a reasonable time period”, i.e. within the twenty working days specified by section 10 of FOIA.

24. Fourth, although the Commissioner accepted the longer the delay between the date of the request and the date of the qualified person’s opinion, the greater the risk the opinion might prove to be unreasonable, this did not mean that an opinion obtained in the course of an internal review carried out after twenty, or even forty, days would necessarily be unreasonable. The Commissioner observed that he still had a discretion as to whether to accept the late correction of any “flaws” in the course of his investigations.
25. Fifth, the Commissioner pointed out that the length of time between the date of the request and the internal review in the instant case was not in fact dissimilar, or too dissimilar, to that in the *McIntyre* case. This element will be revisited below. In that case, a request was made by the MoD on 11 March 2005. The request was refused under section 36(2)(c) on 16 May 2005. Mr McIntyre requested an internal review on 17 May 2005. The outcome of that review was sent to him on 21 July 2005.
26. In this case the request was made on 3 July 2009. The Home Office responded on 17 July 2009. The Applicant requested an internal review on the same date. The qualified person’s opinion was given by a memorandum on 18 November 2009. In the *McIntyre* case in round terms the total period was 119 consecutive days (as distinct from working days). In the present the equivalent period was 138 consecutive days (as distinct from working days) although in the present case the interposition of the summer holidays might well clearly have had an adverse effect on the time spent.
27. In *McIntyre* three opinions of the qualified person were sought in the course of the handling of the request. The first was sought on 14 April 2005 but it was it seems “flawed for a number of reasons”. The second sought on 10 May 2005 was similarly “flawed”. The third was sought on 30 June 2005. The third, it was said: “largely corrected the flaws except for one major issue”, i.e. a failure to specify which limb of the exemption was being relied on. Despite this, and despite the fact as can be seen that the internal review was carried out well in

excess of forty days, the Tribunal, nonetheless concluded that the third opinion was reasonable.

28. Sixth, the Commissioner dealt with what appeared to be an alternative argument to the effect that the internal review process was, and is, provided “as a way for the requester to appeal the decision of the public authority and for the public authority to correct in favour of the requestor any mistakes which he finds he has made.” In other words, the Appellant had claimed that the internal review process should not be an opportunity for the public authority “to correct in its own favour a mistake which it believes it has made, nor to apply further restrictions to the release of information”.
29. In this regard, the Commissioner responded that the purpose of an internal review was, and is, to allow the public authority to reconsider its decision and the handling of a request for information and that there was simply no authority for the proposition that the public authority could only correct mistakes “in favour of the requester” at the internal review stage.
30. In addition, the Commissioner pointed out that, in general, other Tribunal decisions had shown that a public authority which had initially relied on a particular exemption under FOIA was entitled subsequently to rely on an additional or different exemptions at the later stage without the permission either of the Commissioner or the Tribunal.
31. These contentions will be revisited below in connection with the Appellant’s final contentions on the first issue.

Section 42: the Commissioner’s Response

32. As has been seen, judicial proceedings were instituted in 2003 by the Church of Scientology against the Home Office in relation to the non-recognition of Scientology as a religion within the Prison Service.
33. The Commissioner determined that some of the withheld information consisted of communications which related to the Home Office’s preparation for those proceedings, including witness statements and, in the

circumstances, were therefore subject to what is called litigation privilege, i.e. that kind of privilege which related to confidential communications reflected in or consisting of the obtaining of legal advice concerning proposed or contemplated litigation.

34. The test with regard to the application of this kind of privilege is whether there is a reasonable prospect of litigation existing at the time of the creation of the document. See, generally *Re Highgrade Traders Ltd* [1984] BCLC 151.
35. The Appellant claimed that “litigation did not occur”. The Commissioner responded by saying it was not clear on what basis that claim was made. Again, as indicated earlier, although the judicial review proceedings were later withdrawn, they were clearly formally instituted and therefore undoubtedly brought.
36. In addition, and arguably by way of alternative submission, the Appellant had argued that the withheld information “such as witness statements” would have been presented in court. The Commissioner did not dissent from the general correctness of that proposition, but again relied on the fact that the proceedings were withdrawn and therefore the same did not happen.

The Notice of Appeal

37. The Notice of Appeal is dated 14 March 2011. Paragraphs 1 to 7 deal in effect with the first issue. In particular, it is asserted that the qualified person’s opinion should be issued within a reasonable time period, namely, 20 days “normally”, or 40 days “in exceptional circumstances”. In the present case it was claimed that the opinion was not given within a reasonable period. The Grounds state in effect that although it was given before the internal review had been completed “the internal review itself was not completed in a reasonable time period”. The opinion therefore had to be “disregarded”. The remaining Grounds of Appeal address the second issue alone.

The facts: additional points

38. The basic facts have been set out above. On 17 July 2009, the Appellant formally sought an internal review. The Home Office, on 14 September 2009 sent a letter saying that the individual allocated as an independent official of the public authority had been appointed, being a person not involved in assessing the original request.
39. The letter said that the Home Office aimed to provide a response within 40 working days of the date of the receipt of the request (i.e. from 3 July 2009 meaning that the period would go on until on or about 12 August 2009) adding that, unfortunately however, the review process was taking slightly longer than had been expected. The aim, it was said, was to provide “a full response” by 15 October 2009. In fact, as has been indicated above, the final review was provided under cover of a letter dated 18 November 2009. It consisted of a two-page letter and had in addition two annexes comprising in total six pages. On any basis, and the Tribunal so finds, this was a clear and full response by way of review.
40. By letter dated 4 February 2010, the Commissioner formally contacted both the Home Office and the Appellant. In his letter, the Commissioner specifically asked for details of the qualified person’s opinion for the purposes of section 36 and the basis or bases for the result of the opinion. Again, in the Tribunal’s view there can be no doubt but that the Commissioner for his part, was making a full and proper enquiry into what has been called, and for present purposes can be called, the possibility of there being any flaw or flaws in this opinion. The Home Office sent the relevant information by letter dated 5 May 2010, setting out details of the materials that had been sent and provided to the qualified person and to those acting on the qualified person’s behalf. These matters will be reviewed further below in connection with the question raised in paragraph 3 above in the judgment.

The Appellant’s submissions

41. The Appellant has provided further detailed submissions in writing. The Tribunal is grateful for the careful way in which he has set out his contentions.

There are two sets of submissions; however, each set of submissions deals only with the qualified person issue.

42. The Appellant's submissions appear to be as follows.
43. First, the Appellant appears to claim that in order for the qualified person's opinion to be valid, it should have been provided within the twenty day period. On the facts it was clearly not. This point has been set out above.
44. Second, he takes issue with the Commissioner's contention that the internal review provides an opportunity for the public authority to correct mistakes made in the initial processing of the request and "therefore it is legitimate for a public authority to apply new exemptions at the internal review stage". He contends that the review is in the nature of an appeal. Even though it provides an opportunity to correct previous errors "in ways which favour the release of the information", the review process cannot legitimately be used "to place additional restrictions on the release of the disputed information".
45. Third, he claims that if the Tribunal determines that it was in principle legitimate for a public authority to apply further exemptions at the internal review stage, the opinion here was still not provided in time. He added that a reasonable time period would usually be no later than the internal review stage in accordance with the findings in the *McIntyre* decision referred to above. In the present case, it was exceeded and therefore the opinion was, in his words, "invalid".
46. Fourth, insofar as the *McIntyre* decision supported the view that the opinion could be provided after a delay of any length, provided the internal review was also completed by that time, he disagreed.
47. Fifth, the Appellant claimed that in the light of such figures as existed with regard to the Home Office invoking section 36, the Home Office had "considerable" previous experience of the need to use an opinion with regard to the invoking of that exemption.

48. Sixth, he contended that the qualified person in the case did not appear to have seen the withheld information.
49. Seventh, and by way of final submission, he relies on passages of the recent Upper Tribunal decision of *All Party Parliamentary Group on Extraordinary Rendition (APPGER) v IC and MoD* [2011] UKUG 153 (ASE).

The Tribunal's findings

50. Before the Tribunal turns to what appear to be the Appellant's specific contentions as set out above, the Tribunal considers it is appropriate to set out a few general observations about section 36.
51. Section 36 is the only section within FOIA which depends, insofar as the applicability of the exemption is concerned, on the "reasonable opinion" of a specific individual or party providing his or her view on the appropriateness of the exemption. It is clear in the Tribunal's view that this responsibility is intended to be entrusted to a suitably senior official or representative within the relevant public authority. Indeed, the Tribunal would accept that there is a strong argument for saying that the qualified person should be at or towards the very top level of accountability: see generally section 36(5). It has been confirmed at least by one Tribunal at first-tier Tribunal level that this responsibility cannot be delegated. See e.g. *Guardian Newspapers Ltd & Brooke v IC and BBC* (EA/2006/0011 and 0013).
52. Next, in the Tribunal's view, what should not be lost sight of (and the Tribunal feels this is of great importance in the present appeal) is the precise role of the opinion. In the Tribunal's judgment, in the light of the wording of section 36(2), the purpose of the reasonable opinion is limited to deciding whether disclosure would, or would be likely, to have any of the effects set out in subsections (a) to (c) inclusive of section 36(2). The role, function and purpose of the qualified person and of the opinion is quite distinct from the separate issue of whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Naturally, as has been pointed out on more than one occasion, the Tribunal's decision is that the latter exercise may well be at least informed by the fact and reality that the

exemption has been engaged by virtue of the opinion, rather than by some other objective assessment of the facts.

53. Next, and this does not appear in any way to be in issue in the present appeal, section 36 limits the Commissioner's role to assessing whether the qualified person's opinion was reasonable. In legal terms, a *Wednesbury* approach is at that stage in play. In layman's terms, in practice this means that the Commissioner must consider whether the opinion should be overturned or otherwise readdressed on the basis that it represents a view or an opinion that no reasonably qualified person would have taken.
54. In any event, and again the Tribunal sees no contrary argument in this respect, even if the Commissioner does accept that the qualified person's opinion is reasonable, the Commissioner must still apply the statutory principles imposed by section 2 of FOIA accordingly and determine whether or not the information should be disclosed. In this latter respect, he must decide how much weight, if at all, must be given to the qualified person's opinion which would otherwise have determined that disclosure would have a prejudicial effect. The exercise which the Commissioner undertakes is therefore one whereby he must reach his own view, quite independently of what the qualified person's opinion may have suggested, as to whether the specific protected interests in subparagraphs (a) to (c) of section 36(2) would be, or would be likely, to be prejudiced. In other words, the Commissioner is the final arbiter as to whether, and if so to what extent, the exemption applies.
55. Finally, a review before the Tribunal will also involve the consideration by the Tribunal of the manner by which the opinion was reached and of the matters referred to in the previous paragraph.
56. As to the first contention put forward by the Appellant, the strict answer is that neither FOIA nor any related statutory instrument imposes any deadline or time limit upon the provision of the opinion. A more principled answer stems from the general observations made above with regard to section 36. Ultimately, the opinion is subject to scrutiny by the Commissioner and if need be, by the Tribunal. Assuming the internal review stage has been reached, a

stage which has been regarded as a significant part of the process in the statutory scheme, and the Commissioner thereafter is able to assess the matters which have been addressed with regard to the qualified person's opinion, then it seems to this Tribunal at least there can be no objection in principle to the opinion being provided at or by the stage of that review. Doing so will not in any way prejudice the exercise which the Commissioner is charged by statute to undertake.

57. The Appellant's second contention is that he takes issue with the characterisation of the internal review process as made by the Commissioner which is to the effect that an internal review can in principle take place beyond the twenty day period in order for (amongst other matters) the taking into account of additional exemptions to those that may already be relied on.
58. The Tribunal pauses here to say that "flaws" may not necessarily constitute the taking of further exemptions. Indeed, that is not the sense in which that expression was used in the *McIntyre* decision. All that is complained of in the present case is that the internal review process took place at a time by which the qualified person's opinion had been provided. It can perhaps be said that if there was a flaw in that respect, it is a type of flaw reflecting delay only and not necessarily in all cases anything more fundamental. As the *McIntyre* case itself showed, there may be several attempts by a qualified person to render his or her opinion, e.g. having not initially grasped the extent of the materials which are subject to the opinion. There is simply no need at all to consider the applicability of further exemptions. Indeed, it could be said with some force in the Tribunal's view that the ambit of the qualified person's role is not to consider anything other than the exemptions set out in section 36 which, as pointed out, is the only exemption where such an opinion is required.
59. The provision of the opinion is quite a distinct event in terms of legal importance from the act of the public authority itself in relying upon further exemptions.
60. In short, the answer to this contention is much the same as that which is given with regard to the prior contention by the Tribunal. As long as the

Commissioner is acquainted with the means and fact of completion of the process addressed by section 36, i.e. the provision of an opinion, coupled with the results of the internal review taking into account that opinion, then the Commissioner can be said to have fulfilled his statutory purpose.

61. At this stage, the Tribunal pauses in effect to pre-empt the scope of the Appellant's seventh contention by considering another recent Tribunal decision namely *APPGER v IC and MoD supra* in the Upper Tribunal.
62. In that case, the All Party Parliamentary Group on Extraordinary Rendition, i.e. APPGER, made various requests for the disclosure of information relating to the detention of prisoners in connection with the conflicts in Iraq and Afghanistan. The requests were made in the early part of 2008. Between June and September of that year, the MoD refused to supply the information requested. The APPGER asked for an internal review which was completed in late February 2009, i.e. nearly two years after the original request. In its review, the MoD for the first time raised as a new issue, section 12 of FOIA which deals with an exception based on excessive costs.
63. The APPGER was dissatisfied with the review and complained to the Commissioner who made a decision in favour of the MoD with regard to a substantial portion of the total requests. He made a decision in favour of APPGER with regard to the balance. The matter was heard by way of direct transfer to and by the Upper Tribunal.
64. One of the main submissions put forward by the APPGER was that it was too late for the MoD to rely on section 12 at all in response to its request. The reasons advanced were very much the same reasons as those advanced by the Appellant in this case, namely, that section 10 of FOIA required there to be a response as soon as possible and in any event within twenty days. It was also submitted by the APPGER that the Tribunal case law, at least at First-Tier level, suggested that reliance on an exemption from disclosure should only be permitted where there was a reasonable justification for doing so. This is the stance that has been taken by the Commissioner in this appeal.

65. In the event, the Upper Tribunal declined to reach a definitive conclusion for reasons which are not perhaps material here, as to the Tribunal's practice of requiring reasonable justification for late claims. At paragraph 36 of its decision, the Upper Tribunal referred to a decision of Judge Jacobs, also in the Upper Tribunal, in *DEFRA v Information Commissioner and ICV Home Office and others* [2011] UKUT 17 and 39 AAC (UT Case Ref GIA/1694/2010) in which the Upper Tribunal in that case had found that there was no need in allowing late exemptions to require what was called justification before admitting a late exemption. That decision of Judge Jacobs has been referred to in the written submissions in this appeal by the Commissioner.
66. Admittedly, at paragraph 39 and following, the Upper Tribunal in APPGER pointed to the time limits prescribed by FOIA and accepted that it saw strength in the Commissioner's overall submission that access to the statutory process of complaint and appeal be conditioned by exhaustion of internal review procedures. The Upper Tribunal also noted that it would be "antithetical" to a thorough going review for the public authority to be precluded upon review from putting a revised case for substantive exemption in a way it considered most appropriate if it concluded that its initial decision was flawed in some material way. It agreed with the conclusion in another decision of the First-Tier Tribunal, namely, *CAAT v IC* (EA/2008/0040) that the complaints process by way of internal review was "contemplated" in the statutory scheme for response to an application. This last point echoes an observation made earlier in this judgment.
67. However, it also noted that the time limits prescribed by section 1(1) and in particular section 10(1) were expressed "in strong terms". The 20 day limit it said was a longstop and section 17(1) also confirmed that a refusal notice specifying reliance on an exemption "must" be given within the time stated. However, paragraph 43, in what appears to be the final thoughts on this issue as indicated above and which issue did not have to be decided upon by the Upper Tribunal, was put in the following terms, namely:
- "If the raising of a new exemption before the Commissioner is subject to the Commissioner's discretion, to be exercised fairly and in the light of the

statutory purposes, this both restores some meaning to the time limits and avoids the potential unfairness to requestors, since a fair exercise of discretion would normally involve giving the requester the opportunity to comment on the newly claimed exemption before the Commissioner publishes his decision. In other words, if the public authority is being allowed by the Commissioner to add to its s 17 refusal notice even after the internal review, then fairness requires that the requester should be allowed to add to the terms of his complaint under section 50(1).”

68. In the Tribunal’s view, the upshot of the Upper Tribunal’s decision can be stated as follows. First, given the Upper Tribunal’s general observations about the competing arguments in principle about the ability to claim late exemptions and in reliance on the fact that this issue is now, it seems, subject to the Court of Appeal insofar as Judge Jacobs’ decision is concerned, then the law at the moment is such as to be binding on this Tribunal in accordance with not only the views of Judge Jacobs, but also those set out in effect in the quoted passage just cited.
69. Second, even if the issue were settled in favour of there being no right to maintain, and in particular, to prosecute the application of a late exemption after the time limits have expired, that issue is not the issue which concerns the present Tribunal in this appeal for the reasons which have been stated. Here, the issue is entirely separate. It is whether the opinion addressed by section 36 can be provided at, or by the time, the public authority was bound to answer the request when initially put to it. The Tribunal is firmly of the view that provided, as the *McIntyre* decision stated, the opinion is provided at or by the time the internal review occurs, then the Commissioner is able to fulfil his statutory functions under the Act. There is in other words no analogy with the premise addressed in the *APPGER* case. That concerned the claiming of a late exemption.
70. It should be pointed out as has been stressed above that the only complaint which the Appellant makes is the lateness of time by which the opinion was allegedly provided. He makes no complaint about the reliance on any other exemption. The Tribunal therefore endorses the observations made in the

McIntyre case and relied upon by the Commissioner to the effect that on the basis that the Act requires that there be an internal review, it is sufficient if this opinion be provided by that stage and before the Commissioner investigates a complaint under section 50.

71. In paragraph 38 of *McIntyre*, the Tribunal said:

“Parliament clearly intended that a public authority should have an opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made.” (See also paragraph 51.)
72. The second contention also makes the point that the internal review process cannot legitimately be used by the public authority as “an opportunity to place additional restrictions on the release of the disputed information.” The relevance of this particular contention is with great respect not fully understood by the Tribunal. The present case does not involve the placing of any restrictions on the release of the information requested. All that occurred was that the qualified person’s opinion was late. For all the above reasons, these first two contentions are rejected by the Tribunal.
73. The third submission put forward by the Appellant assumes that there is a discretion vested in the Commissioner and/or the Tribunal to make allowance for the provision of a late opinion and that even in such a case, no discretion should be afforded in favour of the public authority. It is enough to point to the facts of *McIntyre* to show that although the time limits are not determinative, they constitute an important component in the process. The real question though as it seems to the Tribunal in the present case is whether the material considered by the Commissioner with regard to the way in which the opinion was formulated satisfied the primary requirements which are set out in the passage dealing with general observations regarding section 36 above, i.e. whether the opinion was properly founded and reasonably arrived at. The Tribunal has already endorsed the findings of the Commissioner in that respect.

74. The fourth ground takes issue with the characterisation afforded to *McIntyre* by the Commissioner. The Tribunal has dealt with this issue and rejects the contention made by the Appellant.
75. The fifth contention deals with statistics. The Tribunal finds no merit in relying on statistics. It has a duty to approach each case on a case-by-case basis and it proposes to do so in this case as with any other before it.

The qualified person's opinion

76. As indicated at the outset of this judgment, the Appellant contends that the qualified person in the present case, in the words of the Appellant's written submissions (the submissions being provided in early April 2011) "does not appear to have actually seen the withheld information herself." In paragraph 43 and following of the Decision Notice, the Commissioner set out the matters he sought to address. They were first the identity of the qualified person, secondly, whether that person gave the appropriate opinion, how the opinion was given and when the opinion was given and lastly whether the opinion was reasonably arrived at and reasonable in substance.
77. As to the first of these matters, the person in question was Ms Meg Hillier, the then Parliamentary Under-Secretary of State in the Home Office. On the second issue, and in the words of paragraph 45 of the Decision Notice:
- "The public authority has provided evidence that an opinion was given by the QP, this evidence taking the form of a submission provided to the QP in which issues related to this request were set out, and emails recording that the QP had provided an opinion. On the basis of this evidence, the Commissioner accepts that the QP did give an opinion."
78. At paragraph 49 of the Decision Notice, the Commissioner stated as follows:
- "... the QP was provided with a submission to assist in the formation of their opinion. This submission records that copies of the information in question were also provided to the QP. That the QP was provided with this submission and at least had the opportunity to view the content of the information in

question suggests that the process undertaken in reaching the opinion was reasonable. The Commissioner has also considered the content of the submission with a view to ascertaining the quality of the arguments within and particularly whether these are relevant to the inhibition described in sections 36(2)(b)(i) and (ii).”

79. In his written submissions, the Appellant refers to that submission. He claims that by virtue of that submission which said that “copies of the information we believe to be governed by this exemption had been provided to your office”, it followed that the withheld information was not included as part of the submission to Ms Hillier herself, but was merely supplied to her private office. The approval of the submission contained a single line reply, namely: “Meg Hillier has seen your submission and is content with the recommendations.” The Appellant therefore claims that the reply does not indicate that Ms Hillier viewed the disputed information, but merely the official submission. It necessarily follows, so the Appellant claims, that the qualified person cannot reasonably be said to have formed her own opinion and that in the circumstances, the process was, as the Appellant puts it, merely rubber stamping.
80. The Tribunal begins with a number of general observations. First, nowhere in this section, i.e. section 36 is it expressly provided that the qualified person must as a matter of mandatory obligation see the disputed information. As the Commissioner submitted in writing to the Tribunal during its deliberations on paper, failure to inspect the disputed information will not without more render the opinion redundant or unreasonable. The Tribunal accepts this. It follows that it is sufficient if it is shown that the qualified person’s opinion was based on a proper understanding of the disputed information.
81. It also follows that there must therefore be a range of situations in which the statutory process can be said to have been satisfied. It is not the function of the Tribunal in this case(where the decision has been made on the papers alone)to attempt to characterise, let alone list such situations. An obvious example where the opinion might not be reasonable would be where the information or description of the information given to the qualified person was

wrong or otherwise misleading, but even then the facts might need to be studied carefully.

82. The facts which are the subject of this appeal have been reviewed carefully by the Tribunal. The Home Office asserts and now formally has stated that it cannot confirm whether Ms Hillier, in the present case, did inspect or did receive the information, or indeed what information was considered or inspected or reviewed. This is because the Home Office now confirms that all the parties involved in this appeal have since left the Home Office.

83. However, the Tribunal has seen and been shown an email also of 16 May 2009. It was sent at 11.32am. It was sent to Ian Lister, the then Information Access Consultant in the Home Office Information Access Team who it seems had provided the submissions. The email emanates from Miss Hillier's office though it is signed by an individual called Mark. It reads as follows, namely:

"Ian, I went through the drafts in hard copy and thought through the changes. A comprehensive sub, and good response letter. Apart from the minor typos, the most substantive point is about including the actual information in the s36 sub and flagging this as Annex C (as agreed with you). I realise you were going to include the information, but it needs highlighting in the sub. Thanks. Mark."

84. The Tribunal is therefore entirely content to find that on the basis of that email and indeed of the contents of the other material which it has seen, it is entirely satisfied that the finding of the Commissioner with regard to the reasonableness of the QP's opinion should be maintained and should not be overturned or departed from.

85. It should be said that the email exchange which has been quoted above is not in the open bundle. Even if the Tribunal were in error about its conclusion on this score, it respectfully refers to the draft response which a gentleman called "Mark" appears to refer to and which is in the bundle at page 84 and following. This is a draft response prompted by Mr Lister and bearing the date "xx November 2009". At paragraph 16 in that draft response, the following passage appears, namely:

“16 Other information that we are seeking to withhold under Section 36 includes advice sought both internally and from other government departments, in preparation for the judicial review hearing. These include candid advice and policy positions from the likes of the Prisoner Administration Group, DFES & CO. Release of this information could have the effect of weakening our ability to defend such matters in future. **Copies of the information we believe to be covered by this exemption have been provided to your office.**” (emphasis in bold in original).

86. It follows therefore that even if the Tribunal wrongly infers that the disputed information was put before and/or considered by the qualified person, paragraph 16 seems in turn to confirm that information covered by the exemption sought to be relied on was provided to Ms Hillier’s office.
87. In the result, the Tribunal respectfully rejects the Appellant’s submission that the QP’s opinion was, in this case, in some way unsound, unreasonable or otherwise should not be relied on.
88. The Tribunal concludes its findings with regard to this particular issue by reverting again to the overall statutory scheme which has been mentioned on more than the one occasion in this judgment with regard to section 36. It is for the Commissioner to determine, as he did, whether the ingredients regarding the provision of the opinion of the qualified person and the manner of its presentation and provision are sufficiently addressed. The Commissioner did so in the Decision Notice. The Tribunal in accordance with its statutory remit has revisited the matters and revisited the facts and the legal conclusions as it is entitled to do under FOIA. It is entirely satisfied that the relevant criteria in this case have been met.

Legal Professional Privilege

89. It does not appear that the Appellant has made any further written submissions with regard to the legal professional privilege point. For the reasons which have set out above and canvassed by the Commissioner, the Tribunal accepts that litigation privilege applies in this case by virtue of the

fact that the judicial review proceedings were brought. Whether subsequently settled and/or withdrawn is of no material effect upon the applicability of that principle.

Conclusion

90. For all the above reasons the Tribunal dismisses the Appellant's appeal.

David Marks QC
Tribunal Judge

Dated: 2 December 2011