FOI/EIR	EIR	Section/Regulation	Reg 12(5)	Issue	Threshold of adverse effect

Line to take:

The threshold to justify non-disclosure because of adverse effect under 12(5) of the EIR is a high one, and the following issues should be considered in this respect.

Further Information:

In *Archer v The Information Commissioner and Salisbury District Council* the Tribunal stated that the following issues should be considered in deciding adverse affect and that the threshold to justify non-disclosure is a high one:

1. It is not enough that disclosure should simply have an effect, the effect must be "adverse"
2. Refusal to disclose is only permitted to the extent of that adverse effect. (In this case the information request was for the whole of a particular report. The IT found that the adverse effect only arose in respect of part of the report and that the cited refusal could not therefore be applied to the whole document.)
3. It is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such an effect. (further discussion of this point is provided in LTT13)
4. Even if there would be an adverse effect, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

This provides a useful summary of the approach required by the wording of the exceptions falling under 12(5).

In *North Western & North Wales Sea Fisheries Committee v the ICO* the Tribunal followed the approach set out in *Archer.* In this case it found that the exception at 12(5)(e) was not engaged as it did not consider that the information concerned could be properly regarded as confidential, " nor, even if that confidentiality could be shown, that disclosure "would" adversely affect that confidentiality" (para 84)

The approach in Archer was also referred to in *Watts v the ICO*, where the information in question was environmental health officers' reports on the premises of a certain meat supplier. In this case the Tribunal found, in relation to Regulation 12(5)(b), that even though there were criminal proceedings pending against the owner of the premises as at the date of the request, "on the special facts of this case, the disclosure of the information requested would not have adversely affected the accused's ability to have a fair trial." (para 7).

Source	Details

IT	Archer / Salisbury District Council (9 May 2007) North Western & North Wales Sea Fisheries Committee / Burkham (8 July 2008) Watts / Bridgend County Borough Council (20 November 2007)

Related Lines to Take

LTT13

Related Documents

EA/2006/0037 (Archer), EA/2007/0133 (Sea Fisheries), EA/2007/0022 (Watts)

Contact		LA	
Date	29/07/2008	**Policy Reference**	**LTT117**

FOI/EIR	FOI	**Section/Regulation**	s36	**Issue**	Flaws in the application of s36

Line to take:

If a reasonable in substance and reasonably arrived at opinion has been given by the qualified person, by the time of the completion of internal review, then s36 will be engaged.

If a reasonable in substance and reasonably arrived at opinion has not been given by the qualified person by the time of completion of the internal review, then the Commissioner has discretion as to whether he accepts the late claiming of s36 or a further opinion as a late correction of flaws in the application of s36.

Further Information:

As per LTT17 (Investigation of the reasonable opinion of a qualified person) and LTT35 (Interpretation of 'reasonable opinion'), in order to establish that section 36 is engaged, case officers will normally need to establish that an opinion has been given by the qualified

person that is both reasonable in substance and reasonably arrived at.

Any references in this LTT to a "reasonable opinion" should be taken to mean an opinion that is both reasonable in substance and reasonably arrived at.

This line is supplementary to LTT17 and LTT35 and provides guidance as to how case officers should deal with flaws in the application of section 36.

The Internal Review

The first point to note is that the internal review is a chance for a public authority to reconsider its original decision and correct any mistakes. Therefore if a reasonable opinion has been given by the qualified person, by the time of completion of the internal review, then s36 will be taken to be engaged. The decision in *McIntyre v the Information Commissioner* confirmed this approach :

- Firstly at para 31 specifically in relation to flaws in the process followed by the qualified person in arriving at their opinion the IT stated that "*even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review".*

- Secondly at para 38 in relation to the general application of the Act it said "*However the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s.50. Parliament clearly intended that a public authority should have an opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made."*

This should not be taken to mean however that LTT92 – the timing of the public interest test- does not apply where an opinion is only obtained at internal review stage. The relevant date for consideration of public interest factors will still be the time of the request or by the time for compliance with sections 10 and 17 FOIA. In other words, errors can be corrected at internal review stage by reference back to the circumstances in existence at the time of the request.

Where the Public Authority claims s36 for the first time in the course of the ICO investigation or before the Tribunal

LTT21 clarifies that where a public authority claims any exemption for the first time in the course of the ICO investigation, then the ICO has discretion as to whether or not to consider this exemption, and that there should be reasonable justification for such a late claim. Case officers should refer to LTT21 for general guidance in this respect and should also note the following comments specifically in relation to s36.

The ICO view is that this practice should be discouraged and that, in addition to us requiring reasonable justification for a late claim, it may increase the likelihood of us concluding that the opinion is not a reasonable opinion. This is because it increases the scope for errors in the Qualified Person's opinion, such as taking into account factors that did not exist at the time of the request, or not giving sufficient weight to the circumstances

that did exist at the time because events have since moved on. (See LTT35 for further discussion on the interpretation of a reasonable opinion.)

Where the process by which the Qualified Person's opinion was reached was flawed in some way

In some cases there may be a flaw in the way the opinion was reached, for example the Qualified Person may have based their opinion on a viewing of the wrong information or an unclear description of the request and/or the requested information. This situation arose in the McIntyre case where the MoD sought the opinion of the qualified person two further times in order to correct flaws they had identified.

Again the comments above in relation to corrections made at Internal Review stage will apply. So whatever the flaw(s) in the process by which the Qualified Person's opinion was reached, if these have been corrected at Internal review then the correction(s) should be accepted.

Where there are flaws in the process by which the Qualified Person reached their opinion and these have not been corrected at Internal Review stage then the ICO has discretion as whether to accept the late correction of flaws during the course of the ICO investigation. *McIntyre* states that a reasonable time period for correction of flaws in this process will **usually** be no later than internal review. The ICO interprets this to mean that there may be particular circumstances where a reasonable time period could be later than the date of Internal Review.

Allowing use of discretion in this circumstance is consistent with allowing use of discretion where an exemption is claimed for the first time during the course of the ICO investigation. In accordance with this view that there must be reasonable justification for accepting the late correction of flaws in the process by which the Qualified Person's opinion was reached.

However, case officers should also refer to LTT35 on the interpretation of a reasonable opinion. This again refers to the *McIntyre* case where the IT comments that *"where the opinion is overrridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion".* This means that if the Qualified Person's opinion is overridingly reasonable in substance then flaws in the process may remain uncorrected.

Where the Public Authority cites section 36 without having first sought the opinion of the Qualified Person

In accordance with the section on Internal Reviews above, if the public authority initially refused under section 36 without having obtained the Qualified Person's opinion, but then obtained the Qualified Person's opinion at Internal Review stage then this opinion should be considered.

If the public authority has cited s36 without first obtaining the Qualified Person's opinion, and then doesn't take the further opportunity of the Internal Review to rectify this omission

then the Commissioner will need to exercise his discretion in how to proceed.

In this situation, at the point at which the ICO investigation commences s36 has clearly not been engaged because the Qualified Person's opinion has not been sought. Allowing the public authority to seek the Qualified Person's opinion during the course of the investigation could be seen as allowing it to correct a flaw in the process at a late stage or alternatively as allowing it to properly claim s36 for the first time during the course of the ICO investigation (the initial claim being invalid).

The ICO view is that, whichever way this is seen, in this situation there will need to be reasonable justification for allowing such a late claim / late correction and that this justification may be difficult for the public authority to supply. This is because it cannot claim that it had only recently realised that s36 might apply, and, because obtaining the Qualified Person's opinion is so fundamental to engaging section 36, it would be difficult to maintain an argument that it didn't realise it had to obtain such an opinion.

Sugar v ICO and BBC and the late claiming of s36.

In the case of Sugar v ICO and BBC, the Tribunal agreed with the principles taken in the cases of BERR and Home Office on the late claiming of exemptions as discussed in more detail under LTT21. However, the Counsel for the appellant had argued that the late application of exemptions did not extend to s36 because it requires the reasonable opinion of a qualified person. The IT summarised Counsel's arguments at paragraph 9 as:

- The BBC Trust which is now the designated 'qualified person' was not the same person at the time of the request (it was the BBC Governors).
- The wording of s36(2) requires that the exercise of seeking the opinion of the qualified person is at the time of the request, and not later.

The Tribunal disputed this view, and in line with the Commissioner's approach, the Tribunal emphasised that s36 should not be treated differently from other harm or prejudiced based qualified exemptions. The Tribunal did not agree that the wording of s36(2) requires the opinion to be obtained at the time of the request (paragraph 10). The Tribunal stated that "the section only requires that a reasonable opinion is obtained as to whether there would, or would likely to be prejudice to the effective conduct of public affairs **before the exemption is claimed** (emphasis added). As a result we do not agree that any change of qualified person matters provided the qualified person is designated as such at the time he/she gives the opinion" (paragraph 10). Therefore, regardless of the change in qualified person, or when the opinion is given, as long as the opinion of the designated qualified person is based on the facts at the time the request is made, the Commissioner will accept that opinion, and then go on to consider whether it is reasonable in substance and reasonably arrived at.

The Commissioner also considers that the complete failure to obtain the Qualified Person's opinion is such a fundamental flaw that if it remained uncorrected it would be a fatal flaw even if the "opinion" were overridingly reasonable in substance. Alternatively it could be said that in reality, because no opinion has been given, there is no opinion to judge as overridingly reasonable anyway.

Impact of guidance and past experience

McIntyre recommends that the ICO provides guidance for public authorities as to the way the opinion of the qualified person is sought. Whilst this guidance has not yet been published, the Commissioner considers that once it is, the application of s36 may be expected to be better executed and evidenced by public authorities. There should be less reason to accept late correction of flaws in the process by which the qualified person gave his/her opinion where this opinion is given after the date of publication of our guidance.

Also, if it is apparent that the public authority is fully aware from past experience of the standard expected in relation to s36, but chooses to wilfully ignore this standard when dealing with complainants and to adhere only upon the ICO's involvement, then the ICO may decide that there is not reasonable justification to accept the late correction of flaws or the late claiming of s36. (This may be less of an issue when dealing with "backlog" cases, and more relevant when considering recent complaints)

PREVIOUS / NEXT

Source	**Details**
IT	McIntyre / MOD (4 February 2008) Sugar / BBC (14 May 2009)

Related Lines to Take

LTT17, LTT21, LTT35, LTT92

Related Documents

EA/2007/0068 (McIntyre), EA/2005/0032 (Sugar / BBC)

Contact		LA/GF	
Date	12/10/2009	**Policy Reference**	**LTT118**

FOI/EIR	FOI EIR	**Section/Regulation**	s11, 21, 39	**Issue**	Inter-relation between s21 & s39 FOIA and the EIRs

			Reg2(1), 6, 12, 14		

Line to take:

Where information is environmental information, as defined by Regulation 2(1) of the EIR, then the Commissioner's view is that the public interest will lie in maintaining the exemption at section 39(1)(a) or (b) of FOIA and considering requests only under the EIR.

Section 39(3) FOIA "*section 39(1)(a) does not limit the generality of section 21"* cannot have an effect on a decision made under the regulations, a standalone piece of legislation, transposed from a European Directive.

Further Information:

In *Rhondda Cynon Taff Borough Council v the ICO* the public authority considered a request for a copy of the Land Drainage Act 1991 and refused it under s21 FOIA, on the grounds that it was reasonably accessible to the applicant by other means i.e. from www.opsigov.uk. The ICO found that the information was environmental information and that the EIR therefore applied. The ICO decision was that as there is no equivalent of s21 in the Regulations the pa should provide the information. The Tribunal found that the Council was entitled to rely on s21. It stated at paragraph 32 that "FOIA is providing a potential supplementary right of access to environmental information."

The Commissioner agrees with outcome of the Tribunal's decision but not the route by which the Tribunal got there. It is accepted the ICO decision notice is not correct, in particular the Commissioner was not aware of the additional wording of "in the form of copies" in article 3(4) of the Directive* when the decision was made.

The Information Tribunal finding that FOIA provides a supplementary right of access to Environmental Information may be right in theory but in practice taking this approach will have little practical effect.

The Commissioner does not agree with the Tribunal's view that there is an important distinction between EIR providing a duty to "make information available" and FOIA providing a duty to "communicate" information. This draws a false distinction that isn't supported by a detailed reading of the legislation. Section 11 FOIA provides details of what means of communication can be used by a public authority (if reasonable in the circumstances) and an applicant can express a preference. The options described in section 11 include inspection. The Commissioner believes the Tribunal overlooked this issue and the distinction drawn between EIR and FOIA in respect of the two duties is not relevant.

In the case of Rhondda Cynon Taff the information may well have been exempt under section 21 of FOIA if the request was considered under the regime. But the Commissioner believes that the public interest would be in maintaining the exemption in section 39(1)(a) or (b) and therefore consideration of the request under the EIR was the only route.

Section 39(3) FOIA - *section 39(1)(a) does not limit the generality of section 21* cannot have an effect on a decision made under the regulations, a standalone piece of legislation, transposed from a European Directive.

A way forward in scenarios relating to EIR and "reasonably accessible" information held by PAs

1. A request for information is made – the information falls within definition of EI in regulation 2

a. Section 39(1)(a) or (b) FOIA will apply, and we would therefore expect the pa to deal with the request under the EIR.

b. Is the information held?

i. Yes – proceed to part 2

ii. No – the exception under regulation 12(4)(a) applies. We would expect the pa to issue a refusal under regulation 14. Failure to do this will be a breach of regulation 14.

2. Is the information held publicly available and easily accessible to the applicant?

a. Yes

i. If the applicant has not requested the information to be made available in a specific format, but the pa has explained to the applicant specifically how they have made requested information publicly available (e.g. in a library, on a website) then we would consider that the pa has made the information available in compliance with Regulation 5.

ii. If the applicant has asked for a **copy** of the information and the pa has refused to provide a copy because the information is already publicly available in another format. Then we would consider that Regulation 6(1)(b) applies and that (reading it via article 3(4) of the Directive – "including in the form of copies) the pa has no duty to make the information available under regulation 5.

iii. If the applicant does not initially request a copy, but when the pa explains how the information is already publicly available the applicant then responds that this unacceptable and that they now want to be sent a copy of the information. Then we would consider that they are now in any case asking for a copy. Again Regulation 6(1)(b) applies and (reading it via article 3(4) of the Directive – "including in the form of copies the pa has no duty to make the information available under regulation 5.

b. No

i. The public authority must provide the information or refuse under another provision in the regulations

* Article 3(4) of Directive 2003/4/EC provides that :

"Where an applicant requests a public authority to make environmental information available in a specific format (including in the form of copies), the public authority shall make it so available unless:

- it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or
- It is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format

Source	**Details**
IT	Rhondda Cynon Taff CBC (5 December 2007)

Related Lines to Take

LTT44, LTT103, LTT106

Related Documents

EA/2007/0065 (Rhondda), Directive 2003 /4/EC

Contact		SW / LA	
Date	11/08/08	**Policy Reference**	**LTT119**

FOI/EIR	FOI	Section/Regulation	s14, s.16	Issue	Advice and assistance – erroneous reliance on s14 or derogation

Line to take:

Where a public authority argues that a request is vexatious but the Commissioner concludes that s.14 is not engaged, the Commissioner may find a breach of s.16(1) where the public authority would have been required to consider providing advice and assistance but failed to do so because they were erroneously claiming the request was vexatious.

Similarly where the Commissioner finds that derogation does not apply to a request, the Commissioner may find a breach of s.16(1) if the public authority failed to provide advice and assistance in circumstances where they would otherwise have been required to do so.

For completeness, where the Commissioner finds s.14 is engaged, or that derogation does apply, then there will be no breach of s.16(1) if the public authority does not offer any advice and assistance in accordance with the s.45 Code of Practice.

Further Information:

The FOIA provides:

"14. – (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious…

16. – (1) "It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it

16. – (2) Any public authority which in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection(1) in relation to that case"

Paragraph 15 (regarding advice relating to fees) of the Code of Practice states: *"…an authority is not expected to provide advice and assistance to applicants whose requests are vexatious within the meaning of s.14 of the Act…"*

In the case of Billings, the complainant requested details of the dates of any communications between the public authority (the Office of the Parliamentary & Health Service Ombudsman ('OPHSO')) and the Deputy Prime Minister for a three year period. The public authority cited s.14 on the grounds that it would constitute a significant burden, and as the request lacked any serious purpose or value. The public authority also said that

as the complainant was dissatisfied with the outcome of the OPHSO's investigations into his complaint, his submission of a number of information requests showed he was being obsessive/manifestly unreasonable. The Commissioner was not persuaded by any of the above arguments and found that s.14 was not engaged but in relation to s.16, paragraphs 34 & 35 of the DN state:

"…the PHSO made no mention to the requester of how his request could be refined so that it would be less burdensome. However, although this would ordinarily have been expected practice under s.16, the PHSO's application of s.14 disapplied this duty.

Whilst the PHSO did not breach s.16 in this case, the Commissioner is of the view that s.16 does not prevent the offering of advice and assistance in cases where such a process would facilitate access to information…".

The complainant appealed to the Tribunal on the grounds that the DN did not 'fairly and accurately reflect the facts of the case' despite the DN finding in his favour and despite him receiving some information under the terms of a refined request. Accordingly, the Tribunal dismissed all of the appellant's grounds of appeal except the last one which related to the provision of advice and assistance in relation to the original request.

The Tribunal summarised the Commissioner's position as follows at paragraph 13:

"…although the Commissioner decided that the PHSO was incorrect in [finding the request to be vexatious], the PHSO's view could not in all the circumstances be said to have been perverse or wholly unreasonable. As such, he says, the PHSO was acting in accordance with the Code of Practice in not providing assistance…"

The Tribunal said it hesitated to adopt the Commissioner's reasoning. At paragraph 14, it said that whilst a complainant could be denied the right to advice and assistance under s.16 if the public authority initially and erroneously found the request to be vexatious, the obligation under s.16 is qualified by the words 'so far as it would be reasonable to expect the authority to do so'.

The Tribunal said that arguably these words could just place a limit on the extent of the assistance that must be provided but that they thought the phrase could also be interpreted as indicating that the obligation was not triggered at all in circumstances where the public authority reached a rational conclusion that the request was vexatious. Indeed they said this latter interpretation represented an appropriate construction of the language and reflected the common sense approach of the Code of Practice:

"…its effect is that if a public authority comes to the reasonable conclusion that a request is vexatious, it should not be open to criticism (if the Information Commissioner or Tribunal subsequently disagrees with its assessment) for having failed to engage in further communications with the person making the request. This does not mean that public authorities may adopt a cavalier attitude to information requests: seeking to avoid their obligations by perversely or unreasonably characterising any inconvenient request as vexatious. The protection of s.16 will not be available to a public authority which has been unreasonable in deciding to treat the request as vexatious." (para 14).

The Commissioner's Approach in relation to s14

The Commissioner recognises that just because requests may initially be considered vexatious, this does not necessarily prevent the offering of advice and assistance (for example, in the Billings case, the public authority initially claimed s.14 but were swiftly able to provide the information under the terms of the revised request following dialogue as part of the Commissioner's investigation).

Therefore, where a public authority argues that a request is vexatious but the Commissioner concludes that s.14 is not engaged, the Commissioner may find a breach of s.16(1) if the public authority failed to provide advice and assistance because of their erroneous reliance on s.14 in circumstances where they would otherwise be required to do so (see LTT87 for the 'triggers' to providing advice and assistance).

Derogation

In the case of Fitzsimmons v Information Commissioner and BBC, the applicant had requested information about the expense statements for Andrew Marr and Natasha Kaplinsky. The BBC refused the request on the basis that the information fell within the derogation to FOIA. The Commissioner had found that the derogation did not apply in this case but upheld the BBC's (subsequent) reliance on section 12 FOIA. In the decision notice, the Commissioner had 'suggested' that the BBC should contact Mr Fitzsimmons so that with a view to him refining his request in order with the duty under s16.

The Tribunal found that the BBC at the time of the request genuinely believed derogation applied (paragraph 50); and that to say there was a breach of s16 in such circumstances would require the BBC to treat all requests under FOIA and offer advice and assistance whether derogation applied or not. However, the Commissioner disputes this view. His duty is to consider whether, at the time of the request, the public authority had correctly applied FOIA; for the Tribunal to say that because the BBC considered it was not covered by FOIA in this case, the BBC cannot be considered to have not complied with section 16 FOIA, even though FOIA did apply at the time of the request, is inconsistent with this duty

Therefore, where the Commissioner finds that derogation does not apply to a request, the Commissioner may find a breach of s.16(1) if the public authority failed to provide advice and assistance in circumstances where they would otherwise be required to do so (see LTT87 for the 'triggers' to providing advice and assistance).

Source	Details
IT	Billings (6 February 2008) Fitzsimmons (3 December 2008)

Related Lines to Take

LTT87, LTT88, LTT89, LTT90
Related Documents
EA/2007/0076 (Billings), EA/2008/0043 (Fitzsimmons)

Contact		HD/GF	
Date	23/02/2008	**Policy Reference**	**LTT120**

FOI/EIR	FOI EIR	**Section/Regulation**	s.1 Reg 5	**Issue**	Information held (on balance of probabilities) test

Line to take:

The normal standard of proof to apply in determining whether a public authority does hold any requested information is the civil standard of the balance of probabilities.

In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

Further Information:

In the case of Linda Bromley & others and the Environment Agency (EA), the applicants framed their request widely by asking for any files in connection with a flood bank near their homes. They said the files should go back to at least 1963. The EA disclosed some information but the applicants felt the search had been poorly and incompetently conducted and that further relevant documents were in existence but had not been discovered. The Commissioner concluded that the information was not held. The Tribunal said:

"…we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities…" (para 10) because *"…there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records…"* (para 13).

The Tribunal also indicated that in considering where the balance lies - *"...we may only consider, in light of the evidence placed before us, whether the scope, quality, thoroughness and results of those searches entitles us to conclude that the Environment Agency does not hold further information falling within the scope of the original request...."* (para 12).

The Tribunal in the later case of Fowler and Brighton & Hove City Council suggested that such evidence may include *"...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place...."* (para 24).

Therefore the Commissioner will look at both:

- the scope, quality, thoroughness and results of the searches and
- other explanations offered as to why the information is not held.

(i) The search

The Tribunal in Bromley said it would "resist" the applicant's arguments that issues such as the seniority of the individuals who conducted the searches or the adequacy of the FOIA training should be taken into account. Instead, they indicated that the application of the balance of probabilities test requires the consideration of a number of factors including:

- *"...the quality of the public authority's initial analysis of the request,*
- *the scope of the search that it decided to make on the basis of that analysis and*
- *the rigour and efficiency with which the search was then conducted..."* (para 13).

This approach led the Tribunal to conclude that all of the documents or categories of documents the complainants requested were not held, for example:

- the complainants requested any documents relating to planning decisions from the 1960s. The EA searched the paper files and also microfiche records provided by its predecessors (Severn Trent River Board, Severn Trent Water Authority and the National Rivers Authority). Based on the public authority's evidence, the Tribunal said that they felt that the EA had carried out *"...an appropriately rigorous and focused search..."* (para 15) and that the importance of these documents (to the complainants at least) was not enough to persuade the Tribunal that the documents were held.

- the complainants requested any documents from the Severn Trent Regional Flood Defence Committee in relation to their flood bank. The EA indicated that the Committee only considered high level matters, not individual flood defences, but nonetheless carried out a search of the papers for the committee meetings for the relevant period but found no relevant material. At paragraph 30, the Tribunal said that the public authority had fulfilled its obligations under the EIRs.

In the case of Christopher Ames and the Cabinet Office the applicant wanted to know which official(s) had amended the executive summary of the dossier on "Iraq's Weapons of Mass

Destruction" between 10 and 16 September. The Tribunal heard evidence from the Cabinet Office that they had searched both hard and soft copy records as follows:-

"…the hard copy information searched included all printed emails, written drafting comments and meeting notes dated between 11 and 16 September inclusive. The hard copy of the draft dossier dated 16 September was also read….

Electronic information searched also included saved emails, drafting comments between 11 September and 16 September 2002 inclusive and the soft copy of the draft dossier dated 16 September. Electronic searches included searches of the metadata held upon the draft of the dossier produced on 16 September i.e. the draft produced immediately after the time frame of Mr Ames' request. Soft copy searches were assisted by the staff of LogicaCMG, who are contracted to support the relevant IT system…. " (para 12).

The Tribunal said the search of the metadata was the most obvious and important search. Searching the written drafting comments, emails and meeting notes was also appropriate. This search strategy allowed the Tribunal to firmly conclude that on the balance of probabilities, the Cabinet Office did not hold any information within the scope of the request and that *"…the Tribunal regards the scope of this search to be reasonable on the face of it and is not aware of any other material that ought to have been searched…."* (para 15).

The Tribunal also said at paragraph 10 that in "*…considering the probabilities and in particular the quality of any search carried out it may on occasion be relevant to bear in mind the Tribunal's comments in relation to deleted data in the case of Harper v Information Commissioner (EA/2005/0001 15.11.05) and the contents of the Code of Practice issued by the Lord Chancellor under s.46 of the Act…*".

See LTT2 for the further details of the ICO's interpretation of the Harper decision although, in short, the ICO's view is that information which has been properly and intentionally deleted from a recycle can but not yet overwritten is not held.

The Commissioner acknowledges that his decision as to what would represent an appropriate search or search strategy will have to depend on the circumstances of each case but he would expect to see evidence of either a reasonable and logical search strategy or a thorough search of both paper and electronic records although if the public authority is arguing that it would exceed the appropriate limit to confirm whether or not it holds the requested information, see LTT31.

(Also see LTT76 which states that information which has been identified, selected, downloaded and saved or printed by a public authority from a third party's online database will be held by that public authority. In most cases public authorities will not hold any of the remainder of the information held in such a database).

(ii) Other explanations as to why the information is not held

a) No business need to hold the information / documents were never created

The Tribunal in Bromley said that as the EA did not own or take responsibility for a number of features to which some of the requested information related, the Tribunal accepted that

the public authority would not hold information on those features. The Tribunal felt supported in making this finding given that the applicants could not provide any evidence to the contrary (paras 16, 20 and 27).

The Tribunal in Bromley also said that their role was not to comment on the EA's administration so that whilst the applicants may have thought that notes should have been made on site visits (para 18), that telephone calls should have been noted and recorded (para 23) and that documents justifying or explaining why previously held views had been superseded (para 25), the Tribunal said its role was *"…not to assess the quality of the EA's administration but to determine the straightforward issue…"* of whether the information was held (para 18). Also at paragraph 28 they said *"…we do not feel qualified, in any event, to tell a complex national organisation discharging statutory responsibilities how it should operate record-keeping systems in support of its functions…"* In response to this point, the Commissioner would say that whilst it may not be the Tribunal's role to comment on a public authority's system of record keeping, it is does fall within the Commissioner's remit via the s.46 records management code.

The Tribunal in Ames said "….w*hile we are not very impressed by the quality of the record keeping revealed by the search….we do not think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one in spite of the evidence put forward by the Cabinet Office…"* (para 15).

The Commissioner's approach is that a poor records management system does not necessarily mean that the information must inevitably be held. Instead, the Commissioner is looking for a rigorous and well focused search which takes into account the limitations imposed by a historically inadequate filing system.

b) Likelihood that information has been destroyed

(i) Sensitivity / importance of the subject to which the information relates

The Commissioner is concerned with an objective level of sensitivity or seriousness which would warrant retention of the information rather than considering whether the information is of subjective importance. For example, the complainants in the Bromley case were convinced that not all the information they requested could have been destroyed. The Tribunal said: *"…the appellants' conviction on this issue and the understandable importance of the informal flood defence from their point of view is not enough to persuade us that the documents must still exist, particularly in the absence of any evidence presented to us which might have undermined what we were told by the EA…"* (para 15).

However, in the case of Francis and South Essex Partnership Foundation NHS Trust, the applicant asked for a number of documents relating to the psychiatric care of her son up to his death and also details surrounding his death. The NHS Trust had already provided the applicant with a large number of relevant documents but said that further information could not be found. At paragraph 20, the Tribunal said:

"…we find it unlikely that the records have been either destroyed or removed from the Trust altogether. Given the sensitivity of some of the records, apparent from the Chief Executive's personal involvement in obtaining information back in early 2000, it seems to us very

unlikely that the Trust has not kept a record somewhere. More likely, on a balance of probability, is that the records are still held by the Trust, but cannot now be located in the time required by the Act to be spent searching for them…"

At paragraph 48, the Tribunal concluded that on the balance of probabilities, the Trust did hold further information but that no further searches were required as the Trust had already exceeded the costs limit as set out in s.12.

However in the case of Ames, the Tribunal said that the Iraq dossier was *"…on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what…."*. However, it said that the evidence of the Cabinet Office was such that the Tribunal could nonetheless conclude that they did not *"….think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one…"* (para 15).

Therefore, where the subject matter is objectively important, the Commissioner will consider the circumstances of the case and any arguments put forward by the complainant to consider whether it is so inherently likely that the information is held to allow him to conclude that it is despite the evidence of the public authority to the contrary. The Commissioner notes that in applying this test, the Tribunal in Francis concluded that the material information was held whilst the Tribunal in Ames found that the requested information was not.

(ii) Age of the information & destruction schedules

The Tribunal in Bromley said at para 15 that they found it was*"...entirely plausible that documents that would be approximately forty years old would have been destroyed at some point…"* particularly given the number of reorganisations prior to the creation of the Environment Agency.

The Tribunal in Fowler suggested that they may be persuaded that the information is not held where there is evidence of destruction. If a public authority raises such an argument, the Commissioner would look to see evidence of destruction such as a retention policy or a disposal schedule.

For guidance, the Commissioner will look to the s.46 records management code which may be used either to support a challenge to the public authority's assertion that the information is not held or may be referenced in the other matters section to promote better record keeping.

Late discovery of relevant documents

In the Bromley case, as a result of the applicant's persistence in corresponding with the EA on this matter, further information came to light which was relevant to their request after the EA's initial response that they had disclosed all documents they had. Also when, preparing for the appeal before the Tribunal, the EA unearthed a number of other documents which it said did not fall within the scope of the original request but which were disclosed to the applicants as a matter of good will. These late discoveries led the applicants to believe that

the other information they requested was held by the public authority.

The Tribunal said "*…it is fair to say that one or two mistakes and mishaps that occurred within the Environment Agency during the course of the matter did not help in convincing the Appellants that the various searches were conducted with appropriate rigour and competence…*" (para 4).

The Tribunal also said that "*…other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light….*" (para 13).

However, the Tribunal went onto say that they were particularly impressed by the care taken by the public authority in revisiting the search in preparation for the appeal and concluded that they had no difficulty in deciding that the EA held no further information relevant to the request. Further, they said "*….there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information…..*" (para 13).

The Commissioner would say that as the test to be applied is not whether the public authority can categorically state that the information is not held, he accepts that occasionally information may come to light after a public authority has indicted that they do not hold it. In such cases, the Commissioner will consider whether this late discovery of relevant information affects his assessment of the public authority's scope, quality, thoroughness and results of the initial search. Further, such a discovery may affect the persuasiveness of other arguments raised by the public authority to explain why the information is not held, for example, where a public authority has argued that the information has been destroyed according to their destruction schedule but is discovered after the date of disposal. The Commissioner will also consider the information itself to consider whether this reveals anything about the existence of other information.

(See note on LTT116 for the effect that the late discovery of information would have on an assessment of whether an estimate was reasonable).

Source	**Details**
IT	Linda Bromley & Others / Environment Agency (31 August 2007) Fowler / Brighton & Hove City Council (6 November 2007)

	Christopher Ames / Cabinet Office (24 April 2008) B Francis / South Essex Partnership Foundation NHS Trust (21 July 2008)

Related Lines to Take

LTT2, LTT31, LTT76, LTT88, LTT89, LTT116,

Related Documents

EA/2006/0072 (Bromley), EA/2006/0071 (Fowler), EA/2007/0110 (Ames), EA/2007/0091 (Francis), FOI Procedures Manual, s.46 Records Management Code

Contact		HD	
Date	15/09/2008	**Policy Reference**	**LTT121**

FOI/EIR	FOI	**Section/Regulation**	s1, Reg 2(1)	**Issue**	Documents containing both environmental & other information

Line to take:

Where a document can be easily divided between environmental and other information then it should be considered in parts to decide which information is caught by EIR and which by FOIA.

Where a document potentially contains both environmental and other information and cannot be easily divided in this way, then a "predominant purpose test" may be applied. This test would be applied to determine the extent to which entire documents or sections of such a document can be taken to be environmental information despite the fact that some of the info within that document/section, when taken in isolation, might not be regarded as

environmental information.

Further Information:

In the Tribunal case *Department for Business Enterprise and Regulatory Reform v the Information Commissioner & Friends of the Earth* the Tribunal commented on the issue of documents which may contain both environmental and other information.

It said (at para 29) that "Where a document divides easily into parts where the subject matter of each part is easily identifiable this should enable the document to be considered in parts so as to decide which information is caught by EIR. Where this is not the case do we need to review the document in exacting detail to decide which parts or even paragraphs or sentences are subject to EIR or FOIA? To do so would be an extremely onerous approach on those needing to apply the law. But our information laws are based on requests for information not documents. We believe that Parliament may not have appreciated such a consequence and that where possible would have wanted a pragmatic approach to be taken. Therefore we find that where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR. Where there are a number of purposes and none of them are dominant then it would appear that the public authority has no choice but to review the contents of the document in detail."

The ICO considers that where a document can be easily divided, and also where there is no dominant purpose and so a detailed review is required, then there is no difference between the Tribunal's approach and the ICO approach as set out LTT80 on Defining Environmental Information. In these situations a "slicing up" approach (between Environmental and other information) should be taken.

Where the document cannot be easily divided (most likely where there are potentially mixed information sentences and/or mixed information paragraphs), and the predominant purpose of the document covers environmental information, then the ICO is prepared to accept the Tribunal's pragmatic approach.

When to use a predominant purpose test

The ICO test for deciding if information is environmental or not is as set out in LTT80. The predominant purpose test is an **additional** test which should **only** be applied in situations, such as in the DBERR case, where there is a single document that potentially contains both Environmental and other information which is inextricably linked and therefore cannot be easily separated. The table below may be used as a guide as to when the predominant purpose test will apply :

1 Can the document be easily divided into environmental and non-environmental info?	Yes – consider the document in parts based on LTT80 No – see Q2
2 Does the predominant purpose of the	Yes – the whole document may be

document/section cover environmental info?	subject to EIR but see LTT82 No – see Q3
3 If the document has a number of purposes and none of them are dominant –	Review the contents in detail based on LTT80

Limits of predominant purpose test

It is important to recognise that the predominant purpose test applied by the Tribunal here **only** relates to determining the extent to which entire documents or sections of such a document can be taken to be environmental information despite the fact that some of the information within that document/section, if it could be easily separated out and taken in isolation, might not be regarded as environmental information.

The language used **should not** be misinterpreted as establishing a dominant purpose test, similar to that applied when assessing derogation issues in BBC cases, in order to decide if information is environmental or not.

Applying a BBC type dominant purpose test would be the equivalent of just asking question 2 from the table above, rather than first asking question 1.

The relevance of a wide interpretation of "any information on"

The ICO considers, however, that following the approach set out in LTT80 and applying a wide interpretation of "any information on" (as per LTT82) may in any case reduce the incidence of this type of case as it will bring a wider range of information under the EIR anyway.

Predominant purpose of the document does not cover environmental information

As detailed above, the Commissioner is prepared to accept the Tribunal's pragmatic approach where a document cannot be easily divided and the predominant purpose of the document covers environmental information.

When the document cannot be easily divided and the predominant purpose of the document does **not** cover environmental information further issues arise and in most cases a detailed analysis of the information will still be needed.

This is because the Commissioner's view is that applying a pragmatic approach in a predominantly FOIA situation has the potential to disadvantage the applicant. It is generally accepted that the EIR provide a more liberal access regime than FOIA (information is more likely to be disclosed under EIR than under FOI) because of the more limited exceptions and the fact that all the exceptions are qualified. Therefore, if an information request is predominantly FOI, but has some elements of environmental information then considering everything under FOIA would mean that disclosure of the environmental information is considered under a less liberal access regime and the applicant may be refused information

under FOIA that they would be provided with under EIR.

There may be exceptional cases where we would be prepared to take a pragmatic approach and consider all information under FOIA but this route should not be taken without first getting advice from a signatory via a case review panel. If you wish to propose that a case is considered in this way then your case panel submissions should detail why you think an exception should be made (e.g. the amount of environmental comprises a very small proportion of the total information, there is an equivalent exception / exemption under EIR / FOIA, the public interest in disclosure is limited, the risk of the complainant being disadvantaged is small). It will be important to relate any reasons given to the information and request in question and not just 'tick boxes'. The case panel will then assess the risk and advise if an exception can be made.

The appropriateness of taking a pragmatic approach will always be considered on a case by case basis. For example, in some cases a single line of environmental information may be considered to be of little significance in the overall context of the totality of information requested. However, in other cases in could be that although the proportion of environmental information is small, its content is significant enough to mean that a pragmatic approach will not be taken.

PREVIOUS / ***NEXT***

Source	**Details**
IT	DBERR / FOE (29 April 2008)

Related Lines to Take
LTT80, LTT82

Related Documents
EA/2007/0072

Contact	LA		
Date	24/08/2009	**Policy Reference**	**LTT122**

FOI/EIR	FOI	Section/Regulation	s14 s12(4)(b)	Issue	Vexatious requests

Line to take:

The Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious:

1) whether compliance would create a significant burden in terms of expense **and** distraction

2) whether the request is designed to cause disruption or annoyance

3) whether the request has the effect of harassing the public authority or its staff

4) whether the request can otherwise fairly be characterised as obsessive or manifestly

unreasonable

5) whether the request has any serious purpose or value

Further Information:

The external Awareness Guidance (No. 22) will be amended in line with this approach and should be published within the next 4 -6 weeks

Background

Section 14 of the Act states as follows:-

"14. – (1) Section 1 (1) does not oblige a public authority to comply with a request for information if the request is vexatious".

The term is not defined further in the Act although the phrasing states that it is the request and not the requestor which must be vexatious. However if a particular applicant has made usage of the Act, then this should be taken into consideration as the Tribunal comments in Welsh & the Information Commissioner *"…it is possible for a request to be valid if made by one person, but vexatious if made by another, valid if made to one person, vexatious if made to another…"* (para 21) and similarly in Gowers & the London Borough of Camden at para 29 *"…it is not only the request itself that must be examined, but also its context and history".*

The Commissioner's Awareness Guidance No 22 previously set out to provide a working interpretation of the term via a two-stage test as follows:-

"…the Commissioner's general approach is that a request (which may be the latest in a series of requests) can be treated as vexatious where it would impose a significant burden on the public authority in terms of expense or distraction ***and*** *meets at least one of the following criteria:*

- *it clearly does not have any serious purpose or value*
- *it is designed to cause disruption or annoyance*
- *it has the effect of harassing the public authority*
- *it can otherwise fairly be characterised as obsessive or manifestly unreasonable…."*

A number of Tribunal judgments have commented that whilst the guidance is helpful, it is not binding and furthermore some express concern about the Commissioner's approach:

- *"…the definition of a vexatious request is still unsettled: we have not, for example, adopted the IC's definition in his Guidance Note…"* (para 33, Hossack & DWP)

- *"…the Tribunal took into account the IC's Guidance Number 22…it was concerned however that the two stage test set out in the guidance might be interpreted in too formulaic a fashion…* (para 20, Coggins & IC)

- *"…we find the guidance interesting and helpful but we are cautious about elevating the*

two-stage test into a necessary sequence …" (para 27, Welsh)

- *"…the Commissioner's guidance…is a helpful framework. We would urge caution, however, when considering whether requests are vexatious, in placing too much emphasis on whether requests impose a significant burden…the appropriate safeguard for that is section 12…. but if the Awareness Guidance is intended to indicate that a request can only be vexatious if it imposes a significant burden on the Council in terms of expense or distraction, in our view, that may be going too far."* (para 70, Gowers)

It also seems the Tribunal is concerned that the Act should not be brought into disrepute by setting the threshold for vexatiousness too high. The Tribunal in Welsh said that:

"…there is a danger that setting the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested…." (para 26).

The Commissioner's Revised Approach

In light of these recent decisions, the Commissioner will modify his guidance to remove the two stage test and instead will consider the context and history of a request to assess whether the request would fall into some or all of the following categories although where the request falls under only one or two categories or where the arguments sit within a number of categories but are relatively weak, this will affect the weight to be given to the public authority's claim that s.14 is engaged:

1) it would create a significant burden in terms of expense and distraction,

2) it is designed to cause disruption or annoyance,

3) it has the effect of harassing the public authority,

4) it can otherwise fairly be characterised as obsessive or manifestly unreasonable, or

5) it clearly does not have any serious purpose or value

The Commissioner acknowledges that these distinctions are a little artificial and that a request may, for example, be both obsessive and create a significant burden or it may have the effect of harassing the public authority but have a serious purpose which lifts it from being vexatious. This idea was succinctly dealt with by the Tribunal in Coggins when it said *"…a decision as to whether a request was vexatious within the meaning of s.14 was a complex matter requiring the weighing in the balance of many different factors. The Tribunal was of the view that the determination whether a request was vexatious or not might not lend itself to an overly structured approach…".* However, whilst the Commissioner accepts that any analysis may cover a combination of these issues, the decision notice should identify which factors have been considered and how they have been weighted.

1. Significant burden in terms of expense and distraction

The Commissioner's guidance at page 2 reads:

"…to determine whether a request imposes a significant burden, a public authority should consider whether complying with the request would cause it to divert a disproportionate amount of resources from its core business. However where the ***only*** *concern….is the burden on resources….it should consider whether it would be more appropriate to apply section 12…"*

The Commissioner takes this opportunity to highlight that where the public authority's only concerns relate to the costs of complying with the request, then they should cite s.12 because to use such arguments to engage s.14, the Commissioner would expect the public authority to show that complying with the request would cause a significant burden both in terms of costs **and** also diverting staff away from their core functions. This is supported by the Tribunal in Welsh who said that whether a request represents a significant burden is "*…not just a question of financial resources but also includes issues of diversion and distraction from other work…"* (para 27). The Tribunal in Gowers also said "*…that in considering whether a request is vexatious, the number of previous requests and the demands they place on the public authority's time and resources may be a relevant factor* (para 70).

In the case of Coggins, the Tribunal found that a "*significant administrative burden*" (para 28) was caused by the complainant's correspondence with the public authority which started in March 2005 and continued until the public authority cited s.14 in May 2007. The complainant's contact with the public authority ran to 20 FOIA requests, 73 letters and 17 postcards. The Tribunal said this contact was "*…long, detailed and overlapping in the sense that he wrote on the same matters to a number of different officers, repeating requests before a response to the preceding one was received….the Tribunal was of the view that dealing with this correspondence would have been a significant distraction from its core functions…"* (para 28).

The Tribunal in Betts also suggested that even if it would not create a significant burden to respond to the material request, it may still be reasonable for a public authority to conclude that compliance would result in a significant burden if in answering that request, it was *"…extremely likely to lead to further correspondence, further requests and in all likelihood, complaints against individual officers…"* (para 34). The Commissioner would however point out that this sort of approach would have to be supported by a history of the public authority responding to requests which the complainant utilises to generate further requests before a public authority could run this argument in support of claiming s.14.

2. It is designed to cause disruption or annoyance

An example of a request which the Commissioner found was designed to cause disruption or annoyance is case reference FS50151851. Here, the Commissioner found the request to be vexatious when considering the volume and disparate nature of the correspondence coupled with the complainant actually writing: "I am insincere and my purpose is mischievous subversion" and "my own motivation is no more than to be disruptive and annoying".

However the Tribunal in Betts did point out that the distress or annoyance must be caused by

the process of complying with the request and not by the possible consequences of disclosure. At paragraph 28 they said - "…d*istress, annoyance, irritation or worry arising from the possible consequences of disclosure cannot turn an otherwise proper request into a vexatious one; indeed that would defeat the purpose of FOIA…*"

3. It has the effect of harassing the public authority or its staff

In the case of Gowers, the complainant made allegations about the public authority's lack of independence and incompetence and subsequently made a number of FOI requests of which 10 were considered by the Tribunal. Alongside the requests, the complainant also corresponded with the Council in which he made personal attacks upon the head of the Council's Central Complaints Unit (CCU) and made enquiries into the identity of the wife of the CCU's head. The Tribunal said:

"…what we do find is that the Appellant often expressed his dissatisfaction with the CCU in a way that would likely have been seen by any reasonable recipient as hostile, provocative and often personal…and amounting to a determined and relentless campaign to obtain any information which he could then use to discredit them….we find that taken in their context, the requests are likely to have been very upsetting to the CCU's staff and that they…are likely to have felt deliberately targeted and victimised…." (paras 53 & 54).

In the case of Ahilathirunayagam, the complainant had been in correspondence with the London Metropolitan University since 1992 as a result of him not being awarded a law degree. The complainant exhausted the University's appeal procedure, complained to the Commissioner (Data Protection Registrar as he was then), instructed two firms of solicitors to correspond with the University, and unsuccessfully issued County Court proceedings. He also complained to his MP and to the Lord Chancellor's Department. In February 2005, the complainant made an FOI request for information on the same issue. The University cited s.14.

The Tribunal found the request to be vexatious by taking into account the following matters:

"…(ii) The fact that several of the questions purported to seek information which the Appellant clearly already possessed and the detailed content of which had previously been debated with the University

(iii) The tendentious language adopted in several of the questions demonstrating that the Appellant's purpose was to argue and even harangue the University and certain of its employees and not really to obtain information that he did not already possess

(iv) The background history between the Appellant and the University…and the fact that the request, viewed as a whole, appeared to us to be intended simply to reopen issues which had been disputed several times before…" (para 32)

Also, as this request could be seen as obsessive, this case demonstrates the connected and overlapping nature of the various categories.

4. It can otherwise fairly be characterised as obsessive or manifestly unreasonable

The Commissioner accepts that at times there is a thin line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue. Further, the more independent evidence available, the more likely the request can be characterised as obsessive although a request may still be obsessive even without the presence of independent evidence.

For example, in the case of Welsh, the complainant attended his GP with a swollen lip. A month later, he saw a different doctor who diagnosed skin cancer. Mr Welsh believed the first doctor should have recognised the skin cancer and subsequently made a number of complaints although these were not upheld by the practice's own internal investigation, the GMC, the Primary Care Trust or the Healthcare Commission. Nonetheless, the complainant addressed a 4 page letter to the GP's practice, headed 'FOIA 2000 & DPA 1998 & European Court of Human Rights" which contained one FOI request to know whether the first doctor had received training on face cancer recognition. The GP cited s.14. The Tribunal said:

"…Mr Welsh simply ignores the results of 3 separate clinical investigations into his allegation. He advances no medical evidence of his own to challenge their findings…..that unwillingness to accept or engage with contrary evidence is an indicator of someone obsessed with his particular viewpoint, to the exclusion of any other…it is the persistence of Mr Welsh's complaints, in the teeth of the findings of independent and external investigations, that makes this request, against that background and context, vexatious…." (paras 24 &25).

In the case of Coggins, the applicant was employed by Age Concern and in this capacity was helping an elderly woman with her care arrangements. The applicant believed that a fraud had been committed by Norfolk County Council in charging the woman for care she may not have received. The Council investigated and concluded that the care had been provided but had not been recorded and disciplined the relevant carer. The applicant also complained to the Commission for Social Care Inspection who did not uphold his complaint. Even the police said there was no evidence of dishonesty. The Tribunal said that the "*…number of FOIA requests, the amount of correspondence and haranguing tone of that correspondence indicated that the Appellant was behaving in an obsessive manner…*" (para 28).

5. It clearly does not have any serious purpose or value

The Tribunal in Coggins said at paragraph 20 - "*…the Tribunal could imagine circumstances in which a request might be said to create a significant burden and indeed have the effect of harassing the public authority and yet, given its serious and proper purpose ought not to be deemed vexatious…*". Thus in this case, despite the request having the potential to cause a significant burden and be obsessive, the Tribunal considered whether the request had a serious purpose which may mean that despite the other findings it ought not be deemed vexatious.

The Tribunal said that the complainant was driven by a genuine desire to uncover a fraud which was not unreasonable particularly given that he had discovered that some of the visits had not been recorded by the carer. The Tribunal felt that this agenda "*…amounted to a serious and proper purpose…*" (para 22). However the Tribunal also said that "*…there came a point when the Appellant should have let the matter drop…there had been three*

independent enquiries…in the Tribunal's view it [the complainant] was not justified in the circumstances to persist with his campaign…." (para 25).

The Tribunal did not clarify whether at the time of the request the complainant no longer had a serious purpose or whether the obsessive and harassing nature of the request outweighed the serious purpose. However on either interpretation, the Commissioner considers this case a good example of how the Commissioner's approach as outlined here can be applied.

In the case of Hossack, the DWP inadvertently revealed to the complainant's wife that he was in receipt of benefits in breach of the Data Protection Act. The DWP initially suggested they were unable to identify the employee who committed the breach although they later were able to identify the individual. The DWP went onto accept responsibility for the breach, apologised and paid compensation but Mr Hossack twice complained to the Parliamentary Commissioner for Administration whose recommendations the DWP accepted and acted upon. However Mr Hossack continued to believe that the DWP's initial misleading reply justified his campaign to prove a cover-up at the DWP. He accused the DWP staff of fraud and corruption and he publicised his allegations by setting up his own website and towing a trailer with posters detailing his allegations around the town.

The Tribunal said *"….whatever cause or justification Mr Hossack may have had for his campaign initially, cannot begin to justify pursuing it to the lengths he has now gone to. To continue the campaign beyond the Ombudsman's second report….is completely unjustified and disproportionate"* (para 26) and "*…seen in context, we have no hesitation in declaring Mr Hossack's request, vexatious"* (para 27).

In Betts, the complainant's car was damaged in 2004 by what he argued was an inadequately maintained Council road. He stated that the Council were responsible and as such should refund the £99.87 charge for the car repair. The Council stated that they had taken all reasonable care to ensure the road was not dangerous to traffic. By a number of letters and emails, the complainant sought inspection records, policies and assessments and the Council provided this information under the FOIA but when in January 2007 the complainant made a further request for information on health and safety policies and procedures, the Council claimed s.14. The majority Tribunal found s.14 was engaged and commented:

"…the Appellant's refusal to let the matter drop and the dogged persistence with which he pursued his requests, despite disclosure by the Council and explanations as to its practices, indicated that the latter part of the request was part of an obsession. The Tribunal accepted that in early 2005 the Appellant could not be criticised for seeking the information that he did. Two years on however and the public interest in openness had been outweighed by the drain on resources and diversion from necessary public functions that were a result of his repeated requests…" (para 38).

Again, this case shows the links between the various categories as the request in Betts seems to be obsessive, to create a significant burden and lacking a serious purpose.

Serious purpose & series of requests

There will be cases where public authorities deal with a number of requests but decide that, for example, the seventh or twentieth request is vexatious albeit that it would have been a

simple matter to comply with that request in isolation. In these circumstances, the Commissioner would look at the pattern of previous requests to consider whether the latest request goes to support either the presence or absence of a serious purpose.

For example, a complainant may have to submit requests in a successive fashion as it may only be by reading the contents of document A, that he/she is able to direct a subsequent request for document B and so on. For example, the Tribunal in Coggins said: "….*one could imagine a requester seeking to uncover bias in a series of decisions covering many years and involving extensive detail, each of fairly minor importance in themselves but representing a major issue when taken together. This might indeed be experienced as harassing but given the issue behind the requests, a warranted course of action …*" (para 20).

However where a series of requests have been made, this may go to demonstrate the absence of any serious purpose, for example, where a complainant uses different phraseology in a number of requests but is essentially asking for the same or substantially similar information as has already been provided.

Conclusion

There is no definition of a vexatious request for FOIA purposes and the Tribunal have therefore concluded that Parliament intended it to have its ordinary meaning i.e. likely to cause distress or irritation, literally to vex a person to whom it is directed. The Tribunal has however commented that it is not helpful to look for a definition within other legal contexts because:

- *"…the consequences of finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in these other contexts, and therefore the threshold for a request to be found vexatious need not be set too high…"* (para 11, Hossack)

- *"…the concept of vexatious litigants from other legal contexts is not an appropriate analogy to use because what s.14(1) does make clear is that it is concerned with whether the request is vexatious, not whether the applicant is vexatious…"* (para 25, Gowers)

Further, the Tribunal in Gowers said that the test is an objective one, i.e. the threshold is whether a reasonable public authority would find the request vexatious. (para 27).

Therefore in determining whether a request is vexatious or not, the Commissioner will consider the context and history of the request to reach a reasoned conclusion based on the strength or weakness of both parties' arguments in relation to some or all of the above five factors as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious.

Environmental Information Regulations

Regulation 12 (4) states as follows:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(a) .....

(b) the request for information is manifestly unreasonable."

In the case of Stephen Carpenter & Stevenage Borough Council, the issue arose as to whether Regulation 12(4)(b) could be applied in the same way as s.14 was applied under the FOIA. In particular, the complainant argued that decisions in relation to vexatious requests had "no bearing" on the meaning of the words "manifestly unreasonable" and as such requested that they should not be referenced by the parties or the Tribunal. However, the Tribunal said at para 8:

"...The Tribunal declined this request on the basis that those decisions might well have a bearing on the matter on which the Tribunal had to decide"

In reaching its conclusion, the Tribunal also said it *"...reminds itself of the principles that have emerged in relation to section 14 FOIA..."* (para 51) and then went onto apply those principles to the circumstances of the case to conclude that the requests were manifestly unreasonable. (Please see the IT summary for full details of this case)

Thus, the Commissioner accepts that the principles to be considered when looking at s.14 cases can also be applied to cases involving Regulation 12(4)(b) although the following points should be borne in mind:

- The term 'manifestly unreasonable' is a wider concept than the term 'vexatious' under the Act and thus Regulation 12(4)(b) may also relate to cases involving costs issues.
- Also, Article 4 of the Directive upon which the Regulations are based states that the exceptions should be interpreted in a "restrictive way" although this is likely to have more application to cases where Regulation 12(4)(b) has been argued in relation to costs.
- There is a presumption in favour of disclosure at Regulation 12(2).
- Regulation 12(4)(b) is an exception and thus is subject to the public interest test (Regulation 12(1)(b)).
- Furthermore, the background and pattern of any requests also made under FOIA **can** be taken into consideration under Regulation 12(4)(b);
- Finally, each case is of course determined on its own circumstances.

Source	Details

IT DN	Vaithilingam Ahilathirunayagam / London Metropolitan University (20 June 2007) Hossack / DWP (18 December 2007) Welsh (16 April 2008) Gowers / London Borough of Camden (13 May 2008) Coggins (13 May 2008) Betts (19 May 2008) Carpenter / Stevenage Borough Council (17 November 2008)

Related Lines to Take

n/a

Related Documents

EA/2006/0070 (Ahilathirunayagam), EA/2007/0024 (Hossack), EA/2007/0088 (Welsh), EA/2007/0114 (Gowers), EA/2007/0130 (Coggins), EA/2007/0109 (Betts), EA/2008/0046 (Carpenter)

Contact		HD	
Date	09/03/09	**Policy Reference**	**LTT123**

FOI/EIR	FOI	Section/Regulation	s40	Issue	Multiple data subjects

Line to take:

Where the requested information constitutes the personal data of more than one individual, then both individuals are data subjects for the purposes of s.40 as there is no basis for suggesting that the individual whose data is more extensive or significant is the only data subject.

In this situation, where a request is made by one of the data subjects, the information in its entirety should be considered under s.40(1). The public authority should not deal with the third party's data under s.40(2), apart from where there is distinct information which is the personal data of **only** the third party and not the applicant.

Further Information:

Section 40 of the FOIA states as follows:-

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

In the case of Nicholas George Fenney & the Information Commissioner, the complainant had been engaged in long running correspondence with the Avon & Somerset Constabulary relating to the investigation of various allegations against him for sexual harassment and of complaints he made about certain police officers. His requests related to various elements of those investigations including the police complaint file.

The police refused the requests under s40(1) where it was Mr Fenney's personal data and the Commissioner agreed this was correct.

On appeal, Mr Fenney argued that the police complaint file could not be his personal data as the police officers were the "principal data subjects". The Tribunal rejected this argument indicating that there is no basis for arguing that the only data subject to be considered when assessing a document containing data on more than one individual is the

one whose data is more extensive or significant.

At paragraph 13, the Tribunal stated:

"…There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent."

This suggests that whilst in the past where the requested information contained the personal data of the applicant and a third party, the applicant's personal data would have been isolated under s.40(1) and dealt with as a subject access request and the third party data dealt with under s.40(2), the Commissioner can now consider information containing mixed personal data under s.40(1).

The Commissioner's view is that where a document contains the personal data of several data subjects including the applicant, but some information within that document relates **only** to third parties and not to the applicant, for example, where a document contains personal data that is separated into distinct sections on the different parties, then he would expect the applicant's data to be dealt with under s.40(1) and information that is **only** third party data to be dealt with under s.40(2). This is because it would not be correct to say that s40(1) applies to the information that clearly relates **only** to the third party(ies) and not to the applicant .

However, where information constitutes the personal data of both the applicant and a third party, for example where the data of the two parties is inextricably linked, as in Fenney, then s40(1) will apply.

This is because the fact that the information is also the personal data of a third party does not stop it being the personal data of the applicant, which he has a right of access to under the Data Protection Act (subject to its provisions).

Further examples of information which may contain the personal data of more than one individual can be found in the Commissioner's guidance on 'Determining what is personal data' (see Appendix A, page 18).

PREVIOUS / NEXT

Source	Details
IT	Nicholas George Fenney (26 June 2008)

Related Lines to Take			
n/a			
Related Documents			
EA/2008/0001, Data Protection Technical Guidance – 'Determining what is personal data'			
Contact		HD	
Date	16/01/2009	**Policy Reference**	**LTT124**

FOI/EIR	FOI	Section/Regulation	s3(2)(b)	Issue	Held on behalf of the public authority – solicitor's files

Line to take:

Not all papers held by a firm of solicitors as a consequence of it representing or advising a public authority client will be held on behalf of the public authority but in general terms, information held solely for the solicitor's own administrative purposes as well as the solicitor's own working file of papers belongs to the solicitor.

Further Information:

Section 3 of the FOIA states as follows:-

"3.- *(1) …..*

(2) For the purposes of this Act, information is held by a public authority if-

(a) …. or

(b) it is held by another person on behalf of the authority"

In cases where legal advice has been sought by a public authority client, the question arises as to whether the file held by the lawyer is held on behalf of the public authority or whether the solicitor's firm holds the information in its own right and thus any information held by them would not be caught by the Act.

This issue was considered by the Tribunal in the case of Mrs B Francis and the South Essex Partnership Foundation NHS Trust ('the Trust') in which the requested information related to the death of the complainant's son and included legal advice from three firms of solicitors. In broad terms the Tribunal found that information held for the solicitor's own administrative purposes as well as the solicitor's own working file of papers belonged to the solicitor i.e. these papers were not held on behalf of the public authority client. However the Tribunal also referred to the 1999 Law Society's Guide to the Professional Conduct of Solicitors (in force at the time of the request) which "*…advises solicitors that client files are likely to contain a mixture of documents belonging to the client and to the solicitor…*" (para 23).

From paragraphs 21 – 26 of the Tribunal's decision, the following general principles were identified as follows:

Documents owned by the public authority client:

- All documents created or received by the solicitor whilst acting as the **client's agent** (emphasis added) belong to the client. Such documents will include all transactional documents (and drafts thereof), correspondence passing between the solicitor and third parties and attendance notes of conversations between the solicitor and third parties whilst acting as the client's solicitor and agent. This statement of principle arises from *Leicestershire County Council v Faraday* [1941] 2 KB 205; and *Re Wheatcroft* [1877] 6 Ch D 97 as referenced in Solicitors' Negligence & Liability (Flenley & Leech (Tottle 2008).

- The Law Society's guidance provides that copies of letters received by the solicitor and made for the client's benefit belong to the client.

- The Tribunal indicated that where a file contains original documents (i.e. they have not been annotated by the solicitor) that these "may well belong to the client".

Further comment on the solicitor acting as the client's agent

To assist case-officers, the Commissioner considers that a solicitor will be acting as a client's agent when he/she is 'stepping into the shoes of the client', for example, representing the client at meetings/Court or in correspondence/communication with third parties, and documents obtained whilst acting in this capacity belong to the client. However where the solicitor is acting as the client's solicitor rather than as the client's agent, it is likely that any information produced in this capacity will belong to the solicitor, for example, annotations on documents, case-related legal research etc. For clarity, clean copies of documents passed to the solicitor by the public authority client remain held on behalf of the client.

Documents owned by the solicitor

- The solicitor's working papers belong to the solicitor. Such papers include correspondence to and from the client, attendance notes of discussions with the client and drafts of letters and notes of other research. This statement of principle arises from *Leicestershire County Council v Faraday* [1941] 2 KB 205; and *Re Wheatcroft* [1877] 6 Ch D 97 as referenced in Solicitors' Negligence & Liability (Flenley & Leech (Tottle

2008).

- Papers relating solely to the internal administrative arrangements of the firm are the property of the firm. The Tribunal looked at the file belonging to Eversheds solicitors and found that it contained a file opening sheet and papers relating to billing with nothing of substance in relation to any named individual.

The Tribunal found that these papers *"…related solely to the internal administrative arrangements of the firm and were clearly the property of the firm. The Tribunal found that they were not papers held on behalf of the Trust…"* (para 28).

- Copies - the Law Society guidance provides that copies of letters, made for the benefit or protection of the solicitor, where the cost of copying is not regarded as an item chargeable against the client, belong to the solicitor.

- A file may contain photocopies of documents bearing the solicitor's annotations. These copies "may well be the working papers of the solicitor".

Further comment on annotations

The Trust argued that the inquest bundle held by Bevan Brittan solicitors, who represented the Trust at the inquest into the death of the complainant's son, was held by the solicitors in their own right because it was described as the working file used at the inquest and "heavily annotated" by the solicitor who had dealt with the case.

The Tribunal examined the bundle and found that only 14 of the 300 pages were annotated at all and that the small number of annotations could have been added by a solicitor or equally by earlier recipients of the documents in question. Also, the most heavily annotated page bore comments that appeared to be medical rather than legal in nature.

These findings led the Tribunal to say at paragraph 36:

"…the status of the bundle as working papers belonging to a solicitor depended largely on its annotated nature. The Tribunal concluded, on the balance of probabilities, that the annotation was already on the documents at the time they were passed to the solicitors. As such, it could not be regarded as a set of working papers….it is more likely that the bundle was a clean copy of the papers held originally for the purpose of representing the Trust at the inquest….Accordingly, the Tribunal found that the Bevan Brittan papers were held by the firm on behalf of the Trust…"

As the Trust had already conceded that s.42 was not engaged in respect of Bevan Brittan's papers, the Tribunal ordered that this information be disclosed to the complainant.

Note:

The Tribunal also looked at the file of papers held by Beachcroft Wansborough's solicitors and found that it contained correspondence, attendance notes and annotated papers. In short, it was a copy of the solicitor's working file. However the Tribunal's first consideration was whether s.42 was engaged rather than considering whether the information was actually held

on behalf of the public authority. The Commissioner would point out that his initial investigation would focus on what, if any, information is held on behalf of the public authority and only with this established would any exemptions be considered.

Source	Details
IT	Mrs B Francis / South Essex Partnership Foundation NHS Trust (21 July 2008)

Related Lines to Take

LTT15, LTT31, LTT85, LTT116, LTT121

Related Documents

EA/2007/0091

Contact		HD	
Date	06/10/2008	**Policy Reference**	**LTT125**

FOI/EIR	FOI	Section/Regulation	s1, s8	Issue	Failure to identify questions as requests

Line to take:

1. Any written question put to a public authority is technically an FOI request.
2. Where a public authority fails to deal with a question as an FOI request, the Commissioner may find the public authority has committed one or more procedural breaches including a breach of s.1(1)(b) (see LTT29) for failing to deal with the request in accordance with the Act.
3. Further, if a public authority initially fails to recognise it as such, the applicant may challenge the response which should alert the public authority to the need to consider the question under FOIA.

4. The practical implications of this line are set out below.

Further Information:

Further Information:

Part 1. Any written question can technically be an FOI request

Section 8 of the FOIA states:

8.- (1) In this Act any reference to a "request for information" is a reference to such a request which-

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested

84. In the Act, unless the context otherwise requires-

- "information" (subject to sections 51(8) and 75(2)) means information recorded in any form:

Richard Day & Department for Work and Pensions (DWP)

In the above case, the complainant asked a number of questions about the Child Support Agency (CSA) which were based on his view that the CSA was poorly run. One such example is:

"Q5. When are proper compensation payments for computer errors and administration going to be made and can individuals directly sue the American company who installed the CSA system?"

The DWP argued that this was not a valid request since it contained an unaccepted assumption that maladministration had occurred which should be compensated. The Tribunal said at paragraph 15:

"*…..The Act only extends to requests for recorded information. It does not require public authorities to answer questions generally, only if they already hold the answers in recorded form. The Act does not extend to requests for information about policies or their implementation, or the merits or demerits of any proposal or action – unless of course, the answer to any such request is already held in recorded form….*".

The Tribunal went onto say that:

"…. there might be a straightforward factual recorded answer even to question 5…suppose for example, that following some report on the CSA, Parliament had approved a scheme enabling individuals "to sue the American company who installed the computer system" and providing for "proper compensation payments to be made". If so, Mr Day's fifth question, far from being tendentious and outside the Act, could be answered simply, by providing recorded information on the implementation date of the scheme…"

This approach was supported by the following Tribunal decision although the judgment in Fowler did not reference the earlier decision in Day.

Fowler & Brighton & Hove City Council

In this case, one of the complainant's many questions regarding wheelie-bins and the Council's policies on recycling was:

"(q) I asked the Council to provide from its records details of why it considered that the system of working that it had introduced was more efficient, when that system of working appeared to be less efficient".

At paragraph 12, and using question (q) as an example, the Tribunal said:

"…it is always possible that the Council may hold recorded information which answers that question: there may have been a report prepared for the Council setting out the pros and cons of different proposals, reaching a reasoned conclusion. However in most cases an individual reply will have to be drafted…neither EIR nor FOIA require public authorities to go to such lengths. The obligation is to provide recorded information, not to create a record so that an answer can be given…"

The following decision from the Tribunal does not reference either of the above cases and does not follow the approach adopted in Day and Fowler and the Commissioner contends that this case can be distinguished on its own circumstances.

John Allison & HM Commissioners for Revenue and Customs

The complainant was concerned about the transfer of his pension funds to Scottish Mutual and in particular the complainant wanted to establish the nature and extent of the trusteeship operated by Scottish Mutual. One of the questions asked was - "Q4. Does the contradiction of clauses 8 & 9 of the approved Deed of Trust by the Standard Provisions at clause 2(i)(c) nullify the approval given…?".

At paragraph 52 the Tribunal said:

"…the Tribunal would add that it does not regard question 4 as constituting a proper information request under FOIA in that it seeks an interpretation of the approved Deed of Trust and standard provisions…" (emphasis added).

Using the approach taken in Day and Fowler, this would be an FOI request because a document which does comment on the contradiction of these clauses may exist. However if there was no such document, then the proper response of the public authority should

have been to deny that it held any information to answer the request to fulfil its section 1 obligations rather than stating that the question was not a valid request and thus fell outside the Act.

The Commissioner also distinguishes this case because this issue was not at the heart of the case - the Tribunal suggests at paragraph 52 that its comments on question four were for 'completeness only' and further that the *"…precise characterisation of these and perhaps other questions remains academic on the facts of this case…"* if the exemption claimed is found to be engaged. The Commissioner would submit that this is incorrect because until it has been clarified whether a request is a valid request for FOI purposes then a consideration of the exemptions would not be required. As such, the Commissioner does not believe that the Tribunal gave its fullest consideration to the issue of whether a question can be a request and so we will not follow the approach taken in Allison.

Riniker / Ministry of Justice

Questions about the publication of information may also be valid requests for information and should be considered carefully. In *Riniker*, the complainant made a number of requests to the Privy Council Office in relation to the Visitor of the University of London, including asking how many decisions the Visitor had made and the question:

"Where can copies of these decisions be obtained?"

The public authority simply responded that the decisions were not published. However, the Tribunal interpreted the question as a request to be provided with copies of the decisions, saying: *"It is said that Ms Riniker's request should be read simply as asking for a place where the decisions could be obtained and not for the decisions themselves and that the answer given to the effect that the Privy Council Office did not publish the decision letters was sufficient because it made clear to her that they could not be obtained anywhere. We are bound to say we find this approach rather disappointing. We are of the view that Ms Riniker's request read in context and in the light of sections 1 and 16 of the 2000 Act clearly required an answer to the effect that copies of the decisions were held by the Privy Council Office but (if it was the case) would not be disclosed by virtue of section 40(2)."*

The Commissioner does not accept that section 16 can affect the objective meaning of a request, and does not accept that this question can be objectively read as a request for copies of the decisions themselves. He would not expect a public authority to read anything into this question and to consider providing the information referred to, unless the wording of the question more clearly asked for the information itself (eg "Can I obtain copies of these decisions?").

However, a question asking where or how information can be obtained would still be a valid FOI request for any information held relating to where or how that information can be obtained. A proper response under the Act is therefore likely to require the public authority to provide information on its FOI request procedure. If the individual appears unaware of the provisions of the Act, there will also be a s16 duty to inform them as a potential requester of the right to request information under the Act (in accordance with paragraph 6 of the section 45 code of practice). As the public authority would therefore be required to inform the individual concerned that they can make a formal request for the information,

the Commissioner does not consider that a literal interpretation of such questions should ultimately frustrate or limit the disclosure of information.

Alternatively, if the public authority suspects that the applicant may in fact have intended to ask for copies, it can seek clarification under s1(3). If the wider context of the request renders the meaning unclear this may also trigger a duty to provide advice and assistance. See LTT90 for more information.

Part 2 – Practical implications

The Commissioner realises that public authorities will fail to recognise that some questions are requests and instead will deal with them as part of their course of business. The case of Welsh and the Information Commissioner is one such example as the Tribunal said at paragraph 23,

"…..The immediate context of the request is a four page letter….the request itself is easy to miss, surrounded by a series of contentious legal arguments. It takes a considerable degree of familiarity with the legislation to separate out, as the IC was able to do, the one FOI request dealt with in this appeal, from the various other requests in the letter, including a number of subject access requests under the Data Protection Act, which were also contained in the letter…..".

However, where a public authority fails to deal with a question as an FOI request as such, the Commissioner may find the public authority has committed one or more procedural breaches, including a breach of s.1(1)(b) (see LTT29) for failing to deal with the request in accordance with the Act.

Although this approach may seem onerous on public authorities it is important to remember that cases should only be investigated by the Commissioner after the applicant has first complained to the public authority so giving it a second opportunity to deal with the request under the Act (*).

If the applicant is satisfied with that response then it is unlikely that a complaint will be made to the ICO and no breaches will be recorded. Further, where an applicant does complain to the Commissioner and their complaint relates solely to the late compliance the case is likely to be closed under the robust case handling policy and again it is unlikely that the matter will result in a decision notice, within which to record the breaches.

There will however be cases that do proceed to a decision notice. These will usually be where the complaint concerns:

a) whether the requested information is held,

b) whether after identifying information that would answer the question the public authority was correct to withhold that information or

c) the issue of late compliance is part of a more complex complaint usually involving multiple requests.

In such cases, the Commissioner may record a procedural breach (see LTT29) within the decision notice in respect of the late compliance with the Act although any criticism of the public authority should be tempered by explaining that although a breach has occurred, it was not unrealistic for the public authority to have overlooked the request because it was phrased as a question.

(*) – If the request being framed as a question means that the public authority is unsure which piece of recorded information is sought by the complainant, they should seek to clarify this via s. 1(3) which may invoke their duties under s.16.

PREVIOUS / NEXT

Source	Details
	Richard Day / DWP (24 September 2007)
IT	Fowler / Brighton & Hove City Council (6 November 2007)
Policy Team	Welsh / IC (20 March 2008)
GS	John Allison / HM Commissioners for Revenue & Customs (22 April 2008)
	Riniker / MoJ (22 September 2009)

Related Lines to Take

LTT8, LTT29, LTT65, LTT89, LTT90

Related Documents

EA/2006/0069 (Day), EA/2006/0071 (Fowler), EA/2007/0089 (Allison), EA/2007/0088 (Welsh), EA/2007/0132 (Riniker)

Contact		HD / LS	
Date	20/11/2009	**Policy Reference**	**LTT126**

FOI/EIR	FOI EIR	Section/Regulation	s35 Reg 12(4)(e)	Issue	Scope & overlap of s35(1)(a) & s35(1)(b)

Line to take:

S35(1)(a) and s35(1)(b) are not mutually exclusive, so there may be information that legitimately falls under both sub sections.

The convention of collective Cabinet responsibility will be most relevant to s35(1)(b), but may also apply to s35(1)(a). It may also apply to certain information falling under regulation 12(4)(e) of the EIR.

Not all information falling under s35(1)(a), s35(1)(b) or Regulation 12(4)(e) will engage the convention of collective Cabinet responsibility.

Further Information:

S35(1)(a) and s35(1)(b) are not mutually exclusive

In *Scotland Office V The Information Commissioner* (EA/2007/0128) the public authority had claimed the exemptions at both s35(1)(a) and s35(1)(b) in relation to the same information.

The Tribunal commented (para 43) that " We do not regard the two categories of information as mutually exclusive as it seems to us that information may relate to a Ministerial communication (section 35(1)(b)) by virtue of who is identified in it and also relate to the formulation or development of government policy (section 35(1)(a)) by virtue of its subject matter. We consider therefore that information can be properly regarded as falling within both exemptions."

This same approach was also taken in *Scotland Office v The Information Commissioner (*EA/2007/0070) where the Tribunal commented at paragraph 78 that "As already noted, the Appellant says that all items of disputed information……come within the ambit of both sections 35(1)(a) and 35(1)(b). These two sub-sections are of course not mutually exclusive. "

The Commissioner concurs with this view. He also notes that (as per LTT51) the exemptions in section 35(1) apply where the information "relates to" the matters set out in the sub-sections.

Case officers should, however, when analysing s35(1)(a) and (b), be careful to reach a clear conclusion in relation to each separate limb. Although many of the same considerations could apply where both sub-sections have been claimed, these considerations may need to be afforded different weight in the Public Interest Test depending on the limb being considered. For example, information which reveals ministerial disagreement but provides little policy detail may do little to undermine the specific policy making process, but much to undermine the quality of future ministerial decisions and debate.

Information falling under s35(1)(a) – the formulation and development of government

policy

The ICO Awareness Guidance 24 provides some guidance on the type of information

that may be caught by s35(1)(a). LTT62 -"when is policy formulation and development complete?" also provides some discussion and Tribunal comment on the nature of policy formulation and development.

However, the Commissioner has noted that section 35(1)(a) has been applied to several different types or levels of policy, and that in some cases it could be argued that the information in question actually related to Departmental rather than Government policy, or to the implementation of an existing Government policy rather than to its formulation and development. For this reason he has commissioned a research project to aid his understanding of the process of formulating and developing Government policy. Whilst in the majority of decisions to date the Commissioner has accepted that the information in question does relate to the formulation and development of government policy, case officers should continue to give this issue careful consideration . One case where the Commissioner found that the information did not relate to the formulation and development of government policy was FS50119242 (link provided below)

The Commissioner considers that the purpose of s35(1)(a) is to protect the integrity of the process of formulating and developing Government policy, and to prevent releases of information undermining this process and ultimately resulting in less robust, well considered or effective policies.

Information falling under s35(1)(b) – ministerial communications

The definition of ministerial communications is provided in full at section 35(5) of the Act.

It includes "in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly and proceedings of the Cabinet or any committee of the Welsh Assembly Government."

Further guidance on information caught by s35(1)(b) is provided in ICO Awareness Guidance 24.

Scotland Office case (EA/2007/0070) confirmed that "communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitutes Ministerial communications. " (para 50).

Scotland Office case (EA/2007/0128) confirmed the status to be accorded to letter written by one Private Secretary to another " Such letters would contain the views of the relevant Ministers and so would, in our opinion, properly fall to be considered under section 35(1)(b).

The Commissioner would concur with the conclusions of both Tribunals, but see also LTT51 for further discussion on this point.

Case officers should not consider the above as an exhaustive list of all information falling under s35(1)(b). Rather, details have been provided in this Line to Take of some information that has

been considered as legitimately falling under s35(1)(b) to date.

The Commissioner considers that the purpose of this exemption is to prevent disclosure of information that results in less robust and well considered Ministerial decisions and debates. He does not consider that its purpose is to protect Ministers from embarrassment or from being held accountable for their decisions.

Information engaging the convention of collective Cabinet responsibility

The convention of collective Cabinet responsibility was described by the IT in *Scotland Office v The Information Commissioner* (EA/2007/0070) as "the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed. " (para 82).

This Tribunal considered the convention of collective Cabinet responsibility in relation to section 35(1)(b) FOIA. It commented at paragraph 85 that "not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Some communications may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated. "

The Commissioner considers that the convention of collective Cabinet responsibility will most obviously apply to information falling under s35(1)(b), because details of deliberations within the Cabinet, Ministerial debate, and divergent views will most obviously be contained within ministerial communications.

However he considers that it may also be applicable to some information falling under s35(1)(a). This is because deliberations, debate and divergent views in relation to policy matters may also be revealed in information relating to the formulation and development of government policy. In particular it may be evident in communications between parties other than ministers (such as officials or departments). He also considers that the convention of collective Cabinet responsibility is designed to protect both the integrity of the policy formulation and development process protected under s35(1)(a), and the Ministerial decision making process protected under s35(1)(b).

Whilst there be Ministerial decisions that don't relate to the formulation and development of Government policy, many Ministerial decisions will be made in this context. In these cases the quality of ministerial debate is likely to effect the quality of the policy formulation and development process, the policy decision, and ultimately the quality of the final policy. As such the convention of collective Cabinet responsibility may span both s35(1)(a) and s35(1)(b). In such cases it should not be forgotten that a causal link between the release of the information and the quality of the debate will also need to be established.

As per LTT104, although Regulation 12(4)(e) of the EIR does not provide a direct equivalent to section 35 FOIA, there is some correlation between theses two provisions. The convention of

collective Cabinet responsibility may therefore, also apply to some information falling under regulation 12(4)(e) of the EIR.

As per the Scotland Office Tribunal position, the Commissioner notes that not all information falling under s35(1)(a), s35(1)(b) or regulation 12(4)(e) will necessarily engage the convention of collective Cabinet responsibility anyway.

For discussion on the public interest in maintaining the convention of collective Cabinet responsibility see LTT132.

There are a number of further Lines to Take which consider the Public Interest Test under section 35, as detailed in the Related Lines to Take section below.

Source	Details
IT	Scotland Office (08 August 2008) Scotland Office (05 August 2008)

Related Lines to Take

LTT51, LTT62, LTT104, LTT128, LTT129, LTT130, LTT131, LTT132,

Awareness Guidance 24.

Related Documents

EA/2007/0070 (Scotland Office), EA/2007/0128 (Scotland Office), FS50119242

Contact		LA	
Date	29/10/2008	**Policy Reference**	**LTT127**

FOI/EIR	FOI EIR	Section/Regulation	s35, s36 Reg 12(4)(b)	Issue	Wider impact of disclosure on the conduct of good government

Line to take:

The arguments about the wider impact of disclosure on the conduct of good government can be categorised as follows :

- The importance of preserving confidentiality of policy discussions in the interests of good government (safe space arguments - see also LTT129)
- The risk to candour and boldness in the giving of advice which the threat of future disclosure would cause (chilling effect arguments – see also LTT130)
- The risk to the role and integrity of the civil service (see also LTT131)

It will be important to distinguish between these arguments.

In reaching a final decision, Case Officers will need to consider the weight of each individual argument raised (in the individual circumstances of the case) and then how the strength of all the arguments in favour of maintaining the exemption weigh against all the factors in favour of disclosure.

Further Information:

A number of Tribunal cases have considered the issue of the direct and indirect consequences of disclosing information falling under s35 FOIA and Reg 12(4)(e) of the EIR,* and of how these considerations should be treated in the application of the Public Interest Test.

LTT43 “Guiding principles in relation to s35(1)(a) & 12(4)(e) public interest” considers detailed comments made by the Information Tribunal in this respect in the case of *DfES v the Information Commissioner* which the Commissioner considers to be a key decision on s35. It

also details relevant comments made in later cases heard in the High Court.

In the Tribunal case *Scotland Office v the ICO* (EA/2007/0070) the Tribunal provided the following helpful summary of the DfES arguments about the wider impact of disclosure on the conduct of good government.

" The arguments advanced by the public authority in this regard had to do, *inter alia*, with (1) the importance of preserving confidentiality of policy discussions in the interests of good government (the *"safe space"* argument); (2) the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause (the *"chilling effect"* argument); and (3) the risk to the role and integrity of the civil service by, *inter alia,* identifying Officials with policies which were no longer in favour thus alienating them from future political masters. These would all be grave consequences, undermining important constitutional safeguards and significantly altering the way in which the executive conducted its business. It would also impact record keeping."

This LTT provides a brief overview of the arguments as categorised in the Scotland Office case and emphasises the need to distinguish between them. It also provides cross references to the relevant "guiding principles" from the DfES case (as covered by LTT43) and refers to further LTTs where these issues are discussed in more detail.

Although terms such as "safe space" and "chilling effect" provide a useful shorthand for case officers and public authorities, the ICO view is that Decision Notices should provide full explanations of the issues being considered, in the context of the circumstances of the case, and should not assume that the reader has prior knowledge and understanding of these terms.

Whilst each individual argument raised will need to be considered in some detail, it should be remembered that any final decision will need to take account of all the factors argued in favour of maintaining the exemption, and all the factors that favour disclosure. It will be important therefore, not to become so focussed on one particular argument, that this wider overview is lost.

All wider impact arguments will need to be considered in the circumstances of the case.

The "safe space" arguments

The Commissioner considers that there are two types of "safe space" argument :

- safe space for policy formulation
- safe space in the context of collective Cabinet responsibility

These are considered in more detail in the LTT129 "Safe space arguments"

The arguments here recognise that there is a public interest in the government being able to formulate policy and debate "live" issues in Cabinet away from external scrutiny. This need for a "safe space" exists separately to, and regardless of, any potential "chilling effect" on the frankness and candour of debate. It is important therefore, to differentiate between "safe space" and "chilling effect" arguments.

The DfES guiding principles most relevant to these arguments are (iv) timing, and (v) when is policy formulation and development complete?

The "chilling effect" arguments

The "chilling effect" arguments basically deal with the overall concept that the disclosure of information will affect the frankness or candour with which issues are debated by relevant parties such as Ministers and Civil Servants. Public Authorities have maintained that such a loss of frankness or candour would not be in the public interest because it would ultimately result in poorer decision making and less robust, well considered or effective policies and decisions.

This concept can cover a number of different scenarios as discussed in detail in LTT130 'Chilling effect arguments'. As stated above it will be important to differentiate between 'chilling effect' arguments and "safe space' arguments.

The DfES guiding principle most relevant to this argument is (vii) robustness of officials.

The "risk to the role and integrity of the civil service" arguments

The arguments here basically deal with the issue of the potential effects of disclosure on the civil service. They emphasise that it is Ministers rather than civil servants that are ultimately accountable for government policy and argue that in light of this protection should be afforded to civil servants. Without such protection, it is argued, the effectiveness and neutrality of the civil service is threatened.

This argument is discussed further in the LTT131 'risk to the role and integrity of the civil service arguments'

The DfES guiding principles most relevant to this argument are (iii) protection for civil servants not politicians, (viii) junior officials, (ix) relationship between officials and politicians, (xi) names of civil servants

Application of these arguments to section 36

The majority of Tribunal cases referred to in this and the related Lines to Take deal with information withheld under section 35 of the FOIA. However the Commissioner considers that there may also be section 36 cases where these arguments are equally relevant.

***Application to the EIR**

As per LTT104 Regulation 12(4)(e) of the EIR covers Internal Communications and as such is wider in scope than s35 FOIA. Whilst Reg 12(4)(e) doesn't provide a direct equivalent of s35, the issues in the LTT will be equally relevant where the information concerned would, but for it being environmental information, fall under s35 FOIA.

Other issues relevant to the Public Interest Test under section 35 or regulation 12(4)(e)

This LTT considers the wider impact of disclosure on the conduct of good government.

LTT43 "Guiding principles in relation to s35(1)(a) & 12(4)(e) public interest", includes other issues relevant to the Public Interest Test under s35 or reg 12(4)(e) and remains a key LTT for section 35 and reg 12(4)(e) cases. It covers both direct and indirect effects of disclosure.

LTT61 "advice to decision makers" also includes some relevant public interest considerations including a discussion on the impact of disclosure on record keeping.

The resource document "Overview of section 35 / Reg 12(4)(e) public interest arguments" provides an overview, in diagram form, of the various section 35 / 12(4)(e) arguments that have been considered, and the Tribunal's reaction to them. It doesn't provide a particular "line to take" but may be useful for case officers in visualising / keeping track of the various section 35 arguments and in cross referencing to relevant LTTs.

LTT132 'Public interest in protecting collective Cabinet responsibility' comments on the public interest in maintaining the convention of collective Cabinet responsibility.

LTT127 Scope* overlap of s35(1)(a) and 35(1)(b) comments on the differentiation and overlap between these two sub-sections

PREVIOUS / ***NEXT***

Source	**Details**
IT	DfES / The Evening Standard (19 February 2007) Scotland Office (08 August 2008)

Related Lines to Take

LTT43, LTT61, LTT104, LTT127, LTT129, LTT130, LTT131, LTT132, LTT133

Related Documents

EA/2006/0006 (DfES) ,EA/2007/0070 (Scotland Office)

Contact		LA	
Date	29/10/2008	**Policy Reference**	**LTT128**

FOI/EIR	FOI EIR	Section/Regulation	s35, 36 12(4)(e)	Issue	Safe space arguments

Line to take:

There is a public interest in civil servants and ministers being able to formulate policy and debate "live" issues in Cabinet away from external scrutiny.

This need for a "safe space" exists separately to, and regardless of, any potential "chilling effect" on the frankness and candour of debate that might flow from disclosure under FOIA.

Safe space arguments may be accepted both in the context of policy formulation and of Collective Responsibility.

Further Information:

Safe space arguments are usually made in relation to the public interest test under s35 FOIA.

However (as per LTT128) they may also apply to some s36 cases and to some information falling under Regulation 12(4)(e) of the EIR.

"Safe space" arguments are about the need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement.

They are related to, but not the same as "chilling effect " arguments, and care should be taken to differentiate between these two concepts. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA (see LTT130 chilling effect). "Chilling effect" arguments are directly concerned with the argued loss of frankness and candour in debate / advice which it is said would result from disclosure of information under FOIA.

The Commissioner considers that there are two main types of "safe space" arguments:

Safe space and policy formulation – s35(1)(a)

Summarised in *Scotland Office v the Information Commissioner* (EA/ 2007/0070) as "the importance of preserving confidentiality of policy discussion in the interest of good government" this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.

In *Department for Education and Skills v the information Commissioner and The Evening Standard* the Tribunal recognised the importance of this argument stating "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy" (para 75, point iv).

This argument recognises that the need for a safe space whilst formulating policy exists separately to, and regardless of any potential effect on the frankness and candour of policy debate that might result from disclosure of information under FOIA (the "chilling effect"). Even if there was no suggestion that those involved in policy formulation might be less frank and candid in putting forward their views, there would still be a need for a "safe space" for them to debate policy and reach decisions without being hindered by external comment.

In another Scotland Office case *Scotland Office v the information Commissioner* (EA/2007/0128 para 62) the Tribunal again recognised the importance of this concept, but warned that "information created during this process cannot be regarded *per se* as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption". The Commissioner agrees with this view and comments that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration.

An important determining factor in relation to the "safe space" argument will be whether a request for such information is received whilst a "safe space" in relation to that particular policy making process is still required (see also LTT62).

In the High Court case *Office of Government Commerce v the Information Commissioner* the

information in question related to the Government's gateway zero review into the introduction of an identity cards Bill. Mr Justice Burnton commented that "I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished"

In *DBERR v the Information Commissioner and Friends of the Earth* (para 114) the Tribunal commented in relation to the need for a private "thinking" space; "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public. "

In summary, several Tribunals have accepted as valid, public interest arguments about the loss of a safe space, specific to the policy debate to which the information relates. This is on the basis that :

- there is a public interest in preserving a "safe space" for policy formulation, and
- that to release information relating to a particular policy, whilst that same policy is still in its formulation and development stages might erode that "safe space".

It will therefore be important when considering such arguments to establish :

- which policy the information in question relates to, and
- whether the formulation and development of that policy is still ongoing (see also LTT62)

and also to judge :

- whether the weight of the public interest has diminished due to the policy becoming "more certain",(see quote from DBERR above) ,

It should also be remembered that the need for a safe space is only one argument to be taken into account in the overall public interest test and that any final decision will need to take account of all the factors argued in favour of maintaining the exemption, and all the factors that favour disclosure.

The guiding principles (see LTT43) most relevant to this argument are (iv) timing, and (v) when is policy formulation and development complete?

Safe space and collective responsibility

The Commissioner would also accept the argument that the need for a safe space extends beyond that related to the ongoing policy formulation and development process in the context of the convention of Collective Responsibility. (see also LTT132, and LTT127) for further discussion on the extent to which the convention of Collective Responsibility may span both s35(1)(a) and s35(1)(b)).

Collective Cabinet responsibility was described by the IT in the Scotland Office case (EA/2007/0070) as "the long standing convention that Ministers are collectively accountable for

the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed. " (para 82).

The Tribunal in this case commented (para 88) in relation to s35(1)(b) that "as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was "live" when the request was made, the public interest in preserving a "*safe space*" for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption. However, that does not detract from the need to assess each case on its own circumstances."

The Tribunal did not expand upon what it meant by a "live" issue, and this will always need to be considered in the context of the case. However, the Commissioner considers that in addition to ongoing policy making issues, this may also cover situations such as agreeing a government response to an unforeseen world event or deciding how to counter critical press coverage.

Collective Cabinet responsibility beyond the "safe space" argument

The "safe space" argument is based on the premise that it is in the public interest for Ministers to be able to have a full and open debate away from external scrutiny to enable them to reach an agreed position. In light of this the Commissioner considers that once the Cabinet have successfully determined an issue and agreed a collective position then "safe space" arguments will no longer apply.

This does not mean, however, that public interest considerations about undermining Collective Cabinet Responsibility will completely fall away. The Commissioner accepts that the there may be a separate public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views, and this issue is discussed further in LTT132 .

The Commissioner considers this to be a separate public interest consideration to the "safe space" consideration however, because it is not the "safe space" to debate and reach agreement away from external scrutiny that it being protected at this stage. Indeed, the very nature of promoting and/or defending an agreed position means that agreement (or a collective position) will have already been reached. Further, promoting and /or defending a position will rarely, if ever, need take place in a safe space (i.e. in isolation or away from external scrutiny) . Arguments that this is the case would raise the question as to whom the position is being promoted to, if not to an external audience of some kind. Therefore case officers should refer to LTT132 when considering arguments about the need to present a united front after a decision has been made

Source	Details

IT	DfES / The Evening Standard (19 February 2007) Scotland Office (08 August 2008) Scotland Office (05 August 2008) OGC / Oaten (11 April 2008 -High Court) DBERR / Friends of the Earth (29 April 2008)

Related Lines to Take

LTT43, LTT62, LTT127, LTT128, LTT130, LTT131, LTT132, LTT133

Related Documents

EA/2006/0006 (DfES), EA/2007/0070 (Scotland Office 08/08/08), EA/2007/0128 (Scotland Office 05/08/08), (OGC High Court, [2008] EWHC 638 (Admin), EA/2007/0072 (DBERR)

Contact	LA		
Date	29/10/2008	**Policy Reference**	**LTT12**

FOI/EIR	FOI EIR	**Section/Regulation**	s35, s36 Reg 12(4)(e)	**Issue**	'Chilling effect' arguments

Line to take:

'Chilling effect' arguments should not be dismissed out of hand as "ulterior considerations" but should be given appropriate weight in the Public Interest Test dependent on the circumstances of the case and the information in question.

The term 'chilling effect' can cover a number of related scenarios, which argue a progressively wider impact on the frankness and candour of debate. As the impact of the 'chilling effect' argued gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained.

Arguments that disclosure under FOIA may equally lead to better quality advice and improved decision making, may also be relevant and should also be considered in the circumstances of the case.

Further Information:

Chilling effect arguments :

'Chilling effect' arguments are usually made in relation to the public interest test under s35 FOIA. However (as per LTT128) they may also apply to some s36 cases and to some information falling under Regulation 12(4)(e) of the EIR. They are described in *Scotland Office v the Information Commissioner* (EA/2007/0070) as arguments about "the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause".

They are related to, but not the same as "safe space" arguments, and care should be taken to differentiate between these two concepts. 'Safe space" arguments are about the need for a "safe space" to formulate policy and debate 'live' issues" without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA (see also LTT129 safe space arguments). "Chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate / advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions, and would result from disclosure of information under FOIA.

The guiding principle (see LTT43) most relevant to this argument is (vii) robustness of officials.

The term 'chilling effect' can cover a number of related scenarios, which argue a progressively wider impact on frankness and candour :

- In relation to s35(1)(a) - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties make future contributions to that particular policy debate.

- In relation to s35(1)(b) – the idea that disclosing information falling under s35(1)(b) that relates to a "live issue" will affect the frankness and candour with which Ministers

continue to debate that same issue.

- In relation to s35(1)(a) - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.

- In relation to s35(1)(b) – the idea that disclosing information falling under s35(1)(b) that relates to a "live issue" will affect the frankness and candour with which Ministers debate other, different "live issues" in the future.

- In relation to s35(1)(a) - the idea that disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.

- In relation to s35(1)(b) – the idea that disclosing information falling under s35(1)(b) that relates to an issue which is no longer "live" will affect the frankness and candour with which Ministers debate other, different "live issues" in the future.

It is conceivable that similar views, arguing a progressively wider "chilling effect", could also be presented in relation to the Public Interest Test under s35(1)(c) and (d).

The Tribunals response to such arguments

The Tribunal has generally endorsed the approach of considering such arguments in the context of the circumstances of the case, with particular reference to the potential disclosure in question.

It has also, however, consistently given less weight to such arguments than has been argued by the Public Authorities concerned and has been dismissive of the weight that should be attached to such arguments in the majority of cases it has heard so far. Comments made by various different Tribunals in this respect are provided below. It should be noted that these comments were all made in cases where the public authority was arguing a relatively wide ranging 'chilling effect', and maintaining that release of information relating to one issue / policy would affect the candour of debate on other, unrelated issues / policies :

Department for Education and Skills v the Information Commissioner (para 75) :

" [principle] (vii) In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote – Trevelyan reforms."

Foreign and Commonwealth Office v The Information Commissioner (para 26) :

" we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001.* These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential

……. Secondly , the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice ever in the face of a risk of publicity."

Scotland Office v the Information Commissioner EA/2007/0128 (para 71) :

"We share the scepticism expressed by other Panels of this Tribunal as to the extent of the "chilling" effects predicted in relation to the impact of disclosure in relation to internal government deliberations"

Scotland Office v the Information Commissioner (EA/2007/0070) (para 89)- in relation to s35(1)(b):

""No evidence has been put before us to show that because of the potential for disclosure under FOIA, Ministers have changed the way in which they communicate, to have taken less robust positions in debate or have been less candid in expressing their views in writing. In other words, there is no evidence that the "*chilling effect*" feared has actually materialised. This is of course as it should be. In line with the views expressed by the Tribunal in DFES, we consider that we are entitled to expect of our Ministers, as elected politicians, a degree of robustness and for them not to shy away, in cabinet discussion, from taking positions and expressing those positions candidly, for fear that their views may, in certain circumstances, become public. "

In *O'Brien v the Information Commissioner and BERR*, Mr Hilton, a witness for the public authority conceded in cross-examination that :

"he could not identify any actual instance of a disclosure made under the freedom of information Act having affected the quality of any advice given or the way they performed their duties in general …..He accepted that since the freedom of information regime was obligatory disclosures made under it would not damage the necessary trust between ministers and civil servants and that there was no reason to be concerned that ministers would be led to disengage from their officials as a consequence of it. He accepted that his concerns about the risk to the quality of government decision-making resulting from cumulative disclosures under the Act were speculative" (para 35).

High Court ruling

In the Tribunal decision in *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* – in relation to Regulation 12(4)(e) of the EIR- the IT had commented at paragraph 61 that *:*

" It is not enough in this Tribunal's view to fall back on appeal that revelation of all information otherwise thought to be inviolate would have some sort of "chilling effect". The Commissioner and the Tribunal have been charged with the responsibility of resolving on a case by case basis where the proper balance should be struck regardless of such ulterior considerations."

This decision was appealed to the High Court and Mr Justice Mitting, whilst finding that the Tribunal's overall decision had been made in accordance with the law, was critical of the

Tribunals' approach as expressed at paragraph 61. He said (para 38)

"Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."

It should be noted that in this case the policy in question could arguably have been considered as still "live" as, at the date of the request, the application for the ECGD to guarantee funding for the Sakhilin LNG project (to which the information related) was still undecided.

The ICO's current position

In accordance with the comments made in the ECGD High Court case 'chilling effect' arguments should not be dismissed out of hand as "ulterior considerations" but should be given appropriate weight in the Public Interest Test dependent on the circumstances of the case and the information in question. It should not be assumed that all disclosures will inevitably have the same consequences. As stated in the DfES case (para 75, principle i)) and commended as a statement of principle in the ECGD High Court case :

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

The Commissioner would expect public authorities to provide convincing arguments for each kind of impact being argued with reference to the particular disclosure being considered.

With regard to the narrowest impact that has been argued - the effect of disclosure of information relating to a given policy / issue, whilst that policy /issue is still "live", on the particular policy-making process / issue in question – so far this issue has not been directly addressed by the IT, as the public authorities concerned have tended to argue a wide ranging "chilling effect". Consequently ,in cases heard so far the Tribunal has concentrated on the effect that such a premature disclosure might have on the "safe space" required for debate, rather than specifically considering any effect on frankness and candour that might result. However, as stated above the Commissioner accepts that part of the reason for needing a "safe space" is to allow free and frank debate to take place. The Commissioner would generally give some weight to arguments that disclosing information relating to a particular policy whilst that policy is still being formulated/developed, could effect the frankness and candour with which relevant parties would continue to contribute to that particular policy making process. Likewise for information relating to Ministerial communications, requested whilst the issue which the information concerns is still a "live" issue. He considers that this approach is consistent with the Tribunal's general acceptance of the need for a "safe space" for policy debate. How much

weight should be afforded to such arguments in the Public Interest Test, and whether or not the public interest in maintaining the exemption outweighs the public interest in favour of disclosure would, of course, depend on the strength of other arguments and the individual circumstances of the case

As the impact argued gets wider however, the Commissioner considers that it will be more difficult for convincing arguments to be sustained and this may particularly be the case for the widest ranging arguments – that disclosures relating to policies where the process of formulation or development is complete and historic issues would affect the frankness and candour of contributions to future live policies / debates.

It should be borne in mind that the Tribunal has given little weight to general arguments about wide ranging "chilling effects" that are not specifically related to the information in question. Whilst there may be cases where the Commissioner would accept that a wider "chilling effect" would occur, such arguments should not be accepted as general 'arguments of principle' and a public authority would need to make a convincing case as to why disclosure of the information in question would have this wider effect.

The importance of the timing of the request

In light of the progressively wider effects that may be argued, the Commissioner considers that the timing of the request will be important in relation to 'chilling effect' arguments (as it is in relation to 'safe space' arguments"). The Tribunal's acknowledgement of the importance of the timing of the request in relation to any argued loss of frankness and candour is indicated in the IT comment in

Friends of the Earth v The information Commissioner and Export Credits Guarantee Department :

" The Tribunal is simply not willing to accept ……that disclosure of the 2003 inter-departmental responses in March 2005 was likely to pose a threat to the candour of further deliberations" (para 74)

This case was a Regulation 12(4)(e) EIR case and the information in question related to Government Department comments on an application to the ECGD to finance the Sakhalin II oi pipeline project.

In *Cabinet Office v Lamb* the Tribunal commented (at para 74) that "When considering how to behave in future Cabinet Ministers will be aware that, as a result of the decision to make this type of information the subject of a qualified, not an absolute exemption, the risk of disclosure in appropriate circumstances has existed since January 2005. Their attitude will no doubt also be affected by the frequency with which disclosure is made and the reasons given for ordering it. Early disclosure as a mater of routine will clearly have a greater impact than if it is seen that disclosure is ordered only in cases that merit it and then only after a reasonable passage of time."

Arguments against the 'chilling effect'

Arguments have been made that far from producing a 'chilling effect' leading to poorer quality

advice and decision making, knowing that advice might be subject to future disclosure under FOIA could actually lead to better quality advice being provided.

This argument was put forward by counsel for the Commissioner in *The Secretary of State for Work and Pensions v The Information Commissioner* at paragraph 90. "He suggested that the new law would have concentrated the mind of civil servants in a beneficial way to ensure a more rigorous approach to any analysis or predictions……the safest thing for the prudent civil servant, faced with the prospect of disclosure, is to make sure that he/she does the best job and puts forward figures that can be defended , not just to the Home Office, but, if necessary, in the course of public debate… the prospect of public disclosure is actually capable of importing a greater degree of rigour into the process." Whilst the Tribunal did not indicate what weight it had given to this argument, its decision was that the information in question should be released.

In the ECGD case the Tribunal stressed that "its determination of the public interest test, relates specifically to the disclosure of the information requested by FoE" (para 75) and then went on to say (at para 76) that it "feels most strongly that disclosure of the type of information in question……is, if anything, likely to improve the quality of the deliberative process" (para 76).

The Tribunal also considered this argument In *Baker v the information Commissioner and the Department for Communities and Local Government* which was a regulation 12(4)(e) EIR case. Here witnesses for the public authority conceded in cross-examination that following FOI training local authority employees "had become more rigorous and disciplined in recognition of the fact that what they wrote might become the subject of public scrutiny – they were more aware of the need … to get it right" .

The Commissioner view is that, in line with the approach of considering how much weight should be given to 'chilling effect' arguments depending on the information in question and the circumstances of the case, arguments about the prospect of disclosure leading to improved advice / debate should also be considered in this case specific way.

Source	Details
IT	DfES / The Evening Standard (19 February 2007) Scotland Office (08 August 2008) FCO (22 January 2008) HMT (07 November 2007) Evans / MOD (26 October 2007) Scotland Office (05 August 2008)

	FOE / ECGD - IT (20 August 2007) FOE /ECGD - High Court (17 March 2008) DWP (05 March 2007) Baker / DCLG (1 June 2007) O'Brien / BERR (7 October 2008) Cabinet Office / Lamb (27 Janurary 2009)

Related Lines to Take

LTT43, LTT61, LTT104, LTT128, LTT129 , LTT131, LTT132, LTT133

Related Documents

EA/2006/0006 (DfES), EA/2007/0070 (Scotland Office), EA/2007/0047(FCO), EA/2007/0001 (HMT), EA/2007/0128 (Scotland Office), EA/2006/0073 (ECGD IT), [2008] EWHC 638 (ECGD High Court), EA/2006/0040 (DWP), EA/2006/0043 (Baker), EA/2008/0011 (O'Brien), EA/2008/0024 & 0029 (Lamb)

Contact		LA	
Date	03/11/2008	**Policy Reference**	**LTT13**

FOI/EIR	FOI EIR	Section/Regulation	s35, s36 Reg12(4)(e)	Issue	Risk to the role and integrity of t Civil Service

Line to take:

Arguments about the risk to the role and integrity of the civil service have been made on the following grounds :

- If information were to be released that identified individual civil servants with policies, the co-operation between civil servants and ministers would be lost, leading to poorer quality advice and decision making.
- If the advice from, or discussions of, civil servants are disclosed, then politicians will reac seeking advice from other sources or adopting other less formal mechanisms for decisio making, thus undermining the role of the civil service.
- Disclosure of the role and identity of the civil servant carries the further risk that accountability for decisions might be seen as passing from the minister, the elected representative, answerable to Parliament, to the unelected official.

The weight to be given to such arguments will vary from case to case as discussed below, howe these arguments will often carry little weight and / or have limited application.

With regard to the naming of officials, whilst fairness to the individual civil servant may be releva from a section 40 FOIA or DPA perspective, the focus of s35 arguments in this respect should b on the extent to which the role and integrity of the civil service might be undermined by accountability for Government policy and political decisions being seen as passing from ministe official.

It is possible that information that would not be exempt under s40 could be withheld under the s public interest test. Conversely information that would be released following the section 35 publ interest test, might be considered as exempt under section 40.

Further Information:

Arguments about the risk of compromising the role of the civil service are usually made in relati the public interest test under s35 FOIA. However (as per LTT128 wider impact of disclosure on good government) they may also apply to some s36 cases and to some information falling unde Regulation 12(4)(b) of the EIR. The arguments are summarised in *Scotland Office v The Information Commissioner* (EA/2007/0070) as concerning "the risk to the role and integrity of th civil service by, *inter alia*, identifying Officials with policies which were no longer in favour thus alienating them from future political masters."

The guiding principles (see LTT43) most relevant to these arguments are (viii) junior officials, (ix relationship between officials and politicians, (xi) names of civil servants.

The various risks to the role and integrity of the Civil Service that have been argued, and the Tribunal's response to them are provided below.

Public Identification of civil servants with policies

The argument here is that if information were to be released that identified individual civil serva with policies then this would undermine the impartiality and neutrality of the civil service. Co-operation and engagement between civil servants and ministers would be lost and the integrity the civil service would thus be compromised, leading to poorer quality advice and decision mak

In the DFES case Lord Turnbull, formerly Cabinet Secretary and head of the civil service and appearing as a witness for the DfES "referred to the suspicion, sometimes exhibited by ministe an incoming administration or even a new minister of the same administration towards an offici apparently identified with a policy which was no longer in favour. He asserted that full identifica of officials would make it "that much more difficult" (para 30)

Another witness for the DfES, Mr Paul Britton, Director General of the Domestic Policy Group in Cabinet Office "reiterated the perceived danger that identification of a civil servant with a policy alienate him from a new team of political masters." (para 36)

The DfES Tribunal's response to this evidence was given at paragraph 75, principle (ix) of its decision, where it said "we are entitled to expects of our politicians.... a substantial measure of political sophistication and, of course, fair-mindedness. To reject or remove a senior official because he or she is identified .....with a policy which has now lost favour.... would plainly betra serious misunderstanding of the way the executive should work. It would, moreover, be wholly unjust. We should therefore proceed on the assumption that ministers will behave reasonably a fairly towards officials.....By the same token, new ministers can expect from that official the sa level of engagement with the policies they now wish to pursue"

In *Scotland Office v The Information Commissioner* (EA/2007/0070) the Scotland Office argued "Inappropriate disclosure of advice would also undermine the impartiality of the civil service. Ci

servants would become publicly associated with unpopular or controversial Ministerial polices w the result that they would no longer be seen as politically neutral and may not be able to comma the confidence of future Ministers" (para 53)

In *Scotland Office v The Information Commissioner* (EA/2007/0128) the public authority made th same argument as set out in relation to EA/2007/0070 and additionally argued that ""Inappropr " disclosure of the advice of civil servants to Ministers, and communication between officials containing the views of Ministers , has the capacity to undermine the relationship of trust and confidence that exists between Ministers and civil servants and risks compromising both the convention of ministerial accountability and civil service neutrality. " (para 39).

The Tribunals in both of these Scotland Office cases referred to the DfES Tribunal's approach i relation to these arguments and did not add any further comments of significance in this respec

Even in *the Department for Culture Media and Sport v The Information Commissioner* where th Tribunal ultimately ordered disclosure of the information in question, the importance of the standards expected from civil servants was acknowledged (para 40) "some emphasis was plac in cross examination on the role of professional integrity and the standards required in the Civil Service code as a bulwark against possible degradation of relationships between Ministers and civil servants caused by the possibility of their communications being disclosed under FOIA, including the integrity of advice and record keeping. We agree that integrity and good standard have a part to play and that they must be viewed in the context of the legal framework in place f time to time" The witness for the DCMS had conceded in cross examination that "there had no been any discernable deterioration in the standard of good conduct of civil servants since the [DfES] decision was published" (para 35).

The Commissioner's position is that whilst he would accept that the consequences set out abov would compromise the effectiveness and neutrality of the civil service if they were to occur (and thus not "ulterior considerations") he agrees with the Tribunal's position that the standards that should realistically be able to expect from both officials and politicians should limit this effect. In summary, the risk as argued by public authorities to date is overstated. Consequently (unless m convincing, information specific arguments are provided in any particular case) arguments of th nature should be afforded little weight in the public interest test.

Increased use of special advisers - sofa government - government by cabal

In broad terms the phrase 'sofa government' or 'government by cabal' refers to a reliance on political advisers appointed directly by politicians for advice rather the professional, politically neutral, civil service (The term was used in the Butler Report on the Intelligence on the Weapon Mass Destruction). The suggestion is that if the advice from, or discussions of, civil servants are disclosed, then politicians will react by seeking advice from other sources or adopting other less formal mechanisms for decision making, thus undermining the role of the civil service.

In the DfES Tribunal case the Tribunal referred to Lord Butler's description of 'sofa government the increase in influence of special political advisors, working independently of senior civil serva and free of public scrutiny, supplanting and undermining the normal processes of policy-making (para 31). This danger was "forcefully highlighted by both Lord Turnbull and Mr Britton, support by quotations from cabinet ministers from the present and former administrations." (para 31). M Britton "warned the Tribunal with a particular vigour of the danger of more "sofa" government" (p

36).

The Tribunal's response to these arguments was given at paragraph 82 of its decision as follow "We recognise the dangers of increasing "sofa government" or "government by cabal" as it was termed by Mr Britton. The use of political advisors rather than career civil servants goes back at least to Churchill and represents a growing trend, lamented by oppositions of whichever politica complexion. Whether it is likely to accelerate if there is a greater risk of disclosure of the dealin civil servants with each other and with ministers we do not feel confident to predict. It will certai not be curbed by any decision of ours. "

As can be seen from the above the Tribunal did not completely dismiss this point. It concluded 'sofa government' will occur with or without FOI disclosures, but left open the question as to whether such disclosures will "accelerate" the use of political advisors rather than civil servants.

Implicit in the Tribunal's recognition of the dangers of increasing 'sofa government' is its accept that it is not in the public interest to undermine the role of the civil service in this way. This poin was also implied in paragraph 72 where the Tribunal said "We accept without question their [the witnesses] assertion as to the vital importance of the principles listed in the last paragraph and others which they cited. "

The ICO view is that it does not necessarily follow that the increased use of political advisors w undermine the *political neutrality or impartiality* of the civil service, although it may arguably undermine the importance of its *role* as the primary provider of ministerial advice – in other word the danger is that although the civil service will remain politically neutral, ministers will increasin look elsewhere for the provision of advice and identification of policy options. If it is accepted tha politically neutral and impartial advice ultimately leads to better quality decisions and more robu and effective polices, then the increased use of sofa government carries the risk of less robust decisions and policy formulation.

In later Tribunal cases little comment has been made on this issue beyond referring to or adopt the DfES guiding principles.

Where arguments of this nature are made by the public authorities, the ICO position would be t follow the approach discussed above. It should be taken into account when applying the public interest test that the increased use of political advisors was already evident prior to the introduc of FOIA, so it is only any additional effect resulting from disclosure under FOIA that will be relev However, if a public authority is able to make convincing arguments that such an additional effe (or acceleration) would result from the disclosure in question then this may be taken into accou is the extent to which the role of the civil service would be additionally undermined by any addit increase in the use of political advisors flowing from disclosure under FOIA, and the extent to w it is accepted that this would adversely effect the quality of Government decision and policy ma that is relevant here.

Accountability seen to pass from minister to official

The argument here was first expressed at Tribunal in the DfES case. Lord Turnbull argued (at 33) that "Disclosure of the role and identity of the civil servant carried the further risk that accountability for decisions might be seen as passing from the minister, the elected representat

answerable to Parliament, to the unelected official. "

The Tribunal responded to this argument at paragraph 84 of its decision stating that "We recogn the importance of maintaining the constitutional position that Ministers, not civil servants , are answerable to Parliament and public for the actions of their department. We also recognise that officials should be able to have robust and honest discussions with their ministers without fear t such frank discussions will make them a political football with possible adverse consequences f their careers. As we have already said, that is not, of itself an argument for withholding the nam of civil servants but the wider impact point may require consideration in some cases. "

At paragraph 75 the Tribunal had already stated that :

"The most senior officials are frequently identified before select committees, putting forward the department's position whether or not it is their own. ", and that

"On other hand, there may be good reason in some cases for withholding the names of more ju civil servants who would never expect their roles to be exposed to public gaze. These are questions to be decided on the particular facts, not by blanket policy." , and that

"A blanket policy of refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified because in many cases disclosure will do no harm to anyone……There must be a specific reason for omitting the name of the official where the document is otherwise disclosable."

It should be remembered that the relevance of these arguments in relation to the section 35 pub interest test, is the extent to which the role and integrity of the civil service would be undermined accountability for government policy and political decisions being seen as passing from minister official. Whilst fairness to the individual civil servant may be relevant from a section 40 FOIA or DPA perspective, the focus here is the public interest in maintaining the constitutional position t Ministers rather than civil servants are accountable to Parliament for Government Policy or polit decisions. The full "wider impact" argument would be that if civil servants rather than ministers become seen to be accountable for government policy or political decisions then the political neutrality of the civil service and the constitutional position of ministerial accountability are undermined, leading to a less effective policy making or decision making process.

In light of this, the DfES comments shouldn't be taken to mean that civil servants have no accountability at all. In the case of *MOD v the ICO & Evans* (a section 36 case), MOD argued th civil servants, as distinct from Ministers, are not accountable to the public, and relied on the DfE judgment to support its position (para 60). The Tribunal in this case accepted that as a matter o constitutional principle the concept is correct, but was clear that, "Questions of competing public interests raise issues which of necessity go beyond pure considerations of constitutional accountability. Those persons who expend public money must in general terms be expected to stand up and account for the activities they carry out on doing so " (para 60)

It made reference to the Nolan Committee's seven principles of public life, in particular that, "Holders of public office are accountable for their decisions and must submit themselves to whatever scrutiny is appropriate to their office." Accepting that this level of scrutiny may vary according to office, it was clear that, "there is certainly no immutable principle that civil servants

should never be held accountable in the way contended for." (para 62).

In "How to be a Civil Servant" by Martin Stanley * (link provided below) the author states that " Servants are accountable upwards through audit and Parliamentary scrutiny, and outwards thro transparency and openness to stakeholders and the public at large."

The Commissioners considers that there is an important distinction to be made between accountability for Government Policy and political decisions, which clearly lies with Ministers (th elected officials), and *non-political* decisions for which holders of public office are accountable Civil servants may be held accountable for the quality of the advice and options they provide, b Ministers will take ultimate responsibility for the political decision as to which option (if any) is ta forward.

Further, as noted in *HM Treasury v the Information Commissioner* (where the information in question was for "all the relevant papers relating to the decision to reduce income tax by one pe in the pound announced in the budget in 1999") it may be possible to address concerns about responsibility being seen to pass from minister to official by providing some context when the information is disclosed. The Tribunal in this case commented at paragraph 62 that " We were wholly unpersuaded by Mr Neale's further point, that the public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a work assumption for the provision of advice, whereas the Ministers actual reason for adopting or reje it might be different, and that would lead to difficulties. Any Minister in that position would be ab explain the status of the official's assumption and what his own thinking was".

Case officers should always take care to relate accountability arguments to the public interest inherent in the exemption being considered. Section 40 arguments, about fairness to individual and breaches of the DPA should be considered under section 40. (for the Commissioner's approach to these issues see the various LTTs provided on s40) Arguments about risks to the and integrity of the civil service, and the knock-on effect on effective policy formulation and deci making are relevant to section 35 (and where relevant s36 and reg 12(4)(e)).

In relation to section 35 issues, the ICO view is that, in accordance with the Tribunal's comment DfES, "each decision will depend on the facts of the case" (para 75, (xi)). Where it is accepted linking advice or opinion to a particular official would lead to accountability for government polic political decisions being seen to pass from minister to official, thus undermining the concept of ministerial accountability and the effectiveness or neutrality of the civil service, then this will be public interest factor in favour of maintaining the s35 exemption. However, where this is not accepted as a likely consequence of disclosure, or where it can be addressed by putting the information into context, this public interest argument will not apply.

It may be that information of this nature that would not be exempt under section 40 (because release wouldn't breach a DPA principle) could be withheld under the public interest test for sec 35 for the reasons discussed above. Conversely information that would be released following t section 35 public interest test, might end up being withheld under section 40, because although release wouldn't undermine ministerial accountability or compromise the neutrality of the civil service, it would be considered unfair to the individual concerned. This will depend on the indiv circumstances of the case.

* Martin Stanley is Chief Executive of the Competition Commission, and author of "How to be a

Servant" – a text about Civil Servant's professional skills duties and responsibilities.

Source	Details
IT	DfES / The Evening Standard (February 2007) Scotland Office (08 August 200 Scotland Office (05 August 200 DCMS / (29 July 2008) MOD / Evans (20 July 2007)

Related Lines to Take

LTT43, LTT61, LTT104, LTT127, LTT128, LTT129, LTT130, LTT132, LTT133

Related Documents

EA/2006/0006 (DfES), EA/2007/0070 (Scotland Office), EA/2007/0128 (Scotland Office), EA/2007/0090 (DCMS), EA/2006/0027(MoD),

"How to be a civil servant"

Contact		LA	
Date	03/11/2008	**Policy Reference**	**LT**

FOI/EIR	FOI EIR	Section/Regulation	s35, Reg 12(4)(e)	Issue	Public Interest in protecting collective Cabinet responsibility

Line to take:

Preserving the convention of Collective Cabinet Responsibility allows the Government to be

able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made.

There is a public interest in allowing free and frank debate in order to agree a collective position, in that it serves to improve the quality of the final decision.

There is a public interest in the Government being able to present a united front, as this prevents valuable government time from being spent publicly debating and defending views that have only ever been individual views rather than Government positions, and in commenting on the meaning and implications of a divided Cabinet.

"Factors such as the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as was well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest." (Scotland Office v the Information Commissioner (EA/2007/0070)), although these factors should not be considered to be an exhaustive list.

Further Information:

The concept of Collective Cabinet responsibility will be most relevant to cases considered under section 35(1)(b), the exemption for "ministerial communications". However, see also LTT127 for further discussion on the extent to which the convention of Collective Responsibility may span both s35(1)(a) and s35(1)(b). It may also be relevant in certain EIR Regulation 12(4)(e) cases (see also LTT104 – information caught by Regulation 12(4)(e)).

Collective Cabinet responsibility was described by the IT in *Scotland Office v The Information Commissioner* (EA/2007/0070) as "the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed. " (para 82).

Although not all Ministers are Cabinet members, all Ministers are bound by the ministerial code to promote Cabinet positions to Parliament and the general public. Therefore the convention of collective responsibility can extend beyond immediate members of the Cabinet to all Ministers.

Cabinet Office v the Information Commissioner & Lamb provides some useful background on the concept of collective Cabinet responsibility and its development through history at paragraphs 38 to 49

Tribunal comments on the importance of preserving the convention of collective Cabinet responsibility :

Scotland Office (EA/2007/0070)

The IT in the Scotland office case considered the convention in relation to s35(1)(b) and recognised its importance as follows " The Appellant has referred us to a number of texts explaining the convention and its history, and underlining its constitutional importance in government decision making and more broadly, its significance in our system of parliamentary democracy. We fully accept the importance of the convention, and we also accept that detriment can arise to the public interest from disclosure of information concerning the formulation of Government policy at cabinet level. " (para 83)

The Tribunal was clear, however, that the convention **did not** act to elevate section 35(1)(b) to the equivalent of an absolute exemption for information which engages collective cabinet responsibility (see also LTT42). It commented that "Even where Ministerial communication engages the collective responsibility of Ministers…..that does not itself mean that the public interest against disclosure[*] will inevitably be weighty. The maintenance of the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to be accorded to it must depend on the particular circumstances of the case. (para 86). It also made the point that not all information falling under section 35(1)(b) will even engage the convention of collective cabinet responsibility (see also LTT127 for further discussion on this point).

It did, however state that "We accept that where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption."

The Tribunal also commented (para 88) that "as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was "live" when the request was made, the public interest in preserving a "*safe space*" for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption. However, that does not detract from the need to assess each case on its own circumstances."

The Tribunal did not expand upon what it meant by a "live" issue, and this will always need to be considered in the context of the case. However, the Commissioner considers that in addition to ongoing policy making issues, this may also cover situations such as agreeing a government response to an unforeseen world event or deciding how to counter critical press coverage.

Scotland Office (EA/2007/0128)

In another case *Scotland Office v The Information Commissioner* (EA/2007/0128), the Tribunal again considered the convention in relation to the exemption at s35(1)(b). The Tribunal again recognised the importance of maintaining the convention, whilst still making it clear that "It is not possible to raise the exemption to a de *facto* absolute one simply because the information relates to, or is, ministerial communications" (para 78).

It further commented however that "We do see some force however in the argument advance by the Scotland Office that the factors in favour of maintaining the exemption for *some* types of information in this category will, almost always be strong and that "very cogent and compelling

reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations. This is not to turn the public interest around, or to say that just because the exemption is engaged that is a factor weighing against disclosure, but recognises the weight that should be given to the public interest factors for maintaining the exemption."

The Commissioner's view on the nature of the public interest in maintaining the convention of collective Cabinet responsilbity :

The Commissioner considers that the Tribunal comments above cover two separate, although related public interest arguments :

- the public interest in protecting the safe space required to engage in frank and candid debate and *reach* a collective position (As the Commissioner considers this to be a "safe space" argument it is discussed in the LTT129).

- the separate public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views.

The Commissioner's view is that regardless of the need for a "safe space" to *reach* a collective position (see LTT129), there is also a separate public interest in the Government being able to present a united front and not reveal divergent individual ministerial views. This is because not allowing this would potentially result in valuable government time being spent publicly debating views that have only ever been individual views, rather than government positions, and in commenting on the meaning and implications of a divided Cabinet.

Whilst it is acknowledged that increased accountability and transparency count in the public interest, it could also be argued that it would not be in the public interest for FOI disclosures to undermine confidence in the Government of the day to the extent that it is unable to devote sufficient attention to the process and business of governing. Whilst this is a debatable point (as some might argue that if confidence is undermined, forcing a general election, then this is just the proper operation of a democracy) the Commissioner's view is that there is some public interest in not allowing FOI disclosures to result in a 'paralysed' Government.

The Commissioner considers that the existence of this public interest – together with the public interest in preserving a "safe space" in order to reach a collective position (see LTT129) - is recognised in the Tribunals' comments above, that where collective Cabinet responsibility is engaged "there will nearly always be a public interest in maintaining the exemption" and "the factors in favour of maintaining the exemption for *some* types of information in this category will almost always be strong."

Whilst recognising the above, as regards the balancing of the Public Interest Test, the Commissioners position remains as set out in LTT42, that there is no inherent public interest in maintaining the exemptions at section 35, nor any presumption against disclosure in such cases.

The Commissioner's view on the balancing of the Public Interest Test

How much weight the public interest in maintaining the convention of collective Cabinet responsibility will carry in any individual case, will vary depending on the specific

circumstances of the case and the public interest in disclosure.

Although, as acknowledged above, the convention of collective responsibility may extend beyond immediate members of the Cabinet, the Commissioner considers the Cabinet to be the hub of Government decision making and debate. Therefore the public interest in protecting the convention of collective responsibility is likely to be stronger in relation to information that reveals the workings of the Cabinet itself, than in relation to information further removed from the Cabinet.

The Commissioner would also comment that the public interest in maintaining the convention of collective Cabinet responsibility may diminish with changes to the Cabinet, Government restructures or the formation of a new Parliament (a new Parliament is formed following a general election) . This would be on the basis that there may be less potential harm (of the kind detailed above) from revealing that a Cabinet that no longer exists were in disagreement, than there might be in revealing that the current Cabinet has divergent views.

This view is supported by the Tribunal's comments in the Scotland Office case EA/2007/0070 (para 87) that "Factors such as the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, was well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest."

Case officers should always take these factors into account when considering the public interest in maintaining the convention of collective Cabinet responsibility, although this should not be considered to be an exhaustive list.

It may be useful to consider the impact of the election of a new Government in this context. Disclosure of information which relates to the policy promises included in the current Government's manifesto may do more to undermine the convention of collective Cabinet responsibility then information relating to the policy commitments of previous Parliaments. This may apply even if there hasn't been a change in the governing party, because each newly elected Government has a fresh mandate and a new manifesto for which it is accountable to the public. At this point it could be argued that the previous manifesto, although it may still retain some relevance, becomes somewhat historic. Case Officers should however, always consider the relevance of such changes in the circumstances of the case as the complexity of these issues does easily not lend itself to a 'blanket' approach.

Of course not all information that engages the convention of collective Cabinet responsibility will relate to manifesto promises. Governments also react to changing circumstances and world events and there may be issues which retain their sensitivity regardless of the factors above, and where the release of information would undermine the collective responsibility of the current Cabinet, even though the information related to the workings of a previous Cabinet. For example releasing information about the Iraq war might be seen to undermine the collective responsibility of the current Cabinet even though a different Cabinet was in existence when the relevant decisions were made. This would be because the same party and some of the same Ministers were involved, and because the earlier decisions continue to impact on current policy. Similarly there may be economic issues that retain their sensitivity and potential effect

on the convention of collective Cabinet responsibility over more than one Parliament.

Again this should not be taken to mean that the convention of collective responsibility acts to elevate section 35 to the equivalent of an absolute exemption in such sensitive cases. Although there may be a higher public interest in protecting the convention of collective cabinet responsibility in such circumstances there may equally be a heightened public interest in disclosure which would need to be taken into account.

In *O'Brien v the Information Commissioner and BERR* , Mr Hilton, a witness for the public authority conceded in cross-examination that "the need for confidentiality would inevitably depend on all the facts including whether relevant ministers had left the Government, whether there had been a change in administration or in policy or the wider political context, the gravity of the issues on which any divisions had arisen and the time that had passed before the information in question was requested". (Para 35)

It should also be remembered that if what actually makes the information in question sensitive is not so much the potential effect on collective responsibility but some other issue that is protected by / inherent in another exemption, then it may be the other exemption that is most relevant. For example information where the public interest test under section 35 would favour disclosure might be legitimately withheld under section 27, because of the public interest in protecting international relations. In these circumstances the Commissioner would encourage case officers to consider the most relevant exemption and should be sceptical of section 35 being used an all-encompassing central Government exemption.

* As per LTTXX the ICO position is that it is the public interest in maintaining the exemption in question, not the public interest against disclosure that should be considered in the Public Interest Test.

PREVIOUS / ***NEXT***

Source	Details
IT	Scotland Office (08 August 2008) Scotland Office (05 August 2008) O'Brien/ BERR (7 October 2008) Cabinet Office / Lamb (27 January 2009)

Related Lines to Take

LTT127, LTT129, LTT130

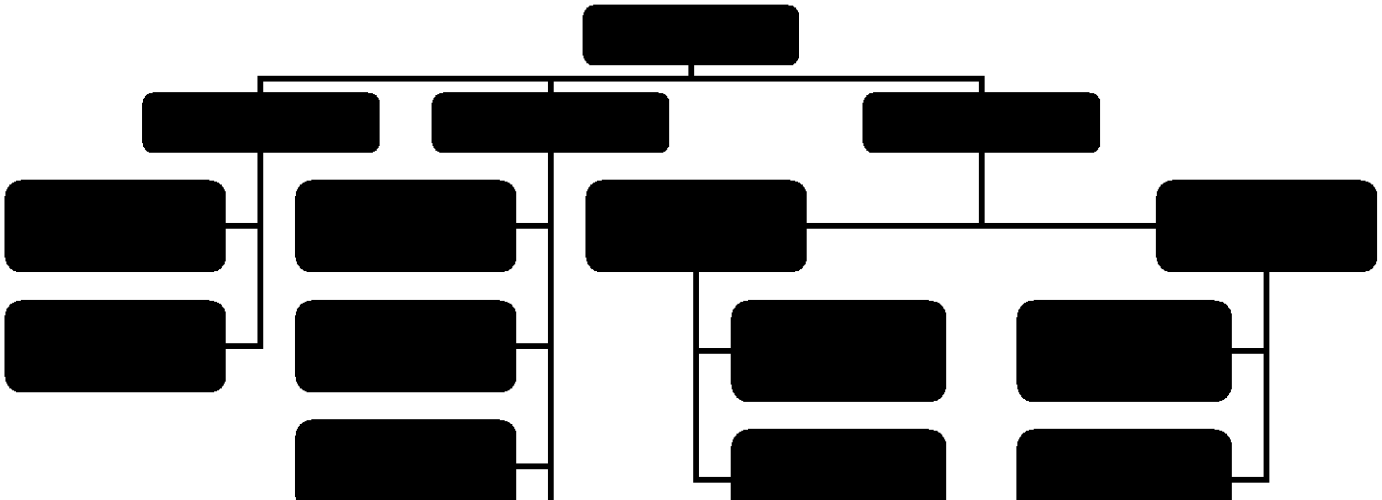
Related Documents

EA/2007/0070 (Scotland Office), EA/2007/0128 (Scotland Office), EA/2008/0011(O'Brien),

EA/2008/024&0029 (Lamb) Ministerial Code			
Contact		LA	
Date	03/11/2008	**Policy Reference**	**LTT132**

Overview of Section 35 & Regulation 12(4)(e) Public Interest arguments

The diagram below provides an overview of how the Tribunal and Commissioner have responded to various Public Interest arguments made by Public Authorities. It doesn't provide a "line to take" as such, and shouldn't be seen as replacing the need for case officers to give full consideration to arguments made in the context of any particular case. It may, however, be a useful starting point when assessing how much credence to give to the various arguments. It also provides cross- references to various "lines to take" which give a more detailed analysis of the ICO's position on these issues.



Details

Source of Line to Take Policy team

Related Lines to Take LTT43, LTT61, LTT129, LTT130, LTT131, LTT132

Related Documents

Contact: LA

Date: 03/11/08 **Reference number: LTT133**

FOI/EIR	FOI EIR	**Section/Regulation**	s27(2) & (3) Reg 12(5)(a)	**Issue**	Realistic expectation of confidentiality under s27(2) and (3)

Line to take:

When considering a realistic expectation of confidentiality under s27(2) and (3), the test is what would be reasonable in the mind of the confider, taking into account their culture and traditions and the lack of an internationally uniform concept of confidentiality.

There is a public interest in not flouting international confidence which is recognised in the Act at s27(2) and (3).

Further Information:

In the recent case of *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence*, where the appellant had requested certain Memoranda of Understanding (MoU) between the UK Government and the Kingdom of Saudi Arabia (KSA), the Tribunal commented on confidentiality under s27(2) and (3).

Reasonable expectation of confidentiality – what would be reasonable in the mind of the confider

Section 27(3) states:

"For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the

State, organisation or court to expect that it will be so held".

In the CAAT case, the Tribunal agreed with the parties' common position that Section 27(3) provides a definition of the confidential information for 27(2), and said that the second part of the subsection (the circumstances in which the information was obtained) was particularly relevant (paragraph 66). It found that the test of confidentiality under section 27 should be judged against "what would have been reasonable for the KSA to have expected" (paragraph 75). The Tribunal took into consideration "the attitude of the KSA to defence or supply of arms" (paragraph 66) and the state's particular characteristics, including "the secretive nature of its society" and the fact the "concept of freedom of information and transparency is generally alien to their culture" (paragraph 76). It concluded that the circumstances in which the information was obtained "made it reasonable for the KSA to expect that they would continue to be so held, at least in the absence of consent to release from the KSA" (paragraph 67).

The Tribunal said that there is no justification in "imposing on the KSA our particular customs and principles as to transparency or democratic accountability". They did not accept the appellant's argument that the conclusion would allow the culture and regime in the KSA to trump the FOI Act, particularly giving regard to the fact the argument in maintaining the exemption remains subject to the public interest balance in accordance with Section 2(2) of the Act (paragraph 78).

The Tribunal were also clear about the distinction of the confidentiality test under s27 from the common law of confidence applied in s41 (paragraph 57). In light of the above, the Commissioner's view is that the principles in the common law of confidence under s41 should not be applied to the exemption under s27 due to the international context. The concept of confidentiality is naturally subject to different interpretations in different countries and therefore, it would be unrealistic to expect a common understanding. Therefore, bearing this in mind, as the Tribunal conclude in paragraph 75, it would be rational to judge the test of confidentiality against what would have been reasonable in the mind of the confider, taking into consideration their cultures, principles and possible lack of awareness about the FOI Act processes operational in the UK.

Consequently, when considering a realistic expectation of confidentiality under s27(2) and (3), the test is what would be reasonable in the mind of the confider, taking into account their culture and traditions and the lack of an internationally uniform concept of confidentiality.

Public interest inherent in 27(2) and (3)

In considering the PIT under s27(2) and (3), the Tribunal commented that it accepts that Parliament recognised that the Act, by virtue of the provisions in s27, assumes an "inherent disservice to the public interest in flouting international confidence" (paragraph 95).

The exemption under s27(2) and (3) is based on the implicit existence of confidentiality between states; the disclosure of the material in this case "would have been seen as reneging on or flouting the basis upon which that information was obtained" paragraph 95). The Tribunal applied significant weight to this in the context of international comity* and relationships, and were clear that the public interest in maintaining the confidentiality and ultimately, relations with the KSA outweighed the public interest in disclosing the information.

*comity - *courteous recognition accorded by one nation to the laws and institutions of another.*

Source	Details
IT	CAAT/MOD (26 August 2008) Derry City Council / Belfast Telegraph (11 December 2006)

Related Lines to Take

LTT109

Related Documents

EA/2006/0040 (CAAT), EA/2006/0014 (Derry)

Contact		GF	
Date	10/11/2008	**Policy Reference**	**LTT134**

FOI/EIR	FOI EIR	Section/Regulation	s27(2) Reg 12(5)(a)	Issue	Confidentiality and information "obtained from" under s27(2)

Line to take:

Information contained in a Memorandum of Understanding may, depending on its content, qualify as information obtained from another state for the purposes of 27(2). However, where its content and/or context demonstrate that the information is in fact jointly created, then 27(2) will not apply.

Further Information:

In the recent case of *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence*, where the appellant had requested certain Memoranda of Understanding (MoU) between the UK Government and the Kingdom of Saudi Arabia (KSA), the Tribunal commented on confidentiality under s27(2).

Information "obtained from"

The Tribunal found that information contained in the MoU in question in this case was information obtained from another state for the purposes of s27(2). Section 27(2) sets out that:

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

It might be expected that the information in such a memorandum of understanding would be the result of an agreement based on some kind of negotiation. At first sight therefore, this finding seems contradictory to the Tribunal's approach in the case of *Derry City Council v the Information Commissioner*, which found that in relation to information obtained from a third party for the purposes of s41, that information was the product of a negotiated agreement that was jointly produced/created and therefore could not be deemed to be provided from a third party (see LTT109).

However, under s27, we would need to look at each 'agreement' (or MoU) on a case by case basis. Where it is clear from the content and/or context of the MoU that the information is obtained from a state, 27(2) applies; but 27(2) won't apply if it is evident that the information is jointly created. It may be that in this particular case, the relationship between the UK government and the KSA, is such that the KSA were in a position to impose the terms of the MoU and that therefore it did represent information obtained from another state.

Therefore, generally, we should continue to follow the approach to 'information obtained from' resulting from the Derry case, even for 27(2), i.e. that where information is created jointly, the information would not be deemed as obtained from another party.

In cases where the information is not classed as obtained from another state and s27(2) is consequently not engaged, it is possible that the information will be exempt from disclosure under s27(1).

Source	**Details**
IT	CAAT/MOD (26 August 2008) Derry City Council / Belfast Telegraph (11 December 2006)

Related Lines to Take

LTT109

Related Documents

EA/2006/0040 (CAAT), EA/2006/0014 (Derry)

Contact		GF	
Date	10/11/2008	**Policy Reference**	**LTT135**

FOI/EIR	FOI EIR	Section/Regulation	s27(1) Reg 12(5)(a)	Issue	Nature of prejudice to international relations under s27(1) (and potentially applicable to Regulation 12(5)(a))

Line to take:

Prejudice under s27(1) can be real and of substance if it makes international relations more difficult or calls for a particular diplomatic damage limitation exercise.

S27(1) concerns the relations and interests of the UK rather than the interests of individual companies or enterprises as such.

Further Information:

The recent case of *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence*, where the appellant had requested certain Memoranda of Understanding between the UK Government and the Kingdom of Saudi Arabia (KSA), considered the nature of prejudice, notwithstanding the likelihood of it occurring, in relation to section 27.

The Tribunal explained that "Prejudice is not defined, but we accept that it imports something of

detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be "real, actual or of substance", as described in Hogan" (paragraph 80) and that the "prejudice can be real and of substance if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary" (paragraph 81).

The Tribunal stated that they "do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty".

The Tribunal also acknowledges that the nature of prejudice under s27(1) is specific to international relations; specifically, the relations and interests of the UK rather than the interests of individual companies or enterprises as such. However, the Commissioner believes that there may be cases where a large business's interests are inextricably linked to the wider relations and interests of the UK, so it is expected that where reasonable the particular circumstances of such cases will be carefully considered.

Source	**Details**
IT	CAAT/MOD (26 August 2008); Hogan/Oxford City Council (17 October 2006)

Related Lines to Take

Related Documents

EA/2006/0040 (CAAT) EA/2005/0026 and EA/2005/0030 (Hogan)

AG14 'International Relations'

Contact		GF	
Date	10/11/2008	**Policy Reference**	**LTT136**