FOI/EIR	FOI	Section/Regulation	s1, s10, s12, s16	Issue	Refined and clarified requests as "new" requests

Line to take:

Where a public authority refuses a request under s12, and the applicant forms a refined request (potentially following advice and assistance under s16), the refined request should be treated as a new request, and the statutory time period for compliance commences on the date of receipt of that new request.

Where a public authority seeks clarification of a request under s1(3) and the applicant submits a clarified request (or further information to clarify), the clarified request instigates a new statutory time period for compliance, which commences on the date of the receipt of that subsequent request as per s10(6)(b).

Further Information:

Refined requests

LTT141 sets out the line to take from the IT decision in Roberts that where a request is refused on grounds of cost under s12, if a public authority does not fulfil their duty under s16 to provide advice and assistance to enable the applicant to refine his request, the costs estimate is **not** invalidated.

The implication of the refusal of the original request under s12 not being invalidated is that any refined request should be treated as a new request.

Clarifying requests

Where an applicant submits a clarified request (or further information to clarify a request) subject to s1(3), this is a "new" request for the purposes of the statutory time period only, as per section 10(6)(b) (reflected in Awareness Guidance 11).

Section 10(6) reads:

"I*n this section-*

"the date of receipt" means-

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);"

Section 1(3) states:

"*Where a public authority-*

(a) reasonably requires the further information in order to identify and location the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliges to comply with subsection (1) unless it is supplied with that further information."

Note: for the Commissioner's approach to the statutory time limit where there is more than one objective reading of a request, please see LTT89.

PREVIOUS / NEXT

Source	**Details**
DN IT	Roberts / ICO

Related Lines to Take
LTT47, LTT87, LTT88, LTT89, LTT116

Related Documents
EA/2008/0050 (Roberts), Awareness Guidance 11, Awareness Guidance 23

Contact	GF

Date	14/10/2009	**Policy Reference**	**LTT137**

FOI/EIR	FOI	Section/Regulation	s12(4)	Issue	Degree of similarity required in order to aggregate requests

Line to take:

The test for aggregation under Regulation 5 of the Fees Regulations is very wide. The requests need only relate to *any extent* to the same or *similar* information.

Requests will be similar where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested.

Further Information:

Section 12(4) of the FOIA states:

"The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- *by one person, or*
- *by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them".

Statutory Instrument 2004 No. 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004" prescribes the circumstances in which requests can be aggregated as follows:

Regulation 5(2) *This regulation applies in circumstances in which –*

- *the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*
- *those requests are received by the public authority within any period of sixty consecutive working days*

This line to take is concerned with the degree of similarity that is required to meet the condition at 5(2)(a) of the regulations.

Ian Fitzsimmons and Department for Culture, Media and Sport

In the above case, the complainant asked for the following information:

(1) *"Please provide a copy of all the expense statements submitted by Mrs Sue Street for the past two years. Such statements should be authorised and certified by a named official/manager.*

(2) *Please provide details and a copy of all the records of all the hospitality received by Mrs Sue Street in her role as permanent secretary at the DCMS for the past two years.*

(3) *Please provide a copy of the record of all matters discussed and arising from 1) and 2) above.*

(4) *Please provide details of all expense statements submitted by Tessa Jowell to the DCMS and any other government department for the past two years.*

(5) *Please provide details of all hospitality received from the BBC by Tessa Jowell for the past two years.*

(6) *Please provide a copy of the record of all the matters discussed and arising from 4) and 5) above"*

At paragraph 38 of the Tribunal Decision, the complainant argued that his requests could not be aggregated because they related to different "topics" (expenses, hospitality and meeting notes) and related to two different individuals in different occupational categories. This argument was rejected by the Tribunal that made the following general observation at paragraph 43:

"The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only relate *to any extent* to the same or *similar* information [Tribunal emphasis]".

The Commissioner made the following arguments that were all accepted by the Tribunal as showing that the requests related to a significant extent to the same or similar information with the exception of argument 5:

- All the requests related to expenses of the Permanent Secretary of the DCMS or the Secretary of State

Therefore, requests will be similar where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested. The fact that requests concern different individuals does not mean that they cannot be similar.

- The Appellant himself stated that the requests all related to the relationship between the BBC and the DCMS

Requests will be similar if they relate to a relationship between two parties. We can also take into account information revealed by the complainant that suggests the requests are similar in

terms of the information he or she is seeking to uncover where this is not obvious from the requests in isolation.

- Request (3) was expressly stated to relate to requests (1) and (2), while request (6) was expressly stated to relate to requests (4) and (5)

Where an applicant expressly relates one request to another in terms of the nature of the information being requested, this can support the case for aggregation.

- Save for the identity of the person about whom the requests were made, requests (1) to (3) mirrored requests (4) to (6).

On occasion, an applicant may adopt the same wording for some requests while changing only certain details as in the above example where the complainant changed the name of the person with whom the requests were concerned. This obviously highlights that the nature of the information being requested is the same or similar and supports the case for aggregation.

- The request was expressly headed "Request for Information" in the singular.

In a footnote to paragraph 43, the Tribunal stated that it had not been persuaded that the fact that multiple requests are headed in the singular is a relevant consideration for the purposes of deciding whether requests relate to the same or similar information.

Source	**Details**
IT, Policy Team	Ian Fitzsimmons/Department for Culture, Media and Sport (17 June 2008)

Related Lines to Take

n/a

Related Documents

EA/2007/0124

Contact	RM		
Date	04/12/2008	**Policy Reference**	**LTT138**

FOI/EIR	FOI	Section/Regulation	s30	Issue	Extent to which information referred to in court (in criminal proceedings) is in the public domain

Line to take:

In criminal proceedings, where documentary evidence is merely referred to (rather than actually disclosed) in open court, then the information contained within that documentary evidence will not automatically enter the public domain.

Even, where information has entered the public domain by virtue of having been disclosed or referred to in court, this does not necessarily mean that it remains in the public domain.

The fact that information referred to in court may have entered the public domain is not in itself conclusive in whether the public interest favours disclosure, but is one factor to be considered in the public interest balance.

Further Information:

Caseworkers need to firstly consider that where information is held only by virtue of being contained in a court record it will be exempt by virtue of section 32. In the Tribunal case considered here s32 did not apply.

In the case of *Armstrong v the Information Commissioner and HMRC*, the applicant, an investigative journalist, requested documents referred to in open court (either contained in the jury bundle or referred to elsewhere in evidence in front of the jury) during the trial of Abu Bakr Siddiqui.

Background - public access to documentary evidence in court (in criminal proceedings)

In considering this issue, it might be a useful starting point to think about what documentary evidence the public may have access to and therefore what information will usually enter the public domain in criminal proceedings. The focus of the following discussion is on the

Tribunal's consideration of access to actual documentary evidence rather than on access to information as applies under FOI.

The Tribunal heard details about the extent to which evidence referred to or presented in court is normally available to members of the public. Generally, the public won't have access to:

- the jury bundle
- witness statements
- certain documentary evidence

The Tribunal summarised that "a member of the public, like the jury, would not have access to witness statements or other documents from the trial bundle" because "the evidence in the trial is the evidence given before the jury and witnesses may give different evidence from that contained in their witness statement so it could be misleading for that witness statement to be made available to anyone other than the parties and the judge" (paragraph 29). A member of the public also would not have access to the jury bundle. The Tribunal also said "certain documentary evidence, which was before the jury but not read out verbatim (especially documents such as maps or photographs) may be released to the press if, for example, it would aid understanding of proceedings". It went on to say that "[r]eporters may also ask to look at particular documents to check spellings of names or to ascertain details which they did not hear at the relevant moment. More usually this would involve a request for an opening note or other document the contents of which are effectively in the public domain" (paragraph 29).

The Tribunal disputed the appellant's comparison with civil proceedings; it was clear that it was not feasible to draw such parallels between criminal proceedings and civil proceedings about the extent to which information referred to in court was in the public domain due to the different nature of the jurisdictions and rules of procedure; and importantly, where members of the public are permitted to inspect the trial bundle in civil matters, it is not common practice in criminal trials (paragraph 90). For further information on Civil Procedure Rules, caseworkers can refer to LTT22.

The Tribunal referred to the Crown Prosecution Service Protocol on "Publicity and the Criminal Justice System". The appellant had drawn the Tribunal's attention to the following excerpt, which he argues was 'sufficiently wide to cover all documents that are referred to in open court and/or are contained in the jury bundle or other bundles used in court that contain those documents':

"Prosecution material which has been relied upon by the Crown in court and which should normally be released to the media, includes... maps/photographs... and other documents produced in court" (paragraph 88).

However, the Tribunal challenged this and said that "the Protocol exists to ensure that the media are able to present a fair and accurate report of court proceedings" and that its intention was not to provide widespread media access that would include being provided with a copy of all documentary exhibits referred to during a trial (paragraph 89).

Extent to which information referred to in court (in criminal proceedings) enters the

public domain

What is significant in deciding whether the **information** has entered the public domain is the extent to which the content of any documentary evidence, i.e. the information rather than the actual document, enters the public domain. For example:

a) Documentary evidence that is fully disclosed in open court, or is provided and released via the media enters the public domain. Here both the document itself and, in consequence, the information contained within it **enters** the public domain.

b) where the content of a document is read out verbatim, the information has **entered** the public domain (although the actual document containing it has not) ;

c) where reference to a document does not disclose the content of that document, neither the information nor the actual document has entered the public domain

In the *Armstrong* case the public authority disputed that the requested information was in the public domain, although it agreed that certain parts of the information that were read out can be said to have entered the public domain (paragraph 83).

The Tribunal stated that it could "envisage circumstances in which a jury is given access to material that is not to be disclosed in the open court, albeit that it is not felt necessary to hold that part of the trial in private" and acknowledged that the jury would have to view that material as part of the evidence, "but it cannot be said that material has automatically entered the public domain" (paragraph 84).

At paragraph 83, "HMRC stressed that it is an important consideration that the disputed information is not in the public domain in the form Mr Armstrong seeks, that is, collated in a file which can be considered, analysed and cross-referenced with other material available to others privately or in the public domain." The Tribunal did not go on to give their view on this, but our approach would be to disagree with the importance the public authority attach to the format; The FOI Act provides the right to information rather than documents, and therefore, it not the format but the extent to which the content is in the public domain that we are concerned with.

Extent to which information that has entered the public domain remains in the public domain

The Tribunal were clear that even if the information "had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain" (paragraph 85). The Tribunal agreed with the Commissioner's observation in the Decision Notice that "knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived" (paragraph 85). The Tribunal was therefore not satisfied that the information in question was in the public domain at the time of the request and as a result of that, it did not agree with the appellant that the information be disclosed.

In considering whether information that has **entered** the public domain via disclosure in open court **remains** in the public domain, case officers may wish to compare the

information being withheld with the information accessible via other sources (such as media reports, internet), as at the date of the FOI request.

Case officers may also need to consider both;

- whether the actual information in question remains in the public domain, and
- whether the fact that this information formed part of the evidence for the court case remains in the public domain

Information in the public domain and the public interest in disclosure

The Tribunal went on to say "even if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weights in favour of disclosure, it is merely one consideration to be weighed in the public interest balance" (paragraph 86).

Non-documentary, verbal evidence heard in open court

Whilst not specifically considered in the *Armstrong* IT case the Commissioner considers the same principles as set out above will apply to verbal evidence given in court that does not form part of the any documentary evidence presented to the court (for example, where a witness refers to something under cross-examination that does not form part of the jury bundle, written witness statements, or other documentary evidence).

In such a situation the ICO would accept that this information will **enter** the public domain by virtue of being revealed in open court. Whether or not the information **remains** in the public domain, and whether the public interest weighs in favour of disclosure, will, as with information contained within documentary evidence, depend upon the circumstances of the case.

Whilst this situation may not arise very often- because verbal evidence that does not form part of the submitted documentary evidence will in many cases not be "recorded" information - the Commissioner considers that it may occasionally arise. For example, there may be information recorded in a public authority's investigation file, that does not form part of the documentary evidence submitted in a court case but is disclosed in open court via the cross-examination of a witness.

Source	Details
IT	Armstrong / HMRC

Related Lines to Take

LTT22, LTT86

Related Documents

EA/2008/0026			
Contact		GF	
Date	05/01/2009	**Policy Reference**	**LTT139**

FOI/EIR	FOI	**Section/Regulation**	s12, s16	**Issue**	Advice and assistance in relation to s12

Line to take:

Where a request is refused on grounds of cost under s12 - although a public authority has an obligation under s16 to provide advice and assistance to enable an applicant to refine his request – if they do not provide this advice and assistance, the costs estimate is **not** invalidated.

Further Information:

Section 12 cost estimates and the duty to provide advice and assistance under s16

The IT in the case of Roberts v the Information Commissioner agreed with the Commissioner's view that whilst the public authority did not deal with its obligation under s16 to provide advice and assistance that might have enabled the applicant to refine his request, this did not invalidate the s12 refusal. They acknowledged the importance of public authorities discussing the scope of a request with the applicant so that complying with it would not exceed the costs limit (paragraph 20), but nevertheless made the following findings at paragraph 20:

- *There is nothing in the language of s12 itself to suggest that the estimate may be*

challenged for any reason other than that it fails to comply with the Regulations.

- *Nor does section 16 specify that failure to comply with its requirement should invalidate an estimate. In fact no sanction is mentioned in that section and it is to be inferred that the only available sanctions are those set out in Part IV of the FOIA, which make no reference to any consequential impact of breach on the applicability of other provisions.*

- *The relevant part of the Code of Practice … indicates that the requirement to give advice only arises once the public authority has reached the stage where section 12 applies ("Where an authority is not obliged to comply with a request for information…). Neither the statute nor the Code of Practice contain any suggestion that avoiding the obligation to comply is conditional on first complying with the Code of Practice or that a public authority must consult with the person seeking information as part of the process by which it reaches an estimated costs figure, This is entirely consistent with the purpose of the Code of Practice, (which is to provide guidance only), and with the language of section 16 itself, (which makes it clear in subsection (2) that the only impact of the Code of Practice is that a public authority which complies with it will be found to have provided the advice and assistance necessary to avoid a breach of subsection (1).*

The Tribunal were of the view that if they had declared that the failure to advise or assist invalidated the costs estimate in this case, "we risk falling into the trap of creating law, rather than interpreting law as created by Parliament and FOIA" (paragraph 21).

In this case, the IT explicitly stated that it would not follow the decision set out in Brown v ICO and National Archives - that failure to offer advice and assistance makes a s12 costs estimate invalid.

Brown v the Information Commissioner and National Archives

In Brown v the Information Commissioner and National Archives, the Tribunal found that because the public authority had not advised the applicant to make phased requests that would each individually fall under the costs limit it had breached s16 for failing to provide sufficient advice and assistance (see LTT87 for further consideration of this point) and incorrectly applied s12 because this rendered the estimate of costs unreasonable.

The Commissioner does not accept the Tribunal's conclusion on section 12. His view, as set out above, is that the estimate was reasonable based upon the request that had been made. Provision of advice and assistance as suggested by the Tribunal would have enabled the applicant to submit a number of phased new requests which might each, individually, have fallen below the costs limit. However these would be treated as new requests, and would have no bearing on the estimate of costs in relation to the original request that had been made.

Source	Details

IT	Brown / National Archives Roberts / ICO

Related Lines to Take

LTT47, LTT87, LTT88, LTT89

Related Documents

EA/2006/0088 (Brown); EA/2008/0050 (Roberts)

Awareness Guidance 11, Awareness Guidance 23

Contact		GF	
Date	13/02/09	**Policy Reference**	**LTT141**

FOI/EIR	FOI	**Section/Regulation**	s16	**Issue**	Specifying steps in relation to advice and assistance

Line to take:

The Commissioner is satisfied that implicit in s50(4) is the legal power to specify steps directing public authorities to provide advice and assistance where he has found a breach of s16.

Further Information:

Section 50(4) provides:

"*Where the Commissioner decided that a public authority -*

- *has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by s1(1), or*

- *has failed to comply with any of the requirements of sections 11 and 17,*

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."

The Commissioner refutes the decision taken by the Tribunal in Fitzsimmons v ICO and BBC, where the IT rejected the Commissioner's submission that there is an implicit power in s50(4) to specify a step requiring a public authority to provide advice and assistance under s16 in accordance with the s45 Code.

The Tribunal were of the view that section 50(4) set out the limits of the IC's powers and that "insofar as non-compliance with 'specified steps' could lead to contempt proceedings, the clearest wording would be required to substantiate such a power and that this was not the case here" (paragraph 48). However, we are of the view that 50(4) creates an obligation on what the Commissioner **must** issue steps in relation to (ie s1(1), 11 and 17). Although there is no obligation for the Commissioner to order steps in relation to s16 under 50(4), he is not precluded from the **ability** to specify steps and therefore it is possible to specify steps in relation to breaches of the Act other than those listed in s50(4). This corresponds with the view that ICO should address any failure to give appropriate advice and assistance in decision notices relating to that particular case (rather than general or future proceedings, where a Practice Recommendation or an Enforcement Notice might be more appropriate).

Caseworkers should therefore continue to specify steps to providing advice and assistance under s16 in relation to the complaint in question.

NB The Commissioner changed his position at the Tribunal from that in the decision notice (FS50081562), in which he had originally only made a suggestion that they should contact the applicant with a view to offering advice and assistance in 'Other matters'.

Source	**Details**
Legal Advice IT	Email Lucie Dennehy to Steve Wood 09 May 2008 Fitzsimmons (3 December 2008)

Related Lines to Take

LTT137

Related Documents

EA/2008/0043			
Contact		GF	
Date	18/02/2009	**Policy Reference**	**LTT142**

FOI/EIR	FOI / EIR	**Section/Regulation**	s.21(1), 21(2)(a) & (b) Reg 6(1)(b)	**Issue**	Reasonably accessible information

Line to take:

The phrase 'reasonably accessible' under s21 refers to whether the applicant can reasonably obtain all the requested information. It does not refer to whether the applicant can access a reasonable proportion of the information requested.

Further Information:

Section 21 of the FOIA states as follows:

"21. – (1) Information which is reasonably accessible to the applicant otherwise than under s.1 is exempt information".

In the case of Colin P England v London Borough of Bexley, the complainant asked for the addresses of empty properties in Bexley, the reasons why the properties were empty and other information about the properties' ownership. The Land Registry holds details of land ownership for registered but not unregistered land and around 30% of land is unregistered. Thus whilst it would be reasonable to expect the complainant to approach the Land Registry, he would not be able to obtain all the information he had requested in this way.

The issue before the Tribunal was whether the fact that 70% of the information requested was available meant that the information requested was reasonably accessible or whether **all** the information had to be reasonably accessible.

One dissenting member of the Tribunal agreed with the decision notice in finding that the requested information was reasonably accessible to the complainant because *"…in section 21 the word 'reasonably' qualifies the 'accessible'…"* (para 113).

However, the majority decision of the Tribunal found that:

"…in the majority's view, 'reasonably accessible' applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere…" (para 113).

The Commissioner now considers that the approach taken by the majority is the correct one. Thus, s.21 can only be claimed where all the requested information is reasonably available to the complainant and any investigation will consider how reasonable it would be for the complainant to access the entirety of the information requested.

Environmental Information Regulations

The Commissioner considers that the above approach may be useful only insofar as specifically interpreting the *"…already publicly available…"* element of Regulation 6(1)(b) but this should not be read across to other aspects of Regulation 6 (see LTT119).

Source	Details
IT	Colin P England / London Borough of Bexley (10 May 2007)

Related Lines to Take

LTT25, LTT26, LTT119			
Related Documents			
EA/2006/0060 & 0066 (England),			
Contact		HD	
Date	18/02/2009	**Policy Reference**	LTT143

FOI/EIR	FOI	**Section/Regulation**	s40	**Issue**	**INTERIM LINE** Personal data – anonymised statistics

Line to take:

INTERIM LINE

Truly anonymised data/statistics is not personal data and thus can be disclosed without reference to the Data Protection Act.

The Commissioner does not accept that where a public authority holds information to identify living individuals from the anonymised data, that this turns the anonymised data into personal data. The Commissioner draws support for this approach from the House of Lords' judgment in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47.

However if a member of the general public could identify individuals by cross-referencing the anonymised data with information already in the public domain, then the information is personal data. Whether it is possible to identify individuals from the anonymised data is a question of fact based on the circumstances of the specific case.

Further Information:

**** PLEASE NOTE THAT THIS IS AN INTERIM LINE AS THE CASE ON WHICH IT IS BASED IS CURRENTLY UNDER APPEAL TO THE INFORMATION TRIBUNAL ****

The Commissioner considers that **truly** anonymised data is not personal data and thus there is no need to consider the application of any Data Protection Act principles when considering whether or not to disclose truly anonymised data.

However, some data controllers point to the wording of s.1(1) of the Data Protection Act which states that *"…'personal data means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is* ***in the possession*** *of, or is* ***likely to come into the possession of the data controller****…"* (emphasis added) to argue that although no living individual could be identified from the requested information on its own, that as the data controllers hold other information which would allow individuals to be identified, this must necessarily make the information, personal data.

The Commissioner does not accept this approach.

Therefore the Commissioner considers that even where the data controller holds that additional 'identifying' information, that this does not prevent them from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone and thus would no longer be personal data.

However it is then necessary to go onto to consider the information which is available to the public. The test of whether the information is **truly** anonymised is whether a (or any) member of the public could identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case.

If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate.

However, where the anonymised data cannot be linked to an individual using the additional available information (i.e. the information had been truly anonymised) then, the information can be considered for disclosure without any reference to DPA principles.

This approach is supported by paragraphs 24 & 25 of Lord Hope's judgment in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47, where it was said:

"…Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection…" (para 25).

The approach outlined above has been taken in the following case which is currently under appeal to the Information Tribunal.

Case reference FS50122432

The complainant made a request to the Department of Health (the "DoH") for a full statistical breakdown of the number of abortions carried out in 2003 under ground (e) – abortions where there is a substantial risk that if the child were born it would suffer from serious physical or mental abnormalities. This information is supplied to the Chief Medical Officer on Abortion Notification Forms which also include details of abortions of foetuses over 24 weeks gestation.

The complainant made the request because when the DoH took over responsibility for publishing this information in 2002, they reduced the level of detail from very detailed (including showing counts of 0, 1 or 2 cases) to redacting the numbers where the occurrences were less than 10.

The DoH withheld disclosure on the grounds of sections 40 and 44. In relation to s.40, the public authority raised the argument outlined above based on the wording of s.1 DPA.

At paragraphs 45 & 46, the Commissioner confirmed that he was not persuaded by this argument and said that *"…the statistical information is so far removed from the information on the Abortion Notification forms that it no longer retains the attributes of personal data. In reaching this view the Commissioner has noted that the DoH accepts that an individual cannot be identified by the requested information alone…"*

The Commissioner is maintaining this approach at the forthcoming appeal before the Tribunal although accepts that this approach has not been adopted in previous cases, for example, FS50133250 (Caerphilly County Borough Council – pupils excluded from schools as a result of drugs finds).

Source	Details
Policy Team	Department of Health (Decision

	Notice -28 July 2008) – APPEALED Common Services Agency / Scottish Information Commissioner

Related Lines to Take
LTT71,

Related Documents
FS50122432 (DoH), [2008] UKHL 47 (Common Services Agency), DP Technical Guidance "Determining what is personal data",

Contact		RM / HD	
Date	24/02/2009	**Policy Reference**	**LTT144**

FOI/EIR	FOI	Section/Regulation	Section 12	Issue	Aggregation of multiple requests within a single item of correspondence

Line to take:

Technically, multiple requests within a single item of correspondence are separate requests for the purpose of section 12. If a public authority has applied the exclusion under section 12 to multiple requests within a single item of correspondence, we need to be satisfied that each request can be aggregated in accordance with the Fees Regulations. If it is found that one of the multiple requests is not similar to the others, the public authority will not be entitled to refuse that particular request under section 12 unless complying with the request by itself would exceed the cost limit.

Further Information:

It is not uncommon for requesters to request information in the form of several (often numbered) parts within a single item of correspondence. It has become common practice to view these parts as representing a single request for information rather than multiple requests. This has seldom caused any problem however it has become apparent that the Tribunal in *Fitzsimmons* (discussed below) took a different approach and considered these separate parts as individual requests.

When we are dealing with multiple requests within a single item of correspondence for section 12 cases, we need to be satisfied that each of the multiple requests meets the conditions for aggregation in the Fees Regulations (see related LTT 138). If we do not recognise when we are dealing with multiple requests, there is a danger that we will fail to recognise when one of the requests should be considered separately because it is not similar to the others and we also deprive the requester of the opportunity to argue that the requests are not all similar in nature.

Ian Fitzsimmons and Department for Culture, Media and Sport

The above case concerned multiple requests made within a single item of correspondence to which the public authority had applied section 12. This case is perhaps somewhat unusual in that we did acknowledge on this occasion that we were dealing with separate requests and we also expressed the view that we were satisfied the requests were related. The only problem here was that we went on to add that because we believed the requests were similar, on that basis we would treat them as representing a single request in line with our "general approach". Consequently, although it seems we had intuitively aggregated the requests, we did not refer explicitly to the Fees Regulations or the process of aggregation. The Tribunal criticised us for this and stated at paragraph 36 of it decision:

"We were troubled by the description of the 'Commissioner's general approach' being that where a number of information requests are made within a single item of correspondence it is appropriate for these to be considered a single request, unless the requests are entirely unrelated. The Fees Regulations prescribe the circumstances in which requests may be aggregated for the purposes of section 12 of the FOIA and should be followed by a public

authority and the Commissioner. It is wrong to describe this as a 'general approach' and understandably mislead Mr Fitzsimmons".

This decision highlighted that our Decision Notice on this occasion had been along the right lines in that:

- it recognised that each of the numbered points made by the complainant was technically a separate request
- it stated that unrelated requests should be considered separately

It is notable that it made no difference to the outcome whether we referred explicitly to aggregation as the Tribunal went on to uphold the Commissioner's decision that section 12 applied, the only issue was with how we expressed our rationale in this particular case. It was clearly the view of the Tribunal that even when the outcome would be the same, we should ensure that we refer specifically to the conditions for aggregation under the Fees Regulations to avoid giving the impression that we are relying merely on our own views or a "general approach" rather than a specific legal framework.

Practical effect on case work

When dealing with refusals under section 12, we need to consider whether the correspondence actually represents one or more separate requests in line with this LTT. We then need to be satisfied that each request could be aggregated in accordance with the Fees Regulations. Experience of dealing with section 12 complaints has tended to show that, in the vast majority of cases, a requester is likely to be concerned with a single issue. He or she may make multiple requests merely as a way of trying to be precise about what information they are seeking. Therefore, it is anticipated that the aggregation of multiple requests within a single item of correspondence will not generally create much difficulty, particularly given that at paragraph 43 of the *Fitzsimmons* decision, the Tribunal also commented that the grounds for aggregation are very wide as the requests need only relate *to any extent* to similar information (see LTT 138). The most important point is to be aware that there may be, on some occasions, a request that is not similar to the others and in those cases the public authority will not be entitled to refuse that particular request under section 12 unless the request by itself would exceed the cost limit.

In line with the *Fitzsimmons* decision, specific reference needs to be made to the Fees Regulations and the process of aggregation and the following standard paragraph should therefore be inserted in Decision Notices dealing with refusals under section 12 of multiple requests within a single item of correspondence.

"The Commissioner notes that in this case the complainant has made more than one request within a single item of correspondence. Section 12(4) provides that, in certain circumstances set out in the Statutory Instrument 2004 No. 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004" ("the Fees Regulations"), requests can be aggregated so that the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them. Regulation 5 of the Fees Regulations sets out the relevant condition in this case and provides that multiple requests can be aggregated in circumstances where the two or more requests relate to any extent, to the same or similar information. Although this test is very

broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether he is satisfied that the requests relate to the same or similar information".

We will then need to go on to conclude either that the Commissioner is satisfied that the requests do relate to the same or similar information and can therefore be aggregated or that the Commissioner is not satisfied that all the requests relate to the same or similar information. In cases where we are not satisfied that all the requests can be aggregated, we will need to explain why.

NB. This line should not be applied to complaints being considered under the Environmental Information Regulations 2004. Separate work involving costs and manifestly unreasonable requests under the EIR is currently underway.

Source	**Details**
Information Tribunal	Ian Fitzsimmons v ICO & DCMS

Related Lines to Take

LTT138

Related Documents

EA/2007/0124

Contact	RM		
Date	09/03/09	**Policy Reference**	**LTT145**

FOI/EIR	FOI / EIR	Section/Regulation	s35, s36 12(4)(e)	Issue	Public Interest Test for "raw notes" and "aide memoire notes"

Line to take:

There is no in-built weight in favour of maintaining the exemptions at section 35 and section 36 simply because the document in question is a "raw note" or an "aide memoire note".

General arguments that there is a higher public interest in maintaining the exemptions at s35 and s36 in relation to "raw notes" or information recorded to act as a personal "aide memoire" should be treated with some caution. There are counter-arguments to this view, and any decision must take into account the particular circumstances of the case. A blanket approach to this type of information should not be adopted.

Further Information:

Evans v the ICO and the Ministry of Defence – the Tribunals comments

In *Evans v the Information Commissioner and Ministry of Defence* the Tribunal considered the application of s36(2)(b)(ii) - inhibition to the free and frank exchange of views for the purposes of deliberation - to the hand written notes taken of a ministerial meeting. It had been envisaged that more formal minutes would be produced from these "rough notes", but in the event no formal minute of the meeting was ever produced.

Although this case considered the public interest in relation to withholding the hand written notes of a meeting under s36(2)(b)(ii), similar arguments about such information could be put forward under the other limbs of s36, and under s35. They could also potentially be made in relation to other exemptions.*

In considering the public interest test the Tribunal made the following comments about the form of the recorded information which they regarded as "a significant inhibition"

"There is a considerable public interest in seeing a formal record of the meeting. But the Private Secretary's contemporaneous, handwritten, illegible and incomplete note is not such a record…….Read by the Secretary who made the record, the single word may trigger a recollection of the context and substance of the discussion; Literally, an aide memoir : the note assists the Secretary to produce from memory a full and formal record. Read by anyone else, the single word is at best meaningless, and at worst misleading" (para 37)

"The public interest from disclosure of the raw data is greatly reduced by the lack of intelligibility of much of the recorded information, at least to a reader who was not present at the meeting; and by the significant inhibitory effect on those attending the meeting of publication of raw notes" (para 39)

"The question of timing of the request is also affected by the raw nature of the data. The public interest in not disclosing information in a raw, unfinished format is less likely to diminish quickly with the passage of time, since the potential to mislead would remain undiminished. Moreover the public interest in disclosing the information would remain less powerful, because the information is not in a fair or accessible format, than if the information were in a final considered form. We endorsed the proposition from Brooke above [EA/ 2006/001 & 013] that "as a general rule, the public interest in maintaining an exemption diminishes over time". We add a rider: "where the information is in a raw, unconsidered form the, the public interest in maintaining the exemption is likely to diminish more slowly than where the information is in a finished, considered form. " (para 41)

The ICO considers that whilst there is some merit in the Tribunals comments there are also relevant counter-arguments, that need to taken into account when considering the public interest test in the particular circumstances of any case. A blanket approach to aide memoir type information should not be adopted.

"Aide memoire" notes

Before considering the arguments and counter arguments arising from the Evans case, it may be useful to think about what is meant be the term "aide memoire", the different types of notes that may be covered by this term, and the purposes for which such notes may be made. It should be noted that whilst the Evans case provided the starting point for the following consideration, the types of notes considered here go beyond those that were the subject of the Evans case (the following list should not be considered to be exhaustive – other types of notes that may be covered by the term may become evident through casework)

- Notes made for personal use only - For example where a meeting attendee makes their own note of a meeting to act as their own personal reminder of the salient points, or to prompt or assist them in any actions they may need to take as a result of the meeting. Here the purpose of the note is **solely** to act a personal reminder / prompt. There is no suggestion that the notes are being taken for any other purpose (such as to facilitate the production of a formal minute, or to act as a wider record that other people may refer to). Similarly an aide memoire note may be made in advance of a meeting or telephone call to act as a reminder to the author only of points to raise during the course of the proposed meeting / call. Further (non exhaustive) examples of aide memoire notes made only for the author's personal use could be; notes made at the start of a piece of work to remind the author what they want to cover, and "to do" lists made at the start or end of the day.

- Notes made for wider use - For example where a note of a meeting or telephone conversation is made and placed on a case file, or personnel file, or where informal agenda notes are circulated to attendees prior to a meeting. Here the note may act partly as an aide memoir to the note taker, but is also made to provide an audit trial, or

to act as a record that may be referred to by others.

- Notes made for the sole purpose of producing a separate more formal record – For example the contemporaneous, hand-written note of a meeting that a "minute taker" may take, and from which formal minutes are then produced. Here there is no suggestion that the note needs to be retained once the formal minutes have been produced and agreed. The note serves a temporary business need, to assist in the production of the formal minutes, once this need has passed then the note may be destroyed or, if it is retained, is retained only for the personal use of the author.

- Notes made to serve the dual purposes of producing a separate formal record, and acting as a distinct or more complete record in their own right – For example, sometimes a note of a meeting may be made partly to assist in the production of a formal minute, but also with the intention of retaining the note to act as a separate record in its own right. This note might be retained because it provides a fuller version of events than is provided in the official minutes, and there is a perceived need to retain a fuller version for future reference. Alternatively it may be retained because it is considered likely to be of historical interest, or because retention schedules require this. Here, although the temporary business need of producing the formal minutes will pass once the minutes have been produced and agreed, there will be a separate reason, beyond retention for the personal use of the author, for retaining the note.

- Typed (rather than hand written) notes – Although in many cases aide memoire notes will be hand written notes, this doesn't have to be the case. For example, contemporaneous notes could be made straight onto a laptop, or aide memoir notes could be typed up from memory immediately after a meeting or conversation. The fact that a note is typed doesn't necessary make it more formal than a hand-written note. A typed note could be made just for the personal use of the author, and a hand-written note could be made to act as a formal record.

Evans v the ICO and the Ministry of Defence – the counter arguments

The ICO has considered the various arguments made in the Evans case, bearing in mind the above discussion on the nature of "aide memoire" notes, and has the following comments. Again it should be noted that although the Evans case provided the starting point for these considerations, the discussion below goes beyond the type of notes that were the subject of the Evans case.

- **"Aide memoir e" notes are an incomplete record and disclosure might mislead the public** – The counter-argument to this would be that FOIA provides a right of access to all "recorded information" not just to accurate or complete information and that although there may be a public interest in not misleading the public this effect could be mitigated by providing an explanation or putting the information into context. (see proposed LTTxx for wider consideration of this issue)

Where the information is meaningless rather than misleading, whilst this might reduce the public interest in disclosure it would also mean that there is unlikely to be any adverse effect from disclosure.

Also, whilst an "aide memoire" note is unlikely to ever be a fully complete record, how complete it is will vary from case to case depending upon the individual note taker (styles may vary from recording odd words here and there to attempting to record everything verbatim).

In light of the above the ICO considers that a public authority would need to provide strong arguments about why the effect of misleading the public could not be effectively mitigated against in any particular case for this argument to have much weight. Factors that might have some weight in this respect in the case of very sparse aide memoir notes, are the extent to which context or explanation could only be provided by the original author of the notes, and whether the amount of work required to provide the mitigating context would be proportional in the circumstances of the case.

- **The public interest may be met by publication of the official record of the meeting provided in the formal minutes** –The ICO response to arguments about information already in the public domain will generally be to consider whether the actual information in question, rather than other similar or related information, is already in the public domain, and whether the public would be further informed by the proposed disclosure (see LTT43 and proposed LTTXX for more detailed discussion on this point)

Specifically in relation to "aide memoir" type information a number of issues are relevant. In situations where the only record of a meeting, discussion or similar is the "note" then it could be argued that the public interest in disclosure increases because no official record exists. Even where a formal record is produced from the "aide memoire", not all formal records are published, so it may be that, as at the date of a request, the public interest in disclosure has not already been met by the prior publication of a formal record. Where a formal record has been produced and made available to the public, there may still be a public interest in disclosure of "aide memoir" type notes if the hand written notes reveal something that is not in the formal record (although depending on what is revealed this may also increase the public interest in maintaining the exemption). Finally even if the notes don't reveal any new content, there may still be a public interest in disclosure in order to demonstrate that fact (see also comments in LTT61 about removal of "suspicion of spin").

- **The public interest in maintaining the exemption for information in a raw form diminishes more slowly than for information in a finished form because the potential to mislead would remain undiminished** - Firstly the comments above about mitigating the effect of misleading the public will be relevant here. Secondly, whilst in many cases the potential to mislead might remain undiminished with time this may not always be the case.

Where the potential to mislead relates to problems with mis-understanding abbreviations or shorthand terms used within the notes, then it may well be that the potential to mislead in this way remains undiminished over time. However, where concerns about misleading relate more to the public being misled because they won't fully understand the complexity of the issues at stake from the "raw notes" that have been made, then the passage of time may actually act to reduce the potential for misunderstanding, because it brings with it the benefit of hindsight. For example the general public arguably knows more about time limits for retention of suspects without charge now than it did 4 years ago. In other words the potential

for the public to be misled by the release of "unconsidered" information may be reduced because the public is inherently, with the benefit of hindsight, more able to put the information into some sort context itself. This will need to be considered in the context of the individual case.

- **There would be a significant inhibitory effect on meeting attendees if it were known that hand written notes might be disclosed**. The Tribunal wasn't explicit here about whether it was referring to an inhibitory effect on the frankness of debate, or an inhibitory effect on the quality of the note taking, or on both (both had been argued by the MOD) .

In terms of the effect on the frankness of debate, case officers should first consider LTT130 on the "chilling effect". Whilst the Tribunal's comments in Evans suggest some acceptance of an inhibitory effect simply because of the "raw notes" form of the information, the Commissioner would generally be cautious about arguments which only consider the form, without giving due consideration to the content of the information. The pure "raw notes" argument would be that a chilling effect would occur just because raw notes have been released, rather than because of the individual content of any disclosures. The Commissioners view (in line with LTT130) is that the wider or more general the effect being argued the more difficult the argument will be to sustain, and that a likely chilling effect from the disclosure of the particular information in question would need to be demonstrated. (see also comments below on *Cabinet Office v the Information Commissioner & Lamb*)

In terms of any inhibitory effect on note keeping, the Commissioner general position is as set out in LTT61 - that record keeping is a staff management matter, and that arguments of this nature should be given little weight in the public interest test. What may be particularly relevant to "aide memoir" notes is not just whether any inhibitory effect would occur, but also, taking into account the type of note in question, whether such inhibition would actually impact on the interest being protected by the exemption claimed.

For example, where notes have been made solely to act as an "aide memoire" for the author, and do not feed into any policy making deliberations, or policy formulation work (such as drafting a new policy), then any inhibitory effect on the author might have little or no impact on the effective formulation and development of government policy or the effective conduct of public affairs (s35 could still be engaged here because although there might be minimal impact on the formulation and development process the information could still "relate to" it) However, if it could be demonstrated that less complete notes of meeting would be made, resulting in inadequate formal minutes, or agreed actions not being followed up, then a likely prejudice to the effective conduct of public affairs might be said to have been shown. Similarly, if one reason for taking hand written notes is so that they can act as a fuller version of events (maybe attributing comment to individuals) that may be needed for a future business need, then there may be a prejudice to the effective conduct of public affairs if that future business need cannot be met because of the inadequacy of the note taking. These will be considerations to be taken into account in the circumstances of the case, and always bearing in mind whether it is reasonable to expect staff to take adequate notes as part of their job, (and in line with the authority's records management policies and the s46 code) regardless of any prospect of future disclosure **

Cabinet Office v the Information Commissioner & Lamb

In *Lamb v the Information Commissioner and the Cabinet Office* the appeal concerned both the official minutes and the hand written notes of Cabinet Minutes at which the decision to go to war in Iraq was discussed. The hand written notes were referred to as the "Additional Material" and comprised the Cabinet Secretaries' notebooks .

The Commissioner accepted that disclosure of the Cabinet Secretaries' notebooks "would be likely to have a greater impact on debates within Cabinet, and the manner in which a record of them was maintained than in the case of the minutes themselves" and the Tribunal agreed. However, it should be noted that the Commissioner's submissions closely related these effects to the specific content of the information in question rather than just relying on general arguments about the notes being in a raw form.

In particular the Commissioner's open submissions (which are not set out in full in the Tribunals decision) took account of the extent to which the notes might attribute comments to individual attendees and reveal something about the language and mood of the meeting which might not be evident in the formal minutes and how revealing such matters might affect the frankness of debate and note taking and might undermine collective Cabinet responsibility (see also LTT132) . In this case, he considered that the overall balance of all the public interest factors lay in favour of maintaining the exemption for the hand written notes.

It should be noted that it is such information specific reasons that the Commissioner considers to be relevant, rather than the more general point of the Tribunal that "the manner in which an individual takes contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight and importance that should be attributed to a particular part of the debate or the tone in which points were expressed" The Commissioner does not accept that an idiosyncratic style of note-taking is in itself an argument for maintaining s35 or s36, and refers back to the comments above about the ability to mitigate against creating a false impression by providing explanation or context.

Ultimately, the Tribunal upheld the Commissioner decision that the Cabinet Secretaries' notebooks should not be released and commented that "this is not to say that circumstances will never arise when it may be appropriate to disclosure informal notes, but we are unanimous in our conclusion that this is not such a case and the no disclosure of the Additional Material should be made"

The Commissioner acknowledges the principle that Cabinet Secretaries' notebooks have been closed for longer than Cabinet minutes (40 years rather than 30 years) but considers that this should not be determinative in any decision.***

EIR

Whilst the arguments in this LTT may have some relevance to particular EIR cases, it cannot just be assumed that the line equally applies to regulation 12(4)(e).

Regulation 12(4)(e) covers internal communications, and our line (as per LTT104) is that where information is recorded simply to be used by its author, for example as an aide

memoire then it will not be an internal communication, but that where the record is communicated to others, or placed on file to be referred to by others it will be. This regulation will not therefore necessarily even be engaged for some "aide memoire" type information.

Footnotes

*This LTT concentrates on the s35 and s36 exemptions, and information that, if it where not environmental, would fall under 35 or s36.

** The recent "review of the 30 year rule" discusses the issue of record keeping and makes the following recommendations (amongst others). "We recommend that the government revisit the Civil Service Code to see whether it needs an amendment to include an explicit injunction to keep full, accurate and impartial records of government business" (para 8.4). "We recommend that the government confirm that special advisers' non-political records are not exempt from the Public Records Act and the FOI Act; that as temporary civil servants they, too, are under a duty to keep a full record of their deeds and doings; and that any misunderstanding about these matters on the part of ministers departments or special advisers is removed" (Para 8.10)

*** Useful background on how the position in relation to Cabinet Secretaries' notebooks has changed, generally in favour of earlier disclosure, can be found on the national archives website.

Source	Details
IT	Evans / MOD (26 October 2007) Lamb / Cabinet Office (27 January 2009) Guardian & Brooke /BBC (8 January 2007)

Related Lines to Take

LTT43, LTT66, LTT104, LTT130, LTT131, LTT132,

Related Documents

EA/2006/0064 (Evans), EA/2006/0011& 0013 (Guardian Brooke), EA/2008/0024 & 0029 (Lamb), review of 30 year rule, Questions about Cabinet Secretaries notebooks – national

archives			
Contact		LA	
Date	09/03/09	**Policy Reference**	**LTT146**

FOI/EIR	EIR	**Section/Regulation**	Reg 12(4)(b)	**Issue**	"Manifestly unreasonable" in relation to the cost of complying with a request

Line to take:

The FOI Fees Regulations can be used as a starting point in determining whether costs under EIR are reasonable. The fact that a similar request may be rejected under the provisions of s12 of FOIA does not, in itself, render a request made under EIR manifestly unreasonable by virtue of regulation 12(4)(b). There are other important factors that must always be taken into consideration before concluding that environmental information can be withheld under this exception:

1. Under EIR, there is no statutory equivalent to the "appropriate limit";
2. Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority;
3. Presumption in favour of disclosure under regulation 12(2);

4. Public interest test under regulation 12(1);
5. The requirement to interpret the exceptions restrictively; and
6. The individual circumstances of the case.

Further Information:

Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test that being simply "unreasonable". "Manifestly" means that there must be an obvious, clear or self-evident quality to the unreasonableness referred to.

Cost of complying with a request for environmental information

The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious (see LTT123) and 2) where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources.

In determining whether the cost of complying with request for environmental information would be "manifestly unreasonable" under regulation 12(4)(b) of EIRs, it is acceptable to use the FOI and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') as a starting point to ascertain what constitutes a 'manifestly unreasonable' cost or diversion of resources.

In assessing whether the cost of complying with a request for environmental information is reasonable, caseworkers should bear in mind the EU Directive from which EIR originates, which states at 4(2) that "the grounds for refusal... shall be interpreted in a restrictive way". Furthermore, the Implementation Guide to the Aarhus Convention (page 57) notes that:

"Although the Convention does not give direct guidance on how to define 'manifestly unreasonable', it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one month time limit to two months. This implies that volume and complexity alone do not make a request manifestly unreasonable."

The fact that a similar request may be rejected under the provisions of s12 of FOIA does not, in itself, render a request made under EIR manifestly unreasonable by virtue of regulation 12(4)(b) - there are additional factors that should always be considered in assessing whether costs are manifestly unreasonable:

1. Under EIR, there is no statutory equivalent to the "appropriate limit";
2. Proportion of burden on the public authority's workload, taking into consideration the size of the public authority;
3. Presumption in favour of disclosure under regulation 12(2);
4. Public interest test under regulation 12(1);

5. The requirement to interpret the exceptions restrictively; and
6. The individual circumstances of the case.

Examples of Approaches

The Commissioner has considered the approach discussed in the decision notices FS50121519 and FS50154310; in each decision, the weighting of the above factors varies, and therefore results in distinct outcomes.

FS50121519

In this case, the public authority had originally refused the request under s12 of FOIA. When the Commissioner alerted the public authority to the fact that part of the response constituted environmental information, the public authority suggested that were the Commissioner to decide that this information was environmental, the request should still be refused under regulation 12(4)(b) as manifestly unreasonable. The public authority suggested that in effect regulation 12(4)(b) runs parallel to the exemption in s12 of the Act and therefore, as responding to the request exceed the appropriate limit detailed in the fees regulations, it could be refused under 12(4)(b).

However, the Commissioner rejected this argument, clarifying that where a request for environmental information would exceed the appropriate limit if it were dealt with under the Act is not straightforward grounds for classing a request as manifestly unreasonable. In line with the approach set out above, the Commissioner went on to consider additional factors before reaching a conclusion on whether dealing with the request would be manifestly unreasonable.

In this case, the public authority did not present satisfactory evidence for its calculations of cost estimates of complying with the request; this therefore gave the Commissioner good grounds to doubt the public authority's claim that the request was unreasonable. In addition to this, the Commissioner considered how proportionate the burden created by the request would be on the public authority's normal activities and whether complying with the request would involve an unreasonable diversion of resources from the provision of public services. As DBERR is a large central government department, the Commissioner made the judgement that dealing with this request would not interrupt its normal activities and responsibilities in any significant way.

In taking into account the factors on the evidence of estimates and the proportionality of the burden, the Commissioner was satisfied that in these circumstances, the request was not manifestly unreasonable, despite the fact it surpassed the equivalent to the appropriate limit under FOI fees regulations. He therefore did not go on to consider the public interest test in this case.

FS50154310

In this case, the complainant requested items relating to the maintenance of a septic tank that served his property and was the responsibility of the local Council. The public authority initially refused the requested under s12 of FOIA. However, the Commissioner decided that the majority of the information was environmental and should be dealt with under the

corresponding regulations.

The Commissioner considered the FOI Fees Regulations as a starting point in his assessment on whether the requests (for environmental information) would be unreasonably costly for the public authority to deal with. The Commissioner was content that the public authority's estimate of 54 hours 32 minutes was reasonable, and considered this in light of the appropriate limit of 18 hours under the FOI fees regulations, noting that such a large search would seriously disrupt the everyday work of the PA and was therefore manifestly unreasonable.

The Commissioner went on to consider the public interest case; he believed that in this case, the release of information would promote accountability and transparency in public services. However, the Commissioner found that the time it would take in responding to the request would divert a disproportionate amount of the public authority's resources from its core functions (paragraph 47), and furthermore, the fact that very few people were directly served by the sewage plant indicated a limited level of public interest in disclosure.

Although acknowledging the specific presumption in favour of disclosure at 12(2) of EIR, in light of the arguments for the above factors, the Commissioner concluded that on balance, the public interest in maintaining the exception under 12(4)(b) outweighs the public interest in disclosing the information, and therefore, the cost of complying with this request was manifestly unreasonable.

Caseworkers should bear in mind that Regulation 9 places the duty on the public authority to provide advice and assistance; the EIR Code of Practice is clear that public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant – this is general enough to include where the cost of dealing with a request is deemed as manifestly unreasonable.

NB: Caseworkers should remember that the costs of complying with requests for non-environmental information cannot be taken into account under EIR.

Source	Details
DN	FS50154310 FS50121519

Related Lines to Take

LTT1; LTT80; LTT116; LTT122; LTT123

Related Documents

FS50154310

FS50121519

Guidance on charging for environmental information; FOI and Data Protection (Appropriate Limit and Fees) Regulations 2004

Contact		GF	
Date	09/03/09	**Policy Reference**	**LTT147**

FOI/EIR	FOI / EIR	**Section/Regulation**	Sections 35, 36. Regulations 12(4)(e), 12(5)(f)	**Issue**	Public interest arguments **presented** in favour of maintain a relevant exemption for withholding information on lobby

Line to take:

1) The value of lobbyists' input

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

2) Safe Space

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

3) Chilling Effects

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

4) Record Keeping

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

5) Effect of the Media

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

Further Information:

Introduction

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

Two Tribunal decisions have considered whether information relating to lobbyists can be disclos The first, Evans v ICO & MoD, involved an introductory meeting between a new minister and a

professional firm of lobbyists which is paid to promote the interests of its clients. The second, DBERR v ICO & FoE, involved information on a series of meetings between a government dept and the Confederation of British Industry (CBI) which, as the name suggests, is a representative body and lobbyist for British industry.

What makes the information or advice provided by lobbyists different to that provided by civil servants is that the role of civil servants is to provide neutral advice to ministers where as the primary role of lobbyists is to influence government policy in favour of the clients or interest grou they represent.

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

It should be recognised that the exemptions/exceptions cited work in a variety of ways with s35 r12(4)(e) being class based, where as the engagement of s36 depends on the qualified person' opinion being reasonable and for 12(5)(f) to be engaged the 'adverse effect' test has to be satis before any consideration of the public interest test. The issues discussed in this line were presented by the public authority as public interest arguments in favour of maintaining **both** ss3 and s36. However they will also be relevant to assessing whether there would be any adverse effect when considering r12(5)(f). When looking at s36 these arguments are likely to be present by the public authority as the reasons why the qualified person believed disclosure would preju the conduct of pubic affairs. If we accept that s36 is engaged we cannot then dismiss these arguments out of hand as this would be tantamount to finding that the opinion was not in fact reasonable. What we can do though is accept the exemption is engaged but reach our own conclusion as to the severity and frequency of that prejudice, which may well be different to tha the public authority, and weigh that against the public interest factors in favour of disclosing the information.

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

It is also important to note that s35 can only be claimed if the dialogue with a lobbyist related to particular policy issue. For example in Evans our original DN had rejected the application of s35 because the meeting in question was simply an introductory one and was not linked to any spec policy development. This was not contested at Tribunal. It should also be remembered that

lobbyists' activities are not solely confined to central government departments, for example they may seek to influence a local authority's policy development, in which case s35 would not be available to the public authority.

1) The Value of Lobbyists' Input

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

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

All parties agreed that it was beneficial to adopt a process which allowed bodies such as lobbyis an early opportunity to influence policy (para 71 DBERR) and for the government to have a pos relationship with influencers (para 67 DBERR) and the Tribunal recognised that there was value government being able to test ideas with informed third parties and knowing what the reaction o particular group of stakeholders might be in relation to a specific policy. The Tribunal stated;

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

2) Safe Space

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

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

of the relationship between lobbyist and government.

LTT 129 explains the safe space arguments in relation to the internal thinking that goes into government policy making. In broad terms there is a public interest in the government having tir to formulate policy in private so that it can reach a fully considered view without disruption and without what are merely options being taken to be decided policy. It is generally accepted that t early stages of policy formulation are best conducted in private but once a policy decision has b reached then there is less sensitivity in disclosing information that gives an insight into how that decision was reached.

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

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

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

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

Because the dialogue with lobbyists had become an integral part of the policy process DBERR argued that its discussions with lobbyists deserved the same safe space as that afforded to inte meetings between civil servants, and civil servants and ministers (para 53).

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

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

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

The opportunity for others to raise counterbalancing arguments

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

"In our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make bes policy…. .This means that there is a public interest in the disclosure of information in relation to such deliberations even at the early stages of policy formulation. This to a large extent counterbalances the strong public interest in maintaining a private space at the early stages of policy formulation… " (para 117 DBERR)

And in its conclusions the Tribunal found that;

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

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

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

Information which is wholly internal

It should not be overlooked that a request for information relating to lobbyists may capture more than the records of the actual dialogue between lobbyist and government. It could also cover information that is wholly internal to government. For example it could include briefing documen on the latest internal thinking on a particular policy issue, or government's negotiating position w lobbyists. This matter was touched on briefly in Evans where one of the pieces of disputed

information was a background note which briefed a new minister on a particular representative a firm of lobbyists and his business activities. Ultimately the Tribunal found that this note was exclusively the personal data of that individual and because of its contents was exempt under s40(2). However the Tribunal did comment at para 44 that **if** the background note had briefed o approaches that the minister may adopt on issues raised by the lobbyists;

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

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

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

3) Chilling Effects

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

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

The Chilling Effect

It is accepted that there is a public interest in maintaining the flow of valuable information from lobbyists to government. What then needs to be considered is whether the risk of disclosing the information in question will have a negative impact on the nature of the information provided by

lobbyists so reducing its value to government, i.e would lobbyists be inhibited from discussing issues with government in a full and frank manner .

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

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

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

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

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

Informal meetings – influencing and advisory roles

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

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

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

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

And at para 118 the Tribunal found that;

"…it is not possible to distinguish between their influencing and advisory roles when its officials

meeting with government and that it would be naive to take any other view."

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

Contrary Evidence

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

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

Experience of FOI

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

"….neither the CBI nor the EEF [Engineers & Employers Federation] appear to have altered the conduct at all in light of the Commissioner's Decision Notice. That appears to us indicative that approach to meetings is unlikely to be substantially altered in practice, i.e. that there is unlikely be a real chilling effect if there is a prospect of disclosure which of course there must be where freedom of information regime is in place. There was no evidence of any actual loss of candour frankness notwithstanding the fact that the Act had received the Royal Assent some five years before the Request and following the Decision Notice. Therefore we are of the view that it is unlikely that the quality of information available to the Government will be substantively diminish as a result of the decision in this case." (Para 119 DBERR)

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

4) Record Keeping

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

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

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

"…he would still advise candour in meetings and full recording. He would not himself, and k of no one else who would, advise an Assistant Private Secretary not to record a sensitive piece information for fear of disclosure."(Evans para 31)

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

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

Ultimately the Tribunal found;

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

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

5) Effect of the Media

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

- Misleading reporting could undermine the relationship between government and lobbyist

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

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

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

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

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

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

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

Source	**Details**
Information Tribunal	DBERR v ICO & FoE (29/04/2 Evans v ICO & MoD (26/10/200

Related Lines to Take

LTT149

Related Documents

DBERR EA/2007/0072, Evans EA/2006/0064			
Contact		RM	
Date	24/03/2009	**Policy Reference**	LT

FOI/EIR	FOI / EIR	**Section/Regulation**	S35, 36 Regulation 12(5)(f)	**Issue**	Public interest in disclosing information about lobbyists

Line to take:

There is a public interest in

1) Understanding the role of lobbyists and their relationship with government, this includes both

- (a) understanding the mechanics of lobbying and,
- (b) understanding the relationship between government and a particular lobbyist and the influence they exert

2) Scrutinising the probity of public officials

3) Providing the opportunity for others to present opposing view during the policy development process.

Further Information:

The Tribunal has considered information relating to lobbyists in two recent cases. In Evans v IC

& MoD the information related to an introductory meeting between a new minister and representatives from a firm of professional lobbyists. In DBERR v ICO & FoE the request captu a range of recent meetings between the Confederation of British Business (CBI) and the department. For a fuller introduction to the subject of lobbyists please see LTT dealing with the public interest arguments presented in favour or maintaining the exemptions.

This line sets out some of the public interest arguments in favour of disclosure that were considered in those cases. Points 1 & 2 relate to the role of lobbyists, their influence, the extent which the level of influence they exert weighs on the public interest and how, because of the influential position they enjoy, there is a need to scrutinise the probity of officials involved in suc relationships. Although this is teased out into two separate issues they are in reality closely intertwined.

1) Understanding the role of lobbyists and their relationships with government

Lobbyists aim to influence government policy and decision making in the interests of those they represent. Therefore there is a public interest in understanding both how lobbyists operate and nature of the relationship and influence that lobbyists have with government.

(a) The mechanics of lobbying.

In DBERR the tribunal stated that disclosure;

"…enables the public to better understand the mechanics of lobbying in that it reveals the many different ways in which lobbying can take place,.." (para 133e DBERR)

This is a fairly general point. At its simplest level it takes account of value in the public actually understanding how lobbying works and how different interest groups gain access to the policy making process in democratic society. At a more dynamic level access to such information may also enable others to more effectively engage in lobbying activities which in turn would broaden the range of views that would feed into the policy making.

(b) Relationship and extent of influence exerted

There is also a clear public interest in understanding the extent of the influence exerted by lobbyists.

In Evans the tribunal stated that;

"We accept that there is a public interest in seeing the record of meetings between Ministers an lobbyists. Publication of the record would tend to increase public understanding of the role and influence played by lobbyists in the formulation of public policy; and that is a matter of real publi interest and concern; …" (para 28 Evans).

This finding was quoted in DBERR, with the tribunal building on the point by stating;

"The public interest is stronger in respect of such communications than it might be in respect of communications between ministers and other non-lobbyist third parties because of the undoubt influence that these unelected (albeit representative) lobbying bodies can have on the formulati

and development of policy;…" (para 133b DBERR)

In DBERR it became clear from the evidence that the lobbyists in question, the CBI, had what th tribunal described as, "privileged access" (para 117 DBERR) to the department i.e. it had greate access to government compared to other lobbyists. It is clear that this added weight to the publi interest in disclosure. In its conclusions the tribunal found that disclosure;

"…subjects the relationship to a certain degree of scrutiny which can assist in ensuring that a particular relationship does not become unduly influential or dependent." (para 133e DEBERR)

Returning to Evans, one of the pieces of information under consideration was an internal briefin note for the minister prepared in advance of his meeting. Ultimately this was withheld under s40(2), however in relation to the public interest in maintaining s36 the tribunal concluded that;

"There is a clear public interest in disclosure of the briefing note since it would throw light on the nature of the meeting between the Minister and lobbyists; and on how that relationship is viewe and developed. We accept it is in the public interest to increase transparency in this way. That public interest is present regardless of whether the meeting is viewed as routine and unremarkable, or as highly sensitive and exceptional." (para 46 Evans)

It can be seen from these quotes that there is a public interest in revealing the impact that lobbyists have on policy making, how persuasive their opinions are and whether the governmer comes to rely on any particular lobbyist. Therefore there is a public interest in understanding no only the degree to which a lobbyist's input has shaped a specific policy issue but also in gaining an insight into how the government views it's relationship with any particular lobbyist as this will determine the extent to which it is able influence a broader range of policy issues.

There is also a public interest in being able to make evidence based judgements on the extent t which different interest groups influence policy making and the range of stakeholders that are consulted with, for example whether business interests or non governmental organisations dominate the process.

Building on this point, in DBERR the CBI was described as having 'privileged access' to government. Although it can not be suggested that there is anything inherently wrong in government giving priority to those lobbyists that which it considers to have the greatest experti in an particular field or which represents a significant number of stakeholders, there is clearly a value in the public having access to information that reveals that the lobbying system is fair and even-handed.

It is also notable in Evans that the applicant, a journalist, argued that the companies represente by the lobbyists;

"…receive contracts worth billions of pounds from the MoD. It is crucial in a democracy that the public is allowed to see whether and how commercial pressures influence the formulation of pul policy." (para 16 Evans)

Although the tribunal did not say what weight it gave this particular strand of his argument, it mu be that in these circumstances public interest arguments around public spending arise and,

potentially, the probity of the officials/ministers involved, which leads us into the next point.

2) Probity

In both Evans and DBERR the issue of probity was touched upon. It is inevitable that where one party tries to influence another issues of impropriety can be raised.

In Evans the tribunal recognised this was so but found that as the actual information in question could not shed any light onto the concerns raised by the applicant then the public interest arguments around probity carried little weight in this particular case.

"We accept that there is a public interest in scrutinising the probity of those in public positions, b we do not attach much weight to that factor in the particular circumstances of this request. Desp Mr Evans' best efforts to persuade us that there is public concern about the propriety of those attending the meeting, (particularly around the question of whether Lord Hoyle has or has not properly declared his interest at various times, or whether and how representatives of Whitehall Advisers have obtained passes to the Houses of Parliament) we are not persuaded that disclos the handwritten notes of meetings of this sort would shed light on these issues. The correct application of the various Codes governing contacts between Ministers and lobbyists may be addressed through other avenues." (para 29 Evans)

However it can be argued that there will always be some public interest in disclosing information even if it was to reveal nothing about propriety of public officials as withholding it could fuel concern over the relationship between government and lobbyists and there is a public interest in having confidence in the official and elected representatives that serve us. Support for this pint can be found in DBERR in which the tribunal commented that;

"…there is a strong public interest in ensuring that there is not, and is seen that there is not, any impropriety. We would make it clear there is no suggestion of any impropriety identified in this case." (para 117 DBERR)

Returning the quote from Evans para 29 the tribunal suggested that in the particular circumstances of that case, it felt the public interest inbeing reassured as to the conduct of a member of the House of Lords could be satisfied through various codes of conduct under which peers have to operate. However it should noted that there are currently no codes of conducts th apply to lobbyists themselves although such legislation exists in the USA and in other EU countries. In the absence of such legislation there will be a weightier public interest in favour of disclosing information that sheds light onto the activities of lobbyists. (may be consider grafting quote from DBERR para 118)

It should also be noted that it is intended to produce a LTT on the extent to which the existence other regulatory mechanisms have on the public interest in disclosure (perhaps this can be accompanied by some Pearl & Dean 'Coming to a Knowledge Base Near You' style music)

3) The opportunity to present counter arguments

In DBERR the information related to a range of policy issues into which the lobbyists were havi

an input. The tribunal considered it important that if lobbyists were helping shape government policy then it was in the public interest for others to know what views had been presented to government so that they could enter the policy debate and put alternative views and counter arguments forward. The important point here is that the tribunal found that if such counterbalancing views were to have any meaningful impact on policy making, these contributio would have to made whilst the policy making process was still ongoing. It is also recognised tha this is the very time where the safe space for policy making warrants the greatest protection. Th means that where requests are received at the time the policy in question is still being formulate or developed case officers may find the public interest is very finely balanced. This issue is discussed in more detail in the LTT dealing with the public interest arguments presented in favo or maintaining the exemptions at point 2 – 'Safe Space'. This section must be read to gain a ful understanding of this important issue.

Source	**Details**
Information Tribunal	DBERR v ICO & FoE (29/04/20 Evans v ICO & MoD (26/10/200

Related Lines to Take

LTT148

Related Documents

DBERR EA/2007/0072, Evans EA/2006/0064

Contact		RM	
Date	24/03/2009	**Policy Reference**	**LTT**