FOI/EIR	FOI	Section/Regulation	s40	Issue	Lawfulness

Line to take:

In the context of freedom of information casework, it is likely that it will be unlawful to disclose personal data where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence.

Further Information:

Schedule 1, part 1 of the Data Protection Act (the "DPA") states that *"personal data shall be processed fairly and lawfully…" "*

The DPA does not define what is meant by the term 'lawful' but the ICO's Guide to Data Protection (published in November 2009) states as follows:

"Lawful" refers to statute and to common law, whether criminal or civil. An unlawful act may be committed by a public or private-sector organisation (para 31).

If processing personal data involves committing a criminal offence, the processing will obviously be unlawful. However, processing may also be unlawful if it results in:

- *a breach of a duty of confidence. Such a duty may be stated, or it may be implied by the content of the information or because it was collected in circumstances where confidentiality is expected – medical or banking information, for example;*
- *….*
- *a breach of an enforceable contractual agreement;*
- *a breach of industry-specific legislation or regulations"* (para 32).

In the absence of any evidence of a breach of sections 41 or 44, the Commissioner is likely to conclude that the processing will be lawful unless the public authority has provided arguments which suggest that it would be unlawful to disclose the requested information as they will need to be considered accordingly.

Further, in the context of freedom of information casework, it may have already been established that disclosure would breach a statutory bar (s.44), breach a contract or be a breach of confidence (s.41); and if any of the these exemptions are engaged then it would be unlawful to disclose the requested information.

**** Casework example – List of residential addresses of ICO staff (FS50128761) ****

The requestor asked for a list of residential addressed for all current, salaried ICO staff. The Commissioner found that s.41 was engaged as his staff had provided their address details in confidence. The Commissioner went onto find that disclosure would also be unlawful under s.40 as the processing would amount to a breach of confidence.

PREVIOUS / NEXT

Source	Details
Policy Team	

Related Lines to Take
LTT57, LTT59, LTT163, LTT165

Related Documents
FS50128761, Guide to Data Protection

Contact	HD		
Date	21/01/2010	Policy Reference	LTT166

FOI/EIR	FOI EIR	Section/Regulation	s40 Reg 13	Issue	Consent

Line to take:

Where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be fair and can be used to satisfy Schedule 2, condition 1.

However, in all other circumstances, the Commissioner will take the data subject's comments into account insofar as they represent an expression of the views of the data subject at the time of the request had they given any thought to the issue at that time and these views will help to inform the analysis of fairness.

Further Information:

The Issue

It is unlikely that the public authority will be in a position to anticipate most FOI requests to enable them to seek the consent of the data subject prior to the processing of their personal data to comply with the FOI request. Instead it is more likely that the public authority will receive a request and then contact the data subject to see whether they would consent to the disclosure of their personal data in complying with the request.

This is problematic for two reasons:-

- Given that the consent or refusal has been obtained post-request this represents a change in circumstance from those that existed at the time of the request and the

time for statutory compliance and thus, according to LTT92, could not be taken into account. The line says as follows:-

Consideration of the exemptions and public interest test is to be based on the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17 FOIA.

Although, matters which were relevant at the time of the request but which only later came to light may also be taken into account.

- Where the data subject has refused consent it may be argued that having been asked to give consent but having refused this would increase their expectation that their personal data would not be disclosed. If this were to be accepted then this would mean that where a data subject had refused to consent, it would be unlikely to be fair to disclose the information as it would not be within their reasonable expectations.

The Commissioner's Approach

The Commissioner would not wish to consider a view which had been provided post-request to be taken into account contrary to LTT92 but nor would he wish to dismiss this outright. This is because the data subject may have provided additional and valuable information about the impact of the disclosure on them including any circumstances unique to the data subject and/or the circumstances in which the information was initially obtained and how this established their expectations as to its further use. In addition, in order to comply with his obligations under the Human Rights Act, the Commissioner would also be required to consider any submissions from the data subject.

(1) When asked by the public authority, the data subject HAS consented to disclosure

Where a data subject has consented to a disclosure of their personal data, an informal resolution is more likely. However, if it is necessary to consider this point in a decision notice then the Commissioner will adopt the following approach:

(i) Where a data subject has consented to disclosure of their personal data, it is useful to consider the following to ensure that any informed consent is obtained:

- Was the data subject fully aware that they were consenting to a disclosure to the world at large?
- Was the consent explicit (particularly where sensitive personal data is involved)?
- Was the data subject vulnerable in some way e.g. age?

This approach was supported by the Tribunal in the case of the Creekside Forum v IC & the Department for Culture, Media and Sport when it said that it would *"…have been appropriate to have had evidence clarifying the circumstances on which consent was sought…"* (para 58).

(ii) Where the informed consent is in place at the time of request or within the time for statutory compliance then the case-officer may want to include the following standard

paragraph:

"The Commissioner notes that the data subject has consented to the disclosure of their personal data within the time for statutory compliance with this request. The Commissioner is satisfied that the consent was freely given and informed and in particular that the data subject was aware that a disclosure under the FOIA is effectively to the world at large. As such, the Commissioner considers that it would be fair to disclose the personal data in this instance.

The Commissioner also considers that this consent can satisfy condition 1, Schedule 2."

Where the data subject provides his/her response outside the time for statutory compliance, then their consent is not valid consent for Schedule 2, condition 1 purposes.

However, the data subject's response can be taken into account insofar as it represents an expression of the views of the data subject which they already held at the time of the request had they given any thought to the issue at that time i.e. the data subject already held these views at the time of the request but they only came to light when they were asked for their consent. Further, although the presence of consent is not entirely determinative, it is likely to be an important factor to take into account as part of the wider analysis of whether it would be fair to disclose the personal data in the case.

(2) The complainant indicates that the data subject HAS consented to the disclosure

Where a complainant indicates that the data subject has consented to the disclosure of their personal data, the Commissioner would need to confirm that this consent was genuine. This may require the public authority checking with the data subject or confirming the authenticity of the email or letter containing the consent. Once this has been confirmed, then points (i) to (iii) above should be considered.

(3) The data subject HAS NOT consented to disclosure (or the data subject has not been asked to give consent) (*)

Where the data subject has expressed a refusal to consent to the disclosure of their personal data either within the time for statutory compliance or at some later date, then the Commissioner will adopt the following approach when considering fairness:

(i) The expression of a refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed.

(ii) Instead, the data subject's comments will be taken into account insofar as they represent an expression of the views of the data subject which they held at the time of the request had the data subject given any thought to the issue at that time i.e. the data subject already had these views at the time of the request but these views only came to light when they were asked for their consent. As such, the data subject's views can be taken into account in any analysis of fairness.

However, as part of the fairness analysis includes a consideration of the data subject's reasonable expectations, a data subject may argue that their expectations have been

shaped or reinforced by the process of seeking, and their refusing to provide, consent.

The Commissioner's view is that where a data subject refuses consent this will be based on how they already feel about the information even though they may not have actively considered their views on a potential disclosure and thus the act of seeking consent simply prompts the data subject to consciously form a view on the issue of disclosure and to articulate that view to the public authority. Therefore although the refusal of consent can be seen as a reflection of the expectations of the data subject, it should not be seen as something that affects or informs those expectations.

It also remains important to still consider whether it is reasonable for the data subject to object to the disclosure. In some cases, it may also be possible for the data subject to provide details of the reasons why their individual circumstances may affect fairness, or shed light onto the circumstances which may lead the public authority to conclude that the data subject had a reasonable expectation that the information would remain confidential.

Therefore, the Commissioner will not give any further weight or consider that the data subject's expectations have been reinforced where the public authority has returned to the data subject claiming to be seeking their 'consent' but will take into account the additional detail provided by the data subject as to the circumstances and issues that existed at the time of the request.

(*) – This should not be confused with cases involving s.10 DPA notices.

Note for Case-Work / Investigations

There is no obligation on a public authority to seek the data subject's consent to disclosure.

It is up to the case-officer to decide whether it would be useful to suggest to the public authority that the views of the data subject be sought as in borderline cases or those involving a small number of data subjects, it may be worth pursuing this point. However, in other cases where a large number of data subjects are involved or where it may over-complicate the investigation and any decision notice, it may be impractical or a disproportionate use of public funds to pursue this point.

In the EIR case of De Mello and the Environment Agency (EA/2008/0054), the Tribunal commented:

"50. The Tribunal has, however, some sympathy with the Appellant's point that -- in this kind of situation -- a check by the EA with the original complainant, to see whether there was any objection to releasing the letter, might have resolved the situation and saved a significant cost to the public (even in the limited circumstances of a paper hearing of the appeal). It may be that the EA and other such public bodies wish to review their initial procedures in situations such as this -- not because it is a matter of law but simply because it is a matter of common sense -- but that is a matter for them. There may well be cost implications that make such procedures difficult to introduce but, if the writer of a letter of complaint is happy for it and the personal data within it to be disclosed in the end, anything that saves public bodies and Appellant's such as Mr de Mello from having to spend time and effort debating the disclosure of such information should be encouraged".

Source	**Details**
Policy Team	Creekside Forum / DCMS De Mello / Environment Agency

Related Lines to Take
LTT57, LTT92, LTT163,

Related Documents
EA/2008/0065 (Creekside), EA/2008/0054 (De Mello),

Contact	HD		
Date	17/02/2010	**Policy Reference**	**LTT167**

FOI/EIR	FOI/EIR	**Section/Regulation**	s40 Reg 13	**Issue**	DPA "special purposes" & disclosures under FOI / EIR

Line to take:

Where disclosures of personal data are made under FOIA or EIR, because they are disclosures to the public rather than disclosures made solely to individual applicants, they will not qualify as disclosures for the "special purposes" of journalism, art or literature as defined by section 3 of the DPA.

Further Information:

The relevant statutory provisions

The first principle of the Data Protection Act provides that

"1. Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

- at least one of the conditions in schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

Schedule 3 of the DPA sets out the conditions under which sensitive personal data may be

processed in accordance with the first DP principle.

Condition 10 of Schedule 3 provides a condition where

"The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph."

Statutory Instrument 2000 no 417 "The Data Protection (Processing of Sensitive Personal Data) Order 2000 " is an order made by the Secretary of State for the purposes of DPA Schedule 3, condition 10.

This statutory instrument sets outs a number of additional circumstances in which sensitive personal data may be processed.

Paragraph 3 of this statutory instrument provides for disclosure of sensitive personal data in the following circumstance :

"3. – (1) The disclosure of personal data –

- is in the substantial public interest ;
- is in connection with –
- the commission by any person of any unlawful act (whether alleged or established)
- dishonesty, malpractice , or other seriously improper conduct by, of the unfitness or incompetence of, any person (whether alleged or established)
- mismanagement in the administration or, or failure in services provided by , any body or association (whether alleged or established)
- **is for the special purposes as defined in section 3 of the Act;** and
- is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

(2) In this paragraph , "act" includes a failure to act."

Section 3 of the DPA states that

"3. In this Act "the special purposes means any one or more of the following –

- the purposes of journalism,
- artistic purposes, and
- literary purposes

The Commissioners position

In the Commissioner's view, because disclosure under FOIA or EIR is disclosure to the public rather than just to an individual applicant, the purpose that lie behind requests should not be taken into account when considering disclosure under the Act or the Regulations.

Therefore, where a disclosure of personal data is made under FOIA or EIR the Commissioner will reject arguments that the disclosure would be permitted because it would be made for a "special purpose" of journalism, art or literature, as defined by section 3 of the DPA .

The Commissioner draws support for his approach from the Tribunals' dismissal of the appeal in the case of The *Rt Hon Frank Field MP v the Information Commissioner* (EA/2009/0055). Although this case didn't specifically relate to the "special purposes" provision of the statutory instrument it did confirm that the purpose behind requests should not be taken into account.

The Tribunal considered paragraph (1) of Statutory Instrument 2000/471 which provides for the processing of sensitive personal data in certain circumstances. It commented that "That fact [the confirmation or denial] and the attendant disclosure cannot be said to be "for the purposes of prevention or detection of any unlawful act", quite the contrary; any such confirmation or denial would be for the purpose of disclosure under FOIA and for no other purpose. " (paragraph 34)

The Tribunal's position

In *Alistair Brett v the ICO and the Foreign and Commonwealth Office* the Tribunal took into account the intentions of the applicant (he intended to write a book about the shooting of 3 IRA members by the SAS in Gibraltar in 1988) in making his FOI request, and found that the disclosure would be for a "special purpose" as defined by section 3 DPA.

The Commissioner does not agree with the Tribunal's approach in this case, for the reasons detailed above, and case officers should not accept arguments of this nature.

PREVIOUS / NEXT

Source	**Details**
Policy team	Content

Related Lines to Take
N/A

Related Documents
SI 2000 no 417

Contact	LA		
Date	17/02/2010	**Policy Reference**	**LTT168**

FOI/EIR	FOI	**Section/Regulation**	40(4) 40 (2)	**Issue**	Information that is exempt from a data subject's right of access

Line to take:

Section 40(4), read in conjunction with section 40(2), provides an exemption from FOIA for information that a data subject would not be able to gain access to under the Data Protection Act via their section 7(1)(c) DPA right of access.

Although the DPA provisions which prevent a data subject from gaining access to their own personal data under the DPA are not subject to a public interest test, section 40(4) FOIA is subject to a public interest test.

Section 40(4) should only be considered in cases where it has been claimed by a public authority. There is no expectation that case officers should pro-actively consider this exemption if it has not been claimed.

Further Information:

Section 7(1)(c) DPA provides that, subject to exemptions contained within the DPA, an individual is entitled

(c) to have communicated to him in an intelligible form –

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data

Section 40(4) FOIA provides that, subject to the public interest test, information is exempt from disclosure under FOIA if it constitutes third party personal data and the information is exempt from section 7(1)(c) of the DPA.

The Commissioner considers that, although it may appear contradictory for FOIA to potentially allow the disclosure of personal data into the public domain when the data subject to whom the data relate would not be able to gain individual access to the same information via the Data Protection Act, in fact this situation accords with the provisions of both pieces of legislation.

Where a data subject requests access to their own personal data, the DPA allows the data controller to refuse such access if a DPA exemption applies. In this situation, because the potential disclosure is only to the data subject and not into the public domain, the Commissioner considers that it is entirely appropriate that the data controller is not required to consider any potential public interest benefits of a disclosure into the public domain when deciding if the exemption will apply.

However, under FOIA, the potential disclosure will always be into the public domain. For this reason the Commissioner considers it appropriate for the potential public interest benefits of a disclosure to be taken into account when considering whether to disclose under FOIA.

One way of accounting for the potential difference in outcomes under the two pieces of legislation would be to think about the DPA as allowing information to be withheld from a data subject where the individual's right to have their own personal data communicated to

them is considered secondary to the need to protect whatever is inherent in the DPA exemption. However, under FOIA, it is not just the access rights of the individual that are relevant. So whilst the access rights of the individual may be secondary to the need to protect whatever is inherent in the DPA exemption, under FOIA there is the potential for the need to protect whatever is inherent in the exemption to become secondary to the wider public interest benefits of disclosure into the public domain.

In reality, we would anticipate that the circumstances in which there will be a public interest in disclosure strong enough to allow the prejudice of whoever's interests are served by the DPA exemption will be relatively rare.

An example of a Decision Notice where the Commissioner found that this was the case is FS50197952 which concerned a request for the undertaking related to the awarding of a life peerage to Michael (now Lord) Ashcroft. The Decision Notice comments (at paragraph 69) that "The Commissioner considers that there is a greater public interest in placing the requested information into the public domain than, in respect of the specific circumstances of this case, to the public interest in protecting the interest which the honours and dignities exemption of the DPA is designed to protect. This is because there is a strong public interest flowing from the need for greater transparency in Lord Ashcroft's controversial ennoblement."

It should also be remembered that where information is disclosed into the public domain, then the data subject will also be able to gain access to their own personal data via this route. Whilst it is likely that a data subject would prefer to know what personal data about them is held prior to it being released into the public domain, the Commissioner considers that in practical terms, at the point at which the information is released into the public domain, then the subject access refusal to some extent becomes academic anyway.

When is it necessary to consider the DPA exemptions in FOI case work?

Section 40(4) should only be considered in cases where it has been claimed by a public authority. There is no expectation that case officers should pro-actively consider this exemption (and by implication pro-actively consider whether any of the numerous DPA exemptions would apply if the data subject were to request the information) if it has not been claimed.

Where section 40(4) has been claimed by a public authority it may also be appropriate to refer it to the Commissioner's guidance on this issue "Awareness Guidance 1 – Personal Information" which states that :

"Section 40(2) together with the condition in section 40(4) provides a qualified exemption where the information would be exempt under the DPA from a subject access request. The relevant provisions are set out in Part IV of the DPA and examples include information protected by legal professional privilege, or information used in the prevention and detection of crime. However, in such cases it will usually be easier to apply the equivalent FOIA exemption."

This may lead to the public authority withdrawing its reliance on section 40(4). If it continues to claim section 40(4) however, then this exemption will need to be considered (unless of

course another exemption has already been upheld).

If it is appropriate to consider s40(4), then how detailed does the analysis of the DPA exemption need to be?

If a public authority cannot be persuaded to withdraw its reliance upon section 40(4) in favour of applying an FOIA exemption equivalent to the DPA provision then, as stated above, it may be necessary to consider section 40(4).

As part of the section 40(4) analysis it will be necessary to establish not just that an exemption under the DPA exists, but also that the exemption would actually apply to the information in question.

In essence the depth of analysis required will be similar to that applied to FOI exemptions and is likely to entail :

- If class based DPA exemption – establishing information falls within the class
- If prejudice based DPA exemption - establishing that the prejudice would be likely to occur
- Applying the public interest test as set out in section 2 FOIA.

What is the public interest inherent in section 40(4)?

In cases where section 40(4) has been claimed then it will be necessary to consider the public interest test.

In the Commissioner's view one public interest factor relevant to maintaining the exemption at section 40(4) is the public interest in data subjects not only finding out what information is held about them via public disclosure . This recognises that it is preferable for data subjects to be as well informed as possible about their own personal data, and supports the upholding of other data protection principles such as ensuring that personal data is accurate and up to date (the fourth principle

In more general terms, where a data subject is denied subject access rights in order to protect the interests specified in a DPA exemption, then this raises inherent privacy issues that need to be weighed against the public interest in disclosure before releasing the same information to the public under FOIA.

There will also be a public interest in protecting whatever interest is being protected by the relevant DPA exemption. For example, where a public authority has claimed that the information is exempt from subject access because a disclosure to the data subject would prejudice the detection of crime, then the public interest in preserving the ability to detect crime will need to be taken into account. In this respect the test will be very similar to considering the public interest in maintaining s31 of FOIA (hence the recommendation in ICO guidance that it may be more appropriate to claim a relevant FOI exemption instead of relying upon section 40(4)).

If the relevant DPA exemption is a prejudice based exemption then the public interest test will need to take account of the extent, severity and frequency of the prejudice that would be likely to result from the disclosure under FOI. This will entail considering the prejudice that

would result from a disclosure to the world, rather than to the data subject.

When considering the public interest test in such cases, if the public authority is able to confirm as a matter of fact that the data subject has been refused access to the information in question under a DPA exemption, then this is likely to support the arguments in favour of maintaining this exemption.

As with any qualified exemption the public interest inherent in the exemption will need to be balanced against the public interest in disclosure of the information in question

Proactive application of section 40(2)

If it is appropriate to consider a public authority's s40(4) claim, but it is found that s40(4) does not apply, then, in light of the Commissioner's role as regulator of the DPA, it may still be necessary to pro-actively consider section 40(2).

In this situation the argument may be made that releasing personal into the public domain under FOIA, when a data subject cannot gain access to the same information under the DPA, is unfair processing and thus contravenes the first data protection principle.

The Commissioner accepts that this will often be the case, but considers that it is also possible for the processing to be fair in the particular circumstances of the case. In the Lord Ashcroft case FS50197952 he found the processing to be fair, and to meet schedule 2 condition 6 of the DPA even though the information in question was not available to the data subject under the DPA.

Duty to confirm or deny

It should be noted that as section 7(1)(c) DPA only relates to the right of the data subject to have information communicated to them. Therefore section 40(4) FOIA will not apply where a public authority wishes to refuses to confirm or deny if information is held.

Use of FOIA by an applicant wishing to gain access to their own personal data

In a situation where a data subject insists on pursuing access to their own personal data via FOIA, then we should follow our normal approach of treating the request as a subject access request under the DPA.

Footnote

Whilst not integral to this line to take, the Commissioner has also considered the question of why there is an explicit public interest test when applying section 40(4) in conjunction with section 40(2), when there isn't one when applying section 40(2) in conjunction with other section 40 subsections.

In the Commissioner's view there is no need for a separate public interest test under section 40(2) in conjunction with these other subsections because, in a potential FOIA disclosure context, the consideration of the first data protection principle takes into account public interest arguments (whether this is done under a schedule 2 condition 6 balancing exercise,

or via a more general assessment of fairness) in any case.

However, as section 40(4) does not require specific consideration of the data protection principles, then a separate public interest test under FOIA serves this purpose (albeit that the default position if the factors on both sides are equal will be disclosure for 40(4) and withhold for 40(2).

There is no expectation that case officers should give consideration to whether a data subject would be able to gain access to the information in question when considering section 40(2) cases. The Tribunal in *Guardian News & Media Limited v the ICO & the Ministry of Justice* did consider this as a factor in a section 40(2) case but the Commissioner will **not** follow this lead.

PREVIOUS / NEXT

Source	**Details**
Policy team, Tribunal	Guardian News & Media Ltd / MOJ

Related Lines to Take
N/A

Related Documents
EA/2008/0084

Contact	LA		
Date	17/02/2010	**Policy Reference**	**LTT168**

FOI/EIR	FOI EIR	**Section/Regulation**	s35(1)(a) Reg 12(4)(e)	**Issue**	Government Policy can be produced in many ways

Line to take:

The following processes **can** all involve the formulation or development of government policy. This list is not exhaustive;

- White papers, bills and the legislative process
- Initiatives to amend existing policy
- Speeches
- Reaction to external events
- Decisions on implementation requiring political judgement

- Answering questions – what does the government think about x?

It remains difficult to define exactly what constitutes the formulation or development of government policy and decisions still need to be made on a case by case basis, however consideration of the following factors should assist case workers;

- The intention of the government to make changes in the real world is a strong indicator of policy making,
- The need for the political judgement of ministers when making the final decision as to the approach to be taken is indicative of policy making,
- The wider the consequences of the decision the more likely it is that the process will involve policy making,
- The greater the political sensitivity of the decision the more likely it is that the process will involve policy making.

Further Information:

This line is informed by the UCL report Understanding the Formulation and Development of Government Policy in the Context of FOI. Chapter 3, 'How is Policy Defined', is of particular interest. The full report is available on the ICO website. Also a summary of the report can be accessed from the section 35 page of the Knowledge Base.

Defining government 'policy' is not easy. However it is useful to think about it as involving "…the process by which governments translate their political vision into programmes and action to deliver "outcomes", desired changes in the real world". (Modernising Government White Paper 1999, see UCL report para 3.4)

The UCL report has broadened our approach to, and understanding of, how government policy is created. The formulation and development of such policy can occur in a number of ways and through a range of activities as the government pursues its political objectives or responds to events. It not only refers to the process of turning manifesto pledges into legislation via the classic process of the production of White Papers, and the drafting of Bills, but can also occur when Ministers draft speeches, or when the government has to react to external events, such as the recent banking crisis.

The following are examples of the processes that **can** involve the formulation or development of policy. However the list is not exhaustive. The intention is simply to alert case officers of the potential for policy making to take place outside the classic process of producing a White Paper and turning this into legislation. Please note it is not the purpose of this line to identify stages of policy formulation or development at which the sensitivity of the information may wane.

1) White Paper – Legislation (UCL report paras 3.13 – 3.16)

The classic and most formal policy process involves the government setting out the overview of its approach to a major issue in a White Paper, i.e. what it wants to do. The White Paper may also include details of the practical measures required to achieve those aims, the "how to do it". The publication of the White Paper usually marks the start of a consultation exercise after which draft legislation is produced in the form of a Bill which is then presented to Parliament. It can be argued that detailed measures on how to achieve the high level policy aims of the government,

the 'how to do it' thinking, should be seen as the start of the implementation of that policy. However the Commissioner accepts that whilst the policy is still in the process of being turned into legislation the policy development is still ongoing. This **can** extend up to the Bill gaining Royal Assent and becoming legislation.

For example in DN case ref 245725, a request had been made to HM Treasury for information on a change in the tax liability for a certain category of people. The request was made in June 2008 and the policy was to be implemented by the Finance Act 2008 which only received Royal Assent in July 2008. The DN acknowledged that, although at a very late stage, the policy formulation was still ongoing. In this particular case it was possible to refer to Hansard for the record of the debates which established the policy issue which was the subject of the request was still being debated at the time the request was made.

It is important to remember however even where policy making process is still ongoing, this does not rule out the possibility that significant landmarks in that process have been passed and that the sensitivity of the information has started to wane, e.g. the publication of the White Paper.

2) One-off initiatives (UCL report paras 3.17 – 3.18)

Even once a policy has been decided and is being implemented, Ministers may wish to improve the effectiveness of that policy. This can be a difficult area in terms of FOI and the application of s35(1)(a). It may not always be clear whether such improvements are more to do with fine tuning the delivery of a policy or whether it amounts to actual policy development. This will have to be decided on the facts of each case. However the purpose of this line is simply to flag up the fact that Ministers can and do seek to improve existing policies and that this can amount to policy development.

The UCL report refers to this as being a "…continuous improvement approach, with existing policies and government interventions being continuously scrutinised for their effectiveness and amended and developed further." This is very close to accepting the seamless web type arguments rejected by the Commissioner and the Tribunal. Whilst it may be true that Ministers and officials are continuously alert to the need or opportunity to improve an existing policy it will only be at the point that this leads to the active re-consideration of the policy that we would accept policy development is taking place.

3) Speeches. (UCL report para 3.19))

Speeches of cabinet ministers whether in the Commons or when addressing other audiences can be used to set out the government's latest political thinking on an issue. As prime minister, Tony Blair often used speeches in this way. The drafting of those speeches therefore formed part of the policy formulation process and could form a significant workload for officials. The speech and information produced as part of the drafting process could therefore all fall within the exemption provided by 35(1)(a). However once the speech has been delivered this **can** have an impact on the need to preserve safe space.

4) Action Taken in response to external events (UCL report para 3.20)

1 to 3 above describe situations where the government takes the initiative in formulating or developing policies but the government also has to develop policies in response to external events, for example the foot and mouth outbreaks, or public concern over the regulation of

doctors following the Harold Shipman case. There will be times where the need to react rapidly to a problem such as the recent banking crisis places time constraints on the policy making process. As a result the process is less likely to follow a measured or formal approach when compared with say the White Paper to legislation approach described above.

5) Operational Issues requiring political judgement. (UCL report para 3.21)

Even once a policy has been formulated, its implementation may raise issues that are politically sensitive and so require the decisions of ministers on how to proceed.

Difficult operational issues do not only arise from implementing policies. The example given in the UCL report relates to the Coal Health schemes. Following legal action by miners the courts required British Coal to establish schemes to compensate miners for the health problems caused by their work, the liability for the schemes later passed to the government. Although the broad parameters of the schemes were set out by the courts, the details are the subject of negotiation between the government and miners' representatives and can be politically sensitive. MPs from mining areas regularly lobby the government, which also has to consider whether decisions taken in respect of these schemes could set precedents for the future. So although much of the negotiations can be seen as simply implementing the courts' directions, other decisions require the political judgement of ministers and these can be considered to be policy formulation or development.

In such situations it is less clear whether the decision making process amounts to policy development and it is hard to set out firm guidance on what is and isn't policy making. In practice each case will have to be judged on its merits. However the more wide ranging the consequences of the ministerial decision and the more politically sensitive the decision is, the more likely it is that we would accept it to be policy making.

6) Answering questions - What does the govt think about X? (UCL report para 3.22)

Ministers can face questions or receive correspondence from journalists or the public seeking their views on any topic under the sun. As the UCL report identifies, some questions may be quite trivial but others will relate to existing government policy and still others may raise new issues or demonstrate a ground swell of opinion on an issue which triggers policy development. Clearly though we have to be careful not to simply accept every response by a Minister to a question to be an act of policy formulation or development. The point is we need to be aware of the possibility that it could be.

In case ref 83726 a request had been made to the government for information relating to its rebuttal of claims in the Lancet that civilian deaths in Iraq were far higher than previously thought. The DN rejected the government's application of s35(1)(a) in respect of some of the disputed information i.e. that relating to the Foreign Secretary's comments to the media and the Prime Minister's statements in parliament given as immediate responses to the Lancet article. At para 62 the DN states that;

"… the Commissioner does not accept that this decision making process [i.e. how to respond] is one which constitutes policy formulation or development. Rather this process is simply the Government's consideration of, and reaction to, a particular press article. Simply because this information reflects decision making within government departments, this does not mean that it must relate to government policy making. If the Commissioner were to accept that such

information fell within the scope of section 35(1)(a) then a consequence of this approach would be that every time the government prepared and reacted to some negative (or indeed positive) comment in the media then such a process would constitute the formulation or development of government policy…"

However other elements of the disputed information related to, and debated, the steps that were needed to ensure that the government's own estimates of civilian casualties were in fact accurate and capable of properly informing diplomatic and military strategies. Although a fine call, this information was found to relate to government policy and so was exempt under s35(1)(a).

In another, currently ongoing, case, ref 2209070, the request was for all information on the government's approach to the use corporal punishment over a specified period. By way of background, the use of corporal punishment is illegal in schools, however it came to light that it was still used in a particular establishment and it became apparent that there was a potential loophole in the legislation in that it did not cover situations where only a very small number of pupils were being taught or where children were being taught at home. Part of the disputed information related to an internal debate on how to respond to a query from a group representing home learners. It has not yet been established whether it was this query that highlighted the potential loophole or not. However it is clear that once the loophole was identified the government considered whether it was appropriate to take steps to close it, including amending the Education & Skills Bill that was being drafted at the time. This case illustrates how responding to a query can relate to government development because of the potential for the query itself to trigger a policy review or because the query relates to a policy already under review.

Whether a response to a query involves the formulation or development of government policy may well involve difficult judgement calls. Many responses can be characterised as PR exercises or simply the provision of information. Such responses will not in themselves involve the formulation or development of policy. However where responding to the query triggers a change in approach to an issue, either by identifying a concern that needs to be responded to or requiring a re-examination of an existing policy then the thinking process involved in responding may constitute the formulation and development of government policy.

So what can we take from all this?

We can't hide from the fact that it's difficult to provide a tight definition of what constitutes the formulation or development govt policy. Policy making may follow more formal processes, e.g. the publication of white papers and the drafting of bills etc and this will make it easier to recognise policy formulation. However policy making can also be unstructured, made on the hoof and even be a form of crisis management.

Therefore case officers will need to weigh the arguments presented by government departments as to why something should be accepted as relating to formulation or development of government policy on a case by case basis. The need for the political judgement of ministers when making the final decisions on the approach to be adopted is a strong **indicator** that the matter under consideration is a policy issue. The wider the consequences of the decisions taken and the greater its political sensitivity **may** also indicate that the matter under consideration is a policy issue. However not all political thinking will amount to the formulation or development of government policy as demonstrated by the example of the government's response to queries on

civilian casualties in Iraq. The thinking and decision making must relate to policy which, in crude terms, is about the government deciding how to make **changes** in the real world.

PREVIOUS / NEXT

Source	**Details**
Policy Team	

Related Lines to Take

LTT62,

Related Documents

Understanding the Formulation and Development of Government Policy in the Context of FOI – UCL Report

Contact		RM	
Date	24/02/2010	**Policy Reference**	**LTT170**

FOI/EIR	FOI	**Section/Regulation**	1, 11	**Issue**	Information vs documents

Line to take:

The Act provides a right of access to information rather than copies of documents. However, a request for a copy of a document will generally be a valid request for all of the information contained within that document.

In considering whether the public authority has complied with the request, the Commissioner will therefore consider whether all of the information recorded in the document has been provided. It will not be sufficient to rephrase the document or provide an outline or summary of its contents unless the applicant has specifically expressed a preference for a digest or summary under s11(1)(c).

If the applicant has expressed a preference to inspect the actual documents (or copies of the documents), the public authority should provide a reasonable opportunity to do so unless this is not reasonably practicable.

Further Information:

Although the Act provides a right of access to information rather than copies of documents, requests may refer to specific documents as a way to describe the information requested. A request for a particular document should generally (unless the

context makes clear that this is not the case) be interpreted as a request for all of the information recorded in that document.

A document will often contain more information than just the main text. For example, an email will contain transmission information in the header and footer and may contain contact details in the email signature. What a person's actual signature looks like on a letter will be information over and above their name. The exact wording or phrasing of a document is also part of the information. However, the physical characteristics or evidential quality of a document (eg the paper it is printed on, the value of an original over a photocopy as evidence) are not information recorded in that document – for the purposes of the Act a complete and accurate copy will record the same information as the original.

In practice, if a copy of a document has been requested, the easiest and most reliable way to ensure that all the information within it has been provided will therefore be to provide a copy. However, in some cases it may also be possible to provide an accurate transcript of the contents of a document. The important thing is to consider whether all of the information contained in the document has been provided.

Scottish Court of Session – the Glasgow City Council decision

In *Glasgow CC v SIC* [2009] CSIH 73, the Scottish Court of Session considered a case where, although the applicant acknowledged that the same information was available elsewhere, they specifically wanted the public authority to provide copies of the documents. The Court confirmed that FOISA entitles requesters to the information within a document, rather than a copy of the document itself. To the extent that this request was specifically for copies of the documents over and above the information they contained, it was invalid. The Court rejected an argument that the copy documents were "information" distinct from the information contained within them.

As a general point of principle, the Commissioner is not bound by Court of Session decisions on FOISA, although they may of course be considered persuasive where the terms of the Scottish legislation mirror the terms of the Act. Nonetheless, we do not consider that this decision conflicts with our approach as it was decided on the basis that all of the information in the documents had already been made available. At para 50, the Court stated: *"Plainly, if those concessions had not been made, this aspect of the case would have had to be considered on a materially different basis."* This means that it supports our approach in principle, although it may not be particularly clear or useful on the facts as the Court was not asked to consider whether or not all of the information had in fact already been provided in that case.

At para 45, the Court confirmed: *"Where the request does not describe the information requested… but refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant."*

In addition, para 48 of the decision states: *"The difference between the original and a copy… does not consist in any difference between the information recorded in each document: that information, if the copy is true and accurate, will be identical"* (emphasis added). By implication this would appear to support our view that, if a copy is not true and

accurate, it will not contain all of the same information.

Our line is also consistent with the Scottish Information Commissioner's guidance on the validity requests following this Court of Session decision, which states: *"FOISA provides a right to obtain information and not a right to obtain copies of specific documents. However, this does not mean that a request for a copy of a document is automatically invalid, as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants."*

Effect of s11 (means of communication)

- **Summarising documents**

Although an applicant can ask for a digest or summary of the requested information under s11(1)(c), if they do not ask for a summary we do not consider that s11 means PAs can unilaterally choose to summarise a document.

If the applicant does not state a preference, s11(4) states that the PA can provide the information by any means that are reasonable in the circumstances. In theory, the PA therefore has the right to provide a summary of the requested information if reasonable to do so. However, in practice the Commissioner cannot envisage a situation where the provision of a summary would be reasonable, as the PA would not actually be communicating all of the requested information. In fact, providing only a summary would generally breach s1(1)(b) because it would not include all of the information requested. If this were not the case s11 would allow PAs to selectively rephrase, edit or redact the information by the back door without considering exemptions.

- **Inspecting documents**

Although a request is for information not copies of documents, the requester can ask to inspect a record containing the information under s11(1)(b). In such cases the PA will need to give the requester a reasonable opportunity to inspect copies of documents (or the actual originals, depending on the applicant's preference), unless it is not reasonably practicable to do so (eg due to the amount of redaction required or the fragility of the original).

It is not necessarily clear from the wording of s11(1)(b) itself whether the inspected record should be the original document, a copy, or whether it can be a newly created transcript. However, the Commissioner considers that the intention behind this provision was to allow applicants to inspect original records where reasonably practicable, otherwise there would be little benefit in the Act allowing for inspection. Support for this interpretation can be drawn from the statement of Lord Falconer during the passage of the FOI Bill: *"If the applicant requests... to inspect the actual document, Clause 10 requires the authority to give effect to that preference so far as is reasonably practicable to do so. That includes "blanking out" information, such as names that cannot be disclosed."* (Lords Hansard 17 October 2000 at column 931). This also accords with our approach to inspection in reg 6 of the EIR, set out in LTT156.

Of course, if the applicant is happy to inspect copies of the documents rather than the originals, the PA will not need to provide the originals in order to comply with that

preference.

PREVIOUS / NEXT

Source	**Details**
Policy team PARF	PARF FS50268791

Related Lines to Take

LTT156

Related Documents

Glasgow CC v SIC [2009] CSIH 73, Scottish Information Commissioner's guidance on validity of FOI requests, Lords Hansard 17/11/2000 col 931

Contact		LS	
Date	25/02/2010	**Policy Reference**	**LTT171**

FOI/EIR	FOI	**Section/Regulation**	s41	**Issue**	Meaning of the term "actionable" in section 41 cases

Line to take:

An actionable breach is not just one that is arguable but one that would, on the balance of probabilities, succeed.

Further Information:

Content

The Tribunal in the case of the Higher Education Funding Council for England (HEFCE) & Guardian News and Media Ltd (EA/2009/0036) considered the issue of what constitutes an actionable breach for s.41 purposes. The Commissioner had argued that an actionable breach was one that was, on the balance of probabilities likely to be successful. However the HEFCE argued that an actionable breach was simply one which was 'properly arguable' – this is described by the Tribunal at paragraph 21 as referring to a case where

"….if the Particulars of Claim would not be struck out applying the normal strike out test of considering if the claim would fail even if the truth of every fact alleged in the Particulars were to be established at trial, then we should treat the claim as 'actionable".

At paragraph 25(d), the Tribunal said as follows:-

"We… turn to Hansard to see if it provides guidance in the form of an authoritative, clarifying statement from a promoter of the legislation. We find that it unquestionably does, the following quotations from statements made in the course of debate by Lord Falconer putting the issue beyond doubt, in our view:

"Simply to put at the top of a document "Confidential"' does not make the disclosure of that document by anyone actionable in breach of confidence. "Actionable', means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)

"... the word "actionable" does not mean arguable … It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win." (Vol.619, col. 175-176)"

Thus, to establish an 'actionable' breach of confidence, the public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed i.e. considering whether or not all three limbs of the test of confidence can be established and whether or not the public authority has a public interest defence to the claim.

It is important to note however that this does not mean that it has to be established that someone (*) would be likely to bring a claim for breach of confidence but rather that if they did; they would be likely to succeed.

(*) - In most cases it will be obvious who would be likely to bring the action for breach of confidence but in cases involving deceased's medical records, it will be sufficient to show that **a** personal representative could bring an action rather than having to identify the specific representative.

PREVIOUS** / **NEXT

Source	**Details**
IT	Higher Education Funding Council / Guardian News (13 January 2010)

Related Lines to Take

LTT93, LTT94, LTT95, LTT96, LTT97, LTT98,

Related Documents

EA/2009/0036 (HEFCE),			
Contact		HD	
Date	07/04/2010	**Policy Reference**	**LTT172**

FOI/EIR	FOI / EIR	**Section/Regulation**	s31, S33, S41,43, Reg 12(5)(f)	**Issue**	Impact of disclosure under FOIA on the voluntary supply of information to regulatory bodies

Line to take:

Where a public authority argues that the disclosure of requested information under FOIA would prejudice its functions by decreasing the amount of information supplied voluntarily from the firms it works with, there are two stages the Commissioner needs to consider:

- Firstly, ascertain that the disclosure would be likely to have an impact on the voluntary supply or free flow of information;
- Secondly, if so, would the change in the voluntary supply of information be likely to prejudice a function of a public authority?

In firstly considering whether the disclosure would (or would be likely to) have an impact on the voluntary supply of information, the following factors may be relevant (only consider the factors that are relevant to the circumstances of your case):

- The content of the information
- The timing of the request in relation to the stage of an investigation;
- The public authority's statutory powers to compel engagement in the investigative process (for example – the power to issue information notices; sanctions for non-compliance; search powers;);
- Incentives that encourage third party engagement;
- Whether the third party considers the disclosure would be damaging;
- Is there evidence of lower levels of engagement post-FOIA or are there any existing risks of publication?; and
- Is there a statutory bar for preventing disclosure of information provided in confidence? A lack of statutory protection for the information implies a greater likelihood of prejudice.

If there is evidence to suggest that the voluntary flow of information is affected, the Commissioner will then go on to consider whether this would (or would be likely to) prejudice a function of the public authority. In doing this, he will consider:

- What the impact of the disengagement and loss of information would be (i.e. the nature of the prejudice to the function);
- The likelihood of the prejudice identified occurring;
- The timing or the request in relation to the stage of the investigation may also have an impact on considering the likelihood and nature of the prejudice.

These factors are discussed in more detail below.

Further Information:

Public authorities often rely on the voluntary co-operation of other organisations, including the voluntary supply of information, to enable them to carry out their functions. Some public authorities (generally regulators) have argued that the volume and quality of information provided voluntarily could be affected by disclosure of such information under FOIA, leading to the regulator not having the information it needs to carry out its functions effectively.

For example, in the Tribunal case of FSA v ICO (EA/2008/0061), the FSA put forward that the disclosure of information that the firms it regulates supplied to it on a voluntary basis would prejudice the exercise of its functions for the purposes listed in 31(2)(c) – "…ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist may arise"; and (d) – "the purposes of ascertaining a person's fitness or competence….in relation to any profession or other activity which he is, or seeks to become, authorised to carry on…".* The FSA maintained that "if information like the disputed material had to be disclosed under the Act, firms would be less likely than at present to be open with the FSA and voluntarily supply information raising possible regulatory issues about themselves" and "firms would be less likely to supply information about their competitors or about developments or conditions in the market generally" (paragraph 23).

Although this line focuses on s31 arguments and regulatory functions, it is not limited to these circumstances only; it may be relevant in considering the public interest test in relation to other exemptions/exceptions. This line focuses on scenarios involving regulators, but it is envisaged that the factors can equally be applied to other public authorities where appropriate.

The Commissioner's approach

Where a public authority argues that the disclosure of requested information under FOIA would prejudice its functions by decreasing the amount of information supplied voluntarily from the firms it works with, there are two stages the Commissioner needs to consider:

- Firstly, ascertain that the disclosure would be likely to have an impact on the voluntary supply or free flow of information;
- Secondly, if so, would the change in the voluntary supply of information be likely to prejudice a function of the public authority?

In firstly considering whether the disclosure would (or would be likely to) have an impact on the voluntary supply of information, the following factors may be relevant (only consider the factors that are relevant to the circumstances of your case):

- The content of the information
- The timing of the request in relation to the stage of the investigation. For instance, if

information was disclosed under FOIA during the early stages of an investigation, it may unfairly expose the third party to adverse publicity or criticism even though a conclusion on the investigation has not been reached. As well as harming the specific investigation in process, this reputational risk may be likely to deter firms more generally from co-operating on a voluntary basis.

- The public authority's statutory powers to compel engagement in the investigative process (for example – the power to issue information notices; sanctions for non-compliance; search powers); although voluntary supply may be affected by disclosure, if the public authority possesses powers to compel engagement, it may reduce the likelihood of prejudice to a function occurring. Alternatively, using formal powers may incur greater use of resources, although whether this amount to prejudice of a function will be dependent on the facts of the case.
- Incentives that encourage third party engagement;
- Whether the third party considers the disclosure would be damaging; the more damaging the disclosure, the more likely it would discourage provision of information in the future;
- Is there evidence of lower levels of engagement post-FOIA or is there an existing risk of publication? For example, information submitted to FSA will ultimately come to be published under the s391(4) of Financial Services Market Act 2000 (FSMA); and
- Is there a statutory bar for preventing disclosure of information provided in confidence? A lack of statutory protection for the information implies a greater likelihood of prejudice.

If there is evidence to suggest that the voluntary flow of information is likely to be affected, the Commissioner will then go on to consider whether this would (or would be likely to) prejudice a function of a public authority. In doing this, he will consider:

- What the impact of the disengagement and loss of information would be (i.e. the nature of the prejudice to the function);
- The likelihood of prejudice identified occurring;
- The timing of the request in relation to the stage of the investigation may also have an impact on considering the level of likelihood and nature of the prejudice – eg disclosure at an early stage is likely to be more prejudicial as continued co-operation with a firm is likely to be more crucial during the early stages of an investigation. Also, disclosure during an investigation may prejudice the public authority's ability to use publicity as an effective penalty in itself in appropriate cases, although this is only likely to affect the investigation in question rather than future investigations.

As the case examples will demonstrate, not all factors will be relevant to all cases; furthermore, the weight applied to the relevant factors will differ dependent on the circumstances of the case and will differ in each regulatory context.

Case examples

Although the following cases do not strictly follow the two-stage approach detailed above, they do broadly consider the some of the factors identified where relevant and present the type of arguments related to them, which may provide some helpful examples for caseworkers. As you can see, it is only necessary to consider factors relevant to the case.

***FSA v ICO* (EA/2008/0061)**

The Tribunal in the case of FSA v ICO were not satisfied that the disclosure of the disputed information would create a real and significant risk of decreasing the amount of information voluntarily provided to the FSA by firms about themselves and found that of the functions at 31(2)(c) and (d) would not therefore be prejudiced. The Tribunal placed cumulative weight on the following factors (paragraph 24):

Incentives that encourage engagement

The Tribunal noted the incentives on firms to supply information about themselves and generally co-operate with the FSA, namely, Principle 11 of the FSA's Principles for Business. They also considered that firms would have a desire to mitigate any steps taken against them and avoid formal enforcement action, noting that these would have remained in place even if disclosure of the disputed information led them to believe that FSA's views on such information might possibly be disclosed.

Existing risk of publication

In addition, to this, for firms regulated by FSA, there is always a risk that information submitted by firms about themselves voluntarily, and the FSA's view on such information will ultimately come to be published pursuant to s391(4) of FSMA.

Level of engagement post FOIA

There was no evidence that behaviour had changed to being less open since the introduction of the Act.

Is there a statutory bar to protect information provided in confidence?

The Tribunal disputed the PA's argument that "firms would be less likely to supply information about their competitors or about developments or conditions in the market generally", acknowledging that s348 of the Financial Services and Marketing Act 2000 (FSMA) exists to protect any information imparted on a confidential basis; therefore, in these circumstances, requests for such information would be exempt from disclosure under FOIA by virtue of s44.

Although the Tribunal found s31 was not engaged and therefore did not go on to consider the nature or likelihood of prejudice, they did emphasise that the conclusion relates to the specific circumstances of the case; highlighting that this decision "does not mean that s31 can never be relied on to resist disclosure of internal FSA views based on information supplied [to it]" (paragraph 26). They noted that there may have been a different outcome if the request was made during an ongoing investigation or the disclosure "would… have risked the identification of a confidential source or revealed something novel about the FSA's methods of investigation" (paragraph 26).

Charity Commission (FS50184898)

This case concerned a request for all documents relating to complaints about a school run by a registered charity. The decision notice concluded that the majority of the withheld information was exempt from disclosure on the basis of s42(1) or s31(1)(g) by virtue of sections 31(2)(f) and (g) and that the public interest test favoured maintaining the exemption. On the engagement of s31(1)(g) by virtue of factors listed under 31(2), the Charity Commission argued

that it was dependent on the voluntary co-operation of its trustees, charities and their advisors (paragraph 74). The Commissioner applied the factors identified above in his consideration of this argument at paragraphs 82-94 of the decision notice.

1. Would disclosure be likely to have an impact on the voluntary supply of information?

Stage of the investigation

The Commissioner noted that the investigation in question had been concluded but only relatively recently, and therefore the likelihood of disclosure impacting on the Charity Commission's ability to gather information from organisations remained relatively high (paragraph 84).

Powers to compel engagement and incentives that encourage engagement

The Commissioner acknowledged the limited powers the Charity Commission has to compel trustees to provide it with information, particularly when compared to other regulators (paragraph 85). However, he also noted that the trustees of charities, and their advisors, have an in-built incentive to communicate with the Charity Commission in a free and frank manner to ensure their charity complies with the legal requirements of charity law (see paragraph 86 for further detail).

Level of engagement post-FOIA.

The Commissioner noted at paragraph 87 that the Charity Commission had presented no evidence to demonstrate that charities have been less willing to provide it with information since the Act came into full force in January 2005.

Is there a statutory bar to protect information provided in confidence?

In this case, the Commissioner acknowledged that there was no statutory bar preventing the disclosure of information received voluntarily by the Charity Commissioner, unlike in the FSA v ICO case (EA/2006/0061, discussed above), where such information was protected by s348 of the Financial Services Management Act 2000 (FSMA). Therefore the Commissioner concluded that this lack of protection increased the likelihood of prejudice occurring following disclosure under FOIA of information provided voluntarily (paragraph 92).

In considering this in more detail, mindful of the new approach set out above, it may be more precise to say that the lack of protection for information that was provided voluntarily to the Charity Commission means that disclosure under FOIA would be likely to have a greater negative impact on the free flow of information; and that this reduction in openness would be more likely to prejudice the Charity Commission's functions of protecting charities against misconduct or mismanagement (31(2)(f) and protecting the property of charities from loss or misapplication (s31(2)(g)).

The factors of timing, the Charity Commission's weak powers to compel engagement and the lack of statutory protection for the information were balanced against the statutory incentives for organisations to engage and the lack of evidence to demonstrate lower post-FOIA

engagement in considering the impact of disclosure. In this case the Commissioner accepted that disclosure of the information would have an effect on the voluntary supply of information.

2. Would the change in the voluntary supply of information be likely to prejudice a function of the public authority?

As disclosure was found to be likely to have an effect on the voluntary supply of information, the next stage is to identify how likely prejudice to specified functions would occur. In this case the nature of prejudice was identified as the potential to slow down the Charity Commission's regulatory process, which may lead to less timely regulatory action (paragraph 93). Rather than just suggesting that the disclosure of information in response to this request would result in trustees refusing to communicate with the Charity Commission at all, the public authority argued that the nature of communications would change. This change in communications would affect the Charity Commission's formal and informal methods, as well as its ability to gather/receive wider intelligence (paragraph 94).

In considering the likelihood of prejudice, the Commissioner considered the significant number of charities the Charity Commission regulates; even if a small percentage altered their behaviour following the disclosure of the information under FOIA, there would be a real and significant impact on its ability to carry out the functions described at s31(2)(f) and (g).

FSA (FS50193437)

In this case, the complainant made a request to the FSA for information related to any concerns it may have regarding the management of a credit union; in contrast to the previous case examples, the public authority refused to confirm or deny that it held the information under s31 and s43. In relation to s31, the FSA put forward that if it were to confirm or deny that it holds this information, then the companies it regulates would be less likely to engage with it on an informal basis in the future (paragraph 44) which would prejudice functions detailed at 31(2)(a)-(d).

Incentives that encourage engagement and the existing risk of publication

The Commissioner was not satisfied that regulated firms would be less likely to engage with the public authority as a result of confirming or denying the requested information was held and found that s31(3) was not engaged. In reaching this decision, the Commissioner was mindful of the FSA Tribunal case (detailed above), highlighting the Tribunal's findings on the incentives to provide information and the provision of s391(4) (as discussed above).The Commissioner was of the view that these factors carried even more weight in this case, given that the concern was what prejudice would be caused by merely confirming or denying if information was held, rather than disclosure of that information (paragraph 46-47).

Stage of the investigation

Furthermore, the Commissioner considered that if an investigation was taking place, then in the circumstances of this case, it would be likely to be at an advanced stage: "any investigation which the public authority may or may not be carrying out would be likely to be at an advanced stage or at least would be unlikely to be an elementary stage….informal co-operation with a firm is likely to be more important during the early stages of an investigation". The Commissioner maintained that even if he were to accept that disclosure would lead to a lack of

co-operation, it is unlikely this would cause any significant prejudice to an investigation which would in all likelihood be at an advanced stage (paragraph 48).

* Note: the Tribunal had found that s43 was engaged in relation to the requested information, but still went on to comment on the application of s31.

PREVIOUS / NEXT

Source	**Details**
IT decision Decision Notice	FSA v ICO (16 February 2009) FS50184898, FS50193437

Related Lines to Take

LTT13, LTT158

Related Documents

EA/2008/0061, FS50193437, FS50184898

Contact	GF		
Date	09/04/2010	**Policy Reference**	**LTT173**

FOI/EIR	FOI / EIR	**Section/Regulation**	s12 / Reg 12(4)(b)	**Issue**	Calculating costs where request(s) span several access regimes (DPA/ FOIA/EIR)

Line to take:

When aggregating requests for the purposes of considering section 12 FOIA (costs), or regulation 12(4)(b) of the EIR (manifestly unreasonable), requests that clearly fall under different access regimes cannot be aggregated.

As the ICO considers that multiple requests within a single item of correspondence actually comprise a number of separate individual requests, the same will apply when considering the aggregation of the individual elements of a multi part request (which will from this point onwards

just be referred to as individual or single requests) .

In situations where each individual request is for information that clearly falls under only one access regime (see **example 1** below) , then only the aggregated costs of complying with "FOI only" requests should be allowed under FOIA, and only the aggregated costs of complying with "EIR only" requests should be allowed under EIR.

However, where a single request is likely to cover information that falls under more than one regime, (see **example 2** below) then the Commissioner :

- will allow the costs (permitted by the Fees Regulations) of responding to the whole request under section 12 FOIA but won't allow the costs of considering which regime applies (the costs of applying section 39 or section 40)
- will consider the circumstances of the case under the EIR to ascertain whether the costs that would be incurred in providing any environmental information mean that the request is manifestly unreasonable.

Nb. This line provides detailed analysis of how to deal with a small minority of cases where some complex issues may arise. However, many cases will not be as complicated as the examples given here. Therefore, careful consideration should be given as to how much of the technical detail in this 'line to take' it is necessary and appropriate to include when drafting a Decision Notice. If you require assistance in deciding how much detail to go into then please discuss with the policy team.

Please also read in conjunction with LTT175 - Flowchart on process for calculating costs where request(s) span several access regimes (DPA/ FOIA/EIR).

Further Information:

The Commissioner's general approach to casework, and advice to public authorities, is that requests should be dealt with under the appropriate access regime (FOIA, DPA or EIR) from the outset.

The Commissioner is clear that the same approach should apply whenever possible, when considering the costs of complying with requests. It is thus essential to get into the right legislative regime from the outset, as far as it is possible.

The Commissioner's preferred approach as set out in this line acknowledges the precedence of European law which provides the freestanding right to access environmental and an applicant's own' personal data via EIR and DPA (Council Directive 2003/4/3 EC and Data Protection Directive 95/46 EC respectively). Their intention is clearly to provide separate access regimes specifically in respect of environmental information and applicants' own personal data respectively. Using s12 FOIA to refuse individual requests for environmental information or applicants' own personal data just because those individual requests have been made at the same time as other requests which properly fall for consideration under FOIA disregards this intention and the higher authority of European law.

The DPA / FOIA hybrid case procedure provides a process for getting assistance from DP

colleagues in deciding whether requests are likely to be Subject Access Requests (SARs), in potential mixed DPA/FOIA or mixed DPA/EIR cases.

LTT80 contains a section entitled " Defining as environmental information without viewing the information " which may be helpful in considering potential mixed FOIA / EIR cases.

Cases where individual requests fall neatly under one regime

In cases where each separate request is for information that would clearly fall under only one access regime this approach should not cause any difficulty.

Eg **Example 1** : In a single letter an applicant makes a number of individual requests :

Request a) "FOI only" request – all information requested non DPA & non EIR information

Request b) "EIR only request – all information requested is Environmental information

Request c) "EIR only" request – all information requested is Environmental information

Request d) "FOI only" request – all information requested is non DPA & non EIR information

Request e) subject access request under the DPA

Assuming that the requests are for similar information (see LTT145) then the Commissioner would allow aggregation of requests a) and d) under FOIA and would allow aggregation of requests b) and c) under the EIR. Request e) would be dealt with separately under the DPA. He would not allow aggregation across regimes in this situation

In such cases only the costs of dealing with FOI requests should be allowed under section 12 FOIA.

Similarly only the costs of dealing with requests for environmental information should be considered under regulation 12(4)(b) of the EIR.

Any Subject Access Requests should be dealt with via normal DP case handling procedures.

The Commissioner notes that this approach was not taken in DN FS50154310– the Commissioner's position has now changed and we will not follow the approach taken in this DN.

Cases where a single request is for information falling under multiple access regimes, or where it is not clear which legislation applies

However, in cases where it is not clear from the request which legislation the information is likely to be subject to, or where a single request is likely to cover information that falls under more than one regime the situation is more complex.

e.g. **Example 2 :**

Request a) "mixed request" - a single broad request such as "all correspondence sent to chief

executive" is made. As the chief executive may be involved in numerous issues it is likely that in order to answer this one single request a mixture of environmental information and FOI (non DPA, non EIR) information would need to be provided.

This situation presents a particular problem where a request is being refused because of costs, in that the information may really need to be reviewed in order to decide which regime applies, but because the refusal is being made on the grounds of costs the information won't have already been collated and thus won't be readily available to view.

Approach under FOIA

In such cases the Commissioner's approach will be to allow the costs (permitted by the Fees Regulations) of dealing with the whole request under section 12 FOI, even where some of the costs may be related to environmental information or the applicant's personal data.

This is because (whilst acknowledging the EC intention to provide separate access regimes for environmental information and applicants' own personal data noted above, and dealing with such requests outside of FOIA wherever this is practicable) technically, any request meeting the requirements of section 8 of the Act is a valid Freedom of Information request. This would include where the request may contain environmental information, to which the exemption at s39 would apply, and / or the personal data of the applicant to which the exemption at section 40(1) or section 40(5) would apply.

As normal (in line with LTT115) it will not be permissible to allow any costs relating to the application of an exemption under section 12 FOIA as this is not permitted by the fees regulations. This will mean that whilst the costs of identifying, locating retrieving and extracting the information to meet the request in full will be allowed under section 12, any costs related to identifying and redacting environmental information under section 39 or the applicant's personal data under section 40, should not be allowed.

It should be noted that this does not remove the applicant's separate right of access to environmental information under EIR, or to their own personal data under the DPA. So although the whole request may potentially be validly refused under s12 FOI, the public authority, and the ICO will still need to consider the public authority's separate obligations under the EIR and the DPA. Whilst this may appear onerous, and may require multiple decisions to be made under FOIA, DPA and EIR, the Commissioner considers that the approach is reasonable and balances the rights of applicants against a workable, proportionate interpretation of the legislation.

Approach under EIR

Under the EIR the situation differs as the regulations only apply to environmental information as defined at regulation 2(1). In considering whether a request is manifestly unreasonable under the EIR it will only be permissible to take into account the costs related to the provision of

environmental information. However, in practice it may be that before a public authority is able to identify any environmental information it will need to take the preliminary step of collating all the information falling within the scope of the request. In this situation the Commissioner will allow the costs of collating all the information when considering if a request is manifestly unreasonable, because he would accept that this forms part of the cost of making the environmental information available.

The approach set out above does not mean that in every case it will be acceptable to allow the costs of collating all the information. There will be a judgement to be made about whether such a preliminary step is actually necessary in the circumstances of a particular case. In decision notice FS50143525 the Commissioner considered that such a preliminary step was necessary and thus allowed the costs of collating all the information falling within the scope of the request in his consideration of whether the request was manifestly unreasonable. The Commissioner would not however allow this approach, for example, in a case where it is apparent that the environmental information is to be found in certain locations and the non-environmental information is to be found elsewhere. In this situation the Commissioner would only allow the costs of searching for the environmental information in his consideration of whether the request was manifestly unreasonable under the EIR.

The situation under the EIR also differs in that the cost of separating out the environmental information from the non-environmental information may be validly taken into account when considering if the request is manifestly unreasonable. This is because the 12(4)(b) decision under EIR is not limited by the FOIA fees regulations, and in any case the identification of environmental information would not be classed as applying an exception. This may be relevant in cases where we have accepted the necessity of the preliminary step of collating all the information, but find that these costs (when considered with other relevant factors as per LTT147) are not sufficient to render the request manifestly unreasonable. In this situation the additional costs of separating out the environmental from the non-environmental information may be requested from the public authority and taken into account before reaching a final conclusion on whether the manifestly unreasonable exception applies.

Cases where there are a number of single requests and some of them are for information falling under multiple access regimes, or it is not clear for each individual request which legislation applies

So long as the requests are sufficiently similar (see LTT138), it will be permissible to aggregate a number of requests which are each for mixed information or to aggregate "mixed" requests with "FOI only" requests . This is in line with the approach detailed above that aggregation will not be allowed where individual requests *clearly fall under different access regimes.*

Example 3 :

Request a) "mixed" request – some information requested Environmental Information, some is FOI (non EIR and non DPA) information

Request b) “EIR only request – all information requested is Environmental information

Request c) mixed” request – some information requested is the applicants own personal data , some is FOI (non EIR and non DPA) information

Request d) “FOI only” request – all information requested is non DPA & non EIR information

Request e) subject access request under the DPA

Assuming that the requests are for similar information (see LTT145) then the Commissioner would allow aggregation of requests a), c) and d) under FOIA and would allow the costs related to providing any environmental information for request a) (subject to “approach under EIR” set out above) to be aggregated with request b) under the EIR.

*** Footnote**

Whilst the Commissioner would discourage the use of FOIA refusal notices for requests which are only for environmental information, or only for personal data, he considers this to be a reasonable approach in these limited circumstances where there is a costs issue and a mix of applicable access regimes.

PREVIOUS / NEXT

Source	**Details**
FOI Policy, DN	FS50143525

Related Lines to Take

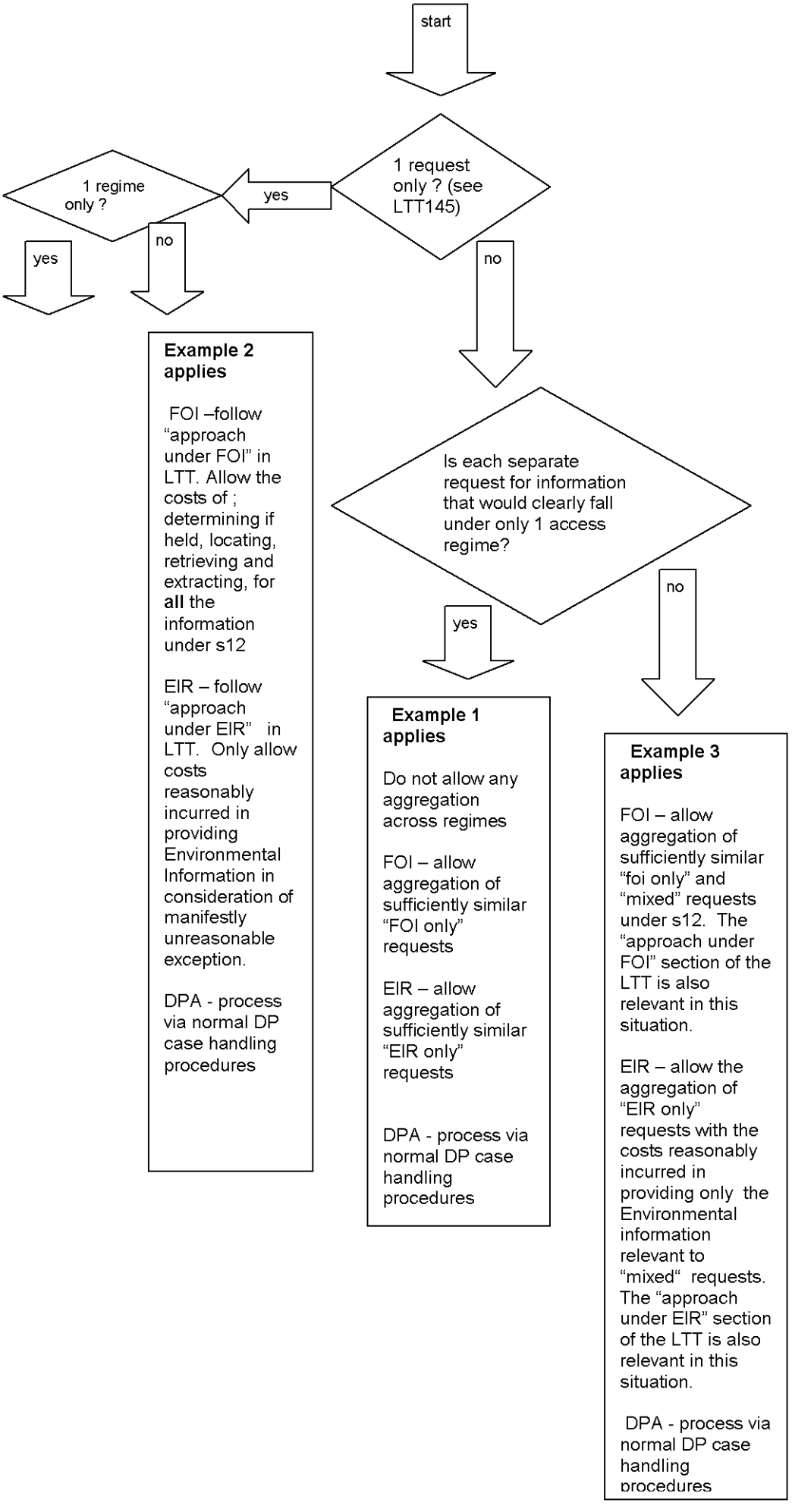
LTT119, LTT122, LTT138 , LTT141, LTT145, LTT147, LTT175

Related Documents

Fees Regulations SI 3244, Council Directive 2003/4/3/EC, Council Directive 95/46/EC

Contact	LA		
Date	09/04/2010	**Policy Reference**	**LTT174**

Costs / Mixed Access Regimes flowchart –only to be used in conjunction with a full reading of LTT174 which provides more detailed guidance on the steps to followed (LA 17/03/10)


start
1 request only ? (see LTT145)
yes
1 regime only ?
yes
no
no
Example 2 applies
FOI –follow "approach under FOI" in LTT. Allow the costs of ; determining if held, locating, retrieving and extracting, for **all** the information under s12
EIR – follow "approach under EIR" in LTT. Only allow costs reasonably incurred in providing Environmental Information in consideration of manifestly unreasonable exception.
DPA - process via normal DP case handling procedures
Is each separate request for information that would clearly fall under only 1 access regime?
yes
no
Example 1 applies
Do not allow any aggregation across regimes
FOI – allow aggregation of sufficiently similar "FOI only" requests
EIR – allow aggregation of sufficiently similar "EIR only" requests
DPA - process via normal DP case handling procedures
Example 3 applies
FOI – allow aggregation of sufficiently similar "foi only" and "mixed" requests under s12. The "approach under FOI" section of the LTT is also relevant in this situation.
EIR – allow the aggregation of "EIR only" requests with the costs reasonably incurred in providing only the Environmental information relevant to "mixed" requests. The "approach under EIR" section of the LTT is also relevant in this situation.
DPA - process via normal DP case handling procedures

FOI/EIR	FOI	Section/Regulation	s40(5)	Issue	When does the public interest test apply to the exclusion from the duty to confirm or deny whether personal data is held

Line to take:

s40(5)(a) will be treated as being absolute i.e. where the information requested constitutes the personal data of the applicant.

In respect of third party personal data;

s40(5)(b)(i) will be treated as being absolute where confirmation or denial whether of third party data is held would contravene the data protection principles or would do so if the exemptions provided by s33A(1) of the DPA were disregarded.

s40(5)(b)(i) is qualified where confirmation or denial would contravene s10 DPA.

s40(5)(b)(ii) is qualified where by the virtue of any provision of Part IV of the DPA the information would be exempt from s7(1)(a) of that Act. i.e. where there would be no obligation for the data controller to inform the data subject that it's processing personal data about him because an exemption to subject access under the DPA applies.

Further Information:

In broad terms section 40(5) means that a public authority does not need to confirm or deny whether it holds personal data in a number of situations;

- where the information requested is the personal data of the applicant,
- where the information is third party personal data and confirmation or denial would contravene the data protection principles,
- where confirmation or denial would contravene a DPA s10 notice, and
- where, if the data subject made a subject access request, he would not be entitled to be told whether the data controller if it held information about him.

The uncertainty as to which parts of s40(5) are subject to the public interest test has arisen because section 2 of the Act, which sets out which provisions are absolute, makes no reference to s40(5) being absolute. As a consequence there has been some debate as to whether s40(5) is subject to the public interest test, and if so to what extent. To compound the confusion there have been a number of contradictory Tribunal decisions on the subject.

The first case to consider the issue was The Rt Hon Frank Field MP v ICO. In this case the request related to a third party who may have been implicated in a fraud investigation. The ICO's DN found that to confirm or deny whether the information was held would contravene the data protection principles and hence s40(5)(b)(i) would apply. We did not go onto consider the public interest test. The Tribunal upheld our decision and reasoned that as the equivalent exemption from the duty to provide the information was absolute, then so too, was this element

of 40(5).

In a later case, Tony Wise v ICO, the applicant had requested information relating to his involvement with Lancashire Police. The ICO found that this was his own personal data and as such the correct response under FOI would have been to refuse to confirm or deny whether the information was held under s40(5)(a). Again we did not apply any public interest test. The Tribunal upheld our decision but in foot note to para 11 explained that it was a moot point whether s40(5)(a) confers an absolute exemption. It went to note that in any case, because of the interaction between s40 and s7(subject access rights) of the DPA, it could see no basis for finding that the public interest in maintaining the exclusion would not outweigh the public interest in confirming whether the information was held.

Finally in Young v ICO the applicant sought all information on complaints that had been made against two named police officers. The Tribunal found s40(5) was engaged and then addressed the public interest test. The Tribunal noted that the ICO had not considered the public interest but stated that the test should be considered (para 13). In a footnote the Tribunal commented that the "…omission of s40(5) from the list in s2(3) [the list of absolute provisions] may well have been a legislative oversight but the Tribunal can see no way round it."

The Commissioner's approach

In light of these conflicting decisions the Commissioner has decided to continue with his established approach, i.e. s40(5) should be treated as absolute in respect to situations where the request is for the personal data of the applicant or where the confirming or denying would breach the data protection principles. In situations where confirmation or denial would contravene a s10 DPA notice or, where the operation of one of the exemptions in the DPA would mean that the public authority was not required to deal with a SAR for the same information, s40(5) should be treated as being qualified.

It is intended that when a suitable case goes to appeal the ICO will take the opportunity to resolve the issue once and for all but until then, it's a case of continue as before.

The Commissioner's view is that this will not disadvantage applicants. Developing the point made by the Tribunal in Wise, an applicant wishing to access their own personal data will still be able to pursue this right under the DPA and it's appropriate that any decision as to whether or not a data subject is entitled to be told whether personal data about them is being processed, should be made in accordance with the scheme of that Act.

In relation to situations where confirming or denying whether the information is held would breach the data protection principles the Commissioner considers that it is difficult to conceive of a situation where breaching legislation aimed at protecting the privacy of an individual would be in the public interest, particularly when it is recognised that the main issue to be resolved in such cases would be the application of the 1st principle. Therefore in determining whether confirmation or denial would be fair, and in considering the 6th condition, the public interest in the disclosure would already have been weighed against the intrusion into the data subject's privacy.

Approach in DNs

In those situations where our approach is that s40(5) is absolute, case officers are advised to

complete their analysis of the exemption when they have concluded whether or not it applies and that the DN should remain silent as to whether it is subject to the public interest test.

Environmental Information Regulations

The situation under the Regs is different to that under the Act.

Firstly under reg 5(3) there is no requirement for a public authority to make available personal data of which the applicant is the data subject. Furthermore there is no requirement to provide a refusal notice under reg 14 stating that the information will not be disclosed under the Regs. The presumption must be that the public authority will simply get on and deal with a subject access request under the DPA.

Third party personal data is dealt with as an exception. Reg 12(3) takes third party personal data out of reg 12 and makes it clear that it should only be disclosed in accordance with reg 13. So although all the exceptions under reg 12 are subject to the public interest test, the provisions under reg 13 are only subject to the public interest test where it is explicitly states so in that provision.

Reg 13(5)(a) provides that where the disclosing whether third party personal data is held would contravene either the data protection principles or a s10 notice a public authority can respond to a request by neither confirming or denying whether the information is held. Similarly reg 13(5)(b) provides that where the information is exempt from the DPA's subject access provisions the public authority may, again, respond to a request by refusing to confirm or deny whether the information is held.

There is nothing within reg 13 to state that these provisions are subject to the public interest test and so they are to be treated as being absolute.

PREVIOUS / NEXT

Source	**Details**
IT	Rt Hon Frank Field MP v ICO (25.01.2010), Tony Wise v ICO (03.02.2010), Young v ICO (10.02.2010)

Related Lines to Take

Related Documents

EA/2009/0055 (Field), EA/2009/0088 (Wise), EA/2009/0057 & 0089 (Young)

Contact	RM

Date	30/04/2010	Policy Reference	LTT176

FOI/EIR	FOI	Section/Regulation	s12, s16	Issue	Advice and assistance where a request cannot be refined

Line to take:

The Commissioner may find a breach of s.16 where a public authority has failed to either confirm what information can be provided under the costs limit or where a public authority has failed to indicate that no information can be provided under the costs limit.

Further Information:

Paragraph 14 of the s.45 Code of Practice says as follows:-

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of ***what, if any****, information could be provided within the cost ceiling"* (emphasis added).

Where a public authority cites s.12, the Code indicates that the authority should consider providing an indication of what information could be provided within the costs limit. This allows the applicant to choose how to refine his/her request to successfully obtain a more limited piece or section of the requested information.

However, a plain English interpretation of the phrase *"…the authority should consider providing an indication of what,* ***if any,*** *information could be provided…"* would also require a public authority to indicate where no information can be provided within the costs limit. This would be useful because:-

- If the applicant understands and accepts that no information can be provided, then this may avoid further and futile attempts to refine the request to bring it under the costs limit.

- Also as the applicant would understand the way in which the decision had been reached then this would allow him/her to properly challenge the decision i.e. either with an appeal or focusing the request in another direction.

Therefore, the Commissioner may find a breach of s.16 where a public authority has failed to either confirm what information can be provided under the costs limit or has failed to indicate that no information can be provided under the costs limit where it would have been appropriate to do so in the circumstances of the case.

PREVIOUS / NEXT

Source	Details
Policy Team	

Related Lines to Take
LTT87, LTT141

Related Documents

Contact	HD		
Date	07/05/2010	Policy Reference	LTT177