FOI/EIR	FOI/EIR	Section/Regulation	s1, s36, s40 Reg 12(4)(d)	Issue	"Meta-requests" (requests about requests)

Line to take:

Meta-requests – requests about requests – are normal requests and should be considered in the same way as any other request under FOIA.

NB: We envisage that in many circumstances, meta-requests will encompass elements of personal data of the applicant. In such circumstances, the personal data elements of the request should be considered in the normal way under s40. Once the personal data is isolated, the remainder of the requested information can be dealt with as normal under FOIA.

Further Information:

In the case of Home Office and Ministry of Justice (MoJ) v ICO, the applicant requested disclosure of any documents relating to internal communication within the Government and Government departments relating to the use of FOIA by the applicant or the applicant's company, John Connor Press Associates Ltd. The applicant clarified that he did not want information already received in answers or correspondence but internal communication about his requests or the way they should be handled. The public authority withheld the information under 36(2)(b)(i) and (ii) and 36(2)(c). The Commissioner was satisfied that the exemptions were engaged but that the public interest weighed in favour of disclosure. The PA appealed the decision and stated that the request in this case was a 'meta-request' by which they meant that the request was for information about another FOI request (paragraph 7).

The Tribunal agreed with the Commissioner's view that meta-requests do not differ in status or importance from any other type of request. There is no legal basis for concluding that public authorities can refuse a meta-request under FOIA simply because it is a meta-request; there is no provision in FOIA which permits requests to be refused on the basis they constitute requests for the disclosure of information as to how a public authority internally handles a particular information request. They should therefore be considered in the same way as any other request. This position was emphasised by the High Court in the subsequent appeal (CO/12241/2008, paragraph 4).

Meta-requests and the public interest test in relation to s36

In this case, the public authority identified factors in favour of maintaining the exemption at s36. The majority of the arguments closely considered the general effect of meta-requests as prejudicial to the effective conduct of public affairs rather than the actual circumstances of the request under consideration (paragraphs 19-25). They can be summarised as follows:

1. There would a chilling effect on the future conduct of those responsible for handling FOI requests;
2. There was a resources issue;

3. Meta-requests circumvented other processes provided for under FOIA;
4. Meta-requests serve irresponsible/private interests;
5. Meta-requests provide backdoor access to information previously withheld
6. The information in this specific case contains little or no material of value;

1. The Tribunal considered these arguments in turn at paragraphs 45-60. Regarding the chilling effect, the Tribunal considered existing IT decisions (Guardian and DfES v IC and Evening Standard) which place some scepticism on the risk of such a chilling effect on the future conduct of officials (paragraph 46). Although it was accepted that there could be a chilling effect in particular cases, this argument could not be maintained in this case as much of the evidence was on the basis of dealing with meta-requests generally. The Tribunal recalled the evidence in the reasonable opinion of a qualified person, that 'much of the information created by a public authority in dealing with a request for information is **not actually sensitive**' (emphasis added). In light of the existing IT decisions, little weight was applied to this public interest argument by the Tribunal. This position was corroborated in the High Court appeal.

2. The PA argued that there would be a disproportionate diversion of valuable resources to deal with meta-requests which would have an impact on resources to deal with substantive FOI requests. However, the public authority presented contradictory evidence which said that meta-requests had not stopped them dealing with 'substantive' requests for information and additionally, that the information relevant to meta-requests will often be relatively easily available and cannot be ruled out on grounds of cost. The Tribunal did not give a firm view in response to this, but it clear that there is little or no evidence to suggest that meta-requests create a disproportionate diversion of resources and that therefore this is a weak public interest argument.

3. The PA's argument that meta-requests circumvents established FOI complaints/appeals procedures was accepted as fundamentally misconceived by the Tribunal and viewed as another weak public interest argument in favour of maintaining the exemption. As detailed at paragraph 50, FOIA provides for information to be released in response to requests unless exempt by virtue of the provisions in the Act; there is no exemption for circumvention of FOI processes in the Act.

4. In considering the public interest argument that the information contains little or no material that would serve the public interest, the public authority argued that the information would not inform public debate, drawing upon the case of Foreign Office and ICO v Friends of the Earth, which noted that there is a clear distinction between information that simply adds to the sum of human knowledge and information that actually furthers a clear public interest (paragraph 52). However, this was countered by the argument that there is an important public interest as such information shows the processes are working well or otherwise; this is emphasised by the fact the appellant sought to apply additional late exemptions to the information, which demonstrates that they consider that some of the information in this case has value (paragraph 53).

5. In response to the argument put forward that meta-requests are an irresponsible use of the Act that serves an individual's private interests, the Tribunal accepted evidence from the Commissioner that irresponsible requests should be dealt with as vexatious under s14 and that the concept of irresponsible use has no place outside of s14. Private interests behind a request should not be taken into account as the Act is motive blind. Therefore little weight was given to this public interest.

6. Lastly, the Tribunal attributed little weight to the public interest argument in regard to the 'backdoor access' argument. The public authority had argued, in the reasonable opinion of the qualified person that meta-requests could be used as a backdoor method of obtaining information

previously withheld – "the public authority would have no choice but to undertake the time consuming task of collating and auditing all the internal information that has been created, to ensure that any reference to the details of previously withheld information is identified". However, although it was accepted that dealing with meta-requests could be time consuming, the Tribunal found that time spent is of no relevance and has limited weight. The exemption at s12 provides for costs and s14 if it encompasses a repeated request. Furthermore, there was no evidence that meta-requests have been used to gain backdoor evidence in general, or in this case.

The Tribunal noted that the public authority's approach was to treat meta-requests as a special category of requests; they were clear that there was no basis under FOIA to do that and there is no separate class of request. They concluded that the public interest factors presented by the public authority were at a high generalised level and noted that a narrow approach focusing on how the information in question would impact upon the particular public interest the exemption is designed to protect (i.e. – the effective conduct of public affairs in this case) should be taken.

The public authority appealed the decision to the High Court, who ultimately upheld the Tribunal's (and the Commissioner's) decision that the public interest test in maintaining the exemption was outweighed by the public interest in disclosure (paragraph 38).

Meta-requests and personal data

We recognise that it is likely that meta-requests may include in part the personal data of the applicant. Therefore, s40 should be considered in the first instance and once any personal data is isolated, the remainder of the requested information can be considered as normal under FOIA.

PREVIOUS / NEX

Source	**Details**
Information Tribunal	Home Office and MoJ v ICO (20 November 2008) High Court CO/12241/2008 (6 July 2009)

Related Lines to Take
n/a

Related Documents
EA/2008/0062, CO/12241/2008

Contact	GF		
Date	29/07/2009	**Policy Reference**	**LTT15**

FOI/EIR	FOI	Section/Regulation	s21	Issue	Examples where information is accepted as reasonably accessible to the applicant.

Line to take:

Although information may be available elsewhere, there is a need to consider if that information is actually reasonably accessible to the applicant.

The Commissioner accepts that information is reasonably accessible if the public authority:

- knows that the applicant has already found the information; or
- is able to precisely direct the applicant to the information. In this case the public authority has to be reasonably specific to ensure it is found without difficulty and not hidden within a mass of other information.

* NB – the public authority can only apply s21 if it **holds** the requested information.

Further Information:

Where information is available elsewhere, it does not necessarily mean that it is 'reasonably accessible' to the applicant. There are additional factors that should be taken into consideration in making the judgment whether the information is in fact 'reasonably accessible' to the applicant. The two IT decisions below demonstrate cases where information was held elsewhere and the Tribunal considered the accessibility of that information.

Craven v ICO

In the case of Craven v ICO, the applicant had requested a report, of which parts were in the public domain as a result of leaks by the author; media reporting and statements made in open court. The public authority had claimed s43(2) and s44(1) against disclosing the information, which was endorsed by the Commissioner's decision notice. The applicant's central ground of appeal was that the report was already in the public domain and therefore, the exemptions applied by the public authority did not apply to it.

The Tribunal said that if the report were fully in the public domain, there would be no purpose in requesting it under FOIA; nor would there be any basis in disclosing it under

FOIA, as it would be exempt from disclosure by virtue of s21 (paragraph 26). However, the Commissioner would not unequivocally accept that if requested information is in the public domain, it is inevitably subject to s21; there are other factors to consider to assess whether that information is actually reasonably accessible.

At paragraph 27, the Tribunal noted the Applicant's statement that he "readily obtained" minutes of Treasury Select Committee meetings and reports by the media, which were available to the public. The Tribunal was satisfied that this demonstrated that the parts of the report which had entered the public domain by this route were reasonably accessible to the applicant by means other than a request under FOIA, and that s21 could have been applied to those parts.

If the applicant had not been able to "readily obtain" that information, the Commissioner would require supplementary evidence to determine that not only was the information available elsewhere, that it was also reasonably accessible to the applicant. For example, he would expect the public authority to provide a clear direction as to where the information could be accessed or found. This point is given fuller consideration in the IT in Ames v Cabinet Office.

Ames v Cabinet Office

In the case of Ames v Cabinet Office, the applicant requested specific information as to the official(s) responsible for drafting the Iraq Weapons of Mass Destruction dossier's executive summary at a specific date. The public authority responded advising that the:

'*drafting of the Iraq dossier, including the executive summary, is referred to in Cabinet Office evidence to the Hutton Inquiry and can be accessed at http://www.the-hutton-inquiry.org.uk/content.evidence.htm. The information held by the Cabinet Office that is published on this site is therefore exempt under the absolute exemption in s21 of the Freedom of Information Act 2000 relating to information accessible by other means, the Cabinet Office does not hold any further information about which official or officials re-drafted the executive summary between 10/11 September draft and the 16 September draft.*'

At internal review, the public authority confirmed it did not hold a record of the officials who drafted the dossier's executive summary between 11 and 16 September; the Commissioner found in his decision notice that the Cabinet Office had dealt with the request in accordance with the Act and had applied s21 correctly.

The Information Tribunal found that, in contrast to the Commissioner's decision, that the requested information was not held on the website. The Tribunal went on to say that should there have been any information on the website that answered the request, "it would not necessarily follow that the material was reasonably accessible to Mr Ames so as to allow the Cabinet Office to rely on section 21". The Tribunal were clear that they were not sure, that in a case where a public authority is asked for a very specific piece of information which it holds, it would be legitimate for the public authority to say to the applicant that the information is somewhere to be found on a large website like that of the Hutton Inquiry, even if the applicant was well informed.

The Commissioner accepts the Tribunal's comment that this might be different if the public

authority were to provide a precise link or some other direct reference to exactly where the requested information can be actually found. Therefore, the Commissioner believes that it is reasonable to expect public authorities to point specifically to the information rather than, for example, say that there could be something of relevance on a website.

Consequently, the Commissioner accepts that information is reasonably accessible if the public authority:

- knows that the applicant has already found the information; or
- is able to precisely direct the applicant to the information. In this case the public authority has to be reasonably specific to ensure it is found without difficulty and not hidden in a mass of other information.

* NB – the public authority can only apply s21 if it **holds** the requested information.

Source	**Details**
Information Tribunal	Ames / Cabinet Office (24 April 2008) Craven /ICO (13 May 2008)

Related Lines to Take
LTT22, LTT143

Related Documents
EA/2007/0110 (Ames), EA/2008/0002 (Craven)

Contact	GF		
Date	24/03/2009	**Policy Reference**	**LTT151**

FOI/EIR	FOI EIR	Section/Regulation	s40 Reg 13	Issue	Naming Officials representing Lobbyists and Public Authorities

Line to take:

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

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

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

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

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

Further Information:

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

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

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

Are names in this context personal data?

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

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

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

"…in relation to the facts in this case that the names of individuals attending meetings which are part of the Disputed Information are personal data. This is because the individuals listed as attendees in the minutes and elsewhere in the Disputed Information will have biographical significance for the individual in that they record his/her employer's name, whereabouts at a particular time and that he/she took part in a meeting with a government department which would be of personal career or business significance." (para 91)

The Tribunal continued;

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

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

Reasonable Expectations

The Tribunal was guided by European Case law when considering what the reasonable expectations of the parties involved would be regarding the disclosure of personal data. In broad terms the Bavarian Lager Case (which is discussed in more detail below for those interested) established the principle that third parties, such as representatives of a trade organisation, who attend official meetings cannot have an expectation that their names will

be kept private where their privacy is not adversely affected by the mere release of a record of who attended the meeting. This position was accepted by DBERR (see para 95)

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

The Test

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

- Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;

- The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.

- Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.

- In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;

- The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.

- The extent of the disclosure in relation to the named official will be subject to the application of the test set out in the 6th condition, schedule 2, in relation to the 1st data protection principle and will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business.

For the sake of clarity the term 'spokesperson' is taken to be any official, of either the department or the lobbyist, whose job role involves representing the views of that organisation to an external audience and actively participating in such debates/dialogue. Essentially any official whose job role encompasses being a spokesperson should expect to be named in disclosures regardless of their seniority. It therefore seems likely that it will capture the majority of attendees except those junior staff with purely administrative duties and, exceptionally, those whose job role would not normally involve participation in such meetings but are standing in for more senior colleagues.

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

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

The Bavarian Lager Case

T-194/04

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-194/04

The details of the Bavarian Lager Case are included to assist case officers who want to familiarise themselves with the case. Generally speaking however it is anticipated that case officers will be able to rely on the authority provided by the Tribunal in para 101 of its decision when considering cases concerning the dialogue between a public authority and lobbyists.

Very briefly the history of the Bavarian Lager Case is as follows. The European Commission (EC) had considered whether the UK Government had breached a European treaty on the import of alcohol. As part of the EC's investigation a meeting was held between the EC, the UK government and a trade organisation. Ultimately the EC decided not to pursue proceedings against the UK. The EC then received a request for the names of the trade organisation's representatives who attended the meeting under a statutory access regime providing a right of access. The EC refused the request, in part, under an exemption respecting the privacy of individuals. The applicant then complained to the European Ombudsman as a result of which some additional information was released and the Ombudsman made a special report to the European Parliament. In this special report the European Ombudsman concluded that;

"…there was no fundamental right to supply information to an administrative authority in secret and that Directive 95/46 [the European data Protection Directive on which the DPA is based] did not require the Commission to keep secret the names of persons who submit views or information to it concerning the exercise of their functions." (as quoted at para 97 of the DBERR case)

He went onto to write to the EC's President and express his concern that;

"data protection rules are being misinterpreted as implying the existence of a general right to participate anonymously in public activities. This misinterpretation risks subverting the principle of openness and the public's right of access to documents, both at the level of the Union and in those Member States where openness and public access are enshrined in national constitutional rules" (as quoted at para 97 of the DBERR case)

However the EC still withheld the names of 5 individuals who had refused to consent to their names being disclosed. This resulted in the applicant pursuing the matter in the Court of First Instance (CIF), a court of the European Union which has jurisdiction over actions taken by natural or legal persons against institutions of the EC and actions by member nations against the Commission (appeals from the CIF are to the European Court of Justice).

It is this case, heard by the CIF, which is commonly known as the Bavarian Lager Case. The CIF noted the European Ombudsman's position as quoted above when setting out the background to the dispute. And later when setting out its findings as to whether the disclosure of the names would affect the privacy of those involved it commented that;

"As the Commission itself has indicated, the persons present at the meeting of 11 October 1996, whose names have not been disclosed, were present as representatives of the CBMC [the trade organisation] and not in their personal capacity. The Commission has also indicated that the consequences of the decisions taken at the meeting concerned the bodies represented and not their representatives in their personal capacity.

In those circumstances, this Court finds that the fact that the minutes contain the names of those representatives does not affect the private life of the persons in question, given that they participated in the meeting as representatives of the bodies to which they belonged. Moreover, as noted above, the minutes do not contain any individual opinions attributable to those persons, but positions attributable to the bodies which those persons represented.

In any event, disclosure of the names of the CBMC representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such an interference, and the protection of the privacy and integrity of the persons concerned is not compromised. " (as quoted in para 94 of DBERR).

The CIF ultimately ordered the EC to disclose the names that had been withheld.

1 Harcup EA/2007/0058

2 Durant Michael John Durant v FSA Court of Appeal Jul 2003 [2003]EWCA Civ 1746

Source	Details
IT	DBERR v ICO & FoE

Related Lines to Take			
LTT148, LTT149,			
Related Documents			
EA/2007/0072 (DBERR),			
Contact		RM	
Date	27/04/2009	**Policy Reference**	**LTT152**

FOI/EIR	EIR	**Section/Regulation**	Regulation 2(1)(b) Regulation 12(9)	**Issue**	The Commissioner's approach to information relating to emissions

Line to take:

Emissions for the purposes of regulation 2(1)(b) and 12(9) should be given its "plain and natural meaning".

In accordance with the EU Directive, the Commissioner acknowledges the emphasis placed on the release of information relating to emissions and will consequently interpret information relating to information on emissions for regulation 12(9) broadly to reflect this.

Requested information does not have to be specifically information **on** emissions for regulation 12(9) to apply, but extends to information that **relates to** information on emissions.

Further Information:

The scope of the regulations in relation to emissions

While regulation 2(1)(b) provides that **information on emissions** is environmental information, regulation 12(9) is broader in scope and covers **information relating to information on emissions** (rather than just *on*). Furthermore, regulation 12(9) demonstrates a clear intention that there are limited circumstances where public authorities may refuse to disclose information

relating to emissions:

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 any exception referred to in paragraphs (5)(d) to (g).

Corresponding to this, the Commissioner acknowledges the emphasis placed on releasing information relating to emissions, which is consistent with the EU Directive.

The Commissioner's interpretation of emissions

The Aarhus Convention Implementation Guide refers to Council Directive 96/61/EC on integrated pollution prevention and control ("the IPCC Directive"), which defines emissions as a "direct or indirect release of substances, vibrations, heat or noise from individuals or diffuse sources in the installation into air, water or land".

This definition was considered by the IT in *Ofcom v ICO and T-Mobile* when contemplating what is covered by emissions. In this case, Counsel for T-Mobile accepted that radio frequency could be characterised as "energy" and "radiation" and also accepted that it was correct to say that they were "emitted" from a base station. However, he argued that *"[radio frequency] did not constitute 'emissions' for the purposes of EIR because the circumstances in which the EIR came into existence require the word to be given particularly narrow meaning. Those circumstances were that the EIR implemented the Directive which included in its fifth recital, a statement that it was itself intended to be consistent with the [Aarhus Convention]. No definition of "emissions" appears in the EIR, the Directive or the Aarhus Convention".*

The Tribunal disputed Counsel's narrow interpretation of emissions, which referred to the IPCC definition, which he had argued made it clear that the term emissions was intended to apply to polluting substances such as chemical elements released into the atmosphere from certain types of industrial plants (paragraph 24). The Tribunal noted that it is not a binding definition and that the Aarhus Convention itself does not cross reference it (paragraph 25). The Tribunal concluded that emissions, for the purposes of regulations 2(1)(b) and 12(9) "should be given its plain and natural meaning and not the artificially narrow one set out in the IPCC Directive". In this context, the Tribunal accepted that radio wave radiation emanating from a base station is an emission (paragraph 25).

The Commissioner agrees with the Tribunal's view; as discussed above, and in accordance with the Aarhus Convention, the Commissioner places vital importance on releasing information relating to emissions and correspondingly, will interpret emissions broadly, in contrast to T-Mobile's Counsel's narrow interpretation of emissions and reading of the IPCC definition.

With regard to the Tribunal's comments, the Commissioner has given further consideration to the "plain and natural" meaning of emissions in case FER0184376, where he considered the dictionary definitions of "emission" and "emit". Emission is defined as "something emitted" and the definition of emit includes "give off, send out from oneself or itself, (something imponderable, as light, sound, scent, flames, etc.)".

In this case, the complainant had made a series of requests relating to a research report conducted on noise issues and wind farms. The public authority had claimed s12(5)(e) and (f) but the Commissioner argued that the information related to emissions, and that by virtue of 12(9), the

exceptions at 12(5)(d) to (g) could not apply to the information. In response to this, the public authority argued that noise was given equal prominence to emissions in the definition of environmental information under 2(1)(b) and therefore has clearly separate status (paragraph 27). The Commissioner was not persuaded by this and believed that regulation 2(1)(b) should be read as saying that noise can be characterised as an emission.

The Commissioner believes that information can be characterised as being within more than one of the factors listed under regulation 2. In light of consideration of the dictionary definition of emissions and emit, the Commissioner was clear that the withheld information was information relating to the noise waves emanating from certain windfarms; with this in mind and considering this alongside the 'plain and natural' meaning of the word emission, the Commissioner believes that the withheld information related to information on emissions.

Case example on the application of 12(9)

Case FER0085500 provides an example of the scope of information relating to information on emissions that the Commissioner will consider for the purposes of applying regulation 12(9). In this case, the complainant had requested a report into an application for a grant towards a proposed biomass generation plant; the decision notice established that the plant had a key aim of reducing carbon emissions. The report contributed to the decision on whether or not to award a grant under Bioenergy Capital Grants Scheme and the Commissioner took the view that the Scheme is likely to affect the reduction of carbon emissions via production of energy from renewable sources and therefore a measure designed to protect all elements referred to in 2(1)(a) by reducing factors within 2(1)(b), namely emissions (paragraph 35).

The public authority withheld the requested information, citing the exceptions provided at regulations 12(5)(d) (confidentiality of proceedings of public authorities provided by law), (e) (commercial confidentiality) and (g) (environmental protection). However, as the Commissioner was clear that the information related to information on emissions, by virtue of regulation 12(9), these exceptions were not engaged. The Commissioner made clear his view that the inclusion of the phrase 'relates to information' in regulation 12(9) means that its application is not restricted to cases where information falls within the definition of environmental information only by virtue of regulation 2(1)(b).

This case demonstrates that where information falls into the environmental infromation definition via measures, you are likely to be looking more widely at whether the measure deals with emissions rather than the specific recorded information in the scope of the request.

Conclusion

The above discussion reflects that the Commissioner acknowledges the emphasis placed on the release of information relating to emissions and therefore, will interpret emissions broadly to emphasise this.

PREVIOUS / ***NEXT***

Source	Details
IT	FER0085500

Decision Notices	FER0184376 Ofcom v ICO and T-Mobile

Related Lines to Take

LTT99

Related Documents

EU Directive

Aarhus Convention,

Ofcom v ICO and T-Mobile,

FER0085500, FER0184376

Contact	GF		
Date	15/05/2009	**Policy Reference**	**LTT153**

FOI/EIR	FOI	**Section/Regulation**	11(1)(a)	**Issue**	The right to specify the **form** in which a copy is provided.

Line to take:

Section 11(1)(a)includes the right to be provided with a copy of information in an electronic form but does not entitle the applicant to specify the specific software format.

Further Information:

Section 11 (1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

c) the provision to the applicant of a digest or summary of the information in a permanent or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

The main purpose of s11(1)(a) is to provide the applicant with a right to specify that they want to be provided with a **copy** of the information requested. However the form in which that copy is provided can also be specified by the applicant. This has to be done at the time of the request (see LTT 72).

It is recognised that s11(1)(a) refers to a copy of the information in a "**permanent** form or in another form acceptable to the applicant". However it is not clear how the reference to the permanence of a copy helps us interpret what is meant by the term 'form'. Therefore the Commissioner simply reads 11(1)(a) as providing the applicant with the right to a copy of the information and to have that copy in the form that they prefer.

The question which then arises is what do we mean by the term form? The Commissioner's view is that it relates to the mode or state in which something exists. So as far as recorded information is concerned this means the recording medium in which information can exist. That is it covers such mediums as a hard copy (paper/printed copy), electronic copy, audio tape, video tape etc.

This is the approach is reflected in our external guidance awareness Guidance 29 : means of Communication.

Electronic copies.

It is anticipated that requests for information in an electronic form will be the most frequent.

Our interpretation of s11(1)(a) as covering the provision of electronic copies is supported by a parliamentary debate on a proposed amendment to the Freedom of Information Bill (Hansard HoL 17th October 2000 : Column 1007 onwards, or see PARF ref POL 85). Lord Lucus explained the purpose of his amendment was to ensure that, in the internet age, applicants were entitled to electronic information rather than being fobbed off with a paper version. The then Lord Chancellor, Lord Falconer, explained that the amendment was unnecessary as the clause, which eventually became section 11(1)(a), already provided for this. The Commissioner's view is that this exchange reveals that the Governments intention was that s11(1)(a) should be read as extending to the provision of electronic copies.

Further support is provided by a decision notice ref FS50217416 in which we required that the Student Loans Company provide the complainant with a copy of its training manual in an electronic form.

Specific electronic formats

Cases have arisen where a complainant has demanded an electronic copy in a particular format, for example in a word document or a pdf file. The Commissioner's view is that there is a distinction between the form in which a piece of information is communicated e.g. an electronic

form, and how the data is arranged within that form i.e. the specific software format. In short although an applicant can ask for an electronic copy they are not entitled to specify down to the next level, the specific software format.

The mis-use of s11

The experience of caseworkers is that some complaints which are raised in respect to the application of s11(1)(a) turn out to concern quite different issues. For example in the Student Loan Company case the public authority argued that it was not reasonable for it to comply with the applicant's request for an electronic copy of the training manual because the complainant could then easily place the document on the internet, so increasing the likelihood of the public authority's copyright and confidentiality being breached. The DN concluded that these were not relevant considerations when deciding whether the provision of an electronic version was practicable. Information disclosed under the Act can still be protected by copyright and issues around confidentially are more properly dealt with under s41 or s43 (the public authority had previously claimed the manual was a trade secret).

In another case, ref FS50176916 (still in open at the time of writing) the complainant had requested an electronic version of an economic model. Although the public authority provided an electronic version of a spreadsheet, this was not a workable model, i.e. the complainant was not able to input their own data and run the model for themselves to test outcomes. The complainant argued that he wanted the model in an executable form which initially seemed to raise s11 issues.

However the real question is what is the difference between the version of the model disclosed and the workable version used by the public authority? If it is that the executable model contains calculations which then have to be applied to the data which is fed into it, the Commissioner's view is that these calculations are all part of the model and so form part of the information requested. Therefore, subject to the application of the exemptions, the public authority is obliged to provide the model complete with all the underlying calculations/information.

In theory the public authority could write down all these calculations and workings out longhand and forward these in an email to the applicant, so providing all the information electronically. However the Commissioner places emphasis on the obligation under s1(1)(b) to **communicate** information. The most effective and meaningful way for the public authority to communicate the information would be to provide a copy of the working model as used by the public authority itself. This is in line with the Commissioner's approach, set out in LTT 114, which is to consider whether a public authority acted reasonably when providing information in order to determine whether it has complied fully with its obligations 1(1)(b). In short, the complainant would be entitled to a workable version of the economic model in an electronic form. In such a case the focus of the investigation should be on what additional information exists which falls within the scope of the request and how this information can be effectively communicated to the complainant. This is more of a s1 issue rather than the complainant's rights under s11. Clearly if it was established that additional information was held then it is possible that the public authority would want to apply exemptions to that information under s1(1)(b).

For Completeness

It is also noted that s11(1)(c) provides that an applicant can ask for a digest or summary in a

form of their choosing. Following our approach to s11(1)(a) we would interpret this as meaning that an applicant can request a digest/summary to be provided electronically or as a hard copy (paper/printed copy), audio tape, video tape etc.

PREVIOUS / NEXT

Source	**Details**
DN, PARF	Anthony Swain v Student Loans Company, Arriva Trains v British Transport Police Authority

Related Lines to Take

LTT72, LTT114

Related Documents

FS50217416, PARF - POL 85 , Hansard HoL 17th October 2000 : Column 1007

Contact	RM		
Date	19/05/2009	**Policy Reference**	**LTT154**

FOI/EIR	FOI	**Section/Regulation**	s33, 35	**Issue**	Gateway Reviews are an audit function

Line to take:

The Gateway Review process undertaken by the Office of Government Commerce in relation to public procurement exercises is an audit function as described by s33(1)(b).

Further Information:

Gateway Reviews as an audit function

In the case of OGC v Dziecielewiski and Oaten, the complainants made requests for information on the Gateway Reviews carried out in relation to plans to introduce ID cards which were refused under s33 and s35.

Major acquisition programmes and procurement projects in civil central government are subject to OGC Gateway Reviews. These are carried out at key decision points by a team of experienced people, independent of the programme / project team. Gateway Reviews are broken into a series of stages from 0 to 5:

- Gateway Review 0 – Strategic assessment
- Gateway Review 1 – Business justification
- Gateway Review 2 – Procurement strategy
- Gateway Review 3 – Investment decision
- [Gateway Review 4 – Readiness for service]
- [Gateway Review 5 – Benefits realisation]

There was some internal discussion during the Commissioner's investigation as to whether Gateway Reviews did satisfy the criteria set down in 33(1)(b): "the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions"; the Commissioner concluded that Gateway Reviews were an audit function for the purposes of s33 (see para 4.10 of the DN FS50070196). However, the Commissioner went on to find that disclosure would not prejudice the audit function and so s33 was not engaged.

In this case, the reviews were 'Gate 0 Reviews' and their purpose was to find out whether the introduction of ID cards was possible, akin to a scoping or feasibility study. Although it might be expected that an audit function is normally carried out in retrospect, the Tribunal and High Court did not discuss the issue of whether 'Gate 0 Reviews' in this instance were an audit process. By finding that s33 was engaged, it is clear it was accepted that the Gate 0 stage of Gateway Reviews are accepted as an audit function. Ultimately, in line with the Commissioner's decision, the Tribunal and the High Court found that the public interest favoured disclosure in relation to s35.

There is a detailed discussion of the Gateway Review process in the Tribunal decision (paras 9 – 21) which was acknowledged in the High Court appeal and provides useful background on the subject for caseworkers. Taking these findings into account, the Commissioner is of the view that all stages of Gateway Reviews are audit functions for the purposes of s33, and accordingly went on to consider whether disclosure would be prejudicial to this function.

Gateway Reviews and s35

Incidentally, in line with the Commissioner's view, the Tribunal and Appeal found that, in this particular case, the Gateway Reviews in question also related to the formulation of government policy. The reviews were conducted at the 'Gate 0' stage, i.e. the initial stage and their purpose was to find out whether the introduction of ID cards was do-able. They were akin to feasibility studies and fed directly into the development of government policy in this area. It will not necessarily be the case that reviews conducted during the later stages of a procurement exercise could be said to relate to the development and formulation of

government policy in the same way.

* For completeness - the High Court remitted the appeal back to a differently constituted Tribunal on a separate point - for reliance of the original Tribunal on the opinion of the Parliamentary Select Committee, which was a breach of Parliamentary Privilege.

PREVIOUS / **NEXT**

Source	**Details**
IT High Court	OGC / Dziecielewiski / Oaten (2 May 2007) Office of Government Commerce v Information Commissioner & the Attorney General [2008] EWHC 737 (Admin) (11 April 2008)

Related Lines to Take

N/A

Related Documents

FS50070196, EA/2006/0068 & 0080

EWHC 737

Contact		RM / GF	
Date	28/05/2009	**Policy Reference**	**LTT155**

FOI/EIR	EIR	**Section/Regulation**	Reg 6(1)	**Issue**	Form & Format and the Right to Inspect

Line to take:

The right under regulation 6(1) to request that information be made available in a particular form or format includes the right to inspect copies.

Further Information:

Regulation 6(1) 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 –

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly and easily accessible to the applicant in another form or format.

It is the Commissioner's view, supported by counsel's opinion, that the right under regulation 6(1) to request that information be made available in a particular form or format extends to the right to inspect copies.

In reaching this view the Commissioner has read regulation 6 in conjunction with regulation 8(2)(b) which implies that there is a right to inspect. The Commissioner has also considered the ethos behind the Regulations as set out in the Directive and the guide to Interpreting the Aarhus Convention. The reasoning is set out below.

General Approach

It seems clear that the intention behind reg 6 is to liberalise the access regime so as to make it as easy and simple as possible for applicants to access environmental information in the form that suits them best. It would therefore be strange if a public authority was obliged to provide an electronic copy of the information, but could refuse to provide an opportunity to inspect the same information without any good grounds. This is particularly true when you consider that the EIR is generally a liberal regime as is the Directive and Convention that sit behind the Regulations

Regulation 8

Support for this approach can be taken firstly from the fact that regulation 8(2)(b) clearly contemplates information being made available for inspection in that it provides that;

Reg 8(2) A public authority shall not make any charge for allowing an applicant –

(b) to examine the information requested at the place which the public authority makes available for that examination.

So it would seem odd for the Regulations to contain a provision which would effectively be redundant if there was no right to inspect.

The Directive

Further support is available from the Directive. The Directive clearly promotes a liberal access regime which aims to make it as easy as possible to obtain environmental information. This is evidenced by Article 1(b) which refers to public authorities having a duty to ensure the widest possible systematic availability and dissemination to the public of environmental information, Recital 15 requires member states to make arrangements that shall guarantee information is effectively and easily accessible and Article 4(2), makes it clear that the grounds for refusing a request are interpreted is a restrictive way. It would therefore be contrary to the spirit of the Directive to try and fetter an applicant's ability to

inspect information for no good reason.

The most convincing support in the Directive however comes from Article 3 which deals with 'Access to environmental information upon request'. Paragraph (5)(c) obliges member states to ensure that practical arrangements are made for accessing environmental information such as;

"- the establishment and maintenance of facilities for the examination of the information required"

Aarhus Convention & Implementation Guide to the Convention.

Support is also available from the implementation guide to the actual Aarhus convention and the Convention itself. Article 4 of the Convention provides that the public should have access to the actual documentation containing or comprising of the information requested. The implementation guide makes it clear that this means individuals should be allowed to examine the original document. Clearly this can only be achieved by providing a right to inspect, unless of course a public authority was prepared to relinquish the original copy.

However this provision was not explicitly incorporated into either the Directive or the EIR and so the level of support which can be drawn from the Convention is limited.

Conclusion

In light of the above the counsel's opinion obtained by the Commissioner is that "All of these provisions tend to suggest that regulation 6(1) should be construed broadly so as to include requests for inspection of environmental information."

Property Searches / Decision Notices

The counsel's opinion referred to earlier was sought in relation to the issue of the property searches that are conducted when buying houses. These searches are commonly carried out by commercial companies who were keen to establish that they were entitled to inspect the information held by local authorities in order to complete their enquiries free of charge. We have now published external guidance 'Property Searches' on this topic and issued two DNs. The DNs provide useful authorities for establishing the principle that reg 6 does extend to the right to inspect.

Although both the DNs and the guidance relate specifically to property searches, they will also provide assistance where casework raises issues around a public authority's right to charge for inspecting information. In broad terms where a public authority is obliged to allow information to be inspected .i.e. neither of the provisions in subparagraphs 6(1)(a) and (b) remove that obligation, it cannot charge for doing so. Case officers should read the guidance and DNs for a fuller understanding of the interrelationship between reg 6 and 8 in this situation.

For Completeness;

The Tribunal

The Tribunal did consider the meaning of form and format in the Keston Ramblers case (EA/2005/0024). The ramblers had argued that the public authority was required to organise the information they had requested by reference to specified subjects. The Tribunal preferred the position taken by the ICO and public authority, agreeing 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." (para 50(3)) See LTT 103 for more details on this point.

This case does provide some support, albeit limited, to our position that reg 6 provides a right to inspect. It could be argued that the reference to viewing information on microfiche provided some support to the contention that reg 6 provides a right to inspect. But it is important to recognise that the main thrust of these arguments related to the particular physical form or format in which the information was provided as opposed to a particular methodology, e.g. providing the opportunity to inspect the information.

Counter Arguments

For completeness

The ICO recognises that it can be argued that the language 'form and format' can be more easily be taken to refer to how the information itself is physically structured rather than how it is communicated to the applicant e.g. Inspected.

It can also be argued that the very fact that reg 8(2) prohibits charging for the inspection of records suggests that, from a purely practical point of view, reg 6(1) should not be read as compelling public authorities to allow such inspections as to do so would unnecessarily disadvantage them. However it is anticipated that in many cases any cost would minimal and that it would be no more onerous to make information available for inspection than it would be to provide copies of that information and The Commissioner would therefore reject this argument if it was ever presented.

So although there may be counter arguments to the proposition that reg 6(1) provides a right to inspect the Commissioner remains of the view that it does.

And finally

Clearly section 11 of the Freedom of Information Act provides a right to inspect information and so the ability to inspect information has been recognised as valuable access right. Although this can not be used as an argument to justify our interpretation of the provisions under the EIR, it does seem desirable that, where possible, the two regimes provide similar rights.

PREVIOUS** / **NEXT

Source	Details
Counsel's Advice	Anya Proops 4 May 2009

	Keston Ramblers Association v ICO & the LB of Bromley

Related Lines to Take

LTT103

Related Documents

Counsel's Advice, Directive 2003/4/EC, Aarhus Implementation Guide, EA/2005/0024 (Keston Ramblers),

Contact		RM	
Date	06/08/2009	**Policy Reference**	**LTT156**

FOI/EIR	EIR	**Section/Regulation**	Reg 2	**Issue**	Listed Buildings

Line to take:

Requests for information which relate to the decision of whether or not to list a building should be dealt with under the Environmental Information Regulations rather then FOIA.

In relation to requests for information on listed building planning consent applications and decisions – the nature of the application will determine the regime under which the request should be considered.

Further Information:

Listing Process

Section 1(3) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the "Planning Act") states the following:-

"s.1(3) In considering whether to include a building in a list…the Secretary of State may take into account not only the building itself but also-

(a) any respect in which the exterior contributes to the architectural or historic interest of any group of buildings of which it forms part; and

(b) the desirability of preserving, on the ground of its architectural or historic interest, any feature of the building consisting of a man-made object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building".

The Department for Media, Culture & Sport (DCMS) website (*1) comments:

"The Secretary of State uses the following criteria when assessing whether a building is of special interest and so should be added to the statutory list:

- ***Architectural interest -*** *A building must be of importance in its architectural design, decoration or craftsmanship; special interest may also apply to nationally important examples of particular building types and techniques (e.g. buildings displaying technological innovation or virtuosity) and significant plan forms*
- ***Historic interest*** *- A building must illustrate important aspects of the nation's social, economic, cultural or military history and/or have close historical associations with nationally important people. There should normally be some quality of interest in the physical fabric of the building itself to justify the statutory protection afforded by listing*

Further detail on the Principles of Selection for listing buildings is set out in Planning Policy Guidance Note 15: Planning and the Historic Environment (PPG15), which was updated in March 2007 by local authority planning circular" but in summary other factors to consider include: age and rarity, aesthetic merits, selectivity, national interest and state of repair.

The following is taken from the English Heritage website

"The older a building is, the more likely it is to be listed. All buildings built before 1700 which survive in anything like their original condition are listed, as are most of those built between 1700 and 1840. The criteria become tighter with time, so that post-1945 buildings have to be exceptionally important to be listed. A building has normally to be over 30 years old to be eligible for listing.

Listing 'protection' covers the whole building, i.e. both externally and internally, even if the object of architectural or historical interest for which the building is listed is an internal feature. It also generally includes any object or structure fixed to the building, or buildings and structures located within its curtilage (the enclosed area immediately surrounding the building).

However the English Heritage website goes onto say:

"…Listing does not freeze a building in time, it simply means that listed building consent must be applied for in order to make any changes to that building which might affect its special interest. Listed buildings can be altered, extended and sometimes even demolished within government planning guidance. The local authority uses listed building consent to make decisions that balance the site's historic significance against other issues such as its function, condition or viability".

The Planning Act states as follows:-

"s7. ….no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised

s9(1). If a person contravenes section 7 he shall be guilty of an offence".

Section 9(4) confirms that anyone found guilty faces imprisonment and/or a fine.

Decision Notices

The Commissioner has previously issued two EIR decision notices on the Department for Culture, Media and Sport on this topic:-

- FS50122983 (19 November 2007) – the complainant asked for all paperwork concerning the decision not to list the Walter Bodmer Building

- FS50122058 (9 July 2008) – the complainant asked for all paperwork regarding the Minister of Culture's issuing of a certificate of immunity from listing in respect of Borthwick Wharf in Deptford. (N.B. This case was appealed to the Information Tribunal albeit not on the grounds of the regime applied).

In response to both cases, the DCMS indicated that whilst they would not appeal the regime used to determine this case, they did want to comment as follows:-

"…we remain strongly of the view that the information in this case - …. – and information in general about whether or not to list buildings of special architectural or historic interest, is not environmental…The listing process has no direct impact on the environment; it merely identifies a building as being of special interest. Once a building is added to the statutory list, it is then brought within the consent system…We accept that the decision as to whether to grant consent for works may have an impact on the environment and as such, is likely to fall within regulation 2(1)(c)…".

The Commissioner's Approach

LTT80 ("defining environmental information") states that it is not necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. Further the line states as follows:-

"…to define as environmental information under 2(1)(c):

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

LTT82 ("any information on") considers planning decisions and states the following:-

"…it is not necessary to say that the decision (to approve or refuse) planning permission is itself a measure affecting or likely to affect the factors or elements in 2(1)(a) or (b). It will be sufficient to establish whether the particular planning regulation under which the decision has been made is a measure affecting or likely to affect the factors and elements in 2(1)(a) and (b) or designed to protect those elements. If it is, then the decision and the related planning application becomes environmental information because they are information on the implementation of the particular planning regulation in question…"

Applying this approach here, the Commissioner finds that the listing process which is dealt with under Part I, Chapter I (entitled "Listing of Special Buildings") of the Planning (Listed Buildings and Conservation Areas) Act 1990 is an administrative measure which is likely to affect the environment. This is so regardless of whether the decision-making process leads to the building being listed or not:

The decision is made to list the building

Once a building is listed, listed building planning consent must be obtained before carrying out any alterations or extensions. The Planning Policy Guidance 15 (*3) states that:

"....planning is also an important instrument for protecting and enhancing the environment in town and country, and preserving the built and natural heritage. The objective of planning processes should be to reconcile the need for economic growth with the need to protect the natural and historic environment" (para 1.2).

The Guidance goes on at para 3.3 to say:

"There should be a general presumption in favour of the preservation of listed buildings, except where a convincing case can be made out....for alteration or demolition. While the listing of a building should not be seen as a bar to all future change, the starting point for the exercise of listed building control is the statutory requirement on local planning authorities to 'have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses' (section 16)".

In relation to the possible demolition of listed buildings, the Guidance says as follows:-

"...the Secretaries of State would not expect consent to be given for the total or substantial demolition of any listed building without clear and convincing evidence that all reasonable efforts have been made to sustain existing uses or find viable new uses, and these efforts have failed; that preservation in some form of charitable or community ownership is not possible or suitable (see paragraph 3.11); or that redevelopment would produce substantial benefits for the community which would decisively outweigh the loss resulting from demolition" (para 3.17).

The preceding paragraph of the Guidance confirms that these 'controls' have *"been successful in recent years in keeping the number of total demolitions very low".*

Thus, the decision to list a building means that the building is protected from unauthorised alteration or demolition and that any decision to allow such activities is based on an assumption in favour of preserving the building, land or landscape which affects or is likely to affect the environment.

The decision is made not to list the building

The decision not to list a building affects or is likely to affect the environment as without the listing 'protection', buildings, land and landscape can be completely altered, extended or demolished.

Thus, the Commissioner maintains his view that information on the listing process

(including the decision on whether or not to list a building) is information on an administrative measure which is likely to affect the elements in Regulation 2(1)(a), namely land and landscape (to include urban and built-up landscapes).

Listed Buildings Planning Consent

Once a building is listed, then listed building planning consent is required before any alteration, extension or demolition can be carried out. This planning process is dealt with under Chapter II of the Planning (Listed Buildings and Conservation Areas) Act 1990 (entitled "Authorisation of Works affecting Listed Buildings"). Listed building planning consent is required for both external works (i.e. demolition, changing the paint colours of exterior features, putting up a satellite dish, installing a fire escape) and but also internal works (i.e. covering over decorative plasterwork or primitive joinery, removing an internal staircase or destroying evidence of an old doorway). Planning applications take into account the extent to which any proposed alteration or extension would affect the special interest for which the building was listed.

Given that Chapter II of the 1990 Act covers both external and internal works (which would be unlikely to impact on the environment), then requests for information which fall under Chapter II cannot automatically be dealt with as environmental information, unlike information which falls under Chapter I. Instead, requests will need to be considered on a case-by-case basis to consider whether the application is information on a measure which is or is not likely to affect the environment, for example, where the special interest feature is a sixteenth century internal door, a request for information on an application to remove the internal door is information on a measure which is unlikely to affect the environment whereas where the special interest feature is an external timber window, then a request for information on an application to block up the window is information on a measure which is likely to affect the environment.

Note:

In addition to requiring listed building planning consent, it may also be necessary to obtain planning permission and/or building regulation approval all for the same work. External works may require planning and listed building consent. However if the proposed work is entirely internal, it is unlikely that planning permission would be required (unless the proposal is to build a basement) although listed building consent and building regulation approval is likely to be required for even quite minor internal alterations.

In such cases, it will be necessary to consider under which measure the application is being considered and whether the particular requested information falls under the FOIA or the EIRs.

(*1) - http://www.culture.gov.uk/what_we_do/historic_environment/3330.aspx

(*2) - http://www.english-heritage.org.uk/server/show/nav.1373

(*3) - http://www.communities.gov.uk/documents/planningandbuilding/doc/157575.doc

PREVIOUS** / **NEXT

Source	Details
Policy Team DN	DCMS (DN – 19 November 2007) DCMS (DN – 9 July 2008)

Related Lines to Take
LTT80, LTT82,

Related Documents
FS50122983 (DCMS), FS50122058 (DCMS),

Contact	HD		
Date	06/08/2009	Policy Reference	LTT157

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

Line to take:

The Commissioner considers that a public authority's functions will include:

1. The performance of any statutory duty that a public authority has the power and responsibility to perform, by virtue of an enactment or subordinate legislation
2. The performance of duties which are not set out in statute, but which nonetheless comprise a formal part of the public authority's core business or purpose. This is will be function of a public nature and is exercised in the public interest.

Subsidiary actions or support services (such as HR services) will not normally be considered as the functions of a public authority, unless this is provided in statute.

In relation to s31(1)(g) to (i), the Commissioner considers that in order for a public authority to have a 'function' for one of the purposes listed under s31(2), that public authority must have sufficient legal basis for the specified purpose they wish to cite.

Further Information:

What is a public authority function?

The Act does not define "public authority function". The ICO Awareness Guidance 17 ("Law Enforcement") states that public authorities will be performing functions with a clear basis in law. The MoJ guidance states that "a public authority's functions are all the things it has the power or duty to do. Functions may be general or specific, and may derive from statute or from the

exercise of the prerogative".

The Commissioner identifies a public authority function as the performance of any statutory duty which that public authority has the power and responsibility to carry out, by virtue of an enactment or subordinate legislation. This will often comprise its core business purpose.

The exemption under section 31(3) of the Data Protection Act 1998, 'regulatory activity' is also helpful, it states that "relevant function" means:

(a) any function conferred on any person by or under any enactment,

(b) any function of the Crown, a Minister of the Crown or a government department, or

(c) any other function which is of a public nature and is exercised in the public interest.

He will also consider whether the performance of duties which are not set out in statute, but which nonetheless comprise part of the public authority's core business purpose constitutes a function.

However, he is clear that subsidiary actions or support services (such as HR services) will not normally be considered as the functions of a public authority, unless this is provided in statute.

Section 31

Section 31(1)(g) reads that:

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

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

Section 31(2) lists a range of purposes, with the intention of protecting the conduct of investigations or proceedings. The explanatory notes for section 31 state that these activities may lead to prosecutions. This will not be true for all of the purposes, but in all cases some form of formal action must follow from the purposes listed, related to the PA's functions.

The Commissioner acknowledges the MoJ guidance on section 31(2) which states: "the exemption does not work by applying the prejudice test directly to these purposes. The test is applied indirectly through section 31(1)(g), (h) or (i). That means that one or more of the "purposes" has to be engaged by one or more of those provisions before a disclosure falls within the terms of this exemption".

In line with this, ICO Awareness Guidance 17 states that in all cases, public authorities will be performing functions with a clear basis in law. If a public authority does not have a legal basis to carry out an action, it is unlikely to constitute a function for the purposes of this section.

Caseworkers should note that "by *any* public authority" means that the prejudice does not have to occur to the public authority who is dealing with the request, but can occur to another public authority exercising a function for a relevant purpose. Accordingly, the Commissioner would

expect this to be evidenced appropriately.

Many cases under section 31(1)(g) via section 31(2) often involve a regulatory body such as the FSA, Charity Commission or the HSE and it is clear that the body concerned exercises a function for certain purposes, by virtue of legislation. The example below is of a more complex scenario involving the functions of an NHS Trust and may not be relevant to more straightforward cases involving regulatory bodies.

Example

In DN FS50086131, the PA (Newcastle-upon-Tyne Hospitals NHS Trust) had claimed that the requested information (a report to assess the conduct and abilities of a named doctor), was exempt under s31(1)(g) by virtue of 31(2)(b) to (d) and (j). Therefore, the PA put forward that the disclosure of the report would, or would be likely to prejudice the exercise by any public authority of its functions, for the purposes of:

(b) Ascertaining whether any person is responsible for any conduct which is improper;

(c) Ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;

(d) Ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on;

(j) Protecting personal other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

The Commissioner accepted that the public authority exercised a function through its discharge of its common law duty of care to patients, and its statutory duties, in particular noting the following duties:

- The duty upon all NHS bodies under section 45(1) of the Health and Social Care Act 2003 "*to put and keep in place arrangements for the purposes of monitoring and improving the quality of health care provided by and for that body*"
- The duty imposed upon every employer under section 3(1) of the Health and Safety at Work Act 1974 "*to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affect thereby are not thereby exposed to risks to their health and safety*" (paragraph 5.1).

The Commissioner noted that the PA's interchangeable use of "function" and "purpose" and emphasised that the scope of functions falling under s31(1)(g) is restricted by the requirement that the function is exercised for one or more of the law enforcement 'purposes' specified under subsection 31(2) (paragraphs 5.2-5.2.2). In light of this, although the Commissioner accepts that the performance of the identified statutory duties are functions of the public authority, in this case, he did not accept that the discharge of the Trust's common law or statutory duties to patients is exercised for the purposes of 31(2)(b) to (d) (paragraph 5.2.3).

However, the Commissioner *did* consider that the discharge of the Trust's functions can be said to be exercised "for the purpose of protecting persons other than persons at work against the risk

to health and safety arising out of or in connection with the actions of persons at work", in accordance with s31(2)(j). The Commissioner was satisfied that this function would be likely to be prejudiced as there would be a significant risk in future that the convening of similar expert panels would prove impossible or at least extremely difficult, with evidence from the panel of experts to demonstrate this view, and the public interest test favoured maintaining the exemption.

Subsidiary actions or support services (such as HR services) will not normally be considered as the functions of a public authority, unless this is provided in statute.

Although the case of HMRC v ICO considered the exercise of a function under s44, the Tribunal's considerations can equally apply under s31(1). In this case, the Tribunal considered whether information contained in a report was held in connection with a function of HMRC for the purposes of s44. The report concerned an investigation into allegations about a proposed amnesty to UK tobacco producers. The Tribunal ascertained that HMRC's central functions were the duty of collecting, accounting and managing revenues of customs and excise as provided for in section 5 of the Commissioners for Revenue and Customs Act 2005 (CRCA).

At paragraph 48, the Tribunal noted that s9(1) of the CRCA provided HMRC had ancillary powers to "do anything which they think necessary or expedient in connection with the exercise of their functions" and that the report was held in connection with the prevention, detection and deterrence of fraud, actions which therefore constituted a function of HMRC.

The report also considered the conduct of the public authority's own staff as part of the investigation. Normally, the Commissioner would expect that this would be a personnel issue, and therefore, a support service which would not form a function for the purposes of the Act, as articulated in the decision notice for this case (FS50129143). For example, investigations under an organisation's grievance procedure would not be considered a function exercised for relevant purposes. The investigation must be linked to the public authorities' defined functions. However, in this case, the Tribunal were of the view that the appointment and suitable disciplining of officers was connected to the main functions of HMRC, as it was provided for in statute through s18(1) of the Commissioners for Revenue and Customs Act 2005 which states that "Revenues and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of Revenues and Customs". As this was provided in statute, and links to the general functions of HMRC as detailed in s5, the Commissioner agrees with this judgment.

PREVIOUS / NEXT

Source	**Details**
Policy Team Decision Notices IT Decision	 HMRC v ICO (10 March 2009)

Related Lines to Take

N/A

Related Documents

Awareness Guidance 17 ("Law Enforcement"), Explanatory notes (FoI Act), MoJ Exemptions guidance: s31 – law enforcement, EA/2008/0067, FS50086131, FS50129143			
Contact		GF	
Date	24/08/2009	**Policy Reference**	**LTT158**

FOI/EIR	EIR	**Section/Regulation**	s35(1)(c)	**Issue**	Law Officer's Advice and similarity with Legal Professional Privilege

Line to take:

Section 35(1)(c) can be treated in a similar way to legal professional privilege under s.42 in that there will always be a strong element of public interest inbuilt into the Law Officers' advice exemption. However it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption will not outweigh the public interest in disclosing the information.

Further Information:

Section 35(1)(c) of the FOIA states:

35. – (1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a)….

(b)…

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice …"

In the case of HM Treasury v the Information Commissioner and Evan Owen, the complainant made a request for Counsel's opinion which supported Gordon Brown's declaration that the Financial Services and Markets Bill was compatible with the Human Rights Act 1998. The Commissioner rejected the Treasury's argument that s35(3) was applicable to exclude the public authority from confirming or denying whether the requested information was held and this decision was upheld by the Information Tribunal.

HM Treasury then appealed to the High Court where Mr Justice Blake commented on the fact that Parliament had specifically sought to single out the advice from Law Officers as being worthy of protection. At para 39 he said:

"…. Parliament has precisely identified as exempt the issue as to whether or not the Law Officers have given their advice….. this was statutory language intending to reflect the substance of the Law Officers' Convention itself, a long-standing rule adopted by the executive

for the promotion of good government. A consideration adopted by the draftsmen as a ground for exemption without having to prove specific prejudice, naturally fits into a regime where there is an assumption of a good reason against disclosure."

Further, the Judge also commented that this principle was not displaced by the introduction of the FOIA when he said that it is not the case that the "...the Law Officers convention or equivalent principles of good government set out in the Ministerial Code cease[s] to have substantial relevance or automatically have less weight the day after the passage of the FOIA" (para 40).

Thus, in the Evan Owen case the Judge concluded that the Tribunal had misdirected itself where it had failed to:

"…conclude that Parliament intended real weight should continue to be afforded to this aspect of the Law Officer's Convention [and] by failing to conclude that the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption even in the absence of evidence of particular damage." (para 54)

However, the Judge also commented that did not mean that the general considerations could never be overridden i.e. he did not wish to elevate the exemption to an absolute one. He said

"….Nothing in this judgment is intended to undermine the important new principle of transparency and accountability that the FOIA has brought to government in many ways. The Law Officers' Convention will now operate subject to the principles of the FOIA…. I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that … the strength of public interest in disclosure of the advice as to the legality of the Iraq war might well have out-weighed the exemption in its general and particular aspects" (para 64).

Thus, the Law Officers' Convention can be considered in a similar way to the concept of legal professional privilege in that the general concept itself has some in-built weight which should be taken into account in any analysis but it is not an absolute exemption. Instead, it is a factor which will need to be considered in every case but which may be outweighed by other factors in the same way that the principle of legal professional privilege may be (see LTT15).

PREVIOUS / NEXT

Source	**Details**
High Court	HM Treasury / IC & Evan Owen (21 July 2009)

Related Lines to Take

LTT15

Related Documents

[2009] EWHC 1811 (Admin)			
Contact		HD	
Date	26/10/2009	**Policy Reference**	**LTT159**

FOI/EIR	FOI	**Section/Regulation**	12(5)(e)	**Issue**	Confidentiality of commercial or industrial information

Line to take:

The Commissioner will consider the following questions when applying regulation 12(5)(e):

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

This is different to the approach to confidentiality taken under s41. In particular, there is no need to consider whether there would be a public interest defence to any claim for breach of confidence. Instead, the exception is subject to the usual public interest test under the EIR.

Further Information:

Regulation 12(5)(e) provides:

(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

The underlying purpose of the exception is to protect the legitimate economic interest that is being protected by commercial confidentiality. It incorporates elements of both s41 and s43 of the FOIA. However, the exception differs from those sections in some key respects and case officers should take care when reading across arguments made under s41 or s43. In particular, it is not enough to argue that disclosure would adversely affect the commercial interests of any person. There must also be confidentiality provided by law, which may include consideration of some of the factors relevant to s41 but is not an identical test.

The Commissioner considers that this exception can be broken down into four elements, all of which are required in order for the exception to be engaged:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?

- Would the confidentiality be adversely affected by disclosure?

In *South Gloucestershire Council / Bovis Homes* (EA/2009/0032), the Tribunal indicated that there were three elements to the exception:

- The confidentiality of the commercial or industrial information.
- The confidentiality is provided by law to protect a legitimate economic interest.
- Disclosure would adversely affect the confidentiality.

The Commissioner considers that there is no conflict between these tests and they essentially cover the same ground. However, he will adopt the four-stage approach for clarity, to avoid any confusion about whether confidentiality should be considered under the first or second limb and also to ensure that clear consideration is given to both the question of confidentiality in law and to the legitimate economic interests at stake in the particular case.

Note that regulation 12(9) provides that the exception is not available for information relating to emissions.

See also LTT161 for more information on the public interest test for regulation 12(5)(e).

(1) Is the information commercial or industrial in nature?

The exception only protects the confidentiality of commercial or industrial information.

The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. It should be remembered that not all financial information is necessarily commercial information. For example, a lot of information about a public authority's finances or resources will not be commercial information.

The Commissioner's view is that "industrial" in this context can be taken to refer to any business activity or commercial enterprise, and is unlikely to expand the scope of the exception to encompass non-commercial information. However, he will consider arguments that non-commercial information is nevertheless industrial information on the facts of a particular case.

(2) Is the information subject to confidentiality provided by law?

The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

There is no need under regulation 12(5)(e) for the information to have been obtained from another. The exception can therefore also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.

However, no confidentiality can attach to information generated by the public authority itself if it has not been shared with a third party, unless there is a specific statutory provision requiring it not to be disclosed.

Common law of confidence

When considering whether the common law of confidence applies, the Commissioner's approach will be similar in some respects to the test under s41, although there are also some key differences. The key issues the Commissioner will consider when looking at common law confidences under this heading are:

- Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. See LTT94 for more discussion on this point.

- Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and/or any standard practice regarding the status of information. A useful test is likely to be to consider whether a reasonable person would have considered that the information had been shared in confidence. See LTT95 for more discussion on this point.

However, in contrast to the Commissioner's approach under s41, there is no need to consider here whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no need to establish an actionable breach of confidence for the purposes of this exception. This approach is also supported by the fact that the element of detriment will need to be considered under the third heading below.

As there is no need to establish an actionable breach of confidence, there is no need to consider whether there would be a public interest defence to any breach of confidence. On a practical level, as the exception is subject to the usual public interest test under regulation 12(1)(b), the balance of the public interest will still be fully considered before any decision on disclosure can be reached. Any prior consideration of a public interest defence could not ultimately change the outcome of the case and would therefore cause unnecessary duplication. The Commissioner considers that this redundancy supports his view that there is no need to consider the public interest defence as part of the engagement of this exception.

Contractual obligations of confidence

For the purposes of this exception, the Commissioner will also accept obligations of confidence imposed by contract. If the public authority can establish that there is a binding confidentiality clause covering the requested information, there is no need to consider the common law test of confidence.

Although this potentially widens the scope of the exception, confidentiality is just one element and is not enough on its own to engage the exception. The Commissioner does not consider that this approach will allow public authorities to contract out of their obligations under the EIR, as to use the exception they will still have to show that the confidentiality is protecting a legitimate economic interest, and also that the public interest in maintaining the confidentiality in the particular circumstances of the case outweighs the public interest in disclosure. However, if the confidentiality is self-imposed by contract, this may affect the weight accorded to maintaining the exemption when conducting the public interest test.

Statute

Although regulation 5(6) disapplies any statutory bars on disclosure for the purposes of the EIR, a statutory bar will still mean that confidentiality is provided by law for the purposes of this exception. However, the other limbs of the exception – and the public interest test – will still need to be satisfied.

(3) Is the confidentiality provided to protect a legitimate economic interest?

The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This will require a consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.

Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient. The Commissioner considers that, taking into account the duty in paragraph 4.2 of the Directive to interpret exceptions in a restrictive way, the wording *"where such confidentiality **is** provided to protect a legitimate economic interest"* (as opposed to *"was provided"*) indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest.

It is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish (on the balance of probabilities) that some harm would be caused by disclosure.

In support of his approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests: "*Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.*"

Arguments under this limb may include arguments about prejudice to commercial interests similar to those relevant to s43. However, the Commissioner considers that economic interests are wider than commercial interests, and can also include financial interests. For example, this could include arguments that disclosure would adversely affect the finances or tax revenue of a public authority (even if we would not accept that this constituted a commercial interest). However, it will not include pure personal privacy concerns.

Whose interests must be affected?

If the information was provided by one party to another under the common law of confidence, it would be the interests of the confider that are relevant here.

However, if the information was jointly agreed or else was provided under a contractual obligation of confidence, either party's interests could be relevant, depending on whose interests the confidentiality is intended to protect. For example, in the South Gloucestershire Council case, the information (appraisal reports on potential development sites) was provided by a third party to the council under a contractual obligation of confidence, but the

confidentiality clause was designed to protect the council's interests (its bargaining position in planning negotiations with developers) rather than the confider's interests. The Tribunal accepted in that case that the confidentiality was to protect the council's legitimate economic interests.

If it is a third party's legitimate economic interests that are at stake, the Commissioner will expect a public authority to provide some evidence from the third party about its concerns, in line with his approach to s43 arguments. It will not be sufficient for the public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. See LTT55 for more information.

(4) Would that confidentiality be adversely affected by disclosure?

Although this is a necessary element of the exception, the Commissioner considers that once the first three elements are established it is inevitable that this limb will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and will also inevitably harm the legitimate economic interests that have already been identified.

PREVIOUS / NEXT

Source	**Details**
Policy team Information Tribunal	South Gloucestershire Council / Bovis Homes Ltd (20 October 2009)

Related Lines to Take

LTT55, LTT94, LTT95, LTT161

Related Documents

EA/2009/0032 (South Gloucestershire)

Contact		LS	
Date	02/12/2009	**Policy Reference**	**LTT160**

FOI/EIR	EIR	**Section/Regulation**	reg 12(5)(e)	**Issue**	Public interest factors for regulation 12(5)(e)

Line to take:

When weighing up the public interest in maintaining the exception, consideration should be given to the harm that the specific disclosure would cause to legitimate economic interests.

There may also be some wider public interest in preserving the principle of confidentiality. The weight of each will depend on the circumstances.

Further Information:

Regulation 12(5)(e) provides:

(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

The underlying purpose of the exception is to protect the legitimate economic interest that is being protected by commercial confidentiality. It incorporates elements of both s41 and s43 of the FOIA, although it also differs from those sections in some respects. For more information on the scope of the exception see LTT160.

Although the engagement of this exception may in some cases include consideration of the common law of confidence, there is no need to consider the availability of a public interest defence.

Relevant public interest considerations will instead be considered as part of the public interest test under regulation 12(1)(b). When considering the balance of the public interest, it is important to consider both the specific harm that disclosure would cause to the relevant economic interest at stake in the particular case, and whether there is any wider public interest in preserving the principle of confidentiality. However, the initial focus should be on the harm to legitimate economic interests.

Harm to legitimate economic interests

In order for the exception to be engaged the public authority will already need to have established that disclosure would cause some harm to a legitimate economic interest of the relevant person. See LTT160 for more information. It should therefore be straightforward to identify the relevant interests.

The weight to be given to this factor is likely to depend on the extent, severity and/or frequency of the identified harm.

Only harm to the relevant economic interest identified for the engagement of the exception will be relevant here, as the exception only protects confidentiality as far as necessary to protect those interests. Any other arguments (eg relating to personal privacy) will not be relevant for the purposes of this exception.

Public interest in preserving the principle of confidentiality

There will always be some inherent public interest in preserving confidentiality. However, in the context of s41, the Tribunal has rejected comparisons with the strong inbuilt public interest in LPP. Therefore we will not place any significant weight on this generic argument. The approach

to “inherent” public interest arguments as set out in LTT96 is helpful here.

Arguments about undermining confidentiality will have more weight when they relate to the specific circumstances of the case. For example, if the authority can demonstrate that this disclosure would undermine its relationship with a particular company, or affect its ability to do business with others, then this should be given more weight than a general assertion that breaching confidentiality will have a harmful effect on trust. To some extent this is also likely to depend on the harm that the specific disclosure would cause, as if the harm caused would be limited it would be more difficult to argue that this would undermine the authority’s relationships.

In the context of regulation 12(5)(e) the Commissioner also considers that the weight of this wider public interest in respecting confidentiality is likely to be affected by the nature of the obligation of confidence. For example, if a duty of confidence has been voluntarily self-imposed on the public authority (eg by contract), this is likely to carry less inherent weight than an obligation of confidence imposed by statute or implied under the common law. In support of this general approach, the Commissioner notes that paragraphs 46 to 53 of the Code of Practice issued under the EIR make clear that a public authority cannot contract out of their obligations under the EIR and should not accept information in confidence unless it is necessary to do so.

Respect for confidentiality imposed on a third party by the public authority is also likely to carry little or no inherent weight. The Commissioner acknowledges that it may be important to preserve trust in public authorities’ ability to treat third party information in confidence, especially if ensuring the free flow of information is important for the authority’s functions. However, public authorities should expect that information they create may need to be disclosed under the EIR, even if they would prefer it to be treated in confidence.

Public interest in disclosure of planning information

Regulation 12(5)(e) is often at issue in requests relating to planning matters. The Commissioner considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. There may of course also be other factors in favour of disclosure, depending on the particular circumstances of the case (eg number of people affected by the proposal, any reasonable suspicion of wrongdoing etc).

PREVIOUS / NEXT

Source	**Details**
Policy team	N/A

Related Lines to Take

LTT96, LTT160

Related Documents

N/A

Contact		LS	
Date	02/12/2009	**Policy Reference**	**LTT161**

FOI/EIR	FOI/ EIR	**Section/Regulation**	s40(2) & reg 13	**Issue**	Anonymising Post codes

Line to take:

This line is relevant when considering the anonymisation of personal data, **not** whether it is fair to disclose information on addresses.

Where a request captures personal data the first thing to do is to consider whether the personal data can be released in its entirety without breaching the data protection principles. If it can't, it is often necessary to anonymise the information so that some of it can be released.

Where the information in question contains a postcode it will be necessary to redact part of the postcode in order to truly anonymise the information.

This is because full post codes are considered sufficient to identify specific addresses and are therefore capable of indentifying the individuals linked to that address.

However you cannot identify individual properties from the outbound part of a postcode (i.e. the first half e.g. SK9) and so this information does not risk identifying individuals.

So to anonymise information it is necessary to remove the second half of the postcode, leaving just the first half or, outbound part, of the postcode. Once information has been anonymised it is no longer personal data and there is no need to consider the data protection principles.

Further Information:

Identifying individuals from Postcodes

Post codes identify groups and tiers of addresses. They are comprised of two parts. The first half is known as the outbound postcode and identifies the post town. The second half is the inbound postcode and will identify a limited number of addresses and in some cases an individual address. In many cases it will be difficult to say with any certainty the extent to which postcodes falling within the scope of a request will relate to individual addresses and so the individuals living at that address. However since there is the risk that individuals could be identified from a **full** postcode the Commissioner considers it responsible to err on the side of caution and so our general approach will be treat the full post code of residential properties as identifying individuals.

Once the second half of the post code, the inbound half, is removed the post code can no

longer identify an individual address and so can not be linked to an individual. The post code has therefore been anonymised. As explained in LTT 144, data that has been anonymised is no longer considered to be personal data and so there is no need to consider the application of the data protection principles.

However this general approach does not rule out the possibility of full post codes being disclosed for example where it is obvious that the post code relates to a company address* or other non residential addresses, where the issue of personal data would not arise in the first place. (*Please note though that personal data extends to sole traders and partners and therefore post codes identifying the commercial property of such enterprises will also be personal data and therefore should not be disclosed in full if to do so would breach the data protection principles.)

There may also be cases where even though the full post code would identify an individual the disclosure of such personal data would not breach the data protection principles in that particular case.

Tribunal cases

Support for this approach is taken from two Tribunal decisions.

Dundas v ICO & the City of Bradford

In Dundas v ICO & the City of Bradford the request concerned the addresses of those involved in a consultation exercise on proposed changes to parish boundaries. By the time the case reached the Tribunal the public authority had disclosed the addresses of any organisation involved in the consultation, on the basis that these could not be personal data, and provided partial addresses for residential houses. The disputed information was the house numbers and the last two letters of the postcodes of these residential properties.

In respect of the residential addresses the Tribunal stated;

"We consider that the full postcode, that is the last two letters, would be sufficient for a living individual to be identified and we consider that the postcodes, in this instance, fall within …the definition of personal data. " (para 56)

It is noticeable that in this case the Tribunal did not expect the public authority to go through its list of addresses to identify those which only related to individual residential properties so that postcodes identifying a three or four houses could be released. (Strangely the Tribunal approached this matter by reference to s 16 explaining that it was not reasonable for the public authority's duty to provide advice & assistance to extend as far as identifying those postcodes that were unique to one house. However the Commissioner would not accept that this is a situation that would trigger the duty to provide advice and assistance - see LTT 87, it is really about the level of detail at which exemptions need to be applied. What we can take from this though is that in this case the Tribunal did not consider it practical for the public authority to go to such lengths)

The Tribunal then went onto to consider whether disclosing the full postcodes would contravene the data protection principles and concluded that in this particular case the first

principle would be breached. (paras 72 -79)

Benford v ICO & Defra

This case concerned a request for a list of addresses of egg producing premises. Apparently egg boxes carry a code that amongst other things contains a farm ID number relating to the actual egg producer. The requestor wanted Defra's list which allowed those serial numbers to be married up with the name of the egg producer and the address of the egg producing premises. In practice a great many egg producers are sole traders and so the addresses of those egg producers would be personal data and quite often be their residential address. The Tribunal concluded that;

"…a residential address combined with a farm ID identifying the person at that address as an egg producer is, in our view clearly 'personal data'." (para 51).

However the Tribunal then went on to consider whether the list could be redacted so that information identifying the general area from which the eggs came could be released without breaching the data protection principles. The Tribunal concluded that the following level of detail could be released (see substitute DN – page 2 of the Tribunal's decision);

Farm ID number together with

- Place name unless it is a small town or village (less than approximately 10,000 people)
- County
- Outbound postcode

The Tribunal considered that as individuals could not be identified from this level of detail it did not constitute personal data and so did not go on to consider the application of the data protection principles.

And finally

It should be remembered that this line relates to the anonymisation of information, in order to allow information that would otherwise be personal data, to be released. There may be other situations in which it may be necessary to consider the redaction, or part redaction, of postcodes in order to render the disclosure of personal data fair. For example there may be cases where it is considered fair to disclose some, limited, information about an identifiable individual, that is, it is deemed fair to disclose some personal data, but that it would be too intrusive, and hence unfair, to disclose their full address. In such situations the redaction of postcodes is about the fairness of the disclosure, not the anonymisation of personal data. The level of redaction necessary to render a disclosure fair will depend on the circumstances of the case, but as we consider the disclosure of a full postcode equates to the disclosure of an actual address, then to prevent disclosure of the data subject's address it will be necessary to at least redact the second half of the postcode.

PREVIOUS / **NEXT**

Source	Details

Information Tribunal	Dundas v ICO & City of Bradford MDC (5 March 2007) Benford v ICO & Defra (14 Nvember 2007)

Related Lines to Take

LTT71, LTT144

Related Documents

EA/2007/0084 (Dundas), EA/2007/0009 (Benford)

Contact		RM	
Date	18/01/2010	**Policy Reference**	**LTT162**

FOI/EIR	FOI EIR	**Section/Regulation**	s40	**Issue**	Fairness

Line to take:

The focus of any consideration of section 40 should be on fairness.

In considering whether a disclosure is fair under the First Principle of the Data Protection Act 1998 for the purposes of s.40 FOI, it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

Further Information:

CONTENTS

(1) Public domain arguments - Authority of the source

(2) Public domain arguments - Extent to which any past disclosure can be said to remain in the public domain

(3) Public domain arguments - Is the information only known to the complainant?

(4) Public domain arguments - Will a disclosure under FOI cause further damage or intrusion?

(c) Reasonable expectations

(i) Consider the reasonableness of the expectation(s)

(ii) Nature of the Expectation(s)

General considerations

- Privacy
- Private v Public Life
- Nature or content of the information
- Circumstances in which the personal data was obtained
- Fair processing notices

Case specific considerations

- Details of what, if anything, the data subject was specifically told about what would happen to their personal data i.e. were they told it would be kept confidential?
- Existing policies or customs within the pa which would shape the data subject's expectations of what would be done with their personal data.
- Consent

(d) Balancing the rights and freedoms of the data subject with legitimate interests

INTRODUCTION

It is probably more difficult to define fairness than it is to recognise it in practice. However, in deciding what is fair, it is useful to balance the possible consequences of any disclosure on the data subject along with the data subject's reasonable expectations of how the data controller will treat/use their personal data, the circumstances in which the data controller may disclose that data which will be shaped by, for example, the nature of the information itself, the circumstances in which it was obtained, the nature of the relationship between the data controller and data subject (i.e. issues relating specifically to the data subject) with the more general principles of the legislation under which the request was made i.e. freedom of information principles such as accountability and transparency as well as any legitimate interests which arise on the specific circumstances of the case.

However it is accepted that it can be artificial to separate out these individual factors as they are often so interlinked with others that any discussion ends up being very circular, for example, in considering the consequences of disclosure, regard should also be had to the

nature of the information and the extent to which the information is, or remains, in the public domain which are both factors which would shape a data subject's reasonable expectations.

Further, these factors have only been identified as a starting point in s.40 cases i.e. the line sets out a menu of factors that may impact on the assessment of what it fair and thus if a factor is irrelevant to the particular case then it need not be considered in the decision notice. Having said that however it is likely that each point will have an opposing argument which needs to be balanced against it, for example, there may be a legitimate interest in disclosing details of a disciplinary hearing of a senior employee but the countervailing argument is that most individuals would expect that these details would remain confidential.

Case-officers are referred to the process chart for section 40 cases from which it will be noted that where it is decided that the information should not be disclosed, then the decision notice will only need to refer to fairness. This decision to focus on fairness (rather than the Schedules) has been made as a result of joined-up DP and FOI policy thinking albeit that, in practice, it is accepted that there is a significant overlap between the balancing approach required under fairness and the three stage test as set out in Schedule 2, condition 6.

However, Schedule 2, condition 6 will still need to be considered where the information is to be disclosed although the analysis under fairness can be referenced to largely deal with the three stage test but the 'necessity' element will require a consideration of any alternative mechanisms for meeting the public interest (see LTT57). (Obviously a Schedule 3 condition will also need to be met where a decision has been made to release sensitive personal data although as this is likely to be extremely rare, it is advisable to get signatory approval before drafting a decision notice ordering the disclosure of sensitive personal data).

Note: The decision notices referenced below are not intended to be 'template' decision notices i.e. they have been selected to exemplify a point but may not represent the definitive approach.

(A) FAIRNESS & SENSITIVE PERSONAL DATA

Firstly, case-officers should determine whether the requested information is sensitive personal data which falls within any of the eight categories as set out at section 2 of the DPA:

- Racial or ethnic origin
- Political opinions
- Religious beliefs or other beliefs of a similar nature
- Trade Union membership
- Physical or mental health or condition
- Sexual life
- Commission or alleged commission of any offences
- Proceedings for any (alleged) offence, disposal of or the sentence of any court in such proceedings.

The general premise behind this approach is that in most cases the very nature of sensitive

personal data means it is more likely that disclosing it will be unfair. For example, it is almost self evident that to disclose someone's medical records will be unfair as in our society there is a clear expectation that medical information will remain confidential both to preserve the relationship between doctor and patient and also because the disclosure will be damaging or distressing to the data subject. Thus, the reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be distressing to them.

However, as always, it remains important to consider all the circumstances of the case and in particular to consider whether the data subject has consented to the disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain i.e. despite the data falling into the category of sensitive personal data, it is not sensitive to the data subject. If either factor is relevant, then it is likely that any disclosure would be fair. (Furthermore, this would also provide the grounds for satisfying a Schedule 3 condition and therefore this could be referenced to shorten any later Schedule 3 analysis).

However, in the majority of cases it is likely that the conclusion will be that it would be unfair to disclose the requested sensitive personal data and then the following standard wording can be used as the concluding paragraph:-

*"The Commissioner notes that the information in this case falls under s2**(complete)** of the Data Protection Act 1998 as it relates to the data subject's……..**(complete).** As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely (*) to have a detrimental or distressing effect (*) on the data subject, the Commissioner considers that it would be unfair to disclose the requested information."*

(*) – It might be possible to be more specific or use stronger language in certain circumstances.

(B) CONSEQUENCES OF DISCLOSURE ON THE DATA SUBJECT

Identifiability

Before considering the consequences of any disclosure, it may be useful to look at LTT144 which considers the Commissioner's position following the decision of the Tribunal in the abortion statistics case (EA/2008/0074) but in brief the Commissioner's position is that truly anonymised data/statistics is not personal data and thus can be disclosed without reference to the Data Protection Act.

Further, the Commissioner does not accept that where a public authority holds information to identify living individuals from the anonymised data, that this turns the anonymised data into personal data but if a member of the general public could identify individuals by cross-referencing the anonymised data with information already in the public domain, then the information is personal data. Whether it is possible to identify individuals from the anonymised data is a question of fact based on the circumstances of the specific case.

Consequences

In looking at the consequences of disclosure, it might be useful to firstly consider what those consequences might be and then look at other related factors.

(i) Examples of Consequences

It may be that the consequences of disclosure are obvious and/or evidenced by the public authority (e.g. disclosure may lead to the identification of informants, witnesses or members of a specific group which could lead to those individuals being subject to threats, harassment or disclosure of someone's bank details may lead to them being the target of fraud or identify theft). However, it may also be unfair to disclose information where the consequences of disclosure are not evidenced or where the distress or damage is less obvious or tangible (e.g. disclosure may lead to unwanted communications, pose a risk to the data subject's emotional wellbeing i.e. if their medical records were disclosed or pose a risk to the data subject's chances of promotion or employment i.e. if a compromise agreement or job application were to be disclosed).

** Casework example (1) – Names of Individuals who suggested IRA were responsible for the Northern Bank Robbery (FS50074788)*

** Casework example (2) – Names of Anti-Fascist Officials (FS50092069)*

** Casework example (3) – CV & Interview Notes for House of Commons vacancy (FS50139317)*

Thus, it is useful to consider the nature of the information itself and also the climate into which the information would be disclosed, for example, in the above case, it is useful to remember that a data subject's colleagues, friends and family are amongst the general public to whom any disclosure is made. Further, the greater the distress or damage to be caused, the more likely it will be that disclosure will be unfair.

(ii) Related Factors

A point which is often raised by complainants is that the information has been or is already in the public domain and thus it would not be unfair to disclose it under the FOIA. However in dealing with the point, it is important to consider the following issues:-

(1) The authority of the source should be taken into account, for example, it may be unfair to disclose information where the information is in the public domain by way of a tabloid article although if related information/detail had been released in an official statement from the Prime Minister's Office, then this may make any disclosure fair.

** Casework example (4) – Confirmation of Names of Officers Investigated (FS50222787)*

(2) The extent to which the past disclosure can be said to remain in the public domain may be relevant to a consideration of fairness e.g. a local news story may only stay in the public's consciousness for a short period whereas if the information is placed and remains on any permanent and easily searchable/accessible source, then this may affect the decision on whether it would be fair to disclose related information. (See also LTT86 – personal data disclosed in open court).

** IT decision (5) – David Armstrong v IC & HMRC (EA/2008/0026)*

**Casework example (6) – Details of Severance Package (FS50074995)*

**Casework example (7) – FS50123489 / IT decision – EA/2007/0021*

(3) Consideration should also be given to whether the information is actually in the public domain or whether it is simply known to the complainant. If the information is only meaningful to the complainant because of his/her pre-existing knowledge or position but is likely to be meaningless to the rest of the world, it would still be unfair to disclose this information given that the complainant is a part of the world at large. However, just because the complainant is aware of certain details which would mean that a disclosure to him/her might be fair, this does not mean that a disclosure under FOI to the world at large would be fair, for example, a partial disclosure of medical information may be made to a data subject's relative on a discretionary basis on compassionate grounds but this can be given little weight when considering whether a disclosure of the same or additional linked information can be made to the world at large.

**Casework example (8) – Internal Investigation into Police Officer (FS50170381)*

(4) However it is important to note that we are looking at any additional damage or intrusion the disclosure would cause. Thus if the information is currently in the public domain (subject to the points above about the authority of the source, the extent to which it remains in the public domain etc), a further disclosure may not be unfair to the data subject although it may be useful to take into account whether the information has been put into the public domain through the actions of the data subject as this may make it more likely to be fair to disclose related information. Also, if related information is already obtainable from a public source, then it may be fair to disclose this information as it might be said that the data subject has no expectation of privacy given the existing availability of the information.

** Casework example (9) –Negotiation of Reinstatement of Ali Dizaei (FS50088977)*

(C) REASONABLE EXPECTATIONS

Consideration should be given to two elements here – firstly whether the expectation is reasonable and secondly the nature of the expectation(s).

(i) Reasonableness of the Expectation(s)

As it is accepted that some people give little, if any, thought to the uses to which their personal information may be put, case-officers should consider the expectations of the reasonable person who has given some thought to the issue of what might happen to their personal data.

It is accepted that there may be cases where the data subject has been informed or assured that the personal information they have provided will not be disclosed. However, this does not mean that if public authorities create a policy to say that no or only limited information will be disclosed, that this is determinative. Further, and as said above, the reasonableness of that expectation should be analysed so that even if a data subject

accepts the public authority's assurance, case-officers should consider whether the reasonable person would have such an expectation bearing in mind all other circumstances of the case. Thus, case-officers should consider whether the data subject's expectation is objectively reasonable.

In any event, the data subject's reasonable expectations is not the only factor to consider when looking at fairness as the decision should also take into account the consequences of any disclosure on the data subject and whether this can be balanced against any legitimate interests.

Note: Case-officers are reminded that they should consider the data subject's expectations at the time of the request (as it is accepted that expectations are not static and may have changed from the time at which the personal data was provided).

** Casework example (10) –Identity of External & Internal University Examiners (FS50155365)*

(ii) Nature of the Expectation(s)

A data subject's expectations of what will or might happen to his/her personal data will be shaped by general and specific factors:-

General considerations

A data subject's general expectations are likely, in part, to be shaped by generally accepted principles of everyday interaction and social norms, for example,

(1) Privacy

It is accepted that every individual has the right to some degree of privacy and this right is so important that it is even enshrined in Article 8 of the European Convention on Human Rights which protects the right to a private and family life. Further, in an increasingly insular society there may be high expectations of privacy.

However, expectations are also shaped by society where personal information is often shared freely and widely on social networking sites as well as on blogs and internet chat-rooms (although this is not determinative as different people have different expectations of the standards of privacy they would expect even when using public forums). The transparency and presumption in favour of disclosure of the Freedom of Information Act is also a part of today's culture. This was recognised by the Tribunal in the case of The Corporate Officer of the House of Commons v IC and Norman Baker MP (EA/2006/0015 &0016) where it was said that:

"….The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money." (para 43).

(2) Private v Public Life

The Tribunal in the Norman Baker case also commented on the distinction between a data subject's private and public life and commented that:-

"…where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives…" (para 78) and further that *"… the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives"* (para 79)

The Tribunal also found that this approach applied "….*even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life."* (para 78). (This comment was made in response to the House of Common's argument that disclosure of information relating to travelling arrangements would necessarily reveal family/domestic arrangements to some degree).

Thus, if the requested information relates to the public/professional life of the data subject rather than their private life then it is more likely that it will be fair to disclose this type of information. However even if the information does relate to an individual's professional life, this does not mean that it will automatically be disclosed, for example, whilst there may be little expectation of privacy with regard to information relating to a data subject's work duties there may still be an expectation that, for example, personnel details will not be disclosed. Although, in considering whether any information about a data subject's public/professional life should be disclosed, it would be useful to consider the following factors:

- the seniority of the role,
- whether the role is public facing and
- whether the position involves responsibility for making decisions on how public money is spent etc.

It may also be useful to draw a distinction between public facing public sector employees and public figures as although disclosure of information in relation to public figures could not be said to be necessary for accountability reasons, the very fact of their public status may affect their expectations and thus whether it would be fair to disclose information about famous or public figures.

** Casework example (11) – Event Attendees' Contact Details (FS50101815)*

** Casework example (12) – Names of Members of Cabinet Committee (FS500177136)*

(3) Nature or content of the information

The nature of the information itself and the consequences of it being released will help shape the expectations of the data subject as to whether their personal data would be disclosed to the public. People have an instinctive expectation that a responsible data controller will not disclose certain information and that they will respect its confidentiality and in some respects the whole issue of fairness is an instinctive reaction as to whether it would be just or proper to disclose the information in question in the prevailing

circumstances, for example,

Casework example (13) – Job Titles and Salaries of ICO Senior Staff (FS50163927)

Casework example (14) – List of Council Owned Properties (FS50066606)

(4) Circumstances in which the personal data was obtained

It may also be relevant to consider the circumstances under which the requested information was obtained as this may affect the expectations of the data subject, for example, it may be unfair to disclose information which has been obtained as part of a small consultation within one public authority or sector or where a member of the public has been canvassed for his/her views on the street.

Casework example (15) – Informer's Name and Substance of Complaint (FS50093233)

Casework example (16) – Barclays Bank's Involvement with Columbian Drugs Money (FS50147637)

Casework example (17) – Use of University Computers to Access Extremist Material (FS50197666)

(5) Fair processing notices

See LTT59 for further information.

Case specific considerations

(6) Details of what, if anything, the data subject was specifically told about what would happen to their personal data i.e. were they told it would be kept confidential? Conversely, it may be appropriate to consider the nature of the data subject's expectations if they were not told anything about what could happen to their personal data.

Casework example (18) – Details of Individuals Paid Compensation (FS50090631)

Casework example (19) – Report into Disciplinary Action Against Magistrate (FS50086866)

(7) Existing policies or customs within the pa which would shape data subject's expectations of what would be done with their personal data. However, case-officers should refer to the points above in relation to the reasonableness of expectations.

Casework example (20) – Names/Addresses of Financial Contributors to Purchase of Art Work (FS50109038)

Casework example (21) – Name of Solicitor who Provided Advice (FS501566539)

(8) Consent

See LTT167 for further information.

(D) BALANCING THE RIGHTS AND FREEDOMS OF THE DATA SUBJECT WITH LEGITIMATE INTERESTS

Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure, for example, in the case involving the MP's expenses the Tribunal said as follows:-

**IT decision – The Corporate Officer of the House of Commons v IC & Norman Baker MP EA/2006/0015 & 0016*

79. …..in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives"

On appeal, the High Court said at paragraph 15 that this issue was not "*…idle gossip, or public curiosity about what in truth are trivialities. The expenditure of public money through the payment of MP's salaries and allowances is a matter of direct and reasonable interest to taxpayers.*" Thus, it was felt that the need to demonstrate accountability and transparency in the spending of public funds outweighed the rights of the data subjects.

Thus in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests, for example, there may be a legitimate interest in knowing how much public money was spent on the consultants who bid for the 2012 Olympics such that this would justify the disclosure of the consultant's personal data (FS50182413) or there may be a legitimate interest in knowing who was responsible for making important decisions in connection with the spending of significant sums of public money on a national electronic fingerprint identity scheme (FS50125350).

In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

Case-officers will note that this type of consideration has formerly been carried out under the Schedule 2, condition 6 test. As said at the outset, there is a significant overlap between fairness and Schedule 2 but the Office has made a joined up decision to focus on fairness. However, if it is necessary to analyse Schedule 2, condition 6 in a decision notice (i.e. where the information is to be disclosed), then the analysis of legitimate interests under fairness can be referenced to dispose of the first limb of the test and the remainder of the analysis should have disposed of the 'unwarranted interference' limb of the test. This therefore means that there only needs to be an analysis of 'necessity' under the Schedule 2, condition 6 test as per LTT57.

Source	**Details**
IT Policy Team	The Corporate Officer of the House of Commons / Norman Baker (16 January 2007) Creekside Forum / DCMS (28 May 2009)

Related Lines to Take

LTT57, LTT59, LTT144, LTT164, LTT165, LTT167

Related Documents

EA/2006/0015 & 0016 (Baker), EA/2008/0065 (Creekside)

Contact		HD	
Date	19/01/2010	**Policy Reference**	**LTT163**

FOI/EIR	FOI	**Section/Regulation**	s40	**Issue**	Fairness - Casework Examples for LTT163

Line to take:

The following casework examples link to and should be read in conjunction with LTT163 on Fairness.

Further Information:

**** Casework example (1) – Names of Individuals who suggested IRA were responsible for the Northern Bank Robbery (FS50074788) ****

The Northern Ireland Office claimed it would be unfair to disclose the identity and opinions of individuals on the question of the attribution of the IRA as being responsible for the Northern Bank Robbery in 2004. The Commissioner found that it would be unfair to disclose this information having taken into account the specific security considerations at the time in Northern Ireland and the need to ensure the safety of the individuals involved. The Commissioner found that these factors weighed more heavily than the argument that the seniority of the public servants involved justified the disclosure.

**** Casework example (2) – Names of Anti-Fascist Officials (FS50092069)***

Sunderland City Council argued that it would be unfair to disclose the names and contact details of the Tyne and Wear Anti-Fascist Association officials and certain Council staff. The Council provided the Commissioner with evidence of previous incidents of harassment following disclosure of similar information and also explained why it had concerns for the safety of its own staff. The Commissioner found that the legitimate interest in knowing the names of those in receipt of public funds was not more significant than the distress that any disclosure would cause to the individuals concerned and so found that disclosure would not be fair.

**** Casework example (3) – CV & Interview Notes for House of Commons vacancy (FS50139317) ****

The House of Commons argued that it would be unfair to disclose a copy of the interview notes and CVs of the other candidates for a job for which the complainant unsuccessfully applied as it would distress the applicants if their personal details were placed in the public domain. The House also pointed out that even if the names were redacted it would be clear to others such as their current employer who the individuals were, and this employer may not know of the applicant's intention to leave their current job. The Commissioner found that disclosure would be unfair.

**** Casework example (4) – Confirmation of Names of Officers Investigated (FS50222787) ****

The Independent Police Complaints Commission argued that it would be unfair to confirm or deny whether two named officers had been subject to an investigation. The complainant referred to two articles naming specific police officers on the BBC news website – one of which made no reference to an IPCC investigation whilst the other article cited a press statement made by the IPCC in which it had confirmed that an unnamed Metropolitan Police Service Officer had been required to resign following an investigation. However there had been no confirmation from the IPCC of the names of the officers involved. The Commissioner accepted that it is "possible for the articles in the press to be linked to the IPCC's statement but this does not amount to a public statement - any linking would be speculation. The Commissioner does not consider that a press article, containing speculation, is the same as a formal confirmation or denial by the IPCC" (para 24). The Commissioner found that it would be unfair to disclose this information.

**** IT decision (5) – David Armstrong v IC & HMRC (EA/2008/0026) ****

In 2005 the applicant, an investigative journalist, requested documents referred to in court in the 2001 trial of Abu Bakr Siddiqui. Albeit that the case dealt with s30, the Tribunal's approach supported the Commissioner's position on s40. The Tribunal were clear that "even if the … information had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain" *(paragraph 85).*

The Tribunal went onto note its agreement with the Commissioner that, "knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived" *(paragraph 85) and that* "[e]ven if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weighs in favour of disclosure, it is merely one consideration to

be weighed in the public interest balance" *(paragraph 86).*

***Casework example (6) – Details of Severance Package (FS50074995) ***

Calderdale Council argued that it would be unfair to disclose the grounds for retirement, the final salary and any other financial details in relation to the severance package paid to a Council Director a couple of years before the request was made. The Commissioner acknowledged that it may be said that unfairness may be lessened by the time that has elapsed but found that the passage of time would not prevent the identification of the third party and nor would it remove the potential for distress to be caused by a later release of this information. In weighing up a number of factors, the Commissioner decided that it would be unfair to disclose this information.

***Casework example (7) – FS50123489 / IT decision – EA/2007/0021 ***

*The Commissioner decided that a list of names of individuals who had received an Anti-Social Behaviour Order (ASBO) in the Camden area, whether current or expired, could be disclosed, subject to certain redactions. However this decision was not upheld by the Information Tribunal (ref: EA/2007/0021) who stated that disclosure of this data would be unfair on the grounds that "…*publicity long after the making of an order…is quite different from identification and denunciation when or shortly after the order is made…" *(para 28). The Tribunal went onto say that later publicity would be an "*unjustified humiliation" *to individuals who had reformed their behaviour and that in any event the mechanism for punishing ASBO breaches was not additional publicity but rather criminal prosecutions.*

***Casework example (8) – Internal Investigation into Police Officer (FS50170381) ***

The complainant made a request for various pieces of information about an internal investigation into a named officer which he believed had taken place. The Commissioner considered what information was in the public domain as opposed to what information the particular applicant may have been aware of and as of the date of the decision notice there was no information that confirmed or denied whether the named officer was subject to an internal investigation and/or a disciplinary hearing. The public authority also informed the Commissioner that it did not believe that any information was in the public domain. The Commissioner therefore found that it would not be fair to confirm or deny whether any information was held.

*** Casework example (9) –Negotiation of Reinstatement of Ali Dizaei (FS50088977) ***

The Commissioner of the Metropolitan Police Service argued that it would be unfair to disclose the ACAS negotiation settlement regarding the reinstatement of Superintendent Ali Dizaei. The decision notice comments as follows: "where media coverage had taken place without the active or consenting involvement of the subject…this would limit the weight that could be given to this factor. However, in this case both the public authority and, notably, the third party [Ali Dizaei] have actively participated in this coverage (para 51). …the third party has actively sought publicity…the third party has given interviews about this matter to a number of media outlets. That the third party and, to a lesser extent, the public authority has participated in the media coverage is a valid and strong argument that disclosure could not be characterised as unfair" (para 52).

**** Casework example (10) –Identity of External & Internal University Examiners (FS50155365) ****

Queen's University in Belfast argued that it would be unfair to disclose the identities of internal and external examiners of their admissions test to the Institute of Professional Legal Studies partly because as the University does not provide its examiners with any information in relation to the potential disclosure of their identities, there was an expectation of confidentiality on the part of the examiners . The Commissioner accepted that the examiners may have an expectation that this information would not be disclosed but this was not a reasonable expectation in the circumstances which were that the internal examiners were drawn from a pool of Institute tutors and so would already be publicly associated with the Institute whilst the external examiners were nominated by various legal bodies who listed such nominations on their websites and therefore the Commissioner did not accept that the external examiners would automatically expect that their names would not be disclosed. Thus the Commissioner found that all the names could be disclosed.

**** Casework example (11) – Event Attendees' Contact Details (FS50101815) ****

The complainant requested the contact details for those delegates who had attended an event organised by the Eastern Cheshire NHS Primary Care Trust as part of a public consultation and the public authority sought only to withhold the contact details where the delegates had provided personal contact details, i.e. residential addresses, personal email accounts. The Commissioner acknowledged that whilst the delegates attended the event in their professional capacity they nonetheless provided this personal/private information which the Commissioner did not accept related to their professional lives. The Commissioner also found that the delegates' reasonable expectation would be that this information would only be used to facilitate the meeting i.e. to provide meeting minutes. Thus the Commissioner found that it would be unfair to disclose this information.

**** Casework example (12) – Names of Members of Cabinet Committee (FS500177136) ****

The complainant wrote to the Cabinet Office to request information regarding a Cabinet Committee that was formed in order to consider data sharing within the public sector. The public authority claimed s.40 to withhold the names of the 'junior' civil servants who were members of the secretariat responsible for the Committee. The Commissioner found that

"civil servants at the Grade 7 level typically have managerial responsibility and whilst they are not members of the "Senior Civil Service" are still relatively senior employees. Equally, members of the Civil Service Fast Stream expect to be given challenging and intensive job appointments which are designed to prepare them for future careers in the Senior Civil Service. With this in mind, the Commissioner feels that these members of staff would have a reasonable expectation that their names would be disclosed in the course of carrying out their work and would be able to cope with any undue pressure that may arise through the disclosure of their names and job titles" (para 51).

****Casework example (13) – Job Titles and Salaries of ICO Senior Staff (FS50163927)****

The complainant made a request for the job titles and salaries of the five most senior staff at the ICO. In reaching a decision about his own office, the Commissioner found that "it is

reasonable to conclude that the five individuals would expect some details about their salary to be placed in the public domain but that it is also reasonable to assume that they would not expect their exact salary details to be made publicly available (para 18). Whilst disclosure of a salary band may infringe on a person's privacy there is a distinction between this and disclosure of the exact salary details requested. Disclosure of the exact salary details would clearly lead to a greater infringement into the privacy of the individuals as it would reveal the specific details of the person's financial situation. It is therefore reasonable to consider that disclosure of this information would cause the individuals unwarranted distress or unjustified damage". (para 19)

***Casework example (14) – List of Council Owned Properties (FS50066606) ***

The complainant made a request for a list of addresses of council properties owned by Braintree District Council. The Commissioner found that this information was personal data but that it would not be unfair to disclose it because although the Commissioner accepted that there would be "unfairness to individuals if they were publicly identified as members of a vulnerable group, for instance asylum seekers, benefit recipients or women who have left violent partners, he does not consider that there would be any general unfairness to individuals in being identified as council tenants. In taking this view, he is mindful of the low inherent sensitivity of the data and that in practice the fact that a particular property is or is not owned by the Council will be generally known to neighbours or because it is part of a known council housing estate" (para 31).

***Casework example (15) – Informer's Name and Substance of Complaint (FS50093233) ***

The complainant requested to know the name and substance of a complaint about a potential unauthorised change in use of the land adjacent to [a specified address] and the erection of a fence restricting access. The Commissioner accepted that "where a person informs a public authority about their concerns regarding a potential breach of planning regulations they would not normally expect their identity to be disclosed to the individual allegedly committing the breach." (para 18).

***Casework example (16) – Barclays Bank's Involvement with Columbian Drugs Money (FS50147637) ***

The complainant requested information from the Financial Services Authority regarding Barclays Private Bank's involvement with Columbian drugs money following an article in the Sunday Times which indicated that senior managers at the Bank had been questioned by the National Crime Squad after a transatlantic investigation identified five accounts linked to a Columbian money laundering scam. The Commissioner found that this information was personal data and that the disclosure of it would be unfair because it would cause unwarranted distress to the individuals because there had been no formal determination of guilt. The Commissioner also accepted that the information about the family members involved in the investigation had been received from third parties, making it unlikely that they would even know that the FSA held this information and thus they would not have any expectation that it would be disclosed.

Casework example (17) – Use of University Computers to Access Extremist Material

***(FS50197666)** **

The University of Bradford was asked to provide information in relation to the use of campus computers to access extremist material by four named students but the University argued that it would be unfair under s.40 to disclose a list of student's names along with the times and dates they accessed campus computers. The Commissioner noted that the information was obtained because the named students were enrolled at the University and required access to the computers as part of their course. However given that the log in and log out reports were originally obtained by the University for operational, monitoring and security purposes, the students would not have expected that this information would be disclosed. Further, as the information related to the student's private life and did not encompass any form of public duty or function, the Commissioner found that disclosure of the requested information would not be fair.

***Casework example (18) – Details of Individuals Paid Compensation (FS50090631)** **

Transport for London argued that it would be unfair to disclose details of the offers of compensation made to residents of a certain road under the Land Compensation Act following the building of the M11 Link Road. The Commissioner notes that TfL did not inform residents at any stage that the details of their claim or final settlement would be made available to a third party(^). The Commissioner also took into account the element of secrecy surrounding the process due to TfL's attempt to protect public monies by negotiating settlements on a case-by-case basis. Given this culture of secrecy, the residents would not have expected that this information would be released. Further, the Commissioner found that as this information related to the individuals' homes and personal finances and by extension their private and family lives, it would be unfair to disclose it.

(^) = Albeit that it is not necessary to specifically refer to a disclosure under the FOI.

***Casework example (19) – Report into Disciplinary Action Against Magistrate (FS50086866)** **

The complainant requested a copy of the Report that was produced following the disciplinary hearing of a named Magistrate. The Ministry of Justice (formerly the DCA) argued that it would be unfair to disclose this report because the Magistrate had received an assurance that the Report would remain confidential. The hearing and following Report were also conducted in accordance with certain Directions which stated that such hearings would be held in confidence and that any views expressed as part of those proceedings would be treated as confidential. In addition, the Commissioner accepted that Magistrates have a right to keep details of any disciplinary matters private just like any other individual. Thus, in all the circumstances, the Commissioner found that it would be unfair to disclose the requested information.

***Casework example (20) – Names/Addresses of Financial Contributors to Purchase of Art Work (FS50109038)** **

The Tate Gallery cited s.40 in relation to a request for the names and addresses of private individuals who contributed to the purchase of the art work entitled 'The Upper Room' by Chris Ofili as well as the amount of their contribution and other biographical information which could lead to their identification. The Tate argued that whilst the donors in question

are already known to the public through its publication scheme (albeit that there are no references associating donors with specific pieces or the amounts contributed), it is their policy to only acknowledge donations over the value of 10% of the overall purchase price. The Commissioner therefore found that it would not be in the reasonable expectations of the donors that details of their donation would be made public and furthermore given that they were acting purely in a private capacity, the Commissioner found that it would be unfair to disclose the requested information.

***Casework example (21) – Name of Solicitor who Provided Advice (FS501566539) ***

The complainant requested the name and address of the solicitor who had provided advice to the Child Support Agency in relation to an application for a special payment referral. The public authority's policy was not to disclose the names of individual government lawyers below the level of the Senior Civil Service and thus given that the solicitor was in a relatively junior role at the time, his/her expectation would have been that their name would not be disclosed. The solicitor in question was also contacted and asked whether they would consent to disclosure but refused. Thus, the Commissioner found that it would be unfair to disclose the requested information.

PREVIOUS / NEXT

Source	**Details**
Policy Team	

Related Lines to Take

LTT163, LTT165

Related Documents

Contact	HD		
Date	19/01/2010	**Policy Reference**	**LTT164**

FOI/EIR	FOI	**Section/Regulation**	s40	**Issue**	Section 40 Process Chart

Line to take:

Process Chart for Section 40 Cases

Note: The starting point of this diagram is that it has already been established that the requested information is personal data.

Further Information:

1. Would it be **FAIR** to disclose the requested information?

(Consider LTT163 on Fairness)

N.B. If the information is sensitive personal data, then this will usually weigh heavily in the assessment of fairness and a standard paragraph has been drafted to use in appropriate cases

2a. Yes, it would be fair.

Go to 3 (if sensitive personal data)

Go to 4 (if not sensitive data)

2b. No, it would not be fair.

End (do not disclose)

3. Can a **SCHEDULE 3** condition be met?

3a. Yes, a Sch3 condition can be met.

Go to 4 (get signatory approval before drafting a DN ordering the release of sensitive personal data)

3b. No Sch3 condition can be met.

End (do not disclose)

4. Can all 3 requirements of **SCHEDULE 2, CONDITION 6** be met?

(Consider LTT57 on Schedule 2, condition 6)

4a. Yes, all requirements of Sch2, con 6 can be met.

Go to 5

4b. No, all requirements of Sch2, con 6 cannot be met.

End (do not disclose)

5. Would it be **LAWFUL** to disclose the requested information?

(Consider LTT166 on lawfulness)

5a. Yes, it would be lawful to disclose the information.

Disclose

5b. No, it would not be lawful to disclose the information.

End (do not disclose)

Source	**Details**
Policy Team	

Related Lines to Take

LTT57, LTT163, LTT164, LTT166

Related Documents

Contact	HD		
Date	26/03/2010	**Policy Reference**	**LTT165**