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FOI Policy: Line to Take

Fol or EIR	Section/Regulation	Issue
FOI/EIR	s50, reg 18	(1) Late claiming of exemptions & exceptions (2) When to consider exemptions and exceptions not originally claimed by a public authority

Line to Take:

(1) A public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims.

(2) The Commissioner is 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 and after carefully taking into account his obligations under the Human Rights Act 1998 and his jurisdiction for data protection in assessing the risks associated with disclosure.

Further Information:

(1) Late Claiming of Exemptions and Exceptions

Public authorities have the right to claim any exemption (including s12 or s14) or exception for the first time before the Commissioner or the Tribunal. This is subject only to the Tribunal's case management powers. The Commissioner does not have discretion as to whether or not to consider a late claim.

In the binding decision of the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC), Jacobs J summarised the case law on this issue as follows (§§29-33):

- The Court of Appeal decision in *Birkett v DEFRA* [2011] EWCA Civ 1606 is authority that late reliance on an exemption is permissible under the EIR.
- The decision of the UT in *IC v Home Office* [2011] UKUT 17 (AAC) is authority that late reliance on an exemption is permissible under FOIA subject to the FTT's case management powers.
- There is no UT decision contrary to the decision in the *Home Office* case which is now generally accepted as correct and the Court of Appeal's decision in *Birkett* is treated as supporting the decision on FOIA.
- In so far as the UT in *APPGER v IC & MOD* [2011] UKUT 153 (AAC) considered that the FTT had a discretion to allow late reliance on an exemption, that is now inconsistent with the Court of Appeal's decision in *Birkett*.

McInerney specifically concerned late claims of s12 and s14. Jacobs J accepted that his earlier decision in the *Home Office* case did not address s12/14, but in *McInerney* he made it clear that the right to make a late claim applied to these exemptions also; see §2 and §§34-41. We had previously taken the view that the APPGER case was authority for saying that PAs do not have the right to make late claims of s12; in *McInerney*, Jacobs J said that that reasoning is no longer valid (§33).

See LTT92 for further details on the specific issue of how to reconcile the requirements of section 10, the Fees Regulations and the Upper Tribunal's comments in relation to the operation of section 12 only being relevant to "future events".

(2) When to consider exemptions and exceptions not originally claimed by a public authority

In the case of *Bowbrick*, the Tribunal (now the First Tier 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 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.

The Upper Tribunal in the *Home Office* and *DEFRA* cases also considered this issue and suggested that the Commissioner's role was to assess whether the information should or should not be disclosed. Therefore, instead of determining whether the public authority was right to withhold the requested information under the

exemptions/exceptions claimed, the Commissioner should consider exemptions not raised by the authority. However, the Commissioner's view is that this comment is obiter because it was not directed at the key issue in the case (namely whether late claims should be allowed) and accordingly the Commissioner finds that this point is not binding upon him. His position therefore remains that he can consider exemptions or exceptions not raised by the authority but that he is under no duty to do so.

Source of Line to Take	IT and CA	Details	Bowbrick / City of Nottingham (28 September 2006) DEFRA / IC & Simon Birkett (26 January 2011) Home Office / IC (26 January 2011) All Party Parliamentary Group on Extraordinary Rendition / IC & MoD (18 April 2011) Department for Education v the IC & Laura McNerney (2 July 2014) McInerney v IC and Department for Education (29 January 2015)
Related Lines to Take	LTT92, LTT190, LTT193		
Related DNs/cases/IT Decisions/Guidance	EA2005/0006 (Bowbrick), GIA/1694/2010 (DEFRA), GIA/2098/2010 (Home Office), GIA/150-152/2011 (APPGER), EA/2013/0270 (DfE), GIA 4267/2014 (McInerney)		
Contact: PB / LB / GF / HD / CW			
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LTT21

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