Current lines to take

LTTs are in numerical order.

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FOI/EIR		Section/Regulation		Issue	
	FOI		s42		
	EIR		reg 12 (5)(b)		Legal professional privilege under EIR

Line to take:

Reg.12(5)(b) will cover information which is subject to legal professional privilege.

Where a public authority claims that requested information is exempt under section 42 of the FOIA because it is subject to Legal Professional Privilege, but it is subsequently decided that that information is environmental, the exception provided by regulation 12(5)(b) may be claimed instead.

Further Information:

In the case of *Kirkaldie v the Information Commissioner and Thanet District Council*, the Tribunal decided that the information requested by the applicant was environmental, and that both the ICO and TDC were therefore incorrect in dealing with the request under the provisions of the FOIA rather than the EIR.

In this case, TDC had claimed that the requested information was exempt by virtue of section 42.

Section 42 provides that information is exempt if it is information "in respect of which a claim to legal professional privilege, or, in Scotland, to confidentiality of communications could be maintained in legal proceedings."

Regulation 12(5)(b) provides that the disclosure of information can be refused if its disclosure would adversely affect, "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."

Both the exemption and exception are subject to the public interest test.

The Tribunal expressed the view that the purpose of this exception was reasonably clear, stating that it "exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial." It continued that to do this, the exception, "covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation" (para. 21).

This view was also upheld in a further Tribunal decision *Burgess v the Information Commissioner and Stafford Borough Council.*

Further support for viewing regulation 12(5)(b) as the appropriate exception to cover legal professional privilege was demonstrated by the Tribunal in the case of *Creekside Forum v ICO and DCMS* (EA/2008/0065). In this case, the appellants had argued that regulation 12(5)(b) was not capable of including legal professional privilege (paragraph 25). The Tribunal was clear that "...whilst regulation 12[(5)(b)] does not explicitly name legal professional privilege, its function and substance fall under the umbrella of "the course of justice" and therefore, regulation 12(5)(b) was the appropriate exception to apply (paragraph 29).

The Tribunal in *Woodford v IC* (EA/2009/0098) further confirmed that the test of "would adversely affect" for 12(5)(b) would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information: "There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice" (para 27). This confirmed the decision in *Rudd v IC & Verderers of the New Forest* (EA/2008/0020) that 'the course of justice' does not refer to a specific course of action but "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'" (para 29). Consideration of the specific circumstances is however required when addressing the public interest test.

It is the Commissioner's view that a presumption or assumption in favour of disclosure applies in both the FOIA and the EIR. However, the Tribunal has generally made reference to the explicit presumption in the EIR when outlining the differences between the application of s.42 and reg.12(5)(b). Therefore it is recommended that case officers make some reference to this to demonstrate that it has been considered.

PREVIOUS / NEXT

Source	Details
	Kirkaldie / Thanet District Council (4 July 2006)
Information Tribunal	Burgess / Stafford Borough (7 June 2007)
	Creekside Forum / DCMS (28 May 2009)

Related Lines to Take

LTT63

Related Documents

FS50069727, EA/2006/001 (Kirkaldie), EA/2006/0091 (Burgess), EA/2008/0065 (Creekside Forum), Awareness Guidance 4

Contact		EW / GF / KP	
Date	18/01/2011	**Policy Reference**	**LTT5**

FOI/EIR		Section/Regulation		Issue	
	FOI		s50		Exemptions and exceptions not claimed by a public authority
	EIR		reg 18		

Line to take:

Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised by the public authority in the course of his investigation. The Commissioner will be pragmatic, taking into consideration the potential risks associated with disclosure of the information in question. This will include considering the topic of the information; its profile, its sensitivity and the impact of release.

The Commissioner does not accept the argument in Creekside Forum v IC & DCMS (EA/2008/0065) that he is automatically obliged to consider any exemption or exception relied upon by the authority, no matter at what point it is claimed.

The Commissioner is also under no positive duty to pro-actively consider exemptions or exceptions which have not been referred to by a public authority but may do so if it seems appropriate to him in any particular case. However, he will carefully consider his obligations under the Human Rights Act 1998 and his jurisdiction for data protection in assessing the risks associated with disclosure.

Further Information:

On the validity of late claims for exemptions / exceptions, the ICO will follow the approach endorsed by the Tribunal in the case of the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*. The Tribunal questioned whether a new exemption can be claimed for the first time before the Commissioner, concluding that the Tribunal (and presumably the Commissioner) "may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case". The Tribunal added that "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations".

Factors which the Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:

- the nature of the information in question which the exemption is designed to protect, taking into consideration risks associated with disclosure;
- where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure (see also LTT193);
- where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption; and,
- where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution.

In considering the circumstances of the case when exercising his discretion on whether to accept late claims for exemptions / exceptions, the Commissioner will be pragmatic, taking into account the potential risks associated with disclosure of the information in question. This will include considering the topic of the information; its profile, its sensitivity and the impact of release.

With this is mind, when assessing the circumstances of the case, the Commissioner must carefully consider his obligations as a public authority under the Human Rights Act 1998 (HRA), which prevent him acting incompatibly with rights protected by the HRA. It will therefore be difficult for the Commissioner to refuse to consider any exemptions that relate to rights under the convention (e.g. articles 6 and 8). This would include sections 38 and 40 and in some cases 30, 31, 32 and 41. Given the circumstances surrounding National Security it would also be difficult to envisage a circumstance where the Commissioner would refuse to consider sections 23 and 24 as late exemptions. The exemptions under sections 26 and 27 may also carry similar risks.

In light of the above obligations, there may also be circumstances in which the Commissioner is required to raise an exemption / exception on behalf of the public authority during his investigation.

Where the public authority claims an exemption / exception late

In *BERR v ICO and Peninsula Business Services Ltd,* the public authority claimed s32 and s40 for the first time in their Notice of Appeal. As well as considering the factors set out in *Bowbrick* and *Home Office and MoJ v ICO* at paragraph 20, the Tribunal considered the ICO's acceptance of the late claim for s32, taking into account the nature of the information s32 seeks to protect (information contained within court records, ensuring that FOI does not impinge on other access regimes) as well as the case being in the early stages of the implementation of the Act (paragraph 21).

- The Tribunal noted that Peninsula (the additional party) did not object to the exemption being claimed at a late stage. In addition to these arguments, at paragraph 24, the Tribunal also considered the origin of the information that would be caught by s.32, were that exemption to be engaged:
-
- *"If the information had been generated by the public authority, and was disclosed as a result of a failure to claim the s.32 exemption at an earlier stage, the public authority could be said to be the author of its own misfortune. However, the information in question is held as a result of BERR (MoJ) providing administrative services through the ETS (TS). Furthermore, the information had been provided by individuals and companies, who had a reasonable expectation that it would not be disclosed at an early stage in proceedings, especially given the abolition of the Public Register in 2004. The Tribunal should consider the interests of those who supplied the information to the public authority (and who are not represented in these proceedings), as well as the interests of the public authority itself. Those former interests are best protected by ensuring that if disclosure is to occur, that should be as a result of a decision of the Information Commissioner or of the Information Tribunal. Disclosure should not occur solely because of a failure of BERR to claim the s.32 exemption at an earlier stage".*

Therefore, the Commissioner will consider the nature of the information the exemption in question is designed to protect and where relevant, the origin of the information and the risks associated with disclosure in considering the late application of exemptions.

In the case of *Home Office and Ministry of Justice v ICO,* the public authorities sought to rely, largely in the alternative, on other exemptions they had not previously raised either with the applicant or the Commissioner. The IT accepted a late claim for s40(2) (third party personal data) in light of the ICO's jurisdiction for data protection, but rejected other claims of 31(1); 35(1)(a); 42 and 43(2). The IT stated that it did not accept that it was obliged to accept the late claiming of exemptions; and in this case saw no reasonable justification for doing so (paragraph 75).

Similarly, the Tribunal in the case of DEFRA v ICO (EA/2009/0039) were of the firm view that there was no reasonable justification to allow claims of regulation 12(5)(b) and (d) that were raised for the first time in the Notice of Appeal. The IT noted that the relevant period of delay was substantial; the exceptions now claimed were not considered by the PA nor the Commissioner at the time they should have been by reference to the relevant existing conditions; no explanation was offered for failure to raise earlier and there were no specific third party interests that would be affected (in contrast to if the information was personal data or commercially confidential) (paragraph 12).

Case officers wishing to not consider exemptions or exceptions raised for the first time during an investigation to should seek advice from their group manager or team leader.

Request initially considered under the wrong regime

One major reason why an authority may have failed to consider the correct exemptions or exceptions at the time of the request is where it initially dealt with the request under the incorrect regime.

The Tribunal in *Kirkaldie v IC & Thanet District Council* (EA/2006/0001) determined that the Council could rely on the exception at 12(5)(b) of the EIR (adversely affect the course of justice) having previously relied on s.42 of the FOIA (legal professional privilege). The Tribunal stated that "we would be reluctant to find that a public authority could not argue that a similar exemption or exception could not [sic] be applied under the correct legal instrument." This relied on the similarity between the arguments relevant to the exception and

exemption, and the Tribunal "would not necessarily extend this finding to other exemptions or exceptions which had no relationship to the original exemption or exception claimed".

However, the Commissioner successfully argued in *Archer v IC & Salisbury District Council* (EA/2006/0037) that "each case must be considered on its own facts" (para 45) and not determined solely on whether the exception in question is similar to the exemption originally claimed. In other words, this situation is the same as others in which exemptions or exceptions are claimed out of time, in that the Commissioner has discretion over whether to consider them and will exercise his discretion in the public interest.

It should be noted, though, that these cases arose early in the FOIA / EIR regime when neither we nor the public authorities had as much expertise in identifying environmental information. We would now hope to identify very early on in an investigation whether all or some of the information is environmental. When the Commissioner determines that the wrong regime has been applied, the normal approach will be to require the authority to reconsider the request and cite exceptions or exemptions as appropriate (see LTT190). In such cases, we are inviting the authority to apply different exceptions or exemptions, and would not then refuse to consider them should a further complaint come to us.

Information considered for the first time during investigation

Where information has not previously been located, or has not been considered as part of the request, any exemptions or exceptions claimed during the investigation will necessarily be late.

See LTT193 for how to approach cases in which the information is only found to be held and to be within the scope of the request during the investigation.

Where the Commissioner cites an exemption / exception on behalf of a public authority

In *Bowbrick*, the Tribunal commented that the Commissioner, although not under a positive duty to do so, was entitled to consider exemptions not referred to by the public authority in appropriate cases. For instance, it endorsed that the Commissioner could refer to section 40 in a decision notice where the public authority had not sought to rely upon that exemption, in line with the obligations discussed above, although the primary responsibility for identifying personal data in need of protection still rests with the public authority.

The Tribunal also stated that a public authority would not be entitled to appeal against a decision notice on the basis that the Commissioner ought to have considered a particular exemption which the public authority had not itself considered.

Source	**Details**
IT	Bowbrick / City of Nottingham (28 September 2006); King / Department for Work and Pensions (20 March 2008); DBERR / Friends of the Earth (29 April 2008); Ofcom (4 September 2007) Home Office and MoJ v ICO (20 November 2008) Sugar v ICO and BBC (29 May 2009) Berr v ICO and Peninsula Business Services Ltd (28 April 2009) DEFRA V ICO (15 October 2009)

Related Lines to Take

LTT92, LTT190, LTT193

Related Documents

FS50063475, EA2005/0006 (Bowbrick), EA/2007/0085 (King), EA/2007/0072 (DBERR), EA/2006/0078 (Ofcom), EA/2008/0062 (Home Office/MoJ), EA/2005/0032 (Sugar v ICO and BBC), EA/2008/0087 (Berr v ICO and Peninsula Business Services Ltd) EA/2009/0039 (DEFRA)

Contact		PB/LB/GF	
Date	18/01/2011	**Policy Reference**	**LTT21**

FOI/EIR FOI **Section/Regulation** Ss 1, 10, 17 s50(4) **Issue** Finding in breach of sections 1, 10 or 17

Line to take:

A breach of s.1(1)(b) will arise if the authority was obliged at the time of the request to disclose information, and failed to do so. A breach of 1(1)(a) will similarly arise where the authority had an obligation to confirm or deny that information was held and did not do so. Breaches of s.17, on the other hand, are based on whether the authority accurately communicated its reasons for refusing the request, not on whether it was correct to do so.

The Commissioner will consider what, if any, breaches of s.1(1)(a), 1(1)(b) and the subsections of s.17 have occurred at the time of completion of the internal review. If the public authority has not taken the opportunity to carry out an internal review then the Commissioner will consider the position as it stands at the statutory time limit for compliance under s.10.

Therefore, if the information is disclosable, the Commissioner will find a breach of s.1(1)(b) where the public authority has failed to provide that information by the time of the completion of the internal review. Depending on this finding, there may also be additional breaches of sections 10 and/or 17 relating to the time limits.

This line relates to fully-investigated cases, i.e. cases where the Commissioner has reached a finding on whether a s.1(1)(a) or (b) duty applied at the time of the request. Where information has been "scoped out" of the investigation, he will not usually make any finding on sections 1 and 10. For requests or elements of a request which are included in the decision but have not been fully investigated, for example because the information was disclosed during the investigation, or where the authority has never responded to the request at all, see **LTT187 gateway line**.

Further Information:

Background

Section 1 of the FOIA provides:

"(1) Any person making a request for information to a public authority is entitled –

> *(a) to be informed in writing by the public authority whether it holds the information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him."*

Section 10(1) of the FOIA provides:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

The Commissioner's approach

The main principles guiding the Commissioner's approach are as follows:

- The Commissioner's role is not to look at what the requester has received by the time the DN is issued, but to assess how the public authority dealt with the request (King v IC & DWP [EA/2007/0085]). However, the authority does get an opportunity at the internal review to reconsider its decision and correct any errors:

> *"....the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s50. Parliament clearly intended that a public authority should have the opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made..."* (McIntyre v IC & MoD, [EA/2007/0068]).

Therefore, any procedural breaches, other than those relating to time limits, should be based on what the authority had done by the time of the internal review.

If the authority does not take the opportunity to review its decision then the "cut off point" is the statutory time for compliance (normally 20 days – but see note below). This means that an authority which does not offer an internal review is at a disadvantage in relation to information which is disclosed, for example, after 30 days.

Note that this relates only to the finding of breaches. Whether an obligation under 1(1)(a) or 1 (1)(b) exists, or whether an exemption can be relied upon, must still be determined by reference to the circumstances at the time of the request. So if the authority was under an obligation to disclose information at the time of the request, it will be found in breach of 1(1)(b) if it did not do so at least by the completion of the internal review.

- Findings on 1(1)(a) and 1(1)(b) are based on what the authority should have done, i.e. what it would have done had it come to the same decision as the Commissioner. Note that section 1(1) is not just a general duty to respond to a request. It relates specifically to the two separate duties to confirm or deny that information is held (1(1)(a)) and to communicate the information (1(1)(b)). Therefore if an exemption applies there will be no breach of 1(1)(b). Similarly if there is an exclusion from the duty to confirm or deny, there will be no breach of either 1(1)(a) or 1(1)(b).

  If you have not investigated whether any exemptions applied at the date of the request, for example because the authority disclosed the information during the investigation, then you will not be able to make a determination on sections 1(1)(a) and (b). In this case, you should not use this line but refer to [Gateway].

- Section 17 (refusal notices) requires an authority to accurately communicate any exemptions it is relying on, whether or not the Commissioner subsequently determines that those exemptions are correct. In other words, it is not dependent on the outcome of the rest of the case. Breaches of s.17(1) (a), (b) and (c) will be decided according to whether the authority had accurately communicated its position by the internal review response at the latest. The Commissioner will also find breaches of s.17 if the authority later seeks to rely on an exemption which it did not mention to the requester either in its refusal notice or its internal review (see LTT63).

- Findings on section 10 (time limits) are based on the findings for s.1(1). Again, section 10 is not a general "time limits" section, but refers to the time for compliance with s.1(1)(a) and (b). If there are breaches of both 1(1)(a) and (b) then there will also be s.10(1) breaches for each of these failures. If there is no duty under section 1(1)(a) or (b) then there are no related breaches of s.10. A late refusal notice is a breach of 17(1).

In order to apply the principles, you should follow these steps:

1. Determine what obligations the authority was under at the date of the request, i.e. whether it was required to confirm that it held or did not hold information and whether it was it required to disclose any information.

2. Identify the "cut off point" for determining procedural breaches. In other words, if an internal review was carried out, determine when you consider this to have been completed. If no internal review was carried out, calculate the date for compliance under s.10 (usually 20 working days, but see note below).

3. Identify what actions the authority ought to have taken but had failed to take by the cut off point. This will give you the breaches of 1(1)(a) and 1(1)(b).

4. Identify whether the authority had given an adequate refusal notice by the time of the cut-off point. This will give you any breaches of s.17 in so far as it relates to the content of the refusal notice. Remember that the refusal notice must include any exemptions which the authority relied on at any point including during the investigation.

5. In addition, if the authority had a duty under 1(1)(a) and/or 1(1)(b) and did not meet the statutory time for compliance, find related breaches of 10(1).

If the authority refused the request but did not issue its refusal notice within the statutory time for compliance there is a breach of s.17(1).

Below is a table setting out the potential breaches arising in relation to sections 1 and 10. Section 17 breaches are covered in a separate section later in this line.

Breaches of s.1(1) and s.10

Breaches of s.1(1) and s.10 are based on what you have found the authority should have done (i.e. what it would have done had it come to the same decision as the Commissioner). You must start by determining what the authority should have done, that is, whether it was under any obligation to confirm what information it held and to disclose it. If you are only investigating the 1(1)(a) duty, see the additional notes at the end of the table. If you are not making a finding as to what obligations the authority was under at the time of the request, do not use this table but see the [Gateway LTT].

The table below gives the breaches of 1(1)(a), 1(1)(b) and 10 which have occurred in a number of scenarios. This should be read in conjunction with the section below on s.17.

Upon completion of an investigation there will be one of five outcomes:

(1) the information requested is not held (and the authority is required to confirm this)

(2) the public authority is not required to confirm or deny whether the information is held

(3) the authority is required to confirm or deny whether the information is held but the Commissioner has not reached a finding (yet) on whether the information should be disclosed.

(4) the information is held but was not required to be released

(5) the information is held and should have been released.

Note that you may reach different outcomes in respect to different pieces of information captured by a request.

Once the case outcome has been determined then use the table to identify what the public authority's obligations were in those circumstances and what breaches of sections 1(1) and 10 arise if the public authority has failed to meet those obligations. **It is important to read the whole section of the table that relates to the particular outcome you have reached** in order to fully determine the public authority's obligations in those circumstances.

Case outcome	Relevant section of the Act	Description of action required by PA (failure to take such action will constitute a breach)	Additional information

(1) Information requested is not held, but the authority should have said this.	s1(1)(a)	PA should have confirmed to the complainant that the information is not held.	The Commissioner will find a PA in breach of s1(1)(a) if confirmation has not been provided by the completion of the internal review or the time for statutory compliance.
	s10(1)	PA should have provided confirmation within the statutory time for compliance.	If the PA has not carried out this action within the statutory time for compliance, the Commissioner will find a breach of section 10(1) regardless of the date of the internal review.
(2) PA was not required to confirm or deny whether information is held	s1(1)(a)	PA was not required to confirm or deny whether the information is held and should have provided a refusal notice.	No breach of 1(1)(a), but see section on s.17 below.
	s1(1)(b)	There is no obligation under 1(1)(b) if 1(1)(a) does not apply.	No breach.
	s10	s10 refers to the time for compliance with s1(1) so does not apply.	No breach.
(3) The public authority was obliged to confirm or deny whether information is held	s.1(1)(a)	No exclusion applied and so the PA was required to confirm or deny whether information is held.	The Commissioner will find a PA in breach of 1(1)(a) if confirmation or denial has not been provided by the completion of the internal review (or the time for statutory compliance).
(where the Commissioner is investigating the authority's reliance on an exclusion from 1(1)(a))	s.1(1)(b)	The Commissioner is not in a position to make a finding on whether the information is disclosable.	Do not find a breach (this may be the subject of a future investigation).
	s.10(1)	PA should have provided confirmation or denial within the statutory time for compliance.	If the PA has not carried this out within the statutory time for compliance then the Commissioner will find a breach of 10(1).
(4) Information requested is not disclosable and should not be provided	s1(1)(a)	PA should have confirmed to the complainant that it holds the information requested	The Commissioner will find a PA in breach of s1(1)(a) if confirmation was not provided by the completion of the internal review or the time for statutory compliance.
(applies where either the authority has not claimed an exclusion from 1(1)(a) or else this has been dealt with and rejected in a previous decision notice)	1(1)(b)	The authority was not under an obligation to disclose the information.	No breach.
	s10(1)	PA should have provided confirmation that information is held within the statutory time for compliance.	If the public authority has not carried out this action within the statutory time for compliance, the Commissioner will find a breach of section 10(1) regardless of the date of any internal review..

(5) Information requested is disclosable and should be provided	s1(1)(a)	PA should have confirmed to the complainant that the information is held	The Commissioner will find a PA in breach of s1(1)(a) if confirmation is not provided by the completion of the internal review or the time for statutory compliance.
(applies where either the authority has not claimed an exclusion from 1(1)(a) or else this has been dealt with and rejected in a previous decision notice – it is not possible to come to a conclusion on 1(1)(b) if the authority is claiming an exclusion from the duty to confirm or deny)	s1(1)(b)	PA should have provided the information to the complainant	The Commissioner will find a PA in breach of s1(1)(b) if information is not provided by the completion of the internal review or the time for statutory compliance.
	s10(1)	PA should have communicated the information within the statutory time for compliance.	If the PA has not carried out this action within the statutory time for compliance, the Commissioner will find a breach of section 10(1) regardless of any internal review. There will be two breaches of s.10(1) if the authority has failed to meet the statutory time limits in relation to both 1(1)(a) and 1 (1)(b).

Note that in practice breaches of 1(1)(b) are only likely to be found where the authority is still refusing to disclose this information. Where information has been disclosed during the investigation, the Commissioner will not reach a decision on whether s.1(1)(b) applied at the date of the request (see LTT[A]). Breaches of s.1 (1)(a) can however be included if the authority confirmed that the information was held after the internal review (or statutory time for compliance) but before the DN is issued, as long as the investigation has established that the 1(1)(a) duty existed at the time of the request.

The statutory time for compliance

The date for statutory compliance is usually 20 working days after the date of the request. This has been extended for specific public authorities and in certain circumstances in accordance with the 'Time for Compliance Regulations' - see LTT47.

In addition under s10(3) a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest in maintaining an exemption. In such cases the public authority is still required to cite and explain the exemption claimed within the 20 working days. The extension to the time limit in s.10(3) applies only where it is necessary in order to consider the application of the public interest test, i.e. where a qualified exemption is engaged.

Moreover, the extension can only be for as long as is reasonable in all the circumstances. The Commissioner's Good Practice Guidance 4 indicates that in no case should this be more than an additional 20 working days, i.e. 40 working days in total.Therefore where a public authority takes longer than 40 working days to comply with a request it will have breached s10(1) unless the Commissioner is persuaded that such an extension is reasonable because of exceptional circumstances. Any extension beyond the additional 20 working days may however raise good practice issues and should be referred to the Enforcement team

If the authority has not provided an internal review, then the statutory time for compliance will also be the last date at which it can comply with its obligations. If it has not done so by that date then it will be in breach.

Breaches of s.17

Section 17 requires the authority to accurately convey its position as to why it is refusing a request. Therefore, the outcome of the request is not relevant – there is no breach of s.17 for citing an exemption which did not apply.

- There will be breaches of s.17(1)(a), (b) and/or (c), 17(5) or 17(7) if the public authority refused the request but failed to issue a refusal notice complying with those sections (as relevant) at or before the internal review, or at the statutory time for compliance if no internal review was carried out.
- Breaches of s.17 will also be found if the authority seeks to rely on another exemption during the investigation which it had not mentioned at or before internal review (see LTT63)
- There will additionally be a breach of s.17(1) if the authority issued its refusal notice later than 20 working days (or as extended by the Time for Compliance Regulations).

Where the public authority is seeking to rely on a qualified exemption, there will be a breach of s.17(1) if it fails to notify the requester of this within 20 working days (or as extended by the Time for Compliance Regulations) and a breach of 17(3) if it takes more than a further 20 working days to communicate the outcome of the public interest test.

Note that there is one limited circumstance (relating to vexatious or repeated requests – see s.17(6)) in which an authority is not required to provide any refusal notice.

Further guidance on 1(1)(a) only cases

When a public authority has claimed an exclusion from the duty to confirm or deny, the DN will relate only to section 1(1)(a). The decision notice itself cannot confirm or deny whether information is held as the authority may appeal the Commissioner's decision and the Commissioner must not undermine this right of appeal by disclosing that information is (or is not) held. Therefore no finding on 1(1)(b) can be included in the decision notice.

If the Commissioner does not accept the authority's reliance on an exclusion from the duty to confirm or deny, then the decision notice will order the authority to confirm or deny whether information is held and, in relation to any information which may be held, to either disclose it or issue a valid refusal notice.

The following breaches will be included in the DN:

- s.1(1)(a)
- s.10(1) related to the breach of 1(1)(a)
- any breaches of s.17 as per the explanation on s.17 above

If the authority subsequently confirms that it holds information but refuses to release it, this may result in a further complaint to the Commissioner.

If a subsequent DN is issued, breaches will be investigated and recorded as normal following this line, i.e. as at the time of the internal review or the time for compliance with the original request, rather than as at the time for compliance with the earlier decision notice. Failure to comply with the decision notice would be dealt with as contempt of court instead. However, it is not necessary to repeat any breaches which have already been found in the earlier DN. Rather, the later DN can include a line referring to the earlier one and confirming that these findings still stand.

EIR

Although this line refers to the FOIA, the principles outlined in the "Commissioner's approach" section above would also apply to cases under the EIR, reading in the equivalent provisions. The main differences are as follows:

- The statutory time for compliance will be 20 working days in all cases, except where the authority can legitimately extend it to 40 due to the volume and complexity of the information.
- Public authorities are under a legal obligation to provide an internal review in relation to EIR requests – see LTT191
- "Not held" is an exception under the EIR, so a refusal notice would be required.
- Whereas the right to information is split into two parts in the FOIA, s.1(1)(a) and s.1(1)(b), both aspects are covered by reg.5(1) of the EIR. There are very limited circumstances in which an authority can claim an exclusion from the duty to confirm or deny under the EIR; however such cases should be dealt with as for s.1(1)(a) cases (described above) with the exception that any breach of this obligation would be phrased as "reg.5(1) in so far as it requires the authority to confirm or deny whether it holds information".

PREVIOUS / NEXT

Source	Details
	Bowbrick / Nottingham City Council
Policy Team, IT, GS	King / DWP (20 March 2008)
	McIntyre / MOD (11 February 2008)

Related Lines to Take

LTT39, LTT47, LTT63, LTT101, LTT187, LTT191

Related Documents

Awareness Guidance 11, EA2005/0006 (Bowbrick), EA/2007/0085 (King), EA/2007/0068 (McIntyre), Robust case handling policy, Good Practice Guidance No.5

Contact		LA / HD / KP	
Date	18/01/2011	**Policy Reference**	**LTT29**

FOI/EIR FOI **Section/Regulation** s10 **Issue** Date of receipt of request, working days & variations to time for compliance

Line to take:

The date of receipt of a request may be a day when an office is closed, such as a weekend, bank holiday or other office closure.

For the purpose of calculating the time for compliance with a request, working days exclude days which are bank holidays anywhere within the UK.

The time allowed for compliance with a request may be varied in accordance with the "Time for Compliance Regulations"

Further Information:

Section 10(1) states that "a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".

Date of receipt

Section 10(6) states that the "date of receipt" is "the day on which the public authority receives the request for information".

There is no requirement for this to be a working day. Indeed the "date of receipt" could be at a weekend, on a bank holiday or any other day on which an office is closed.

We acknowledge that the actual date of receipt when an office is closed may not be entirely certain, particularly with requests submitted in hard copy form.

Working Days

Section 10 of the Act defines a working day as "any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

This means that a day which is a bank holiday in any of the four nations of the UK is a non-working day for the purposes of the FoIA. Therefore a day which is say, only a bank holiday in Northern Ireland but not in England, Scotland or Wales (such as St Patrick's Day) will count as a non-working day in all countries covered by the FoIA.

Where offices close for privilege days in addition to bank holidays, these do not count as non-working days for the purposes of the FoIA.

In *Berend v ICO & London Borough of Richmond upon Thames (LBRT)* the Information Tribunal considered the length of a working day. It found that "working day" in the context of FOI referred to the definition given above, and that "There is no definition within the Act as to the length of a day and in the absence of any such definition, we are satisfied that a day ends at midnight"

Example

A public authority receives a request on a Saturday when it is closed. That counts as the day of receipt. However the time for compliance commences on the first working day after that, which is likely to be the following Monday, or, if the Monday is a bank holiday, the Tuesday.

Time for Compliance Regulations (Statutory Instruments 2004 No. 3364, 2009 No. 1369 and 2010 No. 2768)

In addition to the extensions to time allowed for the collection of fees and for consideration of the Public Interest Test for qualified exemptions, the Time for Compliance Regulations provide details of when the normal 20 working day requirement can be varied.

In all cases, whether or not a variation to the normal 20 working day limit is allowed, the Act requires a public authority to respond "promptly"

The variations allowed by the Time for Compliance Regulations are as follows :

Variations that may be applied without prior reference to the Information Commissioner :

Maintained schools and academies

The twentieth working day following the date of receipt can be read to mean the earliest of

- The twentieth working days following the date of receipt, excluding any day which is not a "school day", or
- The sixtieth working day following the date of receipt

A "school day" means any day on which there is a session (i.e. any day in which pupils are in attendance).

Effectively school holidays and "inset" or training days on which no pupils are in attendance, are not counted as working days.

These provisions have applied to maintained schools in Northern Ireland since June 2009 (The Freedom of Information (Time for Compliance with Request) Regulations 2009) .

Academy schools have been added to Schedule 1 of the FoIA by The Academies Act 2010. This will be in effect for existing academies from January 2011. The "new style" academies, converting from maintained schools, have been covered since September 2010. Subject to that schedule, The Freedom of Information (Time for Compliance with Request) Regulations 2010 apply the same time obligations to academy schools as for maintained schools.

Archives

Where the request is received by an appropriate records authority or by a person at a place of deposit appointed under section 4 (1) of the Public Records Act 1958 and the request relates to information :

- That may be contained in a public record; and
- That has not been designated as open information for the purposes of section 66 of the FoIA.

then the time limit can be extended to the thirtieth working day following the date of receipt.

Effectively 30 working days are allowed for requests for transferred public records that haven't been designated as open information, so that the records authority has time to consult with the responsible or transferring public authority who may need to consider if any of the information is exempt.

Variations that may only be applied at the discretion of the Information Commissioner :

The following variations to the time limit are only available at the discretion of the Information Commissioner. They will only apply if a public authority has, within twenty working days following the date of receipt of the request, applied to the Commissioner for an extension of the time in which it must respond to a request, and the Commissioner has agreed to extend that time.

It is unlikely that actual requests for extensions would be dealt with by FoI Complaints Case Officers, as this issue would arise at a stage prior to a valid section 50 complaint being received. However, Case Officers may need to retrospectively consider whether this requirement has been met when deciding if a time breach has occurred.

Armed Forces

Where a request for information cannot be met without obtaining information (recorded or unrecorded) from any individual (whether or not a member of the armed forces) who is actively involved in an operation, or in

preparation for an operation, of the armed forces then the time for a response can be extended at the discretion of the information Commissioner.

The Commissioner may extend the time for a response to one he considers reasonable in all the circumstances, but not exceeding the sixtieth day following the date of receipt of the request.

Information held outside the UK

Where a request cannot be complied with without obtaining information held outside the UK, and because of this the public authority is unable to comply within the normal time limit, then the time for a response can be extended at the discretion of the information Commissioner.

The Commissioner may, at his discretion, extend the time allowed for a response to one he considers reasonable in all the circumstances, but not exceeding the sixtieth day following receipt of the request.

PREVIOUS / NEXT

Source	**Details**
FoI (Time for Compliance) Regulations 2004, 2009 and 2010	Statutory Instruments 2004 No. 3364, 2009 No.1369 and 2010 No.2768
Academies Act 2010	Academies Act 2010, s10
Information Tribunal	Berend / LBRT

Related Lines to Take

n/a

Related Documents

Statutory Instruments 2004 No. 3364, 2009 No. 1369 and 2010 No. 2768

Academies Act 2010

FoI (Time for Compliance) Regulations, Awareness Guidance 11, EA2006/0049&50 (Berend),

Contact		LA / VA	
Date	14/12/2010	**Policy Reference**	**LTT47**

FOI/EIR FOI **Section/Regulation** s43 **Issue** Evidence from third parties

Line to take:

When considering prejudice to a third parties commercial interests, it will not be sufficient for the public authority to speculate about prejudice that may be caused, rather arguments originating from the third party itself will need to be considered.

Further Information:

In Derry City Council v The Information Commissioner Derry City Council claimed that section 43 applied as releasing the requested information would prejudice the commercial interests of both itself and a third party, Ryanair.

Ryanair were not represented at the Tribunal nor were they joined to the proceedings.

The Commissioner had considered arguments put forward by Derry City Council in support of its assertion that Ryanair's commercial interests would be prejudiced by the release of the requested information. However it was accepted at the Tribunal that these were the Council's own thoughts on the matter and were not representations made to the Council by Ryanair.

The Tribunal did not take the commercial interests of Ryanair into account in reaching its decision commenting that *"Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced."*

It could be taken from this that when considering prejudice to a third party's commercial interests only arguments provided by the third party itself in relation to the request should be taken into account and any arguments formulated by the public authority should be disregarded.

However the Commissioner considers that whilst this approach was appropriate in the particular circumstances of the Derry case, in other cases it may be that, due to time constraints for responding to requests, arguments are formulated and argued by a public authority, based on its prior knowledge of the third party's concerns. The Commissioner accepts that these may be valid arguments and that where a public authority can provide evidence that they genuinely reflect the concerns of the third party involved then they may be taken into account.

If it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then any speculative arguments put forward by a public authority should clearly not be taken into account.

In any case it will be necessary to establish the source of and evidence for any arguments about the prejudice to the commercial interests of a third party and to weight them accordingly.

The Derry approach has also been followed by a differently constituted Tribunal in the case of Keene v the Information Commissioner & the Central Office of Information (COI) in which arguments were put forward by two witnesses on behalf of the COI that it would prejudice the commercial interests of the companies who submitted bids in a tendering exercise to secure a reprographics contact to disclose the COI's evaluation of those bids. The Tribunal said that *"....none of the businesses which submitted tenders are parties to this appeal, and there is no evidence before us from any of them as to whether they would suffer any prejudice, much less as to what prejudice they would suffer"* (para 39).

PREVIOUS / NEXT

Source	**Details**
Information Tribunal	Derry City Council / Hutton (11 December 2006) Keene / Central Office of Information (14 September 2009)

Related Lines to Take

n/a

Related Documents

EA/2006/0014, FS50066753, e-mail Boris Wojtan to FoI 13/12/06, Awareness Guidance 5, EA/2008/0097 (Keene)

Contact		LA / HD	
Date	18/11/2010	**Policy Reference**	**LTT55**

FOI/EIR EIR **Section/Regulation** Reg 2 (1) **Issue** Defining environmental information

Line to take:

In deciding whether information is "environmental information" or not close reference must be made to the provisions of Regulation 2(1)(a) to (f). It is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.

Further Information:

In some early cases the ICO adopted the approach that where a complaint was likely to have the same outcome under both FOIA and EIRs, then an FOI Decision Notice should be issued stating this view but not making a formal decision as to whether or not the EIRs applied

Our approach now, on cases of this kind, is to always give full consideration to whether or not the information falls within the definition of environmental information. If the information is found to be environmental then the decision should be made and any Notice issued under the EIRs. It will not be acceptable to adopt the "same outcome rule" previously applied.

Where ever possible the decision on whether the information is environmental or not should be made based on a review of the actual information that has been identified as held by the public authority, rather than on an assessment of the request. An assessment based on the wording of the request should only be made where this is unavoidable, for example where the public authority claims that information is not held *.

The trigger for considering whether a request should be dealt with under the EIRs rather than under FOI will usually be that the information "looks" environmental or has an environmental feel. Whilst this may be a necessary starting point it should not be used as the final basis for treating the requested information as environmental and the following approach should be taken to validate that the EIRs do in fact apply. It should also be noted that information that does not immediately "look" environmental could also fall under the EIRs when considered in detail

Linking via the Regulations

Close reference should be made to the provisions of Regulation 2(1)(a) to (f) and the information must be linked via the relevant section(s). However, it is not necessary for the information itself to have a direct effect on the environment, in order for it to be environmental.

To define as environmental information under 2(1)(a):

- the information itself must be **on** the state of the elements of the environment.

To define as environmental information under 2(1)(b):

- the information itself must be **on** a factor.
- the factor (not the information itself) must affect or be likely to affect the elements in 2(1)(a).

To define as environmental information under 2(1)(c):

- the information itself must be **on** a measure or an activity
- the measure or activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).

To define as environmental information under 2(1)(d):

- the information itself must be **on** reports on the implementation of environmental legislation.

To define as environmental information under 2(1)(e):

- the information itself must be **on** "cost benefit and other economic analyses and assumptions"
- the "cost benefit and other economic analyses and assumptions" must be used within the framework of the measures and activities referred to in 2(1)(c).

To define as environmental information under 2(1)(f):

- the information itself must be **on** one of the following :
  1. the state of human health and safety (which may include contamination of the food chain)
  2. conditions of human life
  3. cultural sites and built structures
- the information is environmental inasmuch as the state of the elements in 2(1)(a) or, through those elements, the matters in 2(1)(b)&(c) may affect 1. to 3. above.

The link back to 2(1)(a)

Using the linking process detailed above, each of the sections 2(1)(b)(c)(e) & (f) will ultimately link back to one or more element(s) under 2(1)(a) as follows:

(b) must link back to (a)

(c) must link back to (a), either directly or via (b)

(e) must link back to (c), which in turn must link back to (a) either directly or via (b)

(f) must link back to (a), either directly or via (c) and/or(b)

For example under 2(1)(f) it is not sufficient for information to be on the state of human health and safety, it must be on the state of human health and safety *as affected by the state of the elements of the environment.* This may be a direct effect or via a relevant factor, measure or activity. It should be noted that the linking process for 2(1)(f) is slightly different than for (b)(c)&(e) in that it works the opposite way around. I.e. the elements in (a) ultimately affecting the things listed in (f), rather than the things listed in (b)(c)&(e) ultimately affecting the elements in (a).

2(1)(d) is worded differently and does not require the same explicit linking process, rather it identifies a specific category of information.

Defra's guidance

Defra has recently updated its guidance on defining environmental information, and the current version broadly concurs with the ICO approach.

However, it should be noted that Defra's previously published guidance on this issue suggested that in borderline cases, consideration should also be given to the principle of "proximity/remoteness" and that, at least for information falling under 2(1)(c) to (f), the *information itself* would have to have a direct effect on the environment. Some public authorities may still advance arguments of this nature, however the Commissioner would not accept such arguments and would instead follow the line as set out in this LTT.

ICO view of the " Tests" to be used

Our view is that a proximity / remoteness test as previously articulated by Defra does not apply.

We think that there is a proximity / remoteness style test, but that this is a test of the proximity / remoteness of the information itself to the relevant element, factor, measure, activity, analyses etc under 2(1)(a) to (f). This "information on" test would apply in every case. LTT82 provides further guidance on this point.

Under 2(1)(a) and 2(1)(d) there will be no further test.

For 2(1)(b) (c) (e) and (f) there will also be a second test. This will be a test to see whether the identified factor, measure, activity etc can ultimately be linked back to the elements of the environment under 2(1)(a). This "linking" test is briefly outlined under the heading "The link back to 2(1)(a)" above. There is a separate LTT on "affecting or likely to affect" (LTT84).

*** Defining as environmental information without viewing the information**

As stated above, wherever possible the decision on whether the information is environmental or not should be made based on a review of the actual information that has been identified as held by the public authority, rather than on an assessment of the request. An assessment based on the wording of the request should only be made where this is unavoidable.

Where this does occur, for example where the public authority claims that information is not held, or where section 12 or section 14 are being claimed and so the public authority has not extracted the information, then in may be useful to consider and /or ask the public authority the following types of question :

- Can a sample of information be provided?
- Does the wording of the request suggest EIRs would apply (e.g. request for information about waste disposal)
- Does the context of the request suggest EIRs would apply? (e.g. if the complainant has been corresponding with a public authority about a proposed building development and then asks for all for copies of correspondence between the pa and the building contractor)
- Has the complainant made arguments that suggest the information would be environmental?
- How does the public authority hold the information and for what purpose is it held (e.g. information is held by the planning department in a planning file
- The public authority in question (e.g. DEFRA)

These suggestions may not help in every case, and shouldn't be taken to mean, for example, that everything that DEFRA holds is environmental information, However considering the overall context in this way may assist in making a judgement in this situation.

PREVIOUS / NEXT

Source **Details**

Policy team, line agreed in meeting with GS (18/05/07)

Related Lines to Take

LTT82, LTT83, LTT84, LTT122

Related Documents

Boundaries between EIR & FOI -Defra, C-316/01, Council Directive 90/31EEC & 2003/4/EC, Aarhus Implementation Guide

Contact		LA	
Date	24/08/2009	**Policy Reference**	**LTT80**