

FOI/EIR	EIR	Section/Regulation	Reg 9, Reg 16	Issue	Advice & assistance under the EIR
Line to take:					
Where a public authority conforms with the provisions of the regulation 16 code of practice in relation to the provision of advice and assistance it will be taken to have complied with its duties under regulation 9. However, as the regulation 16 code of practice states that advice and assistance should not necessarily be limited to the steps set out within it, in practice a public authority could follow the steps suggested within the code and still be found in breach for something not covered in the code, but nevertheless considered to be reasonable to expect by way of advice and assistance from a public authority.					
Further Information:					
<p>Further Information:</p> <p>N.b. The wording of the regulation 16 code of practice (as opposed to that of the FOI section 45 code of practice) means that there are fundamental differences in the approach to advice and assistance under the EIRs and FOI. For the FOI approach see LTT87</p> <p>Regulation 9</p> <p>Regulation 9(1) of the EIRs states that :</p> <p>“ A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”</p> <p>Regulation 9(3) states that :</p> <p>“Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.”</p>					

Regulation 16 code of practice

The provision of advice and assistance is covered in part III of the regulation 16 code of practice under paragraphs 8 to 23.

Paragraph 9 provides that :

“ Every public authority should be ready to provide advice and assistance, including but not necessarily limited to the steps set out below. This advice and assistance should be available to those who propose to make, or have made requests and help them to make good use of the Regulations. The duty on the public authority is to provide advice and assistance ‘so far as it would be reasonable to expect the authority to do so.’ “

In practice this means that a public authority could follow the steps suggested within the code and still be found in breach of regulation 9, for something not covered in the code but nevertheless considered to be reasonable to expect.

The effect of this in practical terms is that when considering if a public authority has provided sufficient advice and assistance, there is a judgement to be made about what it would be reasonable to expect from that public authority in the provision of advice and assistance in the circumstances of the case.

“Reasonable to expect” under the EIRs

As discussed in LTT87, under FOI the “reasonable to expect” wording of section 16 means that although compliance with the section 45 code will always mean compliance with section 16, there is still some judgement to be made about how far it is reasonable for a particular public authority to go in order to conform with any particular provision of the section 45 code. It may also be that certain provisions or examples of desirable practice within the code are not deemed reasonable for every public authority to follow.

Under the EIRs, whilst the above principle equally applies, there will also be a further judgement to be made. This will be whether or not it would be reasonable to expect the public authority in question to have provided advice and assistance outside of the steps and situations detailed within the regulation 16 code.

Wider approach under EIRs

As discussed in LTT87 the approach under FOI will be to identify the triggering situation that you are in (e.g. proposing to make request, clarifying request, fees) and then to consider the paragraphs relevant to that particular situation.

Under the EIRs this approach will not apply. This is because before the regulation 16 code sets out its more detailed guidance it states at paragraph 9 that “This advice and assistance should be available to those who propose to make, or have made requests and **help them to make good use of the Regulations.**” This suggests a more pro-active approach is expected from public authorities in order for them to meet the more general duty to provide advice and assistance whatever the situation, rather than

making different specific provisions for different situations.

This proactive approach to the obligation to provide advice and assistance was endorsed by the Tribunal in the case of *Keston Ramblers Association v Information Commissioner and London Borough of Bromley*. The issue of advice and assistance was not central to the appeal, however the Tribunal offered some “observations” on the interaction between regulations 8 (fees) and 9 (advice and assistance) of the EIR.

In *Keston Ramblers*, the information held by the public authority which was relevant to the appellant's request comprised over 300 pages of documentation. In its submissions to the Tribunal, the ICO suggested that where an authority had collated the requested information and offered to provide copies of it for a fee, the duty to provide advice and assistance would normally require the authority to offer the applicant the opportunity to inspect the documents first, so that the applicant may decide whether he is satisfied simply to inspect the documents or whether he wishes to pay for copies. The Tribunal stated that this was likely to be the correct approach and would avoid “any sense of grievance” arising from the applicant paying for copies of information which may not be relevant to the information the applicant is interested in.

Source		Details	
Reg 16 code of practice, Agreed by GS; and IT		Keston Ramblers Association / London Borough of Bromley (26 October 2007)	
Related Lines to Take			
<u>LTT87</u>			
Related Documents			
<u>Reg 16 code of practice, EA/2005/0024</u>			
Contact		LA	
Date	21/04/08	Policy Reference	LTT91

FOI/EIR	FOI EIR	Section/Regulation	s2 Reg 12(1)	Issue	Timing at which exemptions and public interest test are to be applied
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Line to take:

Consideration of the exemptions and public interest test is to be based on the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17 FOIA.

Although, matters which were relevant at the time of the request but which only later came to light may also be taken into account.

However, if circumstances change post-request to the extent that disclosure would now be undesirable, then the Commissioner can recognise this by indicating that no steps are required in order for the public authority to comply with the Act.

Further Information:

The Tribunal has considered the time at which to apply the exemptions and the public interest test in a number of cases and has come to a number of conclusions. The Commissioner has previously followed decisions of the Tribunal which stated that the ICO should make its decision by reference to the time the request was internally reviewed.

However the Commissioner will now follow the clear indication provided by the Tribunal in the case of the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth, in which it was said that *"the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and*

17 FOIA" (para 110).

The Tribunal went onto say that it was not Parliament's intention to allow events that took place after the request to be considered as part of the public interest test despite arguments that this could lead to artificial conclusions, particularly where a new and later request could be made with a different outcome.

The Tribunal in the case of the Department for Communities and Local Government and the Information Commissioner also supported this approach by referring to the wording of s.50. At paragraph 14, they said – *"the reference to whether the request 'has been dealt with' seems to us plain in that it refers back to the time of the request and decision to disclose (or not to disclose). This also makes sense as there needs to be a degree of certainty for any public authority and for any subsequent appeal..."*.

Therefore, the Commissioner will consider the circumstances at the time of request or at least by the time for compliance with sections 10 & 17 although, as the Tribunal in DBERR pointed out, if it is the case that matters which were relevant at the time of the request only came to light after the date of the request, these too can be considered.

The High Court in the case of the Office of Government Commerce and Her Majesty's Attorney General on behalf of The Speaker of the House of Commons also considered the issue of timing. 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. The Court 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. Moreover, an applicant can make a new request if the change of circumstances favours disclosure.

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..."

Therefore, if the Commissioner decides that the requested information should be disclosed on the basis of the circumstances at the time of the request but that later events would now make it undesirable to disclose, then the Commissioner can indicate in the 'steps required' section of the decision notice that no steps are in fact required in relation to this aspect of the investigation in order for the public authority to have complied with the Act.

The Commissioner is aware of the different view expressed in the more recent case of the Campaign Against the Arms Trade (CAAT) v Information Commissioner and Ministry of Defence (EA/2006/0040), where the Tribunal recommends that the authority should consider its response at the time it is required to respond. However, the Commissioner maintains the line above and accordingly, the status of this Tribunal decision is red and

should not be followed.

Source		Details	
IT		Campaign Against Arms Trade / MoD (26 August 2008)	
		Dept for Communities & Local Government (22 July 2008)	
		DBERR / Friends of the Earth (29 April 2008)	
		Office of Government Commerce / House of Commons (11 April 2008) (High Court decision)	
Related Lines to Take			
n/a			
Related Documents			
EA/2007/0072 (DBERR), [2008] EWHC 737 (Admin) (OGC), EA/2007/0069 (DCLG), EA/2006/0040 (CAAT)			
Contact		HD / GF	
Date	03/10/08	Policy Reference	LTT92

FOI/EIR	FOI	Section/Regulation	s41	Issue	Test of confidence
Line to take:					
<p>The traditional test of confidentiality involves determining whether information was obtained in confidence, and whether its disclosure would constitute an actionable breach of confidence. For the purposes of s41 a breach will always be actionable if:</p> <ul style="list-style-type: none"> the information has the necessary quality of confidence; the information was imparted in circumstances importing an obligation of confidence; and there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary). <p>This three stage test is taken from the case of <i>Coco v Clarke</i>.</p> <p>However, an actionable breach is not just one that is arguable but one that would, on the balance of probabilities, succeed.</p> <p>A breach will no longer be actionable when there is a defence in the public interest.</p> <ul style="list-style-type: none"> In relation to personal matters the law of confidence has evolved in light of article 8 (right to privacy) of the Human Rights Act and the concepts of both the 'quality of confidence' and 'detriment' have been broadened. 					
Further Information:					
<p>This LTT is the 'gateway' LTT on the subject of confidence and introduces the issues discussed in greater depth in other lines.</p>					

The issues to be determined under subsection (1) of s41 are:

- Was the information obtained by the public authority from a third party?; and
- Would the disclosure of that information constitute an actionable breach of confidence (otherwise than under FOIA)?

As was made clear by the Tribunal in the case of *Bluck v the Information Commissioner & Epsom & St Helier University NHS Trust*, the second question refers to the common law of confidence.

It was also agreed in that case that, “the significance of “otherwise than under FOIA” has no greater significance than specifying that a public authority cannot rely upon FOIA as a justification for disclosing confidential material, if to disclose it in other circumstances would give rise to an actionable breach of confidence.”

Whether or not a breach of confidence is actionable is itself dependent on a number of factors. The most commonly cited statement of the constituent elements of an ‘actionable breach’ is the judgment of Megarry J in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* (quoted in the above Tribunal case), which reads:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must ‘have the necessary quality of confidence about it.’ Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...” *

However in the *Home Office v BUAV & the ICO* the **High Court** described how the law of confidence had evolved in respect to information on personal matters. These changes, which were a response to the Human Rights Act, mean that even quite trivial information on personal matters, the disclosure of which may not be detrimental in terms of any tangible loss, can still be protected under the law of confidence.

All these issues are discussed in more detail in related LTTs. See LTT94 for further discussion of ‘necessary quality of confidence’, and LTT95 for ‘obligation of confidence. As the Tribunal discussed at length in *Bluck*, the element of detriment may not always, in fact, be required (see LTT97). Also see LTT172 for further details on the meaning of the term ‘actionable’ in s41 cases. A disclosure under the Act will constitute an unauthorised use of confidential information unless the confider has given their consent to its disclosure.

It is extremely important to take into account the fact that there is a defence of public interest to a claim of breach of confidence. This means that, as stated in the MoJ Guidance on s41 – and as submitted by the Commissioner in *S v the Information Commissioner and the General Register Office*, “Disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs

the public interest in keeping the information confidential.”

In the case of *Derry City Council v the Information Commissioner* (para 30) (and again in *S*), the Tribunal set out, in a broad restatement of *Coco v Clark*, the elements of an actionable breach. In terms of the public interest it then said, “If this part of the test [actionable breach] was satisfied: Would the Public Authority nevertheless have had a defence to a claim for breach of confidence?”

This should not be read to imply that the public interest defence to a claim for a breach of confidence is distinct from the question of whether or not the breach is actionable. The position is as set out in the MoJ guidance, and by the Tribunal in *S* – “Disclosure would be an actionable breach of that obligation **unless** a defence can be established,” (para 56, ICO emphasis) and in *Derry* – “...a defence of public interest exists and [...] we must decide whether its effect [...] would be that disclosure of the [...] information would not be “actionable”, **even if** all other elements of the tort of breach of confidence were in place.” (para 35, ICO emphasis). The public interest test is inherent to confidence. See LTT41 for further discussion on the public interest in relation to s41.

Other defences to a claim for a breach of confidence which have been successfully used include the defence that the information was already and independently known to the confidante before it was disclosed to them; the defence that since the information was confided it had entered the public domain; and the defence that disclosure was required by law or by a court order.

When dealing with cases involving the law of confidence it is not necessary to consider the issues under (b) above in any given order (despite what may be suggested by the articulation of the test of confidence in *Derry* and *S*). The Tribunal, for example, has looked at s41 cases in various ways – in *Bluck*, for example, the question of the public interest is considered first. Neither is it necessary to consider each issue in equal depth. In some cases, whether the information was obtained from a third party will be clear-cut; in others the fact that information was imparted in circumstances importing an obligation of confidence will be equally straightforward.

*There are other approaches than that set out in *Coco & Clark* to the analysis of confidentiality and in *Smart v ICO* EA/2008/0063 the Tribunal commented that it “...should not be adopted as an exclusive statement of the test”. Although the Commissioners believes that *Coco & Clark* provides a useful tool when considering confidentiality and caseworkers should continue to use the tests it set out as the framework of our analysis of s41 in DNs, we should not present it as being the only test, introducing it as the test which the Commissioner considers appropriate in the case .

[PREVIOUS](#) / [NEXT](#)

Source	Details
IT	Sec of State for the Home Office / BUAV (25 April 2008)

		S / General Register Office (9 May 2007)	
		Derry City Council / Belfast Telegraph (11 December 2006)	
		Bluck / Epsom & St Helier University NHS Trust (17 September 2007)	
		Higher Education Funding Council / Guardian News (13 January 2010)	
Related Lines to Take			
<u>LTT41, LTT94, LTT95, LTT96, LTT97, LTT98, LTT172</u>			
Related Documents			
<u>Awareness Guidance 2, EA/2006/0030 (S), EA/2006/0014 (Derry), EA/2006/0090 (Bluck), EA/2007/0059 (BUAV - IT), [2008] EWHC 892 (QB) (BUAV - High Court), EA/2009/0036 (HEFCE)</u>			
Contact		RM / HD	
Date	07/04/2010	Policy Reference	LTT93

FOI/EIR	FOI	Section/Regulation	s41	Issue	Necessary quality of confidence
Line to take:					
Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered trivial					

Further Information:

As part of the test of confidence, the issue of whether or not the disclosure of information would constitute an actionable breach of confidence needs to be considered (see LTT93).

The first question to be determined here is whether the information has the necessary quality of confidence.

Information in the public domain

Information will not have the necessary quality of confidence if it is already in the public domain. This was articulated clearly *Coco v Clark* by Megarry J, who stated that, "However confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge."

In the case of *S v the Information Commissioner and the General Register Office*, the complainant argued that because some aspects of the information requested in that case were known to some people (including the complainant and her family), it no longer retained the necessary quality of confidence.

The Tribunal dismissed this argument. It acknowledged that the information may indeed be known to the complainant and her family, and parts of it may be known to others, but drew a distinction between this and information disseminated to the general public. It stated, "Whether the information is in the public domain is a matter of degree." (para 42)

In considering whether the breach of confidence may be actionable, the Tribunal developed the point above, and asked whether information already known to someone independently would have lost its quality of confidence. It concluded, "information in the public domain loses the quality of confidentiality but dissemination to a limited number of people does not stop information from being considered to be confidential." (para 78)

There are other examples of where information may have been disseminated to a limited audience and yet still retains its quality of confidence. For instance, where information is assembled and communicated to recipients subject to an agreement or understanding that it is for their use alone. Also information **may** be considered confidential even if all the component items are otherwise available to the public but others would have to spend time or effort in producing them in the form in which they are communicated. (This issue is considered in more detail in DN ref 123005) Where information is published only in part, confidence will still protect the undisclosed parts of the information.

Triviality

It is generally accepted that, as the law should not concern itself with trivialities, information which is trivial will not have the necessary quality of confidence.

The complainant in the case of *S* argued that the information requested in that case

was, as well as being otherwise accessible, trivial, but the Tribunal rejected this. From the evidence available, it was satisfied that the person who had provided the information had attached a great deal of emotional significance to it and would suffer distress if it was disclosed. It was therefore satisfied that in the opinion of the confider the information was clearly worthy of protection.

In conclusion, and in general terms then, "Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed." (para 36).

If a case officer is in doubt as to whether or not the information in question is trivial, they should seek the advice of the lawyers.

Although not playing a part in its deliberations, the Tribunal also raised Article 8 (the right to a family life) as a factor it would have been obliged to consider if it was not already satisfied that the disputed information was not trivial. This may also be relevant in considering the public interest in maintaining confidence (see LTT96).

In the Home Office v BUAV & ICO [2008] EWHC 892 (QB) the High Court considering whether requested information constituted confidential information for the purposes of applying a statutory bar and described how the traditional breach of confidence had broadened into what it characterised as the "misuse of private information". It concluded at para 33 that it was, "... beyond question that some information, **especially in the context of personal matters**, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence" (emphasis added). This approach led the court to reject arguments that "one cannot give 'in confidence' information which does not have the quality of confidence about it". (para 34)

It is clear that this approach to the question of triviality is not restricted just to information on personal matters. However it is the Commissioner's view is that, for the purposes of applying s41, we should continue to take the approach that for an unauthorised disclosure to constitute a breach of confidence the information should still have the necessary quality of confidence, including being more than trivial, except, that is, in the case of information on personal matters. Where the information is on personal matters it may still be protected by the law of confidence even if, on the face of it, it seems trivial so long as the confider considers it to be of importance.

Source	Details
IT	S / General Register Office (9 May 2007) Sec of State for Home Office / BUAV (25 April 2008)

Related Lines to Take			
LTT41, LTT93, LTT95, LTT96, LTT97, LTT98			
Related Documents			
EA/2006/0030 (S), EA/2007/0059 (BUAV - IT), [2008] EWHC 892 (QB) (BUAV - High Court)			
Contact			RM
Date	21/07/08	Policy Reference	LTT94

FOI/EIR	FOI	Section/Regulation	s41	Issue	Obligation of confidence
Line to take:					
<p>Information which is shared in public is not confidential because the circumstances in which it is provided do not give rise to an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly. If information is provided in circumstances that created an obligation of confidence, the circumstances in which any further information provided subsequently, connected to and arising out of the first provision, will also give rise to an implied obligation of confidence.</p>					
Further Information:					
<p>Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances giving rise to an obligation of confidence. Information shared in public will therefore not be confidential.</p>					

Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, suggests that the 'reasonable person' test may be a useful one – "If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

An obligation of confidentiality may be expressed **explicitly**, or **implicitly**. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.

Where there is an explicit obligation of confidence this will not be undermined where a public authority confirms that it will treat the relevant information as confidential but goes on to refer to the fact that confidentiality is qualified by the authority's obligations under FOI. The Tribunal in the case of the Higher Education Funding Council for England (HEFCE) & Guardian News and Media Ltd confirmed this by saying that they "*.... would certainly not accept that the HEFCE, by adopting the fair and responsible approach of making the extent of its legal obligations clear to those contributing [the information] had undermined the protection to which [the contributors] were entitled....*" (para 19).

However, the relevant limbs of the test of confidence must still be met and a simple confidentiality assurance will not be sufficient in itself to allow the public authority to avoid its FOI obligations.

Implied obligation of confidence

In the case of *S v the ICO and the General Register Office (GRO)*, the Tribunal found that information provided in circumstances connected to or arising out of the provision of confidential information, will itself be confidential.

The requested information in this case was a letter from an individual who had registered a death (the Informant) sent in response to a letter from a registrar requesting clarification of her whereabouts at the time of death.

The Tribunal was clear that no specific undertaking of confidentiality was given in the registrar's letter to the Informant, and that the disputed information itself (the reply from the Informant) was in no way marked as being provided on condition that it was kept confidential.

It was satisfied, however, that because the exchange of letters was an extension of the interview which took place at the registration of the death, and because the interview was confidential, so too was the letter from the informant. It concluded that "the nature of and circumstances in which the [requested] information was provided gave rise to an **implied** obligation of confidence" (para 55, ICO emphasis).

The information provided by the Informant in the interview was itself provided in circumstances which gave rise to an implied rather than an explicit obligation of confidence. In respect of the Informant's understanding of the interview, the Tribunal concluded that she could expect any information provided to be kept in confidence because of, "the fact that the interview is conducted in private, the display of notices

indicating that the statistical information provided in the same interview is confidential and the nature of the information being sought.” (para 54)

It should be noted that with the advent of the Human Rights Act the protection provided by the law of confidence has been extended to situations where there is no confider / confidant relationship, for example where journalists photograph private aspects of a celebrity's life. Nevertheless courts still consider whether the party obtaining the information ought to have recognised that the information could be characterised as being private or confidential. This complication is unlikely to arise when applying s41 since it can only be claimed in relation to information obtained from a third party.

PREVIOUS / NEXT

Source		Details	
IT		S / General Register Office (9 May 2007) Sec of State for Home Office / BUAV (25 April 2008) Higher Education Funding Council / Guardian News (13 January 2010)	
Related Lines to Take			
<u>LTT41, LTT93, LTT94, LTT96, LTT97, LTT98, LTT160, LTT172</u>			
Related Documents			
<u>EA/2006/0030 (S), EA/2007/0059 (BUAV - IT), [2008] EWHC 892 (QB) (BUAV - High Court), EA/2009/0036 (HEFCE)</u>			
Contact		RM / HD	
Date	07/04/2010	Policy Reference	LTT95

FOI/EIR	FOI	Section/Regulation	s41	Issue	Public interest in favour of maintaining a confidence
Line to take:					
In weighing up the public interest arguments in favour of upholding an obligation of confidence, consideration should be given to the wider public interest in preserving the principle of confidentiality and the impact that disclosure would have on the interests of the confider. The weight of the consideration will depend on the context, particular weight should be given where the obligation touches on the rights of individuals.					
Further Information:					
<p>Although s41 is an absolute exemption the law of confidence does contain its own inbuilt public interest test in that one defence to an action for breach of confidence is that the disclosure is in the public interest. This LTT discusses the factors that may be taken in to consideration for maintaining a confidence when conducting that inbuilt public interest test.</p> <p>It is important to fully appreciate the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure.</p> <p>In applying the approach taken in the <i>Derry</i> case, the Commissioner's view is that a duty of confidence should not be overridden lightly, particularly in the context of a duty of confidence owed to an individual. For further information on the Derry case see LTT 41.</p> <p>The wider public interest in preserving the principle of confidentiality</p> <p>The consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the <i>Bluck</i> case the Tribunal quoted from <i>Attorney General v Guardian</i> "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."</p> <p>However this did not prevent Tribunal from going on to reject a comparison drawn between the weight given to the public interest inherent in LPP (see LTT 15) and that in confidentiality. Therefore we need to be cautious of placing too much reliance on simple arguments that there is an 'inherent' public interest in confidentiality (<i>Bluck</i> para 19).</p> <p>It would be better to identify in more detail how the relationship of trust, protected by the duty of confidence, operates to serve the public interest. For example in <i>Bluck</i> the public authority's witnesses emphasised the need for patients to have confidence that</p>					

doctors will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients (para 19). This is counter to the public interest as it could endanger the health of patients or, in the case of transmissible diseases, the wider community (para 26).

Another example would be where a regulator claimed that unless it could assure confidences would be respected it would not receive tip offs from members of the public about potential wrongdoing. In a recent DN (ref 152888) the public authority, Companies House, argued that unless it could receive confidential information alleging breaches of the Companies Act its ability to police that Act would be hindered, effectively reducing the safeguards created by that legislation and this would work against the public interest.

There is a public interest in maintaining trust and preserving this free flow of information to the public authority where this is necessary for the public authority to perform its functions in the public interest.

The interests of the confider

In some cases identifying the interests of the confider will be fairly straight forward, for example the *Derry* case (*1) concerned commercial confidentiality and the test focussed on whether the public interest in disclosure outweighed any harm to the commercial interests of the confider.

However many of our cases deal with information confided by private individuals acting in a personal capacity, e.g. information provided by an informant (complaining to a local council about some action of his neighbour), medical records, including those of the deceased, and so on. (*2)

The importance of a right to privacy is recognised by the Article 8 of the Human Rights Act 1998 which provides that "Everyone has a right to respect for his private and family life, his home and his correspondence." The courts are obliged to interpret domestic law, including the law of confidence, in a way that respects this right to privacy and so Article 8 considerations are taken into account when determining whether information is confidential and are weighed against factors favouring disclosure when considering whether there would be a public interest defence against a breach of confidence. (also see LTT 112 on law of confidence and the HRA that highlights the need to consider article 8 and also the competing right under article 10 - the right to freedom of expression)

In short the real consequence of disclosing private, personal information is an infringement of the confider's privacy and there is a public interest in protecting the privacy of individuals.

Clearly there is a link between the impact disclosure would have on the confider and the wider public interest arguments discussed above; concern that information could be made public to the detriment of the confider, whether this is a tangible loss or an

invasion of privacy, deters someone from providing information to the public authority which ultimately works against the public good by hampering the public authority in the performance of its functions.

Whilst it is important to consider the full consequences of disclosing confidential information it will not always be necessary to analyse these in terms of the interests of the confider and the wider public interest, when drafting a DN

*1 The Derry case includes a useful summary of how case law has developed the scope of the public interest defence at para 35.

*2 Such cases will usually raise data protection issues too.

PREVIOUS / NEXT

Source		Details	
IT		Bluck / Epsom & St Helier University NHS Trust (17 September 2007)	
		Derry City Council / Belfast Telegraph (11 December 2006)	
		McTeggart / Dept of Culture, Arts & Leisure (4 June 2007)	
		Sec of State for the Home Office / BUAV (25 April 2008)	
Related Lines to Take			
<u>LTT41</u> , <u>LTT93</u> , <u>LTT94</u> , <u>LTT95</u> , <u>LTT97</u> , <u>LTT98</u>			
Related Documents			
<u>EA/2006/0090 (Bluck)</u> , <u>EA/2006/0014 (Derry)</u> , <u>EA/2006/0084 (McTeggart)</u> , <u>EA/2007/0059 (BUAV - IT)</u> , <u>[2008] EWHC 892 (QB) (BUAV - High Court)</u>			
Contact		RM	
Date	21/07/08	Policy Reference	LTT96

FOI/EIR	FOI	Section/Regulation	s41	Issue	Detriment to the confider
Line to take:					
<p>It is often stated that for a disclosure to constitute a breach of confidence there has to be a detrimental impact on the confider. However this is not always the approach taken by the courts which sometimes find that detriment is not in fact a prerequisite of an actionable breach of confidence.</p> <p>Furthermore an invasion of an individual's privacy can be viewed as a detriment in its own right.</p>					
Further Information:					
<p>Individual's Privacy</p> <p>In LTT93 the test of an actionable breach of confidence established by <i>Coco v Clark</i> was set out. One of the often quoted ingredients of this test is that an unauthorised disclosure of the information would be detrimental to the confider. However later in the same judgment Megary J made it clear that detriment is not a prerequisite of an actionable breach of confidence, explaining that, "At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called a detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect." (emphasis ICO's).</p> <p>In many cases relating to an individual's personal and private life it may be difficult to argue that disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosing personal and private information is an infringement of the confider's privacy and there is a public interest in protecting the privacy of individuals.</p> <p>The <i>Bluck</i> case (Pauline Bluck v IC & Epsom & St Helier University NHS Trust – EA/2006/0090), which dealt with the confidentiality of a deceased person's medical records, is very helpful in setting out the development of the law of confidentiality in relation to what can be characterised as personal information. It quotes from the Attorney General v Guardian Newspaper case (*1) in which first Lord Goff agreed with <i>Coco v Clark</i> that it was appropriate "to keep open the question of whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence ...". However later in the same ruling Lord Keith of Kinkel found that it would be a sufficient detriment to the</p>					

confider if information given in confidence were disclosed to persons to whom he "... would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way." (*Bluck* para's 7 & 8).

So it can be seen that there are two ways of looking at the issue of detriment in relation to personal information. You can say it is not necessary that the confider will suffer a detriment as a result of a disclosure (*2), or you can view the loss of privacy as a detriment in its own right as the Tribunal did in the *Bluck* case.

In the *Home Office v BUAU & the ICO* the **High Court** described how the law of confidence had evolved in respect to information on personal matters. These changes were a response to the Human Rights Act. The court (at para 33) concluded that information on personal matters could be regarded as private and so protected by the law of confidence even though it is quite trivial. Although in *Coco v Clark* the matter of triviality is dealt with as a separate issue to detriment, it can clearly be seen that the two are linked in that the more trivial a piece of information is, the less likely its disclosure would have a detrimental impact on the confider. (For more information on the HRA approach to the law of confidence please see LTT 112)

Generally it will be simpler to adopt the first approach, i.e. the detriment is not a prerequisite of an actionable breach. Whichever approach you take the important thing is to fully consider how the disclosure would affect the confider as this will be a factor in weighing up whether there is a public interest defence to any breach of confidence – see LTT96).

Commercial Confidences

Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged.

This approach was supported in the case of the Higher Education Funding Council for England & Guardian News & Media Ltd. In this case, the Tribunal commented on the establishment of the distinction between information involving an individual's privacy and information relating to commercial confidences. The Tribunal commented "...*we should take note of the courts' apparently consistent acceptance of the three part test (*3)....In contrast to the case law on commercial information, there have been several cases in recent years, involving the private information of an individual, where the court has not required any requirement to show detriment*" (paras 40 & 41).

The Tribunal went on to acknowledge that the existence of this distinction may call into question whether the requirement for detriment should be retained in relation to commercial confidences. However, the Tribunal concluded:

"... we feel sure that, for the time being, this Tribunal, when dealing with the type of information in question in this Appeal (commercial confidence) should not depart from the

line of authority from the higher courts leading from Coco v Clark” (paras 43).

*1 Attorney General v Guardian Newspapers [1990] 1AC 109.

*2 The information would still have to be more than trivial and not in the public domain - see both Awareness Guidance No 2 and LTT 93 – (Test of Confidence).

*3 See LTT93

PREVIOUS / NEXT

Source		Details	
IT		Bluck / Epsom & St Helier University NHS Trust (17 September 2007) Sec of State for the Home Office / BUAV (25 April 2008) Higher Education Funding Council / Guardian News (13 January 2010)	
Related Lines to Take			
LTT41, LTT93, LTT94, LTT95, LTT96, LTT98, LTT172			
Related Documents			
EA/2006/0090 (Bluck), EA/2007/0059 (BUAV - IT), [2008] EWHC 892 (QB) (BUAV - High Court), EA/2009/0036 (HEFCE),			
Contact		RM / HD	
Date	07/04/2010	Policy Reference	LTT97

FOI/EIR	FOI	Section/Regulation	s41	Issue	Human Rights Act 1998 - Article 8
Line to take:					
Article 8 of the HRA does not act as statutory bar to the disclosure of private information.					
Further Information:					
<p>The Human Rights Act 1998 incorporates the Council of Europe Convention on Human Rights into UK Law. Article 8 of the Convention provides that there shall be no interference with the right to family and private life.</p> <p>In the <i>Bluck</i> case the Tribunal considered the right of access to the medical records of the deceased. In broad terms the issues were whether the duty of confidence between doctor and patient survived death and/or whether disclosing the information interfered with the right to privacy of the surviving family members and if so whether this engaged s44.</p> <p>Ultimately the Tribunal decided that the information was exempt under s 41 and so did not make a decision in relation to s44, it did however give a clear indication of its approach to Article 8.</p> <p>Prior to the <i>Bluck</i> case the Commissioner's line was that Article 8 did act as a statutory prohibition to disclosing information that would interfere with that right. However in <i>Bluck</i> the Tribunal took a different view. The Tribunal indicated that it "would not be in favour of translating the general principles laid down in Article 8 into the form of specific legal prohibition to which we believe section 44 is intended to apply." It continued "...we do not believe that the effect of the Human Rights Act is to elevate the level of a directly enforceable legal prohibition the general terms of Article 8" (para 31).</p> <p>The Tribunal's approach was to use Article 8 as a guide when interpreting the law of confidence.</p>					
Source				Details	
IT				Bluck / Epsom & St Helier University NHS Trust (17 September 2007)	
Related Lines to Take					

LTT41, LTT93, LTT94, LTT95, LTT96, LTT97

Related Documents

EA/2006/0090

Contact

RM

Date

21/02/08

**Policy
Reference**

LTT98

FOI/EIR	EIR	Section/Regulation	Reg 12(9)	Issue	Past, present & future emissions under 12(9)
Line to take:					
Emissions referred to at 12(9) are not limited to emissions that have already taken place.					
Further Information:					
<p>Regulation 12(9) provides that :</p> <p>“To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”</p> <p>The ICO view is that the emissions referred to at 12(9) are not limited to emissions that have already taken place and could include past, present and future emissions.</p> <p>The ICO has considered the wording of the EIRs, the European Directive 2003/4/EC which the Regulations implement, and the “Convention on Access to Information, Public Participation on decision-Making and Access to Justice in Environmental Matters”, known as the Aarhus Convention, and is satisfied that the wording of these documents does not limit the definition of emissions under 12(9) to those which have already occurred.</p> <p>The Directive is worded “ Member States may not, by virtue of paragraph provide for a request to be refused where the request relates to information on emissions into the environment.” (Article 4.2)</p> <p>The Aarhus Convention is worded “ “The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment” (Article 4.4).</p> <p>The Commissioner's line has also been informed by Article 7 of Aarhus, which emphasises the importance of information about future plans relating to the environment being made available. (see LTT83 for further discussion on this point).</p> <p>Comment on Defra's view</p> <p>It should be noted that this line differs from that set out by Defra in chapter 7 of its “Environmental Information Regulations 2004 Detailed Guidance”. Defra's view is as</p>					

follows :

“Regulation 12(9) does not include information on emissions that have not yet occurred, for example information on plans to reduce the likelihood of emissions. In this case the public authority would still be able to consider refusing disclosure under exception 12(5) (d) to (g) subject to the public interest test. “ (para 7.5.1)

The Commissioner followed Defra's line in its decision on case FER0072936, but has since reviewed this decision and has agreed the policy line that emissions do not have to have already occurred for 12(9) to apply. Later Decision Notices on cases FER0066052 and FER0073984 reflect the current position.

Source		Details	
Legislation, Decision Notices		European Directive 2003/4/EC Aarhus Convention, East Riding of Yorkshire Council / [Redacted name] Brighton & Hove friends of the Earth/ Brighton & Hove Council	
Related Lines to Take			
<u>LTT83</u>			
Related Documents			
<u>EC/ 2003/4/EC</u> , <u>Aarhus Convention</u> , <u>FER0066052</u> , <u>FER0073984</u> , <u>Defra EIR Detailed Gudiance</u>			
Contact		LA	
Date	20/03/08	Policy Reference	LTT99

FOI/EIR	FOI EIR	Section/Regulation	s30 Reg 12(5)(b)	Issue	Information pre-dating an investigation
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Line to take:

Information created before the commencement of an investigation may still engage the exception at Reg 12(5)(b) of the EIR or the exemption at s 30 of FOIA.

Further Information:

In *Watts v the Information Commissioner* the information in question was the environmental health reports on the premises of a particular meat supplier.

The information was withheld because at the time of the request criminal proceedings were pending against the owner of the premises. It was accepted by all parties that the reports in question came into existence before any criminal investigation had commenced.

The complainant argued that the exception provided at regulation 12(5)(b) would only apply to reports prepared after the criminal investigation had commenced. He relied upon the Commissioner's comment in the DN that "*the type of information requested in this case, relating to routine health and safety reports, should ordinarily be placed in the public domain as a matter of course, normally through inclusion in a publication scheme*" to support his view.

The Tribunal did not accept this argument and commented (at paragraph 6) that "*the language of EIR regulation 12 contains no suggestion that the exception in 12(5)(b) should only apply to material created after an investigation has been started. The only test to be applied is whether disclosure would have the undesirable effects set out in paragraph (5)(b). Not only is the language of the regulation therefore clear but it does not in our view lead to an illogical or unworkable outcome, as the Appellant argues. It is obviously not ideal if information has to be withdrawn from publication, once it becomes apparent that a criminal investigation is to take place and that its further dissemination may prejudice a future trial, but that is a better outcome than the alternative for which the Appellant argues. We conclude, therefore that the information was capable of falling within the scope of*

subparagraph (5)(b) of the regulation and that we should proceed to consider whether it actually did so.”

The Commissioner's view is that this principle will also apply in relation to s30 FOIA. Accordingly, information that, as at the date of consideration of the request, has at any time been held by a public authority for one of the purposes listed at s30(1)(a) to (c), will engage the exemption at s30 even where the information in question was created prior to the commencement of the investigation.

PREVIOUS / NEXT

Source		Details	
IT		Watts / Bridgend County Borough Council	
Related Lines to Take			
<u>LTT19, LTT20, LTT67</u>			
Related Documents			
<u>EA/2007/0022</u>			
Contact		LA	
Date	10/04/08	Policy Reference	LTT100

FOI/EIR	FOI	Section/Regulation	s17 (1)(b)	Issue	Failure to cite specific exemption section number
Line to take:					
<p>A public authority will breach s 17(1)(b) where it only refers to any exemption claimed by name or description of the subject matter of the exemption.</p> <p>The Commissioner will also find a breach of s.17 (1)(b) when a public authority fails to cite the sub-section, sub-section, paragraph and sub-paragraph (where appropriate) where multiple limb exemptions are claimed.</p>					
Further Information:					
<p>In the past, a discretionary approach to this issue has been utilised so that, for example, where a public authority failed to cite s.42 but used the words “legal professional privilege”, this was not considered a breach whereas the public authority using the phrase ‘commercially sensitive information’ without reference to s.43 may have been held to be in breach of s.17 (1)(b).</p> <p>Now, as a matter of good practice and to promote consistency, the Commissioner will adopt the following approach:</p> <p>Where a public authority only refers to the exemption by name or description this will be a breach of s.17 (1)(b) – the obligation to “specify the exemption in question”. For example, where a public authority just uses the words ‘law enforcement’ or ‘confidential information’ without reference to any section number, this will be a breach of s.17 (1)(b).</p> <p>Further, where a public authority is relying upon a multiple limb exemption, there will be a breach of s.17(1)(b) where the public authority fails to provide the section, section, paragraph and sub-paragraph as without this level of detail, the complainant cannot be certain of the grounds on which the information is being withheld. For example, where a public authority just cites s.31(1), the complainant could not be certain which of the many law enforcement</p>					

activities mentioned therein would be prejudiced by the disclosure of the withheld information and thus would be unable to adequately challenge its application. Therefore, the Commissioner would expect to see the full section details provided for clarity (i.e. s.31(1)(g) by virtue of s.31(2)(d)) and failure to do so will result in the Commissioner finding a breach of s.17(1)(b).

However where a public authority claims a single limb exemption, there will be no breach of s.17(1)(b) if the public authority only refers to the section number as with a single limb exemption it could not be said to be unclear what was being relied on. For example, where a public authority just cites s.41, the applicant can understand that the information is being withheld on the grounds that it was provided in confidence and adding the further detail (i.e. s.41(1)(a) & (b)) does not further assist the complainant.

For convenience in applying this line, the following table highlights which exemptions will be considered as single or multiple limbed for the purposes of finding s.17(1)(b) breaches:-

Single limbed exemptions

Sections 21, 22, 24, 28, 34, 39, 41, 42

Multiple limbed exemptions

Sections 23, 26, 27, 29, 30, 31, 32, 33, 35, 36, 37, 38, 40, 43, 44

Note:

Given the stance adopted above and as the ICO is the body responsible for promoting good FOIA practice, all decision notices should, where appropriate, cite the section and sub-section number, paragraph and sub-paragraph.

PREVIOUS / NEXT

Source		Details	
GS			
Policy Team			
Related Lines to Take			
LTT102			
Related Documents			
Contact			HD
Date	15/09/2008	Policy Reference	LTT101

FOI/EIR	EIR	Section/Regulation	Reg 14(3)	Issue	Failure to cite specific exception section number
Line to take:					
<p>A public authority will breach Regulation 14 (3)(a) where it only refers to any exception claimed by name or description of the subject matter of the exception.</p> <p>A public authority will also breach Regulation 14 (3)(a) where it fails to refer and explain the application of the specific section number and sub-section of the exception claimed.</p>					
Further Information:					
<p>This issue does not appear to have yet been considered in a decision notice under EIR, but under the FOIA a discretionary approach had been adopted on a case-by-case basis to determine what constitutes a breach of s.17 (1)(b). For example, where a public authority failed to cite s.42 FOIA but used the words “legal professional privilege”, this was not considered a breach whereas a public authority using the phrase ‘commercially sensitive’ information without reference to s.43 FOIA may have been held to be in breach of s.17 (1)(b).</p> <p>Now, as a matter of good practice and to promote consistency, the Commissioner will adopt the following approach:</p> <p>Where a public authority only refers to the exception by name or description this will be a breach of Regulation 14 (3)(a). For example, where a public authority just uses the words ‘commercial confidentiality’ or ‘course of justice’ without reference to any section number, this will be a breach of Regulation 14 (3)(a).</p> <p>However, given the structure of the Regulations, the Commissioner will also find a breach of Regulation 14 (3)(a) where a public authority fails to specify which sub-section(s) of the Regulations are being claimed because without this level of detail, the complainant cannot</p>					

be certain of the grounds on which the information is being withheld.

For example, where a public authority just cites Regulation 12(4), the complainant could not be certain which of the several activities mentioned therein would be prejudiced by the disclosure of the withheld information and thus would be unable to adequately challenge its application. Therefore, the Commissioner would expect to see the full section details provided for clarity, e.g. Regulation 12(4)(a) or 12(4)(e).

Note:

Given the stance adopted above and as the ICO is the body responsible for promoting good FOIA practice all decision notices should, where appropriate, cite the full exception reference to include the section and sub-section numbers.

PREVIOUS / NEXT

Source		Details	
GS			
Policy Team			
Related Lines to Take			
LTT101			
Related Documents			
Contact		HD	
Date	15/09/2008	Policy Reference	LTT102

FOI/EIR	EIR	Section/Regulation	Reg 6	Issue	Provision of information under request headings
Line to take:					
<p>"The expression 'form or format' is not a reference to categories of subject matter, but is a reference to whether the information should be supplied by means of paper copies, or electronically, or by viewing of a microfiche and so on." (The Information Tribunal in <i>Keston Ramblers Association v Information Commissioner and London Borough of Bromley</i> (EA/2005/0024) at paragraph 50)</p>					
Further Information:					
<p>Regulation 6(1) provides:</p> <p>"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –</p> <p>(a) it is reasonable for it to make the information available in another form or format; or</p> <p>(b) the information is already publicly available and easily accessible to the applicant in another form or format."</p> <p>In <i>Keston Ramblers</i>, the appellant submitted that the public authority's response did not comply with regulation 6 of the EIRs, as it had failed to sort the information relevant to the request and supply it under the seven headings set out in the request.</p> <p>The Tribunal rejected this element of the appeal for a number of reasons, including:</p>					

1. the request did not ask for the information to be supplied under the seven headings of the request, indeed to do so would be “inherently impracticable” as items would be likely to fall under more than one heading; and

2. The Commissioner and the public authority submitted to the Tribunal that “the expression ‘form or format’ is not a reference to categories of subject matter, but is a reference to whether the information should be supplied by means of paper copies, or electronically, or by viewing of a microfiche and so on.” The Tribunal concluded that this interpretation was “probably correct” and that therefore even if it were to hold the appellant’s comments regarding the format of the information as forming part of the appeal, it would not find the public authority to have breached regulation 6.

Article 3(4) of the Directive states that “where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available”. This lends weight to the ICO view that ‘form and format’ is broad enough to encompass provision of information by different means (as set out by the Tribunal) however does not compel an authority to sort information provided in response to a request under the headings of that request.

These factors suggest that a public authority will not be in breach of regulation 6 if it does not sort the documents it is to provide and supply these under the headings of an applicant’s request.

In some circumstances, and in line with the requirements of other regulations of the EIRs, an authority may be required to provide information under the subject headings set out in a request. This will be covered in a future line to take, to be published shortly.

[PREVIOUS](#) / [NEXT](#)

Source	Details
IT	Keston Ramblers Association / London Borough of Bromley (26 October 2007)
Related Lines to Take	
<u>LTT106</u>	
Related Documents	
<u>EA/2005/0024</u>	
Contact	LB

Date	09/06/08	Policy Reference	LTT103
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FOI/EIR	EIR	Section/Regulation	Regulation 12(4)(e)	Issue	Information caught by regulation 12(4)(e)
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Line to take:

Communications within one public authority will constitute internal communications for the purpose of regulation 12(4)(e). All central government departments (including executive agencies) are deemed to be one public authority for the purpose of this exception.

Communications between a public authority and a third party will not constitute internal communications except in very limited circumstances.

The definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.

Further Information:

Regulation 12(4) of the EIR provides:

“For the purpose of paragraph 1(a), a public authority may refuse to disclose information to the extent that –

(e) the request involves the disclosure of internal communications.”

What does the exception cover?

Neither the EIRs, nor the directive from which they are derived, provide a definition of what constitutes an internal communication. The Aarhus Convention states, at article 3(c) that internal communications will be protected where “such an exemption is provided for in national law or customary practice...” Defra’s guidance on the application of exceptions states that the rationale behind the exception is that public authorities should have “a space within which to think in private” when reaching decisions. This suggests that the exception is the EIRs equivalent to sections 35 and 36 FOIA, which protects advice provided to public authorities’ decision makers.

The ICO has not interpreted the exception this narrowly and finds that whilst it will cover the sort of communications which would be protected by section 35 or 36 FOIA, it is also broad enough to encompass any other internal communications, not simply those containing the opinions of a public authority’s staff. This is because whilst article 4(2) of the EC Directive states that “the grounds for refusal...shall be interpreted in a restrictive way” both the Directive and the EIRs refer only to ‘internal communications’ and do not specify that the information need be protected by customary practice or national law. The exception is therefore fairly wide in scope however should not prevent disclosure of information where this is in the public interest, as it is subject to the public interest test.

What constitutes a ‘communication’?

The view put forward by Coppell in *‘Information Rights’* (2007) is that where information is recorded simply to be used by its author, for example as an aide memoir, it will not constitute a communication. However, where the record is intended to be communicated to others or to be placed on file, where it may be consulted by others, the information will constitute a communication. This is in line with the Decision Notices issued by the ICO so far, which have taken a broad approach to the definition of ‘communications’ and have accepted that submissions and advice to ministers, notes of meetings between a government department and representatives of external organisations (where those notes were to be used only by the department, see case FER0098306/7) and minutes of meetings are covered by the exception.

What constitutes an ‘internal’ communication?

Below we envisage a number of channels of communication and, where relevant, explain why each will or will not constitute an internal communication for the purpose of this regulation.

(1) Communications within one public authority

Communications within any single public authority will be internal for the purposes of regulation 12(4)(e).

(2) Communications between two, seemingly separate, authorities

(i) communications between Government departments

Regulation 12(8) provides that:

“For the purposes of paragraph (4)(e), internal communications include communications between government departments.”

This regulation was considered by the Information Tribunal in the case of *Friends of the Earth v Information Commissioner and Export Credits and Guarantee Department*. In that case, the appellant argued that the Directive which the EIRs implement did not intend interdepartmental (between government departments) communications to be protected by the internal communications exception. Both the ECGD and the Commissioner argued that “the definition within the Directive itself specifically addresses a case in which a public authority comprises a number of distinct government departments such as to be properly regarded as a ‘public authority’” (paragraph 46). The Tribunal agreed with this view and found that communications between government departments were protected by regulation 12(4)(e). The ICO has therefore adopted this line.

The rationale for this view is that the Directive should apply equally to all member states, some of which will have simple government structures, and some of which will be complex, like the UK. Those member states with complex structures of government should not be penalised by having to make their interdepartmental communications available, where a state with a single government body would be able to protect its communications by way of this regulation.

(ii) Communications between Government departments and executive agencies

Defra’s guidance states, at paragraph 7.4.5.4 that “executive agencies are part of their parent department”. The ICO adopted this approach in case FER0088372, where communications between Defra and one of its executive agencies were deemed to be ‘internal’ and therefore the exception applied to the requested information. This interpretation is supported by the MoJ’s guide to which authorities are covered by the Act, which explains at paragraph 3 that executive agencies are “part of their parent department for Freedom of Information purposes and therefore are not listed separately in Schedule 1”.

Applying the reasoning at paragraph (i) above, communications between an executive agency and a department other than its parent department, or between executive agencies, will also constitute internal communications and therefore shall fall within the scope of the exception. Indeed, all communications between central government authorities are deemed to be internal for the purposes of this regulation.

(iii) Communications between any other two public authorities

Defra’s guidance at paragraph 7.4.5.5 states that the exception applies to “government administration in the broad sense” and that “the proper scope of the exception for ‘internal communications’ is communications internal to the whole area of the state covered by the definition of ‘public authority’ in Article 2(2)”.

The ICO has not adopted this approach, for the following reasons:

- regulation 12(8) makes specific mention of communications between government departments being covered by this exception. This regulation would serve no purpose if

- any state communication was to be deemed internal for the purposes of regulation 12(4) and
- it would extend the scope of regulation 12(4)(e) to cover any communication sent between public authorities and therefore potentially reduce the availability of information to the public.

Communications between two separate public authorities, for example between a central government department and a local authority, or between two local authorities, will not constitute internal communications for the purpose of regulation 12(4)(e).

A similar approach was taken by the Scottish Information Commissioner in his Decision 052/20 under the Environmental Information (Scotland) Regulations 2004 (paras 57 to 63).

(iv) Communications between a public authority and its external advisors/contractors/etc

The ICO has interpreted regulation 12(4)(e) restrictively, to include only communications passing between members of staff in a public authority to constitute internal communications. At the start of an investigation, therefore, case officers should assume that communications between a public authority and an external party will not be covered by the exception. One possible exception to this may be where a third party is contracted to perform a statutory function on behalf of a public authority, and so may almost be regarded as an authority's employee for the duration of that function being carried out.

Examples

In case FER0156849, a request was made for a draft report produced for the Department for Transport (DfT) by an independent advisor, Sir Rod Eddington. The DfT claimed that the draft report constituted an internal communication for the purposes of regulation 12(4)(e) and refused to provide the information. The Commissioner found that the communication was provided by an external third party and therefore did not fall within the definition of an internal communication. The Commissioner therefore ordered disclosure of the information. **Please note that this case has now been appealed to the Information Tribunal and as such this LTT may be amended following the IT's judgment.**

In case FER0070181, a request was made to DCLG for a planning inspector's report. DCLG deemed the report to be an internal communication, and this decision was upheld by the Commissioner. It is not clear from the case whether the planning inspector was an employee of DCLG, or self employed and contracted to the public authority for the purpose of producing the requested report. However, it is likely that the same decision would be reached whatever the relationship between the authority and the inspector. This is because the inspector "constitutes an integral part of the same legal and administrative function as that performed by the Secretary of State himself" and could therefore be said to be part of the public authority for the purposes of producing his report.

There may be other exceptions; it will be for the public authority to argue why it considers the communication should be covered by the exception. The Policy team may provide advice if case officers are unclear as to whether an additional exception to this line has arisen.

In the annex to its decision in the *Department for Business, Enterprise and Regulatory Reform*

Information Commissioner and Friends of the Earth, the Tribunal stated, at paragraph 4.4, that “the recording of a discussion between a government department and lobbyists is part of an internal communication and therefore regulation 12(4)(e) is engaged”. This is consistent with the line described above, in that discussions with third parties which are recorded by a public authority and communicated internally will be considered internal communications for the purposes of regulation 12(4)(e). However, recorded information provided by a third party will not constitute an internal communication, no matter how it is later disseminated by the public authority.

v) Communications between a public authority and a wholly owned company

Wholly owned bodies are separate legal entities with responsibility for carrying out particular functions. They are deemed to be public authorities in their own right, and are therefore required to adopt publication schemes, publish information in accordance with those schemes and respond to FOI requests. The ICO does not consider that communications between wholly owned companies and other public authorities (even the public authority that established them) are internal communications for the purposes of regulation 12(4)(e).

PREVIOUS / NEXT

Source		Details	
Policy team, IT, DN, SICO		Friends of the Earth / ECGD (20 August 2007) Department for Business, Enterprise and Regulatory Reform (DBERR) / Friends of the Earth (April 2008) Nicholson / The Scottish Ministers (SICO 15 April 2008)	
Related Lines to Take			
<u>LTT66</u>			
Related Documents			
<u>Aarhus Convention</u> , <u>Defra detailed guidance Chapter 7</u> , <u>EC Directive 2003/4/EC</u> , <u>FER0098306</u> , <u>(Defra)</u> , <u>EA/2006/0073</u> (ECGD), <u>MOJ Guide to Freedom of Information act coverage</u> , <u>FER0088372</u> (Defra), <u>FER0156849</u> (DfT), <u>FER0070181</u> (DCLG), <u>EA/2007/0072</u> (DBERR), <u>052/2008</u> (Nicholson)			
Contact		LB / LA	
Date	30/09/2008	Policy Reference	LTT

FOI/EIR	FOI	Section/Regulation	s36(2)(c)	Issue	Claims of more than one limb of s36(2)
Line to take:					
It will be acceptable to claim more than one limb of s36(2) for the same information, as long as					

arguments can be made in support of the claim for each individual subsection.

In order to engage section 36(2)(c) – **otherwise** prejudice the effective conduct of public affairs – some prejudice other than that protected by another limb of section 36 **must** be shown.

The exemption at s36(2)(c) is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another specific exemption.

Further Information:

Claims of more than one limb of s36(2)

It will be acceptable to claim more than one limb of s36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.

For example it will be acceptable to claim both s36(2)(b)(i) and s36(2)(b)(ii), as long as arguments can be made in support of the claim for each individual subsection. These subsections are not mutually exclusive.

Claims of s36(2)(c)

In order to engage section 36(2)(c) – **otherwise** prejudice the effective conduct of public affairs – some prejudice other than that protected by another limb of section 36 **must** be shown.

In *R Evans v The Information Commissioner & the Ministry of Defence* the Tribunal commented on the relationship between s36(2)(c) and the other subsections of 36(2).

In this case the public authority claimed before the Tribunal that both section 36(2)(b)(i) and section 36(2)(c) applied to the withheld information.

The Tribunal commented at (paragraph 53) that “*The principle arguments in favour of this exemption [36(2)(c)] advanced by the MOD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting.*” However, if the same arguments are to be advanced, then the prejudice feared is not “otherwise”. *Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged.*”

In *McIntyre v The Information Commissioner & the Ministry of Defence* the Tribunal commented on the intention behind the exemption at s36(2)(c). It said (at paragraph 25) that “this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority’s ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure.

Source		Details	
IT		Evans / MOD (26 October 2007) McIntyre / MOD (14 January 2008)	
Related Lines to Take			
Related Documents			
<u>EA/2006/0064</u> (Evans), <u>EA/2007/0068</u> (McIntyre)			
Contact		LA	
Date	10/02/2009	Policy Reference	LTT10

FOI/EIR	EIR	Section/Regulation	Regs 6, 9 and 16	Issue	Summaries of information under the EIR
Line to take:					
<p>Unlike s11 FOIA, regulation 6 EIR does not explicitly state that public authorities are required to provide a summary or digest of information upon request. However, paragraph 23 of the Code of Practice issued under regulation 16 EIR states that where a summary is requested it “should generally be provided so long as it is reasonably practicable to do so”. Paragraph 23 falls under the ‘advice and assistance’ section of the Code of Practice and therefore failure to provide a summary of information where it would be reasonably practicable to do so would constitute a breach of regulation 9.</p>					
Further Information:					
<p>Regulation 6(1) provides –</p> <p>“Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –</p> <p>(a) it is reasonable for it to make the information available in another form or format; or</p> <p>(b) the information is already publicly available and easily accessible to the applicant in another form or format.”</p> <p>Paragraph 23 of the Code of Practice issued under regulation 16 provides –</p> <p>“Although there is no specific reference in the Regulations to the provision of information in the form of a summary or digest, a request for environmental information may include a request for information to be provided in the form of a digest or summary. This should generally be provided so long as it is reasonably practical to do so, taking into account the cost.”</p> <p>Defra’s detailed guidance supports this view and states, at paragraph 6.15, that “although there is no specific reference in the EIR to the provision of information in the form of a summary or digest, a request for environmental information may include a request for information to be provided in the form of a digest or summary”.</p> <p>The Aarhus Convention states that public authorities shall make available “copies of the actual documentation containing or comprising such information”, unless it is reasonable to make the information available in another form, or the information is already publicly available in another form. The Aarhus Implementation guide refers to a “functional equivalent”. The ICO considers that the phrase ‘another form’ indicates that the information made available should be the same information as that requested (for example, a hard copy of a letter or an electronic copy of the same letter) unless the applicant requests the</p>					

information to be provided in summary form. Therefore, whilst a public authority may discharge its duties under the EIR by providing a summary of information if requested, it may not provide a summary of information in response to a request if not asked to do so.

Source		Details	
SW			
Related Lines to Take			
LTT91, LTT103			
Related Documents			
Defra detailed guidance chapter 6, EC Directive 2003/4/EC , EIR Code of Practice , Aarhus Implementation Guide			
Contact		LB	
Date	18/06/2008	Policy Reference	LTT106

FOI/EIR	FOI EIR	Section/Regulation	s21, 22, 23, 24, 30, 32, 34, 35, 37, 39, 40, 41, 42,44 Reg 12(4)(a) to (e)	Issue	No prejudice / adverse effect test for class based exemptions / exceptions
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Line to take:

Where a class based exemption or exception is claimed then it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption or exception. Where the exemption or exception is subject to a public interest test however, this may be a relevant factor to be taken into account in the balancing of the public interest.

Further Information:

In *ECGD v Friends of the Earth and the ICO* the Information Tribunal considered the application of Regulation 12(4)(e) of the EIR which provides a potential exception, subject to a public interest test, where “the request involves the disclosure of internal communications” .

It commented at paragraph 53 that “it is sufficient to point to the onus which clearly rests on a public authority in the context of the EIR whenever it chooses to rely on an exception, such as the present case, that onus being to specify clearly and precisely the harm or harms that would be caused were the disclosure to be ordered.” and at paragraph 63 that “the critical question remaining whether disclosure of the information requested would in all the circumstances be shown to cause or be likely to cause the suggested harm”

It then went on to comment at paragraph 70 that the public authority was “unable to advance any evidence of any real or persuasive weight which could have led the Tribunal to determine that there existed a real, as distinct from an imagined, harm or prejudice which would necessarily result from the requested disclosure. “

High Court Ruling

This decision was appealed to the High Court which, although it dismissed the Appeal, criticised the Tribunal's comments above because “The Impression given by paragraphs 53, 63 and 70 is that the Tribunal did set up a hurdle or threshold of proof of actual particular harm which forms no part of the statutory test which it should apply. If I had been satisfied that the

error was central to its decision, I would have allowed the appeal and remitted the issue to be determined afresh by the Tribunal. “

The High Court described the test to be applied under the EIR as follows (para 23) “As is evident from the words of regulation 12, potentially exempt information is dealt with in two categories or classes. Where an item of information falls within one of the classes identified in regulation 12(4) it is not necessary, for the provision of 12(1) and (2) to be engaged, that prejudice to any particular interest should be disclosed. When regulation 12(5) is in issue, it is.”

The High Court also confirmed and commended the approach taken by the Tribunal in *Secretary of State for Work and Pensions v The Information Commissioner* in relation to FOIA. In this case the Tribunal had observed at paragraph 23 that “The Exemption in section 35(1)(a) [of the 2000 Act] is a ‘class’ exemption rather than a prejudice – based exemption. That it to say, in order for the exemption to be engaged the public authority does not need to demonstrate that any specific prejudice or harm would flow from the disclosure of the information in question .“

Public Interest Test

This line, however, should not be taken to mean that for class based exemptions or exceptions any harm or prejudice likely to result from disclosure will always be completely irrelevant. Under FOIA some class based exemptions are subject to a public interest test and under EIR all exceptions are subject to such a test. Where a public interest test is to be applied then arguments about prejudice or harm (which must be specific to the exemption or exception claimed – see also LTT14) likely to flow from the disclosure of withheld information may be relevant factors in the balancing of the public interest.

The point made by the High Court in *ECGD* was not that any potential harm was irrelevant but that it was not an initial hurdle to be overcome in order to engage the exception.

The reason why the High Court did not remit the IT’s decision back to the Tribunal for a second hearing was because it found that although the IT had **given the impression** of using an incorrect test it had actually **applied** a correct test. It had set out the test as including an initial prejudice test, but had then gone on to apply the correct test of balancing of public interest factors in favour of disclosure against those in favour of maintaining the exception. The High Court commented that the Information Tribunal’s “reasoning in paragraphs 75 to 76 showed that, even if it had expressed itself unfortunately or even made errors of law in the passages which I have identified [including paragraphs 53, 63 and 70] it nonetheless applied the correct test.”

[PREVIOUS](#) / [NEXT](#)

Source	Details
IT, High Court	ECGD / FOE (20 August 2007 - IT) (17 March 2008 - High Court)

		DWP / Oaten (5 March 2007)	
Related Lines to Take			
n/a			
Related Documents			
<u>EA/2006/0073</u> (ECGD IT), <u>[2008] EWHC 638 (Admin)</u> (ECGD High Court), <u>EA/2006/0040</u> (DWP)			
Contact		LA	
Date	20/06/2008	Policy Reference	LTT107

FOI/EIR	FOI	Section/Regulation	s1, s11	Issue	Digests and Summaries under the FOIA
Line to take:					
<p>Section 11(1)(c) gives the applicant the right to express a preference for a summary of the actual information requested, to which the public authority must give effect, where reasonably practicable. It does not give the applicant the right to have all the information on any given topic 'summarised' to meet the specific information requirements of the applicant.</p>					
Further Information:					
<p>The provisions of s11(1)(c) – the right to have requested information provided (where reasonably practicable) in the form of a digest or summary – are likely to be most useful to applicants who know that a lengthy report has been produced, but only want to know the headline facts.</p> <p>Dictionary definitions suggest that a 'summary' or 'digest' is a brief statement of the main points of a piece of information. The ICO interprets summary and digest similarly.</p> <p>The Scottish Information Commissioner, however, in the case of <i>McMahon v Common Services Agency for the Scottish Health Service</i>, has interpreted s11 differently.</p> <p>In this case the complainant requested a complete list of mortality rates of all surgeons, including the name of each surgeon in each clinical speciality. The CSA responded that although it held data on this subject, it did not analyse or configure it in the way specified by the complainant, and that therefore it did not hold the requested information.</p> <p>The SIC found that because the constituent data parts were held, the information requested by the complainant should be provided to him because, "what is being asked is for the existing data to be presented in a particular digest (as provided by section 11(2)(b) of FOISA) [the equivalent subsection], which it is demonstrably practicable for the CSA to do."</p>					

The ICO is concerned that this conclusion may imply that the provisions of s11 give the applicant the right to bespoke statistical analyses of data. We are of the view that what may be suggested by this decision is that the section 11 right is to have the totality of information on any given topic 'summarised' in such a way that it meets the particular information requirements of the applicant.

Our interpretation of the SIC's finding is that it is dependent on the request being understood as a request for the whole database, "summarised" so that particular information is provided.

It is the ICO's view that the information in this case will simply be held by a public authority as recorded information, and there is no need to invoke s11. This is explained fully in LTT78.

The ICO line is that s11 should be restricted so that an expressed preference for a summary can only mean a summary of the actual information requested. In this case, the actual information requested was a list of the mortality rates of surgeons with the name and clinical speciality of each surgeon. A summary of that information would therefore be a summary of a list – which would be meaningless.

Source		Details	
Policy Team		Agreed by GS	
Related Lines to Take			
LTT78			
Related Documents			
n/a			
Contact		EW	
Date	20/06/08	Policy Reference	LTT108

FOI/EIR	FOI	Section/Regulation	s 41	Issue	Information "obtained from" any other person
Line to take:					
In deciding whether information has been 'obtained from any other person' the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.					
Further Information:					
<p>The exemption in relation to information provided in confidence at s.41(1)(a) FOIA states that:</p> <p><i>41 – (1) Information is exempt information if –</i></p> <ul style="list-style-type: none"> <i>• it was obtained by the public authority from any other person (including another public authority) and</i> <i>• the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person</i> <p>This exemption was considered in the case of Derry City Council. Here, it was argued that a fax sent by Ryanair to Derry City Council setting out the terms it considered acceptable in operating a scheduled flight service from London to Derry was information obtained from another person.</p> <p>The Tribunal did not agree and their conclusion is set out in LTT40 which states that a</p>					

written agreement between two parties does not constitute information provided by one of them to the other, and therefore a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.

The Commissioner's awareness guidance (no. 2) states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party. This is obviously to prevent public authorities from simply marking internal communications as 'confidential' to try to exempt them from disclosure.

This point was considered in the recent decision of the Tribunal involving the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth where the complainant requested a copy of information about meetings/correspondence between the DTI (the predecessor of DBERR) and the CBI. As the DTI had created the record of the information, the Commissioner concluded that the exemption was not engaged because the information was not obtained from another party.

The Tribunal rejected the Commissioner's decision and found that although the record was created by the DTI, the information contained within it had been obtained from a third party. The Tribunal said it agreed with the submissions made by Counsel for the DBERR when she said that:-

"....the Commissioner confuses the information imparted and the form in which it is recorded, or the party by whom it is recorded. The consequences of such an application, for example, are that highly confidential information passed by an informant to a police officer would be protected if it was recorded in a letter sent to the police by that source, but would not be protected if the police officer met the source, had a conversation, and then recorded it in a memorandum or statement. This privileges the accident of form (or record) over content, and cannot be correct." (para 78).

The Commissioner therefore takes the view that there is no requirement for any physical passing of documents from one party to another to consider whether the information was "obtained from" a third party and therefore information which is transcribed or recorded by one party can fall under s.41(1)(a) FOIA if that record contains information disclosed to it in whatever form from a third party.

Department of Health v ICO

The general approach in Derry was followed by the Tribunal in DoH v ICO, who were clear that a contract is mutually agreed and not obtained by either party (paragraph 34). In this case, the Tribunal rejected the PA's argument that the requested information – a copy of the contract between DoH and a consulting company for the provision of Electronic Recruitment Services for the NHS – was information provided by a third party for the purposes of s41. It said that if information has been provided by the public authority, "its inclusion in a document compiled by [the consulting company] subsequently or a draft does not then transfer "ownership" of the information to [that company] for the purposes of considering the contract" (paragraph 33). It went on to say:

"From the evidence it is clear that DoH undertook a detailed review of all the proposals and made suggestions of substance, often before a draft had been proposed. The installation of DoH ideas from the Invitation to Tender or discussions certainly negates the assertion that the information in the Contract was obtained from [the consulting company] just because it appeared in a document they compiled subsequently" (paragraph 33).

Note:

The Commissioner is aware that there may be cases where the individual who has recorded the information has added his/her own assessment / critique / commentary / interpretation to the record. As such, it may not be possible to say that the entire record contains information obtained from the third party.

An exception to this principle is medical/social care records which the Commissioner accepts do represent information obtained from another person despite the notes not only recording a patient/client's symptoms but also the assessment and interpretation of the professional concerned.

Source		Details	
IT		Derry City Council (11 December 2006)	
		DBERR / Friends of the Earth (29 April 2008)	
		DOH (18 November 2008)	
Related Lines to Take			
<u>LTT40, LTT93, LTT94, LTT95, LTT96, LTT97, LTT98</u>			
Related Documents			
<u>EA/2006/0014 (Derry), EA/2007/0072 (DBERR) EA/2008/0018 (DoH)</u>			
Contact		HD/GF	
Date	13/02/2008	Policy Reference	LTT109

FOI/EIR	EIR	Section/Regulation	Reg 12(4)(d)	Issue	Drafts of documents where final versions are complete
Line to take:					
Once the final version of a document has been completed, earlier drafts of that document will not be exempt under regulation 12(4)(d) EIR.					
Further Information:					
<p>Regulation 12(4) provides:</p> <p>“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –</p> <p>(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data”</p> <p>Article 4(2) of the Directive from which the EIR are derived states that “the grounds for refusal...shall be interpreted in a restrictive way”. Further, the wording of the exception is that the information requested must not itself be in the course of completion, however must only <i>relate to</i> material which is in the course of completion.</p> <p>Therefore, earlier drafts of documents, where the final versions have been completed, relate to the completed material. The fact that the drafts themselves could be considered to be unfinished (ie they do not constitute the final, completed version) is not sufficient for the</p>					

exception to be engaged.

The Commissioner adopted this approach in FER0156849. In that case, the applicant had requested a draft of a report prepared by an independent advisor to government, Sir Rod Eddington, from the Department for Transport (DfT). At the time the request was made, the final version of the report had been published. The Decision Notice states:

“...the draft report cannot be regarded as ‘material in the course of completion’ as the final version of the study had already been published prior to the request being made, and as such the material contained in the draft report would now be considered to be completed. Furthermore, the Commissioner does not believe that the request relates to incomplete data for the same reasons.”

Regulation 14(4) provides:

“If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be *finished* or *completed*. (my emphasis)”

It is important to note that regulation 12(4)(d) is not directly equivalent to section 22 FOIA (information intended for future publication). In respect of regulation 12(4)(d), the relevant event by which the exception will cease to apply is completion, not publication, as evidenced by regulation 14(4).

Source		Details	
Policy team, DN			
Related Lines to Take			
Related Documents			
<u>EC Directive 2003/4/EC, FS50156849 (DfT)</u>			
Contact		LB	
Date	20/06/08	Policy Reference	LTT110

FOI/EIR	FOI / EIR	Section/Regulation	s42 / reg 12(5)(b)	Issue	<p>Waiver of legal professional privilege - part 2 of 2</p> <p>Description of partial waiver</p>
Line to take:					
<p>Partial waiver will occur where the substantial contents of the legal advice have been disclosed. A mere reference to or a brief summary of the legal advice will not be sufficient to waive privilege but it will always be a question of fact and degree in relation to the specific circumstances of each case.</p>					
Further Information:					
<p>The circumstances in which it will be necessary to consider whether there has been a partial waiver will be quite limited as the principle only applies within the context of litigation. However it is difficult to define what will constitute partial waiver because it will very much depend on the specific circumstances of the case. Further, there is limited guidance from the Tribunal as the cases that have appeared before them have only involved advice privilege but there have provided some general guidance which is considered below.</p> <p>However, even if the Commissioner concludes that there has been no partial waiver and thus</p>					

the s.42 exemption is engaged, the nature and extent of any disclosure can still be considered as part of the public interest test.

Waiver is an objective, not subjective principle

The Tribunal In Kirkaldie said that “...*waiver is an objective not subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the party has done (Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529)*” (para 42). This point is also supported at para 40 of the Kessler & HM Commissioners for Revenue and Customs case.

Therefore even where there has been an inadvertent disclosure to the general public, waiver will still have occurred. It is conceivable however that privileged information may be accidentally disclosed to a limited audience who should realise that the information had been disclosed by mistake, for example disclosure to other solicitors. In such cases there may be scope for the public authority to reassert privilege by taking steps to prevent the further use of that information, by seeking an injunction, and securing the information's return. Our legal advice is that where there has been any accidental disclosure our starting point should be that privilege has been waived but in the rare circumstances described above we would need to know the outcome of any court action before making a decision.

Advice on a number of issues

Where a document contains legal advice on more than one issue it is possible for there to be waiver in respect of the advice on one issue, whilst preserving the privilege in relation to other distinct legal issues.

Specific disclosure / restrictions as to use

There can be cases where there is limited waiver of privilege, i.e. where the information is disclosed to a specific party for a specific purpose with restrictions imposed on its further use. In such cases privilege can still be asserted in relation to anyone else seeking access to the information.

Disclosure of actual document containing legal advice

If the full original document containing the legal advice is disclosed, then the document has lost its confidential character and legal professional privilege cannot be claimed for any of the advice.

Disclosure of the contents of the advice

For the avoidance of doubt, it is reiterated here that the cases referred to below involved cases of advice privilege but nonetheless, they do offer general guidance.

The Tribunal in Kirkaldie indicated that “....*the test for waiver is whether the contents of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver (Dunlop Slazenger*

International v Joe Bloggs Sports Ltd [2003] EWCA Civ 901 (para 26).

In the Merseytravel case, legal advice was contained within a document headed 'to whom it may concern'. (See LTT15 for details of the circumstances of this case). The document confirms that Counsel's advice was sought and that Counsel advised that the money provided by the district councils to cover Mersey Tunnel's operating losses should be treated as a loan to be repaid with interest. The document therefore confirms that Counsel's opinion was sought and also the conclusion of Counsel's advice which the public authority used as their justification for a course of action which has continued to date. Reference was also made on Merseytravel's website to a "legal duty", the source of which was the legal advice.

The Tribunal agreed with Kirkaldie insofar as they said "...we are not persuaded that limited references to the conclusions of the advice....could amount to a partial waiver...." (para 27). However they were not convinced that the summary of the advice in the 'to whom it may concern' document waived privilege because it "...at most provides a brief summary of the conclusion of the disputed advice, but reveals nothing of the reasoning or other options considered" (para 25).

In the Foreign & Commonwealth Office case, the Tribunal relied on an analysis of comparisons between the legal advice and the letter purported to constitute a waiver of privilege prepared by the FCO to conclude that "....we are satisfied that the opinion covers points which do not appear in the letter although...we do not believe the applicant has been misled over the substantive legal position as a result of this..." (para 25). This is despite the fact that the letter in question "...referred expressly, indeed, in the second paragraph, verbatim, to advice received from 'our legal advisor' " (para 2).

Conclusion

A mere reference to or a brief summary of the legal advice will not amount to a partial waiver. Further, if the disclosure does not reveal the reasoning behind the conclusion or a considered examination of the relevant case-law, precedent and the way they apply to the case, then waiver will not have occurred.

However if the substantial contents of the advice have been disclosed, then there will have been waiver of the privilege within the document. Unfortunately however they can be no hard and fast rules as the decision will inevitably turn on the specific circumstances of the case. As Tim Pitt-Payne said in his written submissions in the FCO case -

"...whether disclosure is of part only of the contents, or of substantially the whole contents, must be a question of fact and degree...."

Although an examination of whether there has been only a limited disclosure of the legal advice can always be considered as part of the public interest test.

[PREVIOUS](#) / [NEXT](#)

Source

Details

IT	Kirkaldie / Thanet District Council (4 July 2006)		
	Kessler / HMRC (29 November 2007)		
	Mersey Tunnel Users Association / Merseytravel (15 February 2008)		
	Foreign & Commonwealth Office (29 April 2008)		
Related Lines to Take			
<u>LTT6, LTT15</u>			
Related Documents			
<u>EA/2006/001 (Kirkaldie), EA/2007/0052 (Mersey Tunnel), EA/2007/0043 (Kessler), EA/2007/0092 (FCO), Awareness Guidance 4</u>			
Contact		HD	
Date	25/06/2008	Policy Reference	LTT11

FOI/EIR	FOI	Section/Regulation	s41	Issue	The law of confidence & Human Rights Act 1998
Line to take:					
<p>As with all domestic law, the law of confidence has to be read in the context of the Human Rights Act 1998 (HRA). In relation to personal & private information i.e. information on personal matters, this will involve consideration of Article 8 – the right to privacy and Article 10 – the right to freedom of expression.</p> <p>However in practice, in the context of section 41, this is not incompatible with the approach</p>					

set out in *Coco v Clark*(*1). The importance to the right to privacy can be factored into;

- whether trivial information can be protected by the law of confidence when considering if the information has the necessary the quality of confidence,
- whether disclosure would have a detrimental impact on the confider and,
- this can then be balanced against the right to the freedom of expression when weighing up whether the public authority would have a public interest defence against breach of confidence.

Further Information:

The purpose of this LTT is not to suggest that case officers should consider the application of s41 and the law of confidence purely in terms of balancing competing human rights. However following the decision of the *High Court in Home Office v BUAV & ICO* we need to recognise that following the introduction of the HRA, the law of confidence is now broader and can now protect information which would not previously have been considered confidential. At para 31 the court quoted Patten J from *Murray v Express Newspapers Plc (2007)* as saying;

"The incorporation of convention values in this branch of law widens the focus of the cause of action to include private information which would never have been regarded as confidential by a court in the days of ... *Coco v AN Clark (Engineers) Ltd 1969*..."

However the tests set down in *Coco v Clark* should not be abandoned as they can still provide a useful framework for analysing whether s41 is engaged. However when dealing with information on personal matters it will be necessary to double check that in applying the tests set by *Coco v Clark* we have incorporated the HRA approach.

It is conceivable that as case law develops it may become harder to adapt these tests but for now where the information is on personal matters, the Commissioner's approach will be to address the developments triggered by HRA within these tests. Where the information does not relate to personal matters, it is not necessary to address the article 8 issues but please see the comments at the end of the LTT regarding article 10.

It was the Tribunal's failure to address these developments which, according to the High Court in the BUAV case, lead it to proceed on an "... incomplete understanding of the present law..." (para 32) and which ultimately lead to the Tribunal's decision being overturned. Since the traditional approach to confidentiality is stricter, i.e. it results in less information being deemed confidential, information found to be confidential under the traditional approach would still be confidential under an HRA approach. The real value in double checking that we have incorporated the HRA approach into the *Coco v Clark* tests is where the traditional approach results in a decision that s41 is not engaged.

Incorporating HRA into Coco v Clark

In very basic terms the tests set down in *Coco v Clark* are as follows;

- Does the information have the necessary quality of confidence, i.e. not widely known, not trivial,
- Was it imparted in circumstances that gave rise to an expectation of confidence,
- Would disclosure be detrimental

See LTT 93 for a fuller explanation of these tests.

Triviality

In relation to the triviality of the information the High Court found at para 33 that;

"It is beyond question that some information, especially information in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence":

So it is clear that in relation to information on personal matters the quality of confidence has now expanded to include even trivial matters, see LTT 94 for more details.

However it is important to recognise that triviality is only one aspect of the quality of confidence. The other is that the information is not widely known or in the public domain. This remains an essential ingredient for s41 to apply.

Detriment

Regarding the third test, i.e. that disclosure would be detrimental to the confider, even *Coco v Clark* acknowledged that the detriment was not always a prerequisite of an actionable breach. The issue was also considered by the Tribunal in the *Bluck* case, which dealt with access to information contained in a deceased person's medical record. In broad terms the Tribunal found case law to support a view that, where the information is of a personal nature, it was not necessary to show that disclosure would be detrimental in terms of it being harmful in any positive way (see LTT 97 and *Bluck* paras 7 - 9)

The Tribunal then went on to recognise that this approach now had to be read in the context of Article 8 of the HRA, Essentially article 8 identifies the importance to individuals to have the privacy of their affairs respected and so an invasion of privacy is sufficient for there to be an actionable breach of confidence. So in effect what constitutes a detrimental impact has been broadened to include an invasion of privacy, not that the Tribunal ever used such terminology.

Public interest

However there is a competing human right, Article 10, the right to freedom of expression, which includes the freedom to receive and impart information. The Tribunal cited the test of confidentiality for private information as set out in *Ash v McKennitt* (*2) comprising of two questions, "First, is the information private in the sense that it is in principle protected by Article 8?... If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of the expression conferred on the publisher by Article 10" (*Bluck* para 10).

However it should be remembered that there has always been scope for this kind of balancing test when considering whether there is a public interest defence to a breach of confidence. The Tribunal referred to this traditional approach by quoting Lord Goff in *AG v Guardian* (*3), "...although the basis of the law's protection of confidences is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some countervailing public interest which favours disclosure. ... It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure" (*Bluck* para 11). In the *Derry* case the Tribunal also cited Lord Justice Sedley in *LRT v Mayor of London* (*4) as expressing the hope that, in relation to the inbuilt public interest test; "the human rights highway leads to exactly the same outcome as the older road of equity and common law". (*Derry* para 35g)

In the *Derry* case the Tribunal established that the public interest defence was the same as the public interest test set out in the Act except that if the weight of the public interest for & against disclosure was equal, the default position was reversed, i.e. the confidence is respected and the information is withheld. The *Derry* case related to commercial confidentiality. In the *McTeggart* case the information at issue was a report into allegations of bullying at work and the Tribunal took the same approach as in *Derry* by again treating the public interest defence as being similar to the public interest test under the Act. In *McTeggart* the Tribunal did not explicitly consider HRA but in *Bluck* it did analyse the issues within the context of the HRA to apply the same public interest balancing test in relation to personal information.

It should be recognised that although this LTT concentrates on confidences of a personal nature the right to freedom of expression provided by Article 10 would be a factor to be weighed when considering public interest defence to any breach of confidence.

Finally, although it may appear that courts are beginning to move away from, or at least broaden, the tests established by *Coco & Clark* in light of the HRA it should be remembered that the circumstances of many of those cases was such that they could not be captured by s41. That is cases such as *Campbell V MGN Ltd**(5) involved journalists photographing aspects of a celebrity's private life. As s41 requires information to be obtained from a third party, information obtained by a public authority itself through some form of surveillance would not fall within the scope of the exemption.

The High Court's decision in *Home Office v BUAV & ICO*, on which this line is based, in part, has now gone to the Court of Appeal. Our line may be reviewed in light of the Court Appeal's judgement.

(*1) *Coco v AN Clark (Engineers) Limited* [1968] FSR 415

(*2) *Ash v McKennitt* [2006] EWCA Civ 1714

(*3) *Attorney General v Guardian Newspapers* [1990] 1AC109

(*4) *London Regional Transport, London Underground Ltd v The mayor of London, Transport for London* [2001] EWCA Civ 1491

(*5) Campbell v MGN Ltd [2004] 2 AC 457.

Source		Details	
High Court IT		Home Office / BUAV (April 08) Derry City Council / Belfast Telegraph (11 December 2006) Bluck / Epsom & St Helier University NHS Trust (Sept 07) McTeggart / Dept Culture Arts Leisure (4 June 07)	
Related Lines to Take			
<u>LTT93</u> (gateway LTT on confidence)			
Related Documents			
<u>BUAV [2008] EWHC 892 (QB)</u> , <u>Bluck EA/2006/0090</u> , <u>Derry EA/2006/0014</u> , <u>McTeggart EA/2006/0084</u>			
Contact		RM	
Date	25/06/2008	Policy Reference	LTT112

FOI/EIR	FOI	Section/Regulation	s42	Issue	Definition of Legal Professional Privilege
Line to take:					
See below.					
Further Information:					
<p>Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client.</p> <p>It has been described by the Information Tribunal (in the case of Bellamy v the Information Commissioner and the DTI) as:</p> <p><i>“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third]* parties if such communication or exchanges come into being for the purpose of preparing for litigation.”</i> (para. 9)</p> <p>There are two types of privilege –litigation privilege and legal advice privilege.</p> <p>Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.</p> <p>Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. Advice privilege has been discussed by the courts in the Three Rivers case.</p> <p>For the avoidance of doubt, the Tribunal in the case of Calland and the Financial Services Authority also confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.</p> <p>The preceding description is a brief summary only and if further information is required, Legal Services internal guidance should be consulted.</p> <p>* - The quote from the Tribunal reads <i>“...between the clients and their parties...”</i> but for the purposes of this LTT, the Commissioner will assume this to read [third] parties.</p>					

Source		Details	
IT		Calland / Financial Services Authority (8 August 2008) Bellamy / Secretary of State for Trade & Industry (4 April 2006)	
Related Lines to Take			
<u>LTT6</u> , <u>LTT15</u> , <u>LTT111</u> ,			
Related Documents			
<u>EA/2005/0023</u> (Bellamy), <u>EA/2007/0136</u> (Calland),			
Contact		HD	
Date	19/08/08	Policy Reference	LTT113

FOI/EIR	FOI / EIR	Section/Regulation	s 1(1)(a) and (b) Reg 5(1) and Reg 14(1)	Issue	Assessing whether information has been communicated or made available
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Line to take:

The duty to communicate information under section 1(1)(b) FOIA or to make information available under regulation 5(1) EIRs allows the ICO to determine whether the public authority has acted reasonably when providing the information to the applicant. Information must be provided to the applicant in such a way that s/he may determine whether the public authority's response is satisfactory and that s/he may identify which information corresponds to which element of the request (where relevant).

Public authorities must address individual elements of requests if they do not hold information in respect of those elements, in order to make clear to the applicant what information they do and do not hold.

Further Information:

Background

LTT103 discussed whether a public authority is obliged, under regulation 6 EIRs, to sort the information it provides in response to requests in line with the headings used by the applicant when the request was made. We concluded that authorities are **not** obliged to take such action *under regulation 6*. However, in some circumstances, a public authority may be obliged to sort information and provide it under the headings specified in the request, in order to effectively communicate information (section 1(1)(b) FOIA) or to make information available (regulation 5(1)) where the ICO considers it would be reasonable for it to do so.

The Policy team is not suggesting that case officers proactively establish, in relation to each complaint, whether public authorities were obliged to provide the information requested under the headings set out in the request. Rather, this LTT is intended to provide guidance to case officers where the complainant alleges that the way in which the information was provided means that it was not communicated/made available or that, in the process of investigating a complaint, the case officer believes it is necessary to consider whether the information has been communicated/made available.

Factors to take into account

In order to determine whether a public authority has acted reasonably when providing information to the applicant, case officers may wish to consider the following factors:

- whether the reasonable person would be able to understand which item of information corresponded to which element of the request;
- whether it would be reasonably practicable for the authority to provide the information under request headings;
- whether, at the time of the request, the applicant asked for the information to be provided separately, under the headings set out in the request;
- whether asking the public authority to take such action at the investigation stage would result in a widening of the scope of the request; and
- whether, in cases under the EIRs only, the public authority should have provided the information under the headings set out in the request, in line with its proactive duty to provide advice and assistance under regulation 9(1).

Case officers are likely to give greater weight to the first of the above factors as, if an applicant is unable to ascertain whether his/her request has been complied with from the information provided, it is likely that it has not been communicated/made available to him/her and therefore it may be determined that the public authority has failed to comply with its obligations, without consideration of the other factors.

The ICO will not expect public authorities to take such action where it would be “inherently impracticable” to do so (the Tribunal in *Keston Ramblers Association v Information Commissioner and the London Borough of Bromley* at paragraph 50). In *Keston Ramblers* the Tribunal rejected the suggestion that the public authority had been obliged under regulation 6 EIRs to provide the requested information under the seven headings set out in the complainant’s request, as “items would be likely to fall under more than one heading”. The Tribunal did not go on to consider whether the public authority had been obliged under any other regulation to provide the information in this way, however this may have been because it also rejected this element of the complainant’s appeal because it was raised for the first time at the appeal hearing.

The above factors do not form an exhaustive list, and case officers may take into account all the circumstances of the particular case when deciding whether a public authority has communicated information/made available information on request.

Example 1

An applicant makes a request for information to a council relating to licences it has issued for taxis. He requests: (a) a copy of each licence, (b) copies of any vehicle inspection reports in relation to the licensed taxis in (a) and (c) information recording any action taken by the council regarding taxis driven on expired licences. The council responds by providing copies of the information it holds, however the applicant is unable to identify which vehicle inspection reports relate to which taxi, as it is not clear from the face of the documents. There are no documents concerning action taken by the council following the expiration of licences included in the bundle of documents provided to the applicant, however the council does not explain why this is the case until the ICO commences its investigation. It then explains that it does not

hold the information in (c) as it has never taken any action regarding expired licences.

Conclusion under FOIA

In this instance, the council did not link the licences in (a) with the vehicle inspection reports in (b) and would therefore have failed to communicate the requested information to the complainant. It would have breached section 1(1)(b) of the Act. In addition, it would have breached section 1(1)(a) for failing to confirm that it did not hold the information in (c).

Conclusion under EIRs

Had the information as described above been environmental information, the council would have breached regulation 5(1) for failing to make available information on request, and regulation 14(1) for failing to explain to the applicant that it did not hold the information requested in (c).

Example 2

An applicant requests all correspondence from (a) the council's Conservation department and (b) the council's Enforcement department, addressed to a particular property. The council responds by providing the complainant with the information requested, in chronological order of the dates the letters were sent. Therefore letters from the Enforcement and Conservation departments were mixed. Each department is clearly identified on the headed paper, and each has been signed by either an 'Enforcement Officer' or a 'Conservation Officer'.

Conclusion under FOIA

In this instance, the council did not specify which items of information fell under requests (a) and (b). However, given the information on the headed paper and the job titles of the relevant officers being included on the information provided, the reasonable person would be able to understand which item of information corresponded to which element of the request. Even though it may have been reasonably practicable to sort the information under the request headings, given that it was clear from the information provided which item fell within which element of the request, the council has not breached section 1(1)(a) or section 1(1)(b).

Conclusion under EIR

Had the information as described above been environmental information, the council would not have breached regulation 5(1), as it had made available the information requested.

PREVIOUS / NEXT

Source	Details
Policy team	Keston Ramblers / LB Bromley (26 October 2007)
Related Lines to Take	

LTT34, LTT91, LTT103

Related Documents

EA/2005/0024

Contact

LB / LA

Date

04/07/2008

**Policy
Reference**

LTT114

FOI/EIR	FOI	Section/Regulation	s12 / reg.4(3)(d) and reg. 6 Fees Regulations	Issue	Redaction and the Fees Regulations
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Line to take:

The “information” in this context is the information requested, not the information to be disclosed. Therefore the time taken to redact a document when the process of redaction is to blank out exempt information, leaving only the information which is to be disclosed in response to the request **does not** fall within reg 4(3)(d).

The time taken to redact exempt information **cannot** be taken into account when calculating a fee chargeable under regulation 6. The other costs of physical redaction (not time) can be taken into account under regulation 6.

Further Information:

Interpreting Reg 4(3)(d)

Under reg 4(3) a public authority may, for the purposes of its estimate of the cost limit, take account only of the costs it reasonably expects to incur in relation to the request in:

- (a) determining whether it holds the information,
- (b) locating a document containing the information,
- (c) retrieving a document containing the information, and
- (d) extracting the information from a document containing it.

The key to the proper interpretation of this provision is that the “information” in this context is the information requested, not the information to be disclosed.

These activities are sequential, covering the retrieval process of the information requested from a public authority’s information store, no matter how or where the information is held. It has always

been clearly understood that the charging regime did not allow public authorities to take into account for these purposes the cost of considering whether the information requested was exempt.

Confusion has arisen over whether a figure can be included in calculating the cost limit for the time taken to redact a document when the process of redaction is to blank out exempt information, leaving only the information which is to be disclosed in response to the request. This activity does not fall within reg 4(3)(d) as it is not the task of extracting the requested information from a document which contains other information which has not been requested, but of extracting the information to be disclosed from a document, where either the whole document or a larger amount of the information contained within it has been requested.

The reference to “editing or redacting” information at paragraph 2.3.2 of the DCA guidance on the Regulations is not clear, but it is not inconsistent with what is set out above. Endnote 4, which is referred to in para. 2.3.2, does explain the point. The context here is that the public authority is going through the information held “to establish what is contained within a file or document” and the guidance continues: “...any subsequent readings (e.g. to consider exemptions) ...should not be included.

Physical redaction

Physical redaction of that information could properly be regarded as attracting a fee under regulation 6, specifically 6(2)(b) and/or 6(3)(b). Regulation 6(4) sets out that costs attributed to time **may not** be taken into account when charging a fee.

Regulation 6 states:

6. - (1) Any fee to be charged under section 9 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by the public authority in accordance with this regulation.

(2) Subject to paragraph (4), the maximum fee is a sum equivalent to the total costs the public authority reasonably expects to incur in relation to the request in-

(a) informing the person making the request whether it holds the information, and

(b) communicating the information to the person making the request.

(3) Costs which may be taken into account by a public authority for the purposes of this regulation include, but are not limited to, the costs of-

(a) complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(4) But a public authority may not take into account for the purposes of this regulation any costs which are attributable to the time which persons undertaking activities mentioned in paragraph (1)

on behalf of the authority are expected to spend on those activities.

Any fee charged for physical redaction may not take into account time spent, but could include costs such as materials (e.g. tape) or use (rental, licensing) of specialist equipment for that specific activity.

As an alternative to redaction, for example where the information to be withheld is greater in quantity than that to be disclosed, a public authority might decide to reproduce the information to be communicated in a separate document or letter, rather than send a larger document with significant chunks blanked out. Obviously this will be subject to the expression of a preference by the requester, under section 11(1) of the Act and consideration as to whether the means are “reasonable in the circumstances” under section 11(4).

Chief Constable of South Yorkshire Police v ICO

The Commissioner’s approach to regulation 4(3)(d) was endorsed by the Tribunal in the case of *The Chief Constable of South Yorkshire v ICO* (EA/2009/0029) (paragraphs 30-37) – caseworkers are encouraged to refer to this IT as it is the first case to that covers the issue as a core consideration. The public authority appealed the Commissioner’s decision on the basis of establishing whether the costs it is likely to incur in removing exempt information from non-exempt information can be included when estimating how much it will cost to comply with a FOI request. The Tribunal confirmed at paragraph 34:

“In our view, it is clear that what regulation 4(3)(d) is concerned with is the process of differentiating the requested information from other information which has not been requested where a document contains both.”

Jenkins Tribunal decision

In *Jenkins v the Commissioner and Defra* (EA/2006/0067) the Tribunal addressed the issue of whether the words “extracting the information from a document containing it” include the redaction of exempt information containing it. The Tribunal supported the position of the Commissioner: “The Tribunal agrees with the Commissioner that such an act of deletion, i.e. removal of what may be thought to be exempt material, even at the stage at which the exercise is carried out, cannot sensibly be viewed as coming within the provisions of Regulation 4(3)(d) as it is presently drafted.”

In relation to charging under regulation 6 the Tribunal also commented: “The exercise which a public authority may embark on in order to consider whether an exemption applies and the extent to which material otherwise disclosable may be subject to an exemption, is a separate exercise. The Commissioner and DEFRA agree that Regulation 6 is wide enough to encompass the charge of a fee in that respect.” To clarify his position, the Commissioner **does not** agree that the time spent on the process of redaction can be charged for under the regulations. The Commissioner’s line is as set out above; that costs of redaction that could be charged for would be limited to the physical costs of redaction and are clearly limited by regulation 6(4). In written submissions to Tribunal the Commissioner stated that any fees could only be charged “subject to reg 6(4) of the Appropriate Limit and Fees Regulations.”

DBERR Tribunal decision

In DBERR v ICO and FoE ([EA/2007/0072](#)) the Tribunal again commented that the time taken to redact is not caught by the 2004 Regulations and should not be taken into account when calculating the appropriate limit and that the decision in Jenkins “should not be interpreted in any other way”.

[PREVIOUS](#) / [NEXT](#)

Source		Details	
Developed by GS/SW		Jenkins / Defra (2 November 2007)	
		DBERR / FoE (29 April 2008)	
		Chief Constable of South Yorkshire Police v ICO (14 December 2008)	
Related Lines to Take			
n/a			
Related Documents			
EA/2006/0067 (Jenkins), EA/2007/0072 (DBERR), EA/2009/0029 (Chief Constable of South Yorkshire Police)			
Contact			SW / GF
Date	18/01/2010	Policy Reference	LT

FOI/EIR	FOI	Section/Regulation	s12	Issue	Reasonable estimates
Line to take:					
1 - It is up to the public authority to estimate whether it would exceed the costs limit to comply with a request although any estimate must be reasonable. However in considering the reasonableness of that estimate, the Commissioner can investigate and					

challenge the public authority's process of investigation, assessment and calculation which led to their estimation that it would exceed the costs limit to comply with the request.

2 - Also, although it is not a statutory requirement, as a matter of good practice a public authority should provide a breakdown of how they arrived at their estimate so that the applicant can consider refining his request to come within the costs limit.

Further Information:

Part 1 – the Commissioner can investigate the way in which the estimate has been calculated

Regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 states as follows:-

“In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –

- *determining whether it holds the information,*
- *locating the information, or a document which may contain the information,*
- *retrieving the information, or a document which may contain the information,*
- *extracting the information from a document containing it.*

In the case of Mr William Urmenyi & the London Borough of Sutton the Tribunal said that it was clear from the wording of section 12 that it was up to the public authority to estimate whether the appropriate limit would be exceeded in carrying out the activities described in Regulation 4 but that:

“....the Commission[er] and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable”. (para 16).

The issue of what constitutes a reasonable estimate was also considered in the case of Alasdair Roberts and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:

- *“Only an estimate is required”* (i.e. not a precise calculation)
- The costs estimate must be reasonable and only based on those activities described in Regulation 4(3)
- Time spent considering exemptions or redactions cannot be taken into account (reaffirming the position in Jenkins (EA/2006/0067)) (see LTT115)
- Estimates cannot take into account the costs relating to data validation or

communication

- The determination of a reasonable estimate can only be considered on a case-by-case basis and
- Any estimate should be “*sensible, realistic and supported by cogent evidence*” (reaffirming the position in Randall (EA/2007/0004)).

The Tribunal went on to suggest that producing an estimate requires a process of both investigation and assessment/calculation. At paragraph 12, the Tribunal said:

“...The investigation will need to cover matters such as the amount of information covered by the request, its location, and the hourly rate of those who have the task of extracting it. The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information...”

Following this approach, the Commissioner will consider the way in which the public authority has investigated, assessed and calculated that the cost of the activities required in extracting the requested information would exceed the limit and the Commissioner may find that the public authority's estimate is unreasonable. Where this is the case, the Commissioner can dismiss the public authority's estimate and substitute his own reasonable estimate and his decision as to whether s.12 has been correctly applied would then be based upon the revised 'reasonable' estimate.

Alternative Methods of Extracting the Requested Information

In the Alasdair Roberts case, the complainant offered a number of suggestions as to how the requested information could be extracted from the database. The Tribunal concluded that none of the ways suggested would have brought the request under the costs limit. However the Tribunal also made the following more general comments on alternative methods of extraction:

“(a)...the complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;

(b) that circumstances might exist where a failure to consider a less expensive method would have the effect of preventing a public authority from relying on its estimate...” (para 15).

Those circumstances were set out at paragraph 13 where it was said:

“...it is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party...”

Thus, a costs estimate will only be disregarded if it fails to consider an absolutely obvious alternative means of extracting the requested information.

However, neither the Commissioner (nor the later Tribunal in the Roberts case) will

follow the Tribunal's decision in the case of Brown and The National Archives (TNA) in which TNA claimed s.12 in relation to 637 requests made by the complainant. The Tribunal in that case concluded that it would have been reasonable to expect TNA to advise the complainant to phase his requests in intervals exceeding 60 days, to take into account the complainant's priorities and advise of the searches that TNA could offer. The Tribunal concluded that because TNA did not offer such advice, the estimate was unreasonable. The Commissioner does not accept this conclusion as his view is that the estimate was reasonable based on the actual request that had been made and that a series of phased requests would have no bearing on the reasonableness of the costs estimate applied to the original request. (Also see LTT137 on refined and clarified requests as new request).

Records Management

The Commissioner can take into account the fact that a poor standard of records management will mean that a public authority will take longer to complete its searches. Further, the Commissioner accepts the general principle that it may also take more time to carry out a search of manual files as opposed to records stored electronically where the searches available on the computer should speed up the process.

This is supported by the Tribunal's decision in the case of Robin Williams & Cardiff and Vale NHS Trust in which the Trust spent 26 hours searching for some of the requested information without success (although the decision notice concluded that 20/21 hours was more reasonable in this case). The Director of Development said that the Trust held a master file but that this was incomplete and that further searching would be required in different files stored in different locations. The complainant argued that to allow the Trust to rely on s.12 in these circumstances would "...in effect be sanctioning incompetence..." (para 27). However the Tribunal said:

"....The Tribunal agreed with the IC that he could properly take into account 'the manner in which the information was held; the fact that it is held in various location by the Trust and its appointed agents and also the fact that very little information is available by electronic means' (para 41 of the decision notice) (para 26)..... It was not open to the Tribunal to disallow reliance upon section 12 on the basis that the Trust could have organised its records more efficiently. The question was whether the information was held by the Trust or its agents and if so the time taken in compliance with the letter of the request...." (para 28).

However the Commissioner would expect the public authority to give a reasonable explanation as to why it is necessary to search across multiple sources or systems of information and the Commissioner may go onto challenge any **assumptions** about where information may be held.

Furthermore, where a search for information exceeds the appropriate limit due to poor records management, this may indicate s.46 code issues and as such should be referred to the Enforcement team who can determine if and how to raise this issue with the public authority and/or the National Archives.

Part 2 – It is good practice, although not a statutory requirement, to provide a

breakdown

There is no statutory requirement for a public authority to provide a breakdown as to how they have reached their estimate but as a matter of good practice they should, if only to try to avoid cases being passed to the ICO and thereafter to avoid decision or enforcement notices or practice recommendations being issued against them. The Tribunal offered support for this approach in the case of Gowers and the London Borough of Camden in which it was said that a public authority **should** demonstrate how their estimate has been calculated:

“...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit...” (para 68).

As the Commissioner should be seen to promote good practice any failure to provide a costs breakdown should be referred to in the other matters section of the Decision Notice although case-officers should contact a member of the GPE team before drafting any paragraphs dealing with good practice issues.

Note:

The Commissioner is aware of another Tribunal decision involving s.12. In the case of James & Government Departments, the Cabinet Office ('CO') confirmed they would hold the information requested but were unable to find it despite conducting a search of the three most likely places. The CO concluded therefore that the only alternative would be to search the entire archive. The case reached the Tribunal who, of their own volition, called a senior civil servant to give evidence. This evidence led to the discovery of the requested information. In this case, despite indicating that it was surprised that this civil servant had not been approached which showed a *“...certain lack of constructive thinking about compliance...”* (para 57), the Tribunal nonetheless considered that the initial estimate was reasonable. At para 48, they said *“...what about an estimate which, whilst undertaken in good faith, proceeds on a mistaken basis or involves honest errors? We do not think that this is any the less an estimate.....”*.

The quite unusual circumstances of this case make it of very limited application to other cases and also the Commissioner is not minded to follow the approach of accepting honest but mistaken estimates as this would allow public authorities to justify incompetence, disorganisation and poor record keeping providing they were acting in good faith. Although in those rare cases where the information turns up at a later date, this may cause the Commissioner to reconsider the extent to which the original estimate was reasonable because, for example, in the James case, it was arguable that the public authority's failure to take advantage of the senior civil servant's available knowledge would lead to the conclusion that the original estimate was not reasonable.

Source	Details
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IT	Urmenyi / London Borough of Sutton (13 July 2007) Gowers / London Borough of Camden (13 May 2008) James / Govt Departments (25 September 2007) Robin Williams / Cardiff & vale NHS Trust (22 September 2008) Brown / The National Archives (2 October 2007) Alasdair Roberts (4 December 2008)		
Related Lines to Take			
LTT4, LTT31, LTT137			
Related Documents			
EA/2006/0093 (Urmenyi), EA/2007/0114 (Gowers), EA/2006/003 – 2007/0007 (James), EA/2008/0042 (Williams), EA/2006/0088 (Brown), EA/2008/0050 (Roberts)			
Contact			HD
Date	11/11/08	Policy Reference	LTT116