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FOI/EIR	FOI / EIR	Section/Regulation	s2, s40 reg 12, reg 13	Issue	Effect of other means of scrutiny or regulation or access to information on the PI in disclosure

Line to take:

UPDATE: *As part of the guidance review most of the content of this line to take is now covered in external guidance. The remainder of the line will be incorporated into guidance or caseworker advice notes in due course at which point this line will be withdrawn.*

The Commissioner's position is that the mere existence of other mechanisms for scrutinising or debating an issue is irrelevant as FOI exists as an additional rather than alternative means of promoting public debate and transparency.

In cases where existing mechanisms for scrutiny or regulation have actually been utilised or exercised and/or where a report providing the conclusions of that other mechanism for scrutiny or regulation is publicly available, then the Commissioner may accept, depending on the circumstances of the case, that **to some extent** this goes to reduce or satisfy the public interest in disclosure.

However, there will always be some public interest in disclosure of new information in order to provide as full a picture as possible and therefore the fact that another regulatory mechanism has been used will never **fully** satisfy the public interest in transparency, openness and encouraging public debate.

Further Information:

UPDATE: *This line is now summarised in the following external guidance:*

- *The public interest test*
- *Information in the public domain*

Caseworkers are advised to consult the guidance in the first instance, although this line remains effective and contains some additional detail. This further detail will be fully incorporated into external guidance in due course, at which point this line will be withdrawn.

A public authority may suggest that the mere existence of alternative forms of scrutiny or regulation, such as ombudsmen, independent regulators, complaints procedures, peer review, internal monitoring, parliamentary debate etc, means that there is no need for the general public to review the same or related information. This is on the basis that the reasons for the public needing to see the information, for example to allay concerns over standards, are already met by the existence of these other mechanisms which would be invoked in appropriate cases.

Public authorities may also argue that where an alternative mechanism for scrutiny or regulation not only exists but has been exercised, then there is no public interest in disclosing the requested information as the public can be reassured by the investigation or review by a suitably qualified and informed body/individual. Authorities may also claim that any relevant public interest in disclosure has already been met by, for example, the publication of an external body's report at the end of its investigation.

The Commissioner's Approach

The first point to note is that the Commissioner is only concerned with public, as opposed to private, interests.

Secondly, the Commissioner does not accept that the mere existence of other mechanisms for scrutinising or debating an issue goes to affect the public interest in disclosure as FOI exists as an additional rather than alternative means of promoting public debate and transparency.

However, where existing mechanisms for scrutiny or regulation have actually been utilised or exercised, then the Commissioner may accept that this goes to reduce or satisfy the public interests in disclosure, **to some extent**, depending on the circumstances of the case. However, it should be noted that there will always be some public interest in disclosure of new information in order to provide as full a picture as possible and therefore the fact that another regulatory mechanism has been used will never fully satisfy the public interest in transparency, openness and encouraging public debate.

Similarly, the Commissioner may accept that the public interest in disclosure is reduced, **to some extent** and depending on the particular circumstances of the case, where a report providing the conclusions or outcome of that other means of scrutiny or regulation is publicly available. However, even where the requested information would add little to the public debate, this does not mean that there is no public interest in disclosure as the Commissioner's view is that there is always some public interest in disclosing the 'full picture' for general transparency and accountability purposes.

Finally, whether the public interest in maintaining the exemption claimed will outweigh the (possibly reduced) public interest in disclosure will depend on the circumstances of the particular case.

Specific Arguments

The Commissioner has set out his general approach above but it may also be useful to consider the following specific points which may be raised:

(a)

The requested information itself does need to be able to meet the public interest(s) which have been identified. For example, in the University of Central Lancashire (UCLAN) v IC & Professor Colquhoun (EA/2009/0034) case, the Professor requested copies of the course materials for undergraduate students on the BSc course in homeopathy. The Tribunal found that disclosure of the requested information would go to meet the recognised public interest in scrutinising the issue of whether an unregulated practice such as homeopathy was suitable for study and a qualification at degree level.

However, in the case of Alan Digby-Cameron v Information Commissioner & Bedfordshire and Hertfordshire Police (EA/2008/0023&0025) one part of the requested information was a statement taken by Bedfordshire Police in relation to alleged threats made just before the death of the complainant's son in connection with an incident involving the complainant's deceased son's company car. The Tribunal accepted that there was a public interest in the proper investigation into the cause of the complainant's son's death but found that one of the factors in favour of maintaining the exemption was that the actual statement contained *"…no information of any intrinsic public interest"* (paragraph 20(1)).

(b)

A complainant may argue that the public interest in disclosure is increased where the existing means of scrutiny or monitoring is flawed or inadequate. The Commissioner may take such an argument into account (i.e. over and above the general public interest in transparency and understanding the underlying issues being considered) where cogent evidence or objectively reasonable arguments are presented that the conduct or outcome of the investigation was unsatisfactory but it will not be enough simply for the complainant to argue that the alternative means of scrutiny or regulation was flawed simply because it did not find in his/her favour.

For example, in the case of Alison Ince v Information Commissioner, the complainant argued that there was heightened public interest in disclosure of the requested information because of the public authority's failure to properly investigate or address allegations of fraud in the Further Education sector. The Tribunal dismissed this argument on the basis that there had already been several other independent investigations into the fraud allegations (including by the police) and in the context of the other independent investigations coming to the same conclusion, the outcome of the investigations by the authority did not appear unsatisfactory and thus there was no increased public interest in disclosure on the basis of this argument.

In the Digby-Cameron case, another aspect of the withheld information consisted of internal emails at Herefordshire Police. The Tribunal found that the public interest test favoured the disclosure of these emails because *"…the information reveals some possible incompetence by the Police in relation to the investigation of the road traffic accident. We will therefore …. order that the documents are disclosed to Mr Digby-Cameron"* (paragraph 31).

However, this does not mean that the public interest in disclosure is reduced or affected where there are no allegations of inadequacy or impropriety, for example, one Tribunal commented that *"…whilst it would appear that the Contract is a success that does not mean that there would be no public criticism or input were the opportunity afforded to the public"* (paragraph 73, DoH v IC (EA/2008/0018)).

In short, therefore, the Commissioner's position is as set out by the Tribunal in the case of Richard Bowden and the Information Commissioner and the BBC where it was said at paragraph 55(b): *"…we consider an absence of evidence about poor practice does not negate this interest [enabling the public to be able to assess for themselves how the system works – in addition to the independent consideration by the Courts and audit by the NAO]. It is simply that particular evidence of poor practice might make the interest all the more pronounced"*.

Also, see LTT235 for further details.

(c)

The timing of the request may be relevant where the alternative means of scrutiny or regulation is ongoing at the time of the request.

For example, in the case of Digby-Cameron case, the Tribunal found that the Coroner's Inquest process was still ongoing at the time of the request and that the police investigation, which could have led to criminal proceedings being instituted, was also still open at the time of the request. The Tribunal therefore commented that it *"…fully accepts Mr Digby-Cameron's point that there is public interest in the proper investigation of the cause of the death of a young person in circumstances like those in which [his son] died ….however, the way in which this should normally happen is through the Coroner's inquest process which was in this case still on-going at the relevant date"* (paragraph 20). Accordingly, in this case the public interest in carrying out a proper investigation is served by allowing that investigation to run its course and the complainant's argument about providing full background details was outweighed by the prejudice that could be caused to that ongoing investigation by a disclosure of the information under the Act.

The Commissioner's position therefore is that the public interest in disclosure is less where the alternative means of scrutiny or regulation is ongoing at the time of the request.

Case Examples

In the majority of cases, authorities combine arguments that other forms of scrutiny have been exercised with arguments that relevant information is already in the public domain or that those bodies have published relevant information. Case examples have been included below to show how the Commissioner (and usually the Tribunal) has followed the approach outlined above.

University of Central Lancashire (UCLAN) v IC & Professor Colquhoun (EA/2009/0034)

In this case, the Professor requested copies of the course materials for undergraduate students on the BSc course in homeopathy, arguing that the disclosure of this information was necessary to allow the public to see how the University had reconciled the principles of homeopathy with established scientific principles and to allow a proper peer review. The University argued that it"*…already did much to allow potential students and the general public to assess the value and quality of its degree courses. Its website contained a wide range of information. It provided introductory materials to potential students, including reading lists. Standards were ensured by the validation procedures which were required before a course was launched and which involved independent expert external monitors and by quality assurance (QAA) which demands a continuing compliance with national standards"* (para 17(iii)). The Tribunal's response was to say that:-

"….the public has a legitimate interest in monitoring the content and the academic quality of a course. It is no answer, we consider, to say that this function is performed by the process of validation or the continuing monitoring of standards with external input. Whether or not these processes are conducted with critical rigour, it must be open to those outside the academic community to question what is being taught and to what level in our universities" (paragraph 47).

Department of Health v Information Commissioner (EA/2008/0018)

The complainant requested a copy of the contract for the provision of electronic recruitment services but the Department of Health argued that the public interest in disclosure was reduced because:

- existing mechanisms were sufficient to promote accountability and scrutiny as the Department has to report the results of its procurement decisions to the Treasury and all procurement decisions are examined internally by the OGC and the Public Accounts Committee and because
- there was sufficient information in the public domain to further public debate to include, an advertisement in the Official Journal of the European Union set out the nature of the project, its probable duration, the nature of the services being provided, the total contract price, the contractor's name and the reasons for choosing their bid.

However, the Tribunal commented that *"….there is considerable weight in the Commissioner's arguments that there is very little material in the public domain and as such is insufficient to inform public debate. That there is internal scrutiny whilst important does not meet the argument that the public have no opportunity to participate in this scrutiny"* (para 72).

Foreign and Commonwealth Office (EA/2007/0047)

The complainant requested a copy of a previously unpublished early draft produced by John Williams of the Government's dossier on the issue of Iraq's Weapons of Mass Destruction. One of the reasons the Commissioner found that the public interest test favoured maintaining section 36 was the significant amount of information already in the public domain as a result of the Hutton Inquiry into the death of Dr David Kelly and the publication of Lord Hutton's report and accompanying evidence in January 2004. The FCO argued this point and also"*….that, as the Hutton Report was issued at the end of a detailed investigation into the drafting process, the public interest in the issue has been served either in full or at least to a degree that reduces significantly the public interest in seeing an additional document"* (paragraph 27).

The Tribunal however did not agree and found that the public interest test favoured disclosure because the "….*Williams draft might be capable of adding to the public's understanding of the issues in question"*. The Tribunal said:

"*We do not accept that we should, in effect, treat the Hutton Report as the final word on the subject… First, the Hutton report does not expressly state that the Williams draft is an irrelevance… Secondly, the issue which we are required to consider, namely whether the FCO ought to have disclosed the Williams draft, is different from those that the Hutton Report addressed. Thirdly… information has been placed before us, which was not before Lord Hutton, which may lead to questions as to whether the Williams draft in fact played a greater part in influencing the drafting of the Dossier than has previously been supposed"* (paragraph 28).

People for the Ethical Treatment of Animals (PETA) v IC & The University of Oxford (EA/2009/0076)

The complainants requested information about the licence held by Professor Aziz at Oxford University in relation to scientific experiments which were carried out on a macaque named "Felix" featured on a BBC documentary. PETA argued that the public interest test favoured disclosure to facilitate transparency in (amongst things) the way the public were kept informed and in open public debate as well as transparency in the regulatory system. In finding that the public interest test favoured maintaining section 38, the Tribunal commented at paragraph 59 that

"(a) ….whilst not all information was in the public domain there was already substantial material relating to results, methods, retrospective cost benefit analyses, alternative methods already in the public domain in relation to this type of experiment relating to other projects.

(b) There are a number of independent scientific bodies funding research ….which contributes to the wider public and scientific debate.

(d) …there is sufficient information for the lay public to make an assessment of costs".

Further, in response to the complainants' arguments making the case for external scrutiny, the Tribunal found:

"…The Tribunal recognized that the opportunities for external scrutiny are limited, however they accepted the evidence of Professor Philips that the 'internal' scrutiny involved in the 3 stage process of: grant application, ethical approval and Home Office licence was rigorous. This was not a public process; however, those involved were drawn from a wide variety of backgrounds including scientists in other fields, ethicists, statisticians and those opposed to animal experimentation. Whilst it was accepted that no regulatory system was flawless and there would be individual cases where the system broke down, there was no evidence that as a system it is malfunctioning" (paragraph 62).

The Commissioner notes that the Tribunal has accepted that the public interest in disclosure was fully met by (i) the information that was already in the public domain, (ii) the existence of a "rigorous" internal regulatory system and (iii) the proposition that there was no evidence that the internal means of scrutiny was "malfunctioning". The Commissioner's position is that whilst these arguments may go to reduce the public interest in disclosure, they cannot be used to fully satisfy

the public interest in promoting transparency and openness and accordingly the Commissioner's position would now be that there remained some public interest in the disclosure of the requested information in this case.

Exemption Specific Considerations

Section 14

See LTT123 for further details but where other means of scrutiny or regulation have been exercised and have reached the same conclusion (which is unlikely to be in the complainant's favour), then this may go to evidence one limb of the test for determining whether a request is vexatious as the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue. Further, the more independent evidence available, the more likely the request can be characterised as obsessive. Accordingly, arguments about the effect of existing relevant information from other regulatory or scrutinising bodies may be relevant to the engagement of section 14.

Section 40

Under section 40, one limb of the three part test under Schedule 2, condition 6 is whether the disclosure is "necessary" to meet the legitimate interests already identified in relation to the disclosure of personal data. (Albeit that the Commissioner now focuses his analysis on fairness rather than the Schedules, the same considerations apply under a complete analysis of fairness). This means that in cases involving section 40, the test is whether alternative means of scrutiny or regulation exist such that a disclosure of personal data under FOI is not necessary whereas this line sets out that this is largely irrelevant in non-section 40 cases.

For example, in the case of Butters and the Information Commissioner (EA/2008/0088 – 30 January 2009) the complainant requested a statement submitted to the Nursing and Midwifery Council (the regulatory body which investigates complaints against and determines the fitness of nurses to practise) submitted by a named nurse who was working for the relevant NHS Trust at the time of the death of the complainant's mother. The Commissioner found that the Trust should have claimed section 40(5) and in considering whether this personal data should be disclosed, the Tribunal considered whether it was necessary under Schedule 2, condition 6 and at paragraph 29 said:

"…..The Tribunal considered that whilst there was a legitimate interest in the public being confident of the fitness to practise of nurses, the IC had been correct in concluding that this did not require disclosure of complaints. In terms of paragraph 6, the legitimate interest did not make disclosure to the world "necessary". There were other means by which this confidence could be maintained most notably through a regulatory system which publicised its determinations where the particular professional had been found not to be fit and proper. The public's confidence would not be increased by a knowledge of any or all complaints, whether or not well founded".

Source	Details
Tribunal	FCO v IC (22 January 2008)
	Welsh (16 April 2008)
	Dept of Health v IC (18 November 2008)
	Digby-Cameron v Information Commissioner & Bedfordshire and Hertfordshire Police (26 January 2009)
	Butters v IC (30 January 2009)
	UCLAN v IC & Colquhoun (8 December 2009)
	Alison Ince v Information Commissioner (17 November 2010)
	PETA v IC & University of Oxford (13 April 2010)
	Richard Bowden v IC & BBC (6 January 2011)

Related Lines to Take
LTT123, LTT235
Related Documents
EA/2007/0047 (FCO), EA/2007/0088 (Welsh), EA/2008/0018 (DoH), EA/2008/0023&0025 (Digby-Cameron), EA/2008/0088 (Butters), EA/2009/0034 (UCLAN), EA/2010/0089 (Ince), EA/2009/0076 (PETA), EA/2010/0087 (Bowden)

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