Current lines to take

LTTs are in numerical order.

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FOI/EIR FOI **Section/Regulation** s40 **Issue** Anonymised Personal Data

Line to take:

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

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

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

Further Information:

For the Commissioner's view on the recent DoH (abortion stats) case - SEE IT SUMMARY. Please also note that the DoH has appealed the Tribunal's decision to the High Court.

The Commissioner's approach

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

The alternative view

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

The Commissioner does not accept this approach because it has the potential to restrict the amount that can be disclosed in, broadly speaking, two scenarios.

The most obvious is where it is not possible to identify any individual from any of the information falling within the scope of the request, but the data controller holds additional, unrequested, information which would allow the data controller to identify individuals from that which has been requested. A good example of this is where the information that has been requested consists of a table of statistics. Although it may not be possible to identify anyone from the statistics alone, the data controller that produced those statistics will have the raw data from which those statistics were compiled and so will be able to identify those individuals that the statistics refer to. By adopting the alternative view outlined above, even though the statistics themselves were anonymised they would still be considered personal data since the data controller held additional, identifying, information. Therefore it would be necessary to consider the application of the data protection principles before disclosing the statistics. This could be problematic for example, where the statistics related to criminal offences or health issues and would therefore have to be treated as sensitive personal data.

The second situation is where individuals can be identified from the information that has been requested when considered in its entirety. For example, an applicant requests a report into a major overspend at a local authority involving allegations of corruption. The report deals with the actions, responsibilities and competences of the officials involved. It may be possible to redact information from that report that identifies the individuals concerned. However under the approach outlined above the disclosure of the residual, redacted, anonymised information would still require consideration of the data protection principles.

The Commissioner's approach in more detail

Therefore the Commissioner considers that even where the data controller holds that additional 'identifying'

information, this does not prevent them from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone and thus would no longer be personal data.

This would accommodate the disclosure of information in both the scenarios discussed above without having to consider the data protection principles. The table of statistics could be disclosed because no one could be identified from the statistics alone. And similarly the redacted version of report could be disclosed because, again, at the point of disclosure, no one could be identified from it.

Truly anonymised data

However before deciding whether the information is anonymised and so can be disclosed without reference to the data protection principles it is also necessary to go on to consider the information which is available to the public. The test of whether the information is truly anonymised is whether a (or any) member of the public could identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case.

Returning to the two scenarios above, with the table of statistics it would still be necessary to consider whether, for example, a low cell count revealing that only one person in a small geographical area had a particular illness would allow people from that area to use their local knowledge to identify that person. Similarly with the report into the treatment of patient it would be necessary to consider whether information gleaned from any news reports of the allegations would enable someone to identify who the references in the report related to. In practice the onus would be on the public authority to explain how such identification may occur.

Policy Delivery is currently considering whether it is possible to provide any additional guidance on this issue.

If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information (i.e. the information had been truly anonymised) then the information can be considered for disclosure without any reference to DPA principles.

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

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

Department of Health – Abortion Statistics Case

The Decision Notice (FS50122432)

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

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

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

At paragraphs 45 & 46, the Commissioner confirmed that he was not persuaded by this argument and said

that "...the statistical information is so far removed from the information on the Abortion Notification forms that it no longer retains the attributes of personal data. In reaching this view the Commissioner has noted that the DoH accepts that an individual cannot be identified by the requested information alone..."

Thus it was the Commissioner's conclusion that anonymous information is not personal data and provided the data subject is not identifiable upon disclosure to a third party, it is not personal data. The Commissioner sought to rely upon the House of Lords decision in the CSA v Scottish Agency case referred to above.

The Commissioner accepts that this approach has not been adopted in previous cases, for example, FS50133250 (Caerphilly County Borough Council – pupils excluded from schools as a result of drugs finds).

The Tribunal's Decision (EA/2008/0074)

On appeal to the Tribunal, the Commissioner maintained the position taken in the decision notice. The DOH argued that the statistical information is not anonymous in the hands of the data controller.

The Tribunal concluded that "the question of fact for the Scottish Commissioner (in the CSA case) was whether the process of barnardisation would mean that the data could not be reconstituted to its original form by the agency, in which case it could be released without further reference to the DPA. Consequently the Tribunal is satisfied that for the purposes of section 40(2)(a) FOIA, the statistics derived from the HSA4 forms *constitute personal data* pursuant to section 1(1)(b) DPA *in the hands of the DoH, because the data relates to individuals who may be identified from those data and other information held in the HSA4 forms*." (para 43).

Thus, the Tribunal found that the disputed information was personal data in the hands of the DoH. However the Tribunal also concluded that the likelihood of identifying any of the individuals was so remote as to make any disclosure fair. This lack of identifiability also meant that Schedule 2, condition 6 was satisfied given that the disclosure would serve the legitimate interest in publishing abortion statistics but would not cause any unwarranted interference with the rights of the data subjects.

Therefore, the Tribunal arrived at the same conclusion as the Commissioner but on the alternative premise that the statistical information was personal data in the hands of the data controller.

The DoH has now appealed the decision of the Tribunal to the High Court, (it has been listed for early Feb 2011, however the actual decision may not be promulgated until later in 2011.) However pending any High Court judgment, the Commissioner will maintain his position that anonymous information is not personal data and that as long as the data subject is not identifiable upon disclosure to a third party, it is not personal data.

PREVIOUS / NEXT

Source	**Details**
	Department of Health (Decision Notice -28 July 2008)
Policy Team	Department of Health / Pro-Life Alliance (15 October 2009)
	Common Services Agency / Scottish Information Commissioner

Related Lines to Take

LTT71, LTT162

Related Documents

FS50122432 (DoH), [2008] UKHL 47 (Common Services Agency), DP Technical Guidance "Determining what is personal data", EA/2008/0074 (DoH),

Contact		HD / RM	
Date	11/11/2010	**Policy Reference**	**LTT144**

FOI/EIR	FOI EIR	Section/Regulation	s40 Reg 13	Issue	Naming officials representing public authorities and third party organisations, such as lobbyists

Line to take:

Officials representing public authorities or third parties should expect their **names** to be disclosed where they communicate with one another in their role as a spokesperson.

Any official who is a spokesperson should expect their name to be disclosed, regardless of whether they are senior or junior staff.

Where names can be linked to their contributions, then providing those comments relate to their professional capacity and do not reveal information of a personal nature, then the name and associated comment should generally be disclosed.

In the rare situation where a junior official who does not normally act as a spokesperson and is only doing so as a stand in for a more senior colleague, then it would be reasonable for that junior official to have an expectation of privacy and to not be named.

It would also be a reasonable for any junior official who is not a spokesperson to have an expectation of privacy and to not be named.

Further Information:

(**Note**: This line focuses on the naming of officials in the context of communications between lobbyists and public authorities. It is possible that the broad principles developed in this line may apply to the naming of officials and third parties in other situations but this will have to be considered carefully on a case by case basis.)

In DBERR v ICO & FoE (Friends of the Earth) the Tribunal considered whether the names of officials contained in records of meetings and correspondence between the Confederation of British Industry (CBI), an influential body representing and lobbying on behalf of British industry, and the department were exempt under s40(2) or reg 13. The department had disclosed the names of its own officials but had withheld all the names of the CBI's representatives except that of its Director General, Sir Digby Jones.

The Tribunal's decision provides some useful guidance that the Commissioner would wish to follow in cases that concern access to information on the dialogue between a public authority and the representatives of any third party, other than a natural person, such as a company or lobbyists and includes information recorded in both correspondence and notes of meetings.

Are names in this context personal data?

The Tribunal first considered whether the names of officials was personal data. This may seem a very obvious question and following the DP Technical Guidance – Determining What is Personal Data, the answer is clearly 'yes' as names are the most obvious way of identifying or distinguishing one individual from another and so brings them easily within the definition of personal data as set out in s1(1) of the DPA.

However a differently constituted Tribunal in Harcup took the view that the names of individuals attending events hosted by Yorkshire Forward, a regional development agency, was not personal data. The basis of the Harcup decision was that following the Durant judgement, the focus of the information was on the businesses represented by those individuals and that the information had little or no biographical significance to those individuals. The Commissioner disagrees with the Harcup decision.

In DBERR, although the Tribunal noted the Harcup decision, it found that;

> "*...in relation to the facts in this case that the names of individuals attending meetings which are part of the Disputed Information are personal data. This is because the individuals listed as attendees in the minutes and elsewhere in the Disputed Information will have biographical significance for the individual in that they record his/her employer's name, whereabouts at a particular time and that he/she took part in a meeting with a government department which*

would be of personal career or business significance." (paragraph 91)

The Tribunal continued;

> "*We make the same finding even where the individual did not attend the meeting but was on a circulation list only for the minutes where the name is associated with an organisation.*" (paragraph 91)

It is anticipated that in the majority of cases the reliance on the published technical guidance referred to above will be sufficient to establish that names are indeed personal data. However the analysis above may assist case officers should a complainant raise the Tribunal's approach in Harcup to argue that the information does not constitute personal data.

Reasonable Expectations

The Tribunal was guided by European Case law when considering what the reasonable expectations of the parties involved would be regarding the disclosure of this personal data. In broad terms the Court of First Instance in the Bavarian Lager Case* established the principle that third parties, such as representatives of a trade organisation, who attend official meetings cannot have an expectation that their names will be kept private where their privacy is not adversely affected by the mere release of a record of who attended the meeting. This position was accepted by DBERR (see para 95).

However DBERR maintained that the Court of First Instance provided no guidance in relation to whether personal data attributing comments to individuals should be released or the seniority of officials about whose personal data could be released. The ICO argued that in light of FOIA there could be not blanket expectation of confidentiality but recognised that the there may be an unfairness if the names of junior employees were disclosed.

The Test

Having considered these arguments and the jurisprudence provided by both the Court of First Instance in the Bavarian Lager Case and a special report by the European Ombudsman on the same matter, the Tribunal (at para 101) applied the following test to the disputed information which should be followed by caseworkers in relation to the **names** of officials recorded in discussions between government departments and lobbyists.

- Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;
- The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.
- Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.
- In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;
- The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.
- The extent of the disclosure in relation to the named official will be subject to the application of the test set out in the 6th condition, schedule 2 [DPA], in relation to the 1st data protection principle and will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business.

For the sake of clarity the term 'spokesperson' is taken to be any official, of either the department or the lobbyist, whose job role involves representing the views of that organisation to an external audience and actively participating in such debates/dialogue. Essentially any official whose job role encompasses being a

spokesperson should expect to be named in disclosures regardless of their seniority. It therefore seems likely that it will capture the majority of attendees except those junior staff with purely administrative duties and, exceptionally, those whose job role would not normally involve participation in such meetings but are standing in for more senior colleagues.

It's clear from the third bullet point that generally speaking there would be no breach of the data protection principles if named individuals were associated with their actual contribution. It is noted that the third bullet point states that there will be '**no**' expectation of privacy, although this establishes a strong rule of thumb, it may be rather overstating the point since the final bullet point recognises that it is still necessary to consider the nature of those comments. Where the comments simply reflect the views of the body that individual represents the information is unlikely to be exempt under s40(2). Similarly where the comments relates to the individual's professional life then, again, it's likely that the information would not be exempt under s40(2). If the information related to an individual's private life then it is less obvious that disclosure would satisfy the tests established by the 6th condition of schedule 2. Having said that we consider that it will be very rare for such personal information to be included in the records of a meeting etc.

The test above was applied to the names of those attending a meeting. However considering the Tribunal's comments at para 91 that the names of individuals on a circulation list where associated with an organisation was also personal data, the Commissioner's view is that where names on a circulation list relate to either spokespeople or senior officials then those individuals should also expect their names to be disclosed.

Creekside Forum v ICO and DCMS (EA/2008/0065)

The Tribunal's decision in Creekside Forum v ICO and DCMS broadly supports the approach set out in the above test. In this case, the requested information related to the issuing of a certification of immunity from listing for Borthwick Wharf in London, and included letters and communications to the DCMS which featured the names of a range of individuals. The Commissioner, in his decision notice, had found that all of the names could be withheld under regulation 13 (personal data) of the EIR. The Tribunal disagreed with the Commissioner, distinguishing the fairness of disclosure in relation to the capacity an individual wrote in.

Private individuals and junior civil servants

The Tribunal found that DCMS were entitled to withhold the names of private individuals, junior civil servants and some individuals representing third parties under regulation 13, concluding that they would have had an expectation of privacy (see paragraphs 64-67). In relation to civil servants, the Tribunal confirmed that the more junior a representative in an organisation, the less necessity there is to disclose their name and the more unwarranted the intrusion (paragraph 75). The Tribunal accepted that the role of junior civil servants is largely administrative, without significant responsibility, or a public profile or personal responsibility for policies and therefore should not be exposed to public censure (paragraph 79-80).

Individuals representing third party organisations

However, for the majority of individuals representing third party organisations, the Tribunal found that disclosure would be fair. The Tribunal considered that there is a difference between an expert organisation who has been approached to provide an opinion, and a lobbying organisation which approaches the public authority as part of a campaign, or a commercial organisation who stands to gain by their involvement in the process; noting that the former might be seen to be a more reluctant participant in the process (paragraph 76) (which presumably informed their decision as to which information would be disclosed).

The Tribunal's principles for ordering disclosure of the names of individuals representing third party organisations were consistent with the test identified above, with particular focus on the seniority of the representatives and the fact that they were representing the views of an organisation and actively participating in dialogue, meaning that they would have no reasonable expectation of privacy.

The Tribunal concluded that it would not be unfair to disclose the information on the following basis:

> *"no individual working on behalf of or representing an organisation (including lobbying groups) would have an expectation that their details would remain private unless they expressed a concern. Being representatives of an organisation, there would be less general expectation of privacy. The contact details relate to work of those of the organisation rather than personal details and the individuals are accountable to the membership of company, and would expect*

some degree of scrutiny." (paragraph 70)

The Tribunal countered DCMS's point that it is the name of the organisation rather than individual names that are important, by noting that "*rank, status, interests and qualifications of a person in an organisation are of relevance in assessing the weight given to the opinion*" (paragraph 73) and that "*knowing who is lobbying, who has been consulted, their seniority and role can add to the understanding of a substantive decision*".

* Case reference T-194/04 – please note this is separate to the later judgement of the ECJ on the same case. Although the actual decision was overturned by the later ECJ judgement (ref C-28/08 P), the Commissioner considers that the Court of First Instance's findings on reasonable expectations stand.

PREVIOUS / NEXT

Source	**Details**
	Harcup (5 February 2008)
	Michael John Durant v FSA (Court of Appeal Jul 2003)
IT, Court of Appeal	DBERR v ICO & FoE (29 April 2008)
	Creekside Forum (28 May 2009)

Related Lines to Take

LTT148, LTT149,

Related Documents

EA/2008/0065 (Creekside), EA/2007/0072 (DBERR), EA/2007/0058 (Harcup), [2003]EWCA Civ 1746 (Durant)

Contact		RM / GF	
Date	14/09/2010	**Policy Reference**	**LTT152**

FOI/EIR	FOI	Section/Regulation	s31(1)(g), s31(2)	Issue	Functions exercised for specified purposes under section 31

Line to take:

In order for the exemption to be engaged, the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) to be a function which is:

(i) designed to fulfil one of the purposes specified in s31(2) and,

(ii) imposed by statute (or in the case of a government department, authorised by the Crown) and,

(iii) specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).

The Commissioner does not accept that this exemption may be engaged where the functions identified by the public authority have not been specifically imposed on that authority by statute (or in the case of a government department, by the Crown).

Further Information:

Section 31(1)(g) states that information which is not exempt under s30 will be exempt if disclosure would, or would be likely to, prejudice –

"…. the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

However, the Act does not define the term 'function' and nor does it set out how the terms 'function' and 'purpose' inter-relate. As such, there would seem to be two ways in which this exemption can be interpreted - either that the exemption may be engaged where any function is being exercised provided it is being exercised for one of the specified purposes or alternatively that the exemption may only be engaged where the function being exercised is a function designed for the specified purpose.

The Commissioner had previously adopted the first interpretation but this issue has recently been raised in casework and the Commissioner has taken this opportunity to reconsider the matter and has looked at the following for clarity:-

Explanatory Notes

The explanatory notes which accompany the Act say in relation to section 31(1)(g) as follows:-

"…This subsection essentially protects the conduct of investigations and proceedings which may lead to prosecutions. …."

Whilst this is not particularly conclusive of the interpretation to be taken, it goes to show that the intention behind the drafting was concerned with protecting those activities which would lead to prosecutions.

Case-law

The House of Lords considered the meaning of the word 'function' in the case of Hazell v Hammersmith & Fulham London Borough Council which questioned whether 'swap transactions' facilitated, were conducive or incidental to the Council's acknowledged function of borrowing under s111 of the Local Government Act 1972. Lord Templeman provided the following important quote at page 23:

"…..in section 111 the word 'functions' embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions…."

This provides for a wide interpretation of the term 'functions' to include an authority's powers and duties and although Lord Templeman was speaking with specific reference to s111 LGA 1972, the Commissioner considers that this interpretation can be applied to other legislation which refers to functions such as s31(1)(g) FOIA. However, the Commissioner considers that this wide interpretation has been limited by the phrase – *"the sum total of the activities Parliament has entrusted to it"*.

Firstly, Lord Templeman has referred to *"activities"*. The Commissioner considers that this refers to a positive duty on a public authority rather than an obligation imposed on all public authorities, for example, the Health and Safety Executive's activities involve promoting health and safety, investigating accidents etc. Therefore material regarding these activities would constitute information about its functions. In contrast, the HSE also has obligations, as do other public authorities, to manage its human resources but this could not be said to be its (main) activity and therefore one of its functions.

Secondly, Lord Templeman referred to the sum total of the activities that Parliament had entrusted to *"it"*. This goes to suggest that the relevant functions are only those which are specifically entrusted to that particular authority rather than general activities entrusted to all authorities i.e. HMRC is specifically entrusted with revenue collection and enforcement activities but is not specifically entrusted with managing, for example, its human resources.

Wording of the Exemption

Sections 31(2)(a) to (e) include the word "ascertaining". The Commissioner considers that this means to determine definitely or with certainty and thus in this context means that the public authority should be empowered to make, rather than merely have input into, the decision in question. In relation to s31(2)(a), for example, although a local Council may have the power to conduct an internal investigation into whether an employee has committed a theft, it is not the public authority that has been empowered to "ascertain" whether any persons have failed to comply with the law. Instead the Council would have to pass the matter to the police and later the Crown Prosecution Service and the Courts and it is these parties who have been empowered to "ascertain" whether the law had been broken.

Accordingly, the Commissioner finds that the use of the word "ascertaining" limits the application of this exemption to those cases where the authority, in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law, judge whether any person's conduct is improper etc and the Commissioner acknowledges that this is likely to limit the use of these limbs of the exemption to law enforcement or regulatory bodies e.g. the police, FSA, Solicitors Regulation Authority, the Civil Service Commissioners.

However, it should be noted that the exemption refers to functions being exercised "*by any public authority*". This means that the prejudice does not have to relate to the public authority who is dealing with the request but can relate to another public authority who is exercising a function for a relevant purpose, for example, where a police investigation is in prospect or is being carried out at the same time as the public authority is carrying out its own internal investigation, then the public authority could claim the exemption in relation to the prejudice that would or would be likely to be caused to the police investigation. The Commissioner would expect this type of scenario to be evidenced appropriately and he would adopt a similar approach to that set out in LTT55 in respect of accepting arguments from a public authority claiming a prejudice on behalf of another authority.

* A casework example for ss 31(2)(a) and (b) has been provided at the end of the line.

Section 31(2)(f) & (g) refer to "protecting" charities against mismanagement and "protecting" the property of charities from loss or misapplication respectively. The Commissioner considers that the term 'protection' has a different quality and requires different considerations than the term 'ascertain' but that nonetheless in order to claim either section 31(2)(f) or (g), the public authority needs to be formally tasked with "protecting" a charity against misconduct/mismanagement and from loss or misapplication of charity property.

As such, the Charity Commission is the public authority in relation to which the prejudice is most likely to be claimed although the Commissioner would still expect the relevant function which would or would be likely to be prejudiced to be identified. For example, where the Commission has sufficiently serious concerns about possible misconduct or mismanagement in the administration of a charity or where it is necessary to protect or secure the charity or its assets from loss, damage or misuse, it may commence a formal inquiry under s8 of the Charities Act 1993 (as amended). Opening an inquiry allows the Commission to exercise its powers under s18 of the Charities Act which includes the power to, for example, suspend a trustee or vest charitable property with an official custodian and thus it may be argued that disclosure of the requested information would or would be likely to prejudice the exercise of these powers.

However, the Charity Commission's remit does not extend to investigating allegations of criminal behaviour or queries over taxation; instead it will refer the matter to the appropriate (law enforcement) agency. Again, as above, it should be noted that the exemption refers to functions being exercised "*by any public authority*".

Thus, for example, if a police investigation is in prospect or progress then the Charity Commission could claim that disclosure would or would be likely to prejudice the police investigation or another public authority could claim a prejudice to the Charity Commission's functions (provided these claims were evidenced appropriately).

Where sections 31(2)(f) and (g) are claimed by public authorities other than the Charity Commission, then the public authority needs to be provide comprehensive arguments as to how the exemption can be engaged.

Section 31(2)(h) refers to "recovering" the property of charities. The intention behind this subsection is not entirely clear but the Commissioner's initial view as to how this subsection could be applied is as follows:-

Where a charity has suffered loss, for example, via fraud or theft, the charity's trustees should inform the relevant law enforcement body, such as the police. The police may carry out an investigation and a prejudice could be claimed to the prospective or ongoing police investigation if the police seek to recover the misappropriated assets. In order to be convinced the exemption was engaged in this way, the Commissioner would expect the arguments to be adequately evidenced, in particular, that the police would or are in the process of seeking to recover the charity's property.

This exemption could also be theoretically claimed by the limited number of charities who are also a public authority for the purposes of FOI if they are able to demonstrate that they are seeking to issue or are pursuing civil proceedings to recover the misappropriated funds or property. However, the charity would need to point to the relevant statutory provision which requires them to recover any assets or funds.

If the affected charity has taken legal action against the perpetrator and sought to recover its property, then it is unlikely that the Charity Commission will take any further action as it is a risk based and proportionate regulator. However, where the issues raised are sufficiently serious or complex to warrant the opening of a statutory inquiry under section 8 of the Charities Act 1993, as detailed above, the Charity Commission has the power under s18(6) of the Charities Act 1993 to *"...make any such order with respect to the vesting in or transfer to the charity trustees of any property as the Commissioners* [now Commission] *could make on the removal or appointment of a charity trustee"*. Were the Charity Commission to claim this exemption, the Commissioner would require substantive arguments as to the how this 'vesting' or 'transfer' amounts to a recovery in order to engage the exemption.

Section 31(2)(i) refers to "securing" the health and safety of persons at work. In line with the approach adopted above, the Commissioner considers that the terms "securing" has a different quality than the term "ascertaining" but that nonetheless, in order for this exemption to be claimed, the relevant public authority must be formally and specifically tasked with securing health and safety.

As such, the Health and Safety Executive (HSE) is the public authority in relation to which the prejudice is most likely to be claimed on the basis that the HSE enforces the Health and Safety Act 1974 of which Part 1 states that the *"provisions of this Part shall have effect with a view to (a) securing the health, safety and welfare of persons at work"*. Section 13 of the 1974 Act states that the Health & Safety Executive shall have the power to do anything which is *"calculated to facilitate, or is conducive or incidental to, the performance of its functions"*.

The Commissioner also acknowledges that section 2 of the 1974 Act refers to the duty on every employer to ensure the health and safety of its employees. However, in line with the Commissioner's interpretation of Lord Templeman's comments above, the general duty under section 2 does not amount to an "activity" that has been specifically entrusted to any one particular public authority. Thus the Commissioner is unlikely to find that the exemption is engaged on the basis of section 2 unless the authority can provide details of the legislation which specifically imposes a positive duty on it, beyond the general duties imposed upon all public authorities.

Section 31(2)(j) refers to "protecting" persons other than persons at work against risks to their health and safety arising out of actions of persons at work.

In line with the approach adopted above, the Commissioner considers that the term "protecting" have a different quality than the term "ascertaining" but that nonetheless, in order for these limbs of the exemption to be claimed, the relevant public authority must be formally and specifically tasked with protecting health and safety. As in relation to s31(2)(i), the HSE is the public authority in relation to which the prejudice is most

likely to be claimed on the basis that the HSE enforces the Health and Safety Act 1974 of which Part 1 states that the *"provisions of this Part shall have effect with a view to ... (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work".* Section 13 of the 1974 Act states that the Health & Safety Executive shall have the power to do anything which is *"calculated to facilitate, or is conducive or incidental to, the performance of its functions".*

The Commissioner also notes that section 3 of the 1974 Act says that *"...it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety".* As in relation to section 31(2)(i), the Commissioner is unlikely to find that any public authority will be able to successfully claim this subsection unless the authority can point to a statutory obligation which has been specifically imposed upon it, rather than a general obligation, to protect the health and safety of those who may be affected by the actions of its employees.

However, the likely exception to this approach will involve healthcare authorities who have specific duties, above and beyond the Health and Safety Act, to protect the health and safety of patients from the more obvious and direct risks posed by the healthcare industry, for example, s45(1) of the Health and Social Care (Community Health and Standards) Act 2003 places a duty on all NHS bodies to *"....put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body".*

Conclusion

In light of the above, the Commissioner considers that the second interpretation of the way in which this exemption can be interpreted is the more appropriate. Thus in order to engage the exemption, the Commissioner will expect the function identified by the public authority as being likely to be prejudiced by the proposed disclosure to be a function which can only be exercised by the public authority for one of the purposes specified in 31(2)(g). That is to say, the exemption does not apply where the function in question is a general function of the public authority which it has decided to exercise for one of the specified purposes.

Case-work Example for Section 31(2)(a) and (b)

FS50210000 (June 2010)

An external contractor, EduAction Ltd, was employed by the Council to run its education services. The contractor was paid £240,000 to reduce exclusions from schools in targeted areas of the borough but in 2006 whistleblowers reported that the contractor had not used the money for the intended purpose. The Council's audit and anti-fraud team investigated and produced a report. The complainant requested a copy of that report. Amongst other exemptions, the Council claimed s31(1)(g) by virtue of s31(2)(a) and s31(2)(b).

The Council argued that:-

- the investigation was a necessary part of its duties to manage and protect public funds under s151 Local Government Act 1972,
- the Council also cited s111 Local Government Act which states that *"...a local authority shall have the power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions"* and
- the Council also added that systems of internal control were required by the Accounts and Audit Regulations 2003 (as amended).

Para 23 of the notice states as follows:-

"....having examined the three pieces of legislation... In his [the Commissioner's] view all organisations would investigate matters if they believed they had been defrauded in order to ascertain whether money could be recovered, however, they would not be doing this in connection with a function relevant for the purposes of s31(1)(g) but would be doing so because it was in their interests. Whilst the council conducted an internal investigation and formed the view that a fraud had been committed it then relayed its suspicions to the police and it was the function of the police to ascertain whether someone had failed to comply with the

law".

In summary, therefore, the Council argued that disclosure would prejudice its own functions to investigate fraud and mismanagement but the Commissioner did not accept that the Council has the power to ascertain whether a person had failed to comply with the law or acted improperly – rather those were functions which could only properly be claimed by the police (and it is possible that the Commissioner may have accepted the exemption was engaged had the Council been able to confirm that the function of the police (to ascertain whether the law had been broken) was likely to have been prejudiced by the disclosure.

PREVIOUS / NEXT

Source	**Details**
Policy Team	
Decision Notices	Hazell v Hammersmith & Fulham London Borough Council (24 January 1991 House of Lords decison)
HL decision	

Related Lines to Take

LTT55, LTT184

Related Documents

Explanatory notes (FoI Act), [1991] 2 WLR 372 & [1992] 2 AC 1 (Hazell), FS50210000,

Contact		GF / HD	
Date	19/11/2010	**Policy Reference**	**LTT158**

FOI/EIR	EIR	Section/Regulation	Reg 8 (2)(b)	Issue	A public authority shall not charge for allowing an applicant to inspect information

Line to take:

Where a public authority attempts to charge for allowing an applicant to inspect the requested information, but does not actually collect a fee because the applicant refuses to pay, it is still in breach of regulation 8(2)(b).

Further Information:

Regulation 8(2)(b) states that "A public authority shall not make any charge for allowing an applicant to examine the information requested at the place which the public authority makes available for that examination."

Regulation 6(1) allows an applicant to request that information is made available in a particular form or format. The Commissioner's view, which was endorsed by the Information Tribunal in East Riding of Yorkshire Council v Information Commissioner & York Place (EA/2009/0069), is that this gives an applicant the right to ask for the opportunity to inspect the information (see LTT156). Where inspection is allowed, the authority cannot make any charge, in accordance with regulation 8(2)(b).

Situations may arise whereby an authority attempts to levy such a charge but it does not actually collect any fee, for example because the applicant has refused to pay. However, regulation 8(2)(b) has still been breached because the public authority required the payment of a fee in order to allow inspection of the requested information. This will remain the case even where the public authority subsequently provides the applicant with a hard copy of the information and makes a charge for that, because regulation 8(2)(b) will have been breached as a result of the attempt to charge for allowing inspection. In other words, the breach occurs at the point where the public authority attempts to make a charge for inspection and not when the charge is actually collected.

This issue has arisen in the context of requests to inspect information for property search purposes. Further information on this subject can be found in guidance produced by the ICO. This includes discussion of charging for such information.

PREVIOUS / NEXT

Source	Details
FOI Policy	East Riding of Yorkshire Council (15 March 2010)

Related Lines to Take

LTT156,

Related Documents

EA/2009/0069, Guidance on Property Searches

Contact		DC	
Date	22/06/2010	Policy Reference	LTT178

FOI/EIR FOI **Section/Regulation** s22 **Issue** s22 only applies to information clearly intended for publication

Line to take:

In order to engage s22 (information intended for future publication) a PA must be able to show clearly which information within the scope of a request it intends to publish. It is not sufficient to say that it will identify for publication some, but not all, information within the scope of the request.

Further Information:

In FS50121803 the public authority had refused a request for prison-related information about several notorious convicted murderers. One of the exemptions upon which it relied was s22, on the grounds that it intended to place some of the requested information into the public domain via The National Archives (TNA). To do this, it planned to review all the information prior to transfer to TNA at some future date. It would have to undertake that exercise, since it was likely other exemptions would apply to some of the sensitive information.

Our Decision Notice rejects the authority's view that s22 was engaged. Although we agreed that at the time of the request it was clear that some of the information was destined for future publication, the authority could not specify which information that was.

In order to engage s22, a public authority must be able to clearly point to the specific information it intends to publish. The exemption will only apply to that information.

This line accords with the Information Tribunal's often expressed view that we must consider circumstances as they were at the time of a request.

PREVIOUS / NEXT

Source	**Details**
Decision notice	FS50121803 Ministry of Justice (14.4.09)
Related Lines to Take	
N/A	
Related Documents	
FS50121803	
Contact	VA
Date	12/07/2010 **Policy Reference** **LTT179**

FOI/EIR FOI **Section/Regulation** s38 **Issue** The endangerment test under s38

Line to take:

- When applying s38, to assess endangerment the same test as for prejudice in other exemptions should be used (see LTT13).

- To establish a danger to mental health under s38, it must be demonstrated that the disclosure of information would or would be likely to endanger mental health, to an extent greater than mere stress or worry.

Further Information:

The Commissioner considers that the term "endanger" under s38 should be interpreted in the same way as the term "prejudice" in other FOIA exemptions. In order to engage this exemption therefore the public authority must demonstrate that disclosure of the information in question would or would be likely to have a detrimental effect upon the physical or mental health of any individual, or the safety of any individual, that is more than trivial or insignificant.

His view was confirmed by the Tribunal in PETA v ICO & University of Oxford (EA/2009/0076), where it went on to apply the prejudice test it had used in Hogan and Oxford City Council v IC (EA2005/0026 and 0030). The principles set out in LTT13 on the prejudice test should therefore also be followed when assessing endangerment under s38.

To demonstrate a danger to mental health under s38, the Commissioner considers that clinical evidence of a psychiatric condition is not necessary. The Tribunal confirmed this view in the PETA case. It also explained however that the effect of the disclosure upon any individual's mental health must "go beyond stress or worry".

PREVIOUS / NEXT

Source	**Details**
	PETA / University of Oxford (13 April 2010)
IT	Hogan / Oxford City Council (17 October 2006)

Related Lines to Take

LTT13,

Related Documents

EA/2009/0076 (PETA); EA/2005/0026 and 0030 (Hogan)

Contact		VA	
Date	26/08/2010	**Policy Reference**	**LTT180**

FOI/EIR FOI **Section/Regulation** s30 **Issue** Information / Documents post-dating an investigation

Line to take:

Information created after the completion of an investigation will not, in general, engage the exemption in s30 FOIA. However documents created after the completion of an investigation may do so, to the extent that they contain information previously held for the purpose of the investigation. It is therefore important not only to consider the date of the document but also the content of the information within it in the particular circumstances of the case.

Further Information:

Section 30(1) applies to "information held by a public authority...if it has at any time been held by the authority for the purposes of -

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it".

In *Chief Constable of Surrey Police v Information Commissioner* the appellant argued that s30(1)(a) applied to the information requested, despite the fact that the investigation to which it referred had been completed. The Information Tribunal ruled that: "by definition given the terms of the request the information is generated later. There is simply no ground for any justified reliance on section 30".

The Commissioner's view is that there will, however, be cases where documents created after the completion of an investigation could still be covered, at least partially, by s30. For instance, a document created after the completion of an investigation may still contain or repeat information that was previously held for the purposes of the investigation. That information could still be exempt under s30. When considering the application of s30 to documents which postdate an investigation, it is therefore important to consider the content of the information contained within them, within the context of the investigation.

PREVIOUS / NEXT

Source	**Details**
Tribunal	Chief Constable of Surrey Police (8 July 2010)

Related Lines to Take

LTT19, LTT20, LTT67,LTT100

Related Documents

EA/2009/0081

Contact		VA	
Date	07/09/2010	**Policy Reference**	**LTT181**

FOI/EIR EIR **Section/Regulation** Reg 12 (4)(b) **Issue** Vexatious requests under EIR

Line to take:

1. It is permissible to refuse vexatious requests under regulation 12(4)(b) as manifestly unreasonable.

2. It is still necessary to carry out the public interest test when refusing a request for environmental information under regulation 12(4)(b).

3. The Commissioner accepts that it may not be appropriate for public authorities to have to confirm or deny that information is held where the request is vexatious or manifestly unreasonable.

Further Information:

1. It is permissible to refuse vexatious requests under regulation 12(4)(b) as manifestly unreasonable.

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. The complainant had 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 paragraph 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 (as set out in LTT123) can also be applied to cases involving Regulation 12(4)(b) although the following points should be borne in mind:

a) 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.

b) 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.

c) There is a presumption in favour of disclosure at Regulation 12(2).

d) Regulation 12(4)(b) is an exception and thus is subject to the public interest test (Regulation 12(1)(b))

e) Furthermore, the background and pattern of any requests also made under FOIA **can** be taken into consideration under Regulation 12(4)(b);

f) Finally, each case is of course determined on its own circumstances.

2. The public interest test under regulation 12(4)(b) and serious Purpose / value

As stated in point (d) above, the exception provided by regulation 12(4)(b) is subject to the public interest test. In Easter v the Information Commissioner (EA/2009/0092), the Tribunal questioned the logic in applying a public interest test to manifestly unreasonable requests, but concluded that this requirement reflected the particular importance placedon making environmental information available.

There is an argument that following the approach set out above and in LTT123 (of considering the serious purpose and value behind a request in order to establish whether a request is manifestly unreasonable on the grounds of vexatiousness) and subsequently considering the public interest in disclosure as part of the public interest test amounts to "double counting" of the same argument. However, the Commissioner considers that he is not prohibited from carrying arguments relevant to engaging an exception through to the public interest test.

The Commissioner is of the view that there will sometimes be a difference between the serious purpose and value of a request to an individual requester (which is what should be taken into account when engaging the exception) and the public interest in disclosure to the world at large (which is what should be taken into account in the public interest test). He considers that cases might arise where the serious purpose and value of a request to an individual requester might not be sufficient to prevent a request from being manifestly unreasonable on the grounds of vexatiousness, but the public interest in disclosure of the information in question to the public might be sufficient to mean that the public interest weighs in favour of answering a vexatious request.

The Tribunal in Easter also commented that it did not require the public authority to provide it with the information which was the subject of the requests as to do so would expose the public authority to the very harm that the exception was designed to protect against (paragraph 63). It did not, however, rule out the possibility that there may be regulation 12(4)(b) cases where it is necessary to see the information in order to make a decision on the public interest. The Commissioner's view is that it will be difficult to properly assess the public interest in disclosure of information without having a good idea of its content. There may also be occasions where the Commissioner needs to examine the contents of the information in question to determine whether or not the exception is engaged in the first place as it may have some bearing on whether the applicant was justified in showing a high level of persistence in pursuing an issue, or it could even reveal that the public authority shared some of the responsibility for a deterioration in its relationship with the applicant.

Should case officers see the information in regulation 12(4)(b) cases?

Case officers are advised to take a pragmatic approach with regard to assessing whether they should obtain the disputed information in these cases. Ideally, the Commissioner would wish to see the information in question in order to assess the public interest in disclosure, and where this will not be burdensome to the public authority, this should always be what happens. However, if the volume of information requested is such that accessing it would prove burdensome for the public authority then it may be possible to make an assessment on the balance of the public interest by gleaning some idea of the public interest in the information from the nature of the request, i.e. from the subject that the request relates to, or from a description of the information in question. Alternatively, or where the wording of the request does not assist in this, the approach of requiring the public authority to provide a representative sample of the information in question should be considered.

3. Confirming or denying information is held under EIR

EIR requires a public authority to confirm or deny that the requested information exists and is held in response to all requests. Regulation 12(6) provides the only exception; allowing a public authority to neither confirm or deny whether information exists and is held by a public authority if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in regulation 12(5)(a) (international relations, defence, national security or public safety).

Although the regulations do not provide an exception to confirming or denying information is held in response to requests that are manifestly unreasonable, the Commissioner accepts that it may be appropriate for a public authority not to do this where it is of the view that the request is vexatious / manifestly unreasonably, so as not to defeat the purpose of the exception. The approach to be taken to this issue when upholding a manifestly unreasonable decision in a decision notice, should be to make a finding that the request was manifestly unreasonable without making specific reference to the duty to confirm or deny.

Note: where a public authority refuses a request under regulation 12(4)(b) on the basis it is vexatious, the Commissioner does not consider that a duty arises under regulation 9(1) to provide any advice and assistance.

PREVIOUS / NEXT

Source	**Details**
Information Tribunal	Carpenter / Stevenage Borough Council (17 November 2008) Easter / New Forest Park Authority (15 May 2010)

Related Lines to Take

LTT123

Related Documents

EA/2008/0046 (Carpenter), EA/2009/0092 (Easter)

Contact		GF	
Date	13/09/2010	**Policy Reference**	**LTT182**

FOI/EIR	FOI / EIR	Section/Regulation	s50 Reg 18	Issue	Discretion to order no steps in a DN

Line to take:

If information should have been disclosed at the time of the request but later events mean that disclosure would now be undesirable, the Commissioner has the discretion to find a breach of s1(1)(b) or reg 5(1) but to indicate in the Decision Notice that no steps are required.

Further Information:

LTT92 confirms that consideration of the exemptions and public interest test should be based on the circumstances as they existed at the time of the request, or at least the time for compliance with sections 10 and 17.

However, if circumstances have since changed to the extent that disclosure would now be undesirable at the time the Commissioner makes his decision, he will recognise this by indicating that no steps are required in order for the public authority to comply with the Act or Regulations.

This does not mean that caseworkers need to investigate whether there has been any relevant change of circumstances in every case. Only in limited circumstances is it likely to be necessary to use the discretion not to order disclosure, where the change in circumstances is explicitly raised by the public authority or is otherwise obvious from the context of the case. Cases where the Commissioner chooses to exercise his discretion may for example include:

- where responsibilities have transferred from one public authority to another, so that a statutory bar would now apply to the disclosure.
- a change in circumstances after the request which means it would now be unfair to reveal personal data.
- other evidence of an impact on the rights of individuals – eg due to a change in circumstances disclosure would now compromise an individual's health or safety.
- court proceedings have been commenced since the date of the request and disclosure would prejudice the fairness of the trial.

This is not intended to be an exhaustive list and there may be other situations where we would exercise this discretion. Caseworkers are advised to obtain a steer from their Group Manager or another signatory if they consider ordering disclosure would now be inappropriate.

The High Court in the case of OGC v Information Commissioner and HM Attorney General [2008] EWHC 737 (Admin) considered this issue. The High Court gave the example of a request which is relevant to criminal proceedings that were commenced after the date of the request and where disclosure would prejudice the fairness of the trial. Although the Court did not give a definitive ruling, it said that it would be "*undesirable*" for the Commissioner to order disclosure where the information was not exempt at the time of the request but became so thereafter.

The High Court went onto say at paragraph 98:

"*...it seems to me to be arguable that the Commissioner's decision whether a public authority complied with Part 1 of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required by the authority may take account of the subsequent changes of circumstances...*"

The Commissioner is aware of the different view taken in Gaskell v IC and HMRC (EA/2010/0090; 11 October 2010), where the Tribunal found that the Commissioner did not have any such discretion and was obliged to order disclosure irrespective of any change in circumstances. However, the Commissioner will maintain the line set out above and is applying for permission to appeal this decision. Pending the outcome of any appeal, the Gaskell decision is flagged red and should not be followed. Caseworkers should continue to follow this line.

PREVIOUS / NEXT

Source	Details
Policy team	OGC (11 April 2008) (High Court decision)
High Court	
Related Lines to Take	
LTT92	
Related Documents	
OGC v IC [2008] EWHC 737 (Admin); EA/2010/0090 (Gaskell)	
Contact	LS
Date	19/11/2010 **Policy Reference** **LTT183**