



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision Notice: - FS50756874
(by reference to FS50742951)**

Appeal Reference: EA/2018/0299

**Heard at Field House, London
On 2 May 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

HENRY FITZHUGH & DAVID WILKINSON

Between

JENNA CORDEROY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

INDEPENDENT PARLIAMENTARY STANDARDS AUTHORITY

Second Respondent

Appearances: -

Appellant: in Person

First Respondent: Robin Hopkins

Second Respondent: Alastair Bridges (director of corporate services, IPSA)

DECISION

THE APPEAL IS ALLOWED

REASONS

1. The Second Respondent (the Independent Parliamentary Standards Authority "IPSA") was created by the Parliamentary Standards Act 2009 and is the regulator of business costs and expenses for Members of Parliament. It has a role both to ensure that MPs are appropriately resourced to carry out their parliamentary functions and also to ensure that MPs' use of taxpayers' money is transparent and well regulated. IPSA do this through the Scheme of MPs' Business Costs and Expenses which is revised annually. The General Conditions of the Scheme (8th Edition 2016-7 1 April 2016) provide: -

"3.4 The following are examples of activities that are not considered as necessary for the performance of MPs' parliamentary functions:

- a. attendance at political party conferences or meetings;*
- b. work which is conducted for or at the behest of a political party;*
- c. activities relating to reviews of parliamentary constituency boundaries;*
- d. activities which could be construed as campaign expenditure within the scope of the Political Parties, Elections and Referendums Act 2000;*
- e. activities which could be construed as election expenses within the scope of the Representation of the People Act 1983;*
- f. work relating to delegations to an international assembly; or*
- g. work relating to the performance of ministerial functions."*

2. In administering this IPSA must treat MPs fairly, operate transparently, regulate efficiently, cost effectively and proportionately. In 2017 it published its first Annual Review of Assurance which summarised the validation and assurance work it carried out in 2016-2017. In addition to reviewing payments validation systems it carried out thematic assurance reviews. One area of interest upon which it focused was on expenditure which had potential for party-political activity and campaigning (and therefore outwith their parliamentary functions and ineligible for funding) including an examination of the use by MPs of pooled services affiliated with political parties. IPSA explained its thinking in approaching this question: -

"Why did we look at this topic?

83. The Scheme is clear that IPSA will only pay for claims that are for parliamentary purposes, and not for any work that is party political. However, the nature of an MP's role means that there can be an overlap between their parliamentary and party political activity.

84. An example of something that could be considered both parliamentary and party political is the materials provided by 'pooled services'. These are organisations that

provide research and other services to MPs of a single political party. Pooled services are widely used by MPs to receive detailed background briefings, template correspondence and other materials that they use in parliamentary debates. MPs may claim from IPSA their subscription fee to a pooled service, provided that the organisation has an agreed arrangement in place with us such that they must comply with our rules.

85. From an assurance perspective, we wish to ensure that the materials provided to MPs by pooled services do not cross the line into being work 'for or at the behest of a political party' and therefore ineligible for funding from IPSA. This thematic review informed our comprehensive review on the Scheme in 2016, which considered IPSA funding for pooled services which are exclusively subscribed to by MPs of a single political party.

What did we find?

86. The thematic review looked at expenditure during the 2014-15, 2015-16 and 2016-17 financial years (up to August 2016) on the pooled service organisations with current arrangements in place with IPSA:

- the Parliamentary Research Service (PRS), for Labour MPs;*
- the Policy Research Unit (PRU), for Conservative MPs;*
- the Parliamentary Support Team (PST), for Liberal Democrat MPs;*
- the European Research Group (ERG), also for Conservative MPs; and*
- the Scottish National Party (SNP) Research Team, for SNP MPs.*

87. 589 MPs paid subscriptions to a pooled service organisation for one or more financial years during the period March 2014 to August 2016. This equates to 56 per cent of all MPs in 2014- 15, and 73 per cent of all MPs in 2015-16. The number of MPs each party has in the House of Commons broadly corresponds with the proportion of costs paid to that party's pooled service. For instance, Conservative Party MPs, having more MPs than any other party, claimed for the largest proportion of pooled service expenditure during the period. The Liberal Democrats, with the fewest MPs among parties with a pooled service, claimed the smallest proportion.

88. All pooled services charged an annual subscription fee, but the amounts varied widely between £2,000 and £10,500 per year. The SNP Research Team charges the highest subscription fee, while the ERG charges the lowest.

....

91. To assess compliance with the Scheme – specifically, to ensure that pooled service materials did not constitute party political activity, or campaign expenditure or election expenses according to electoral law – samples of the materials provided by each pooled service were examined. There was a generally high degree of compliance found, apart from a small number of concerns that were not considered to be systematic or widespread.

92. We concluded that PRS and PRU materials were compliant with the Scheme, barring some minor instances of language that strayed into the party political. Similarly, materials provided by the ERG were also assessed as compliant. The ERG's focus is solely on issues relating to the UK's relationship with the European Union, which are of cross-party interest, and materials were factual and informative.

....

100. The ERG attracted some media coverage in 2017, following the completion of this review, in part because of its focus on a single issue and support for a particular type of withdrawal from the European Union. Some MPs and members of the public

questioned whether the service should be funded with public money. IPSA will only fund a single-issue research service so long as it complies with the rules and principles of the Scheme – e.g. that it supports MPs’ parliamentary work, is not party-political and does not constitute campaigning. We concluded in the assurance review that this was the case for the ERG, and therefore its services were eligible for IPSA funding. However, given the concerns raised, we believed it was right to seek additional assurance and conducted a further review of material produced by the ERG since the 2017 General Election. Whilst a small degree of party-political language was identified (which has been highlighted to the ERG), the vast majority of the material was factual, informative and not in conflict with the Scheme.”

3. On 21 January 2018 the Appellant (“Ms Corderoy”) sought information from IPSA:-

“I understand that as part of IPSA’s assurance review, it scrutinised examples of materials produced by each of the pooled services, including the European Research Group.

In light of this, I would request all materials produced by the European Research Group that was scrutinised by IPSA as part of its assurance review”

4. IPSA initially refused to provide the information relying on section 43(2) prejudice to the commercial interests of ERG. It subsequently changed its stance and relied on an exemption contained in s.36 FOIA:-

*“36 **Prejudice to effective conduct of public affairs.***

(1)This section applies to –

....

(b)information which is held by any other public authority....

(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 –

....

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

5. On 22 February 2018 another person sought information from IPSA:-

“Please provide copies of all materials provided to IPSA by the European Research group in relation to the following IPSA report:

Assurance Review, Pooled Services – Assessment of risks, control and compliance, 2015-16

Please include all materials provided in relation to the report update in June 2017”

6. Both these requests were the subject of complaints to the First Respondent (the IC) following the refusal of IPSA to disclose the material. The IC issued a decision notice with respect to the 22 February request under reference

FS50742951 on 6 November 2018 and adopted the reasoning of that decision when she issued the brief decision notice with respect to Ms Corderoy's request on 29 November.

7. In FS50742951 the IC accepted the arguments of IPSA. The qualified person in IPSA (Sir Robert Owen QC, a member of the board) considered the two requests and in a decision of 23 October 2018 set out his reasoning (bundle pages 116-119):-

"3....I have considered the material in question mainly 31 briefing notes on various aspects of the UK's relationship with the EU sent to subscribers (about 30 Conservative MPs) to the European Research Group (ERG), a registered pooled service.

...

5...In each case IPSA requested copies of materials produced by ERG for its subscribers so that it could be assured that such material fell within paragraph 7.4.b of the scheme and did not amount to work carried out "for or at the behest of a political party" (see paragraph 3.5.b of the Scheme) and therefore ineligible for funding from IPSA. In each case ERG provided the material on the assurance that it would remain confidential.

...

7. I recognise the importance of maintaining a high degree of transparency and accountability as to the manner in which IPSA discharges its statutory duties. I also recognise that some of the document[s] the subject of the request are months and in some cases years old, mitigating any commercial disadvantage that ERG might suffer from the disclosure of the material. But I have come to the conclusion that the arguments in favour of the engagement of section 36 are compelling.

8. First the material in question was provided to IPSA on the assurance that it would remain confidential. Its disclosure would constitute a breach of the assurance given to

ERG and could significantly damage of working relationship with the group. Hitherto IPSA's relationship with the ERG based in part up upon that assurance, has enabled us effectively to discharge IPSA's principal function, the proper administration and regulation of MPs business costs and expenses.

9. I am satisfied that were IPSA to disclose the material it is very likely that the ERG would not cooperate with IPSA as fully in the future. IPSA has no legal power to compel such organisations to provide information. If in the future IPSA were to be unable to provide the assurance that such materials would be treated as confidential, its ability effectively to regulate expenditure would be impaired, a consequence that would be against the public interest.

10. Secondly it is also likely that it a decision to disclose the material, in breach of the undertaking given as to confidentiality would have a wide effect that it could inhibit other parties from whom IPSA requests information for assurance purposes from producing such information, in particular other pooled services. Such a consequence, which would of adversely affect IPSA's ability effectively to regulate expenditure, would be against the public interest.

11. I am therefore satisfied that this section 36 exemption is engaged in relation to both requests.

12. As to the public interest in disclosure, I recognise the importance of the current debate in Parliament as to Brexit; and that MPs subscribing to the pooled service provided by ERG do so in order to obtain material to be deployed in the course of the debate with the intention of influencing government's policy as to Brexit. But I am satisfied that the public interest in the proper use of public funds in this regard is met by the publication of claims by MPs for their subscription to ERG's pooled services,

and by the publication of IPSA's 2016 assurance report into pooled services and the 2017 annual review of assurance, which provided a comprehensive summary of the work undertaken by ERG. Such publication satisfies the public interest in transparency as to the manner in which IPSA regulates MPs' expenditure, and specifically in this context in the nature of the services provided to subscribing MPs by ERG.

13 Thus it is my opinion that in relation to both requests the public interest in maintaining the exception outweighs the public interest in disclosing the material.

8. The IC in considering the reasonable opinion reviewed the process by which it was arrived, that it was an opinion that a reasonable person could adopt and accepted that the exemption was engaged. However, in weighing the balance of public interest she adopted a more nuanced approach to the issue of no-cooperation than that of Sir Robert. While acknowledging that there would be some damage to the working relationship between ERG and IPSA by the disclosure and some reluctance to co-operate in the future (DN paragraphs 29-30):-

"29. However the Commissioner considers that in the case of ERG this reluctance will be tempered by a couple of factors. From the published assurance review it appears that almost all ERG's income is generated by the research services it provides to MPs. It would therefore not serve ERG's interests or those of the subscribers it was set up to serve, if it hindered a review that ultimately had a bearing on whether its subscribers would have their costs reimbursed. As well as this very practical incentive to cooperate with IPSA, it could be difficult for its subscribers if ERG was seen to be hindering a body which was established following the MPs expenses scandal of 2009 to ensure only eligible expense claims were paid. It should also be noted that the ERG is governed by a board of two MPs.

30. The Commissioner considers that it would be very difficult for ERG to completely refuse requests from IPSA for samples of the material it produces for the reasons given above. Nevertheless the Commissioner does accept that ERG could become less cooperative and that any failure to engage fully with IPSA's review processes would present problems. The Commissioner accepts that as a consequence there could be a marked prejudice to IPSA's ability to perform its duties and its principal function of overseeing MPs' business costs and expenses."

9. The IC in examining arguments against disclosure considered the impact of disclosure on the behaviour of other providers of pooled services, that while the material was old the issue of Brexit was still live, that individual

subscribers to ERG could commission specific research and it was conceivable that MPs could be inhibited from commissioning work if it could be disclosed, and that it could impact on future reviews of pooled services.

10. In considering the arguments for disclosure the IC noted the relationship between the pooled service and the group of MPs called the ERG which was a large group with many senior MPs and which in IPSA's view possessed a significant influence over government policy on Brexit:—

“Given the importance of Brexit and its impact on the future economic, legal and security relationship with Europe there is an undoubted public interest in scrutinising the research work produced by the ERG pooled service provider in order to better understand how these influential opinions were formed.

38. IPSA also acknowledges that the public interest in transparency of the work carried out by ERG is heightened by the fact that it is almost entirely funded by public money, in that the subscriptions paid by MPs are reimbursed in accordance with the Scheme.

39. There is also a public interest in allowing access to information that would allow scrutiny of IPSA's performance in overseeing the claims made by MPs and, in effect, whether its assurance review of pooled services in respect of ERG was robust and its findings as to the nature of the material produced by ERG were sound. Clearly, if there was any credible suspicion that the assurance review was not thorough and objective there would be a greater public interest in the disclosure of the information. Although there may have been some controversy in the media about the role of the ERG pooled services and discussion of the influential role played by MPs subscribing to that service, the Commissioner is not aware of any criticism of the performance of IPSA. Nor is there anything within the withheld information which suggests cause for concern with the findings of the assurance review. The publication of the assurance review itself goes some way to meeting the public interest in providing confidence that the expense claims submitted by MPs for ERG's Services were made in accordance with the Scheme and that public money was spent appropriately.”

11. In weighing the competing arguments the IC recognised the real and weighty public interest in disclosure which would allow scrutiny of the quality of research on which an influential group of MPs sought to steer government policy and public debate and it would provide increased transparency about the work of IPSA. However the IC accepted that disclosure would seriously undermine the ability of IPSA to carry out its role and:-

“There is clearly a very strong public interest in ensuring that such oversight is as thorough as possible, not only to safeguard the public purse but also as part of the process of continuing to rebuild public confidence in MPs and the expenses they are able to claim. The Commissioner therefore finds that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure.”

12. In her grounds of appeal Ms Corderoy challenged the reasonableness of the Qualified Person's opinion arguing that the prejudice feared was not probable (relying in the IC's finding in FS50742951 paragraph 29) *"it could be difficult for its subscribers if ERG was seen to be hindering a body which was established following the MPs expenses scandal of 2009 to ensure only eligible expenses claims were paid. It should be noted that the ERG is governed by a board of two MPs"*. She argued that since IPSA was subject to FOIA it must have been aware that it could not promise to keep the material confidential. With respect to the public interest test she challenged the assumption that these materials were confidential suggesting that researchers wish their results to be the subject of public scrutiny. In the light of the significance of Brexit and the role ERG played it was in the public interest to disclose the material.

13. In resisting the appeal the IC noted that further information could be provided by IPSA which would be of benefit to the tribunal in coming to its decision. The IC reaffirmed her position which was subject to review in the light of further information.

14. In responding to the appeal IPSA responding to issues raised by Ms Corderoy and the IC noted that:-

"25. For the next assurance review, IPSA intends to ask each of the service providers for a digest of the work they have produced, and will then select materials from which to conduct its assurance review":

15. IPSA explained the assurances given to the pooled service providers at the time of the 2016 review (bundle page 59):-

"Pooled Services have been assured that the materials provided for the review will not be published proactively by IPSA, and would not be sent to the Board of IPSA as annexes..."

16. ERG were given assurance in the following terms:-

"Thank you for providing me with this information, which is all very useful.

I can confirm that we have no intention to make public the research materials that you provide to your subscribers. It may be necessary for us to refer to parts of the content of the materials in our report. I may also need to share them with colleagues internally at IPSA, for their reference."

17. IPSA further commented in response to the IC raising the issue of the s41(1) FOIA exemption (that disclosure would be an actionable breach of confidence):-

"As part of our decision whether or not to disclose the information in response to Ms Corderoy's FOI request, we considered whether the s.41 exemption applied, but

concluded at the time that our undertaking to the ERG and other Pooled Service Providers does not meet the necessary quality of confidence to meet the conditions required under that exemption. We had nevertheless provided them with an assurance that their materials would not be proactively published. This is of course subject to Public interest considerations which were taken into account at the time of the request."

18. IPSA confirmed its continued opposition to disclosure on the basis of concern that in future pooled service providers would be *"far less inclined to freely engage with us as they have done in previous years."*
19. In written and oral submissions Mr Hopkins analysed the issues for the tribunal. He submitted that the reasonableness of the qualified person's opinion is a matter of substance rather than procedure and the "likely to prejudice" threshold under FOIA is met where there is a very significant and weighty chance of the prejudicial consequences occurring, even if that chance falls short of the balance of probabilities. The Commissioner's view was that the qualified person's opinion in this case was comfortably within the range of reasonable opinions that could be reached in these circumstances. There was a level of voluntary cooperation and it was reasonable to conclude that this level of voluntary co-operation based on trust could very well be diminished to some extent by disclosure in this case, and that this would cause some degree of prejudice to IPSA's ability to conduct its reviews rigorously and efficiently. In the circumstances, the qualified person's opinion was reasonable. In the public interest balance, some weight should be given to the fact that the qualified person has provided this reasonable opinion; however, the Tribunal must assess all the competing considerations in the disclosure of the specific information.
20. With respect to the public interest the issue was how would disclosure impact on the assurance regime in the future. Mr Hopkins noted that at the time of the request there had been a range of methods that IPSA could adopt for its future approach to informing its decisions with respect to whether pooled service providers were compliant and their charges eligible for public funding and it was foreseeably going to change. One of those approaches had been adopted which was that of requiring providers to submit a list of materials from which IPSA could make a selection. That would mean it would be harder for the providers not to co-operate.
21. Mr Bridges confirmed the independence of IPSA and its wish to be a fair, clear consistent and proportionate regulator. In 2016 IPSA had asked pooled service providers for a sample; it was satisfied that the sample provided by ERG was comprehensive and representative. IPSA had a methodology of continuous improvement in its regulatory work and in the next review of pooled services it would obtain a list from each provider and then select materials from that list for examination. It was likely that there would be more matters of concern

with respect to other service providers since in the previous review there had been more issues with them.

22. The first issue for the tribunal to decide is whether or not the exemption claimed is engaged. The tribunal is satisfied that it is. All regulators benefit to a greater or lesser extent from the co-operation of the regulated community in carrying out its functions. In dealing with that community it is highly likely that the community will not want details of its activities widely published, even when there is little if anything to cause public concern. It is entirely proper and appropriate for the regulator to give some assurance as to the limited distribution of material supplied for regulatory purposes and there is a real risk of prejudice to some extent. The qualified person's opinion properly sets out the issues and the conclusion he came to was reasonable.
23. In considering where the balance of public interest lies proper weight needs to be given to that opinion, informed as it is by understanding of the issues which IPSA faces. However the weight to be given to that opinion and the harm which flows from it to the work of IPSA needs to be scrutinised. The IC in her decision notice correctly identified a key driver tending to restrict the harm which would result (DN paragraph 29 above). Although the IC suggested that ERG (and indeed other pooled service providers) could become less co-operative, by the time of the request the framework within which IPSA was carrying out its scrutiny of pooled services was changing and, as the IC's Counsel observed the change would make it harder for pooled service providers not to engage with IPSA's approach; that, together with the need for MPs to get reimbursement of expenses and their desire not to be seen to obstruct accountability greatly limits the extent of non-cooperation likely to arise.
24. It should be noted that pooled service providers were given an assurance by IPSA that it would not proactively publish the material. They can be in no doubt that IPSA was properly stating its intentions as to how it would carry out its function, but it was not giving any assurance beyond that. All parties to these exchanges were fully aware of the working of FOIA and its impact on the scrutiny of MPs finances; since IPSA was brought into being as a result of impact FOIA requests leading to disclosure of some inappropriate financial conduct by MPs.
25. In considering the arguments for disclosure the tribunal notes Ms Corderoy's view that the role of members of the ERG has been of importance in shaping government policy with respect to Brexit: - *"the ERG produces material which have shaped Conservative MP's thinking on the issue"*. She argues the importance for public understanding for this material to be published. She further argues that researchers wish their research to be in the public domain. While there is force in these points and the political situation framed the request for information, it is important to recognise that MPs themselves are not within

the scope of FOIA. It is also important not to conflate research that she suggests the academic community aspires to produce – high quality, reliable based on identified evidence and sources and neutral, with briefing material produced to give individual MPs arguments on issues they are concerned about.

26. A key public interest in disclosure of the material is to illuminate how IPSA carries out its role of ensuring that public money is only expended on proper public purposes; there is real public interest in scrutiny of IPSA's assurance review process and the ERG materials at issue here were among the raw materials for the review. Disclosure would help the public understand the assurance review process better, and IPSA's conclusions following these reviews. This would further transparency, accountability and public trust with respect to the working of Parliament.
27. The tribunal is satisfied that while some harm will flow from an impact on IPSA's relationships with pooled service providers, this harm is not great. Demonstrating the rigour of the regulatory process underpinning the work of MPs is of considerable significance and the tribunal is satisfied that the public interest is in disclosure.
28. For the reasons stated, the appeal is allowed.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 18 May 2019

Promulgated: 23 May 2019