FOI/EIR	FOI	Section/Regulation	s41	Issue	Public interest in confidence

Line to take:

The public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under the FOIA

Further Information:

As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, in deciding whether the exemption applies it is necessary to consider whether an actionable breach of confidence would occur. Case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.

Prior to *Derry City Council v The Information Commissioner* it was generally understood that for there to be a successful public interest defence against a breach of confidence, there would have to be an exceptional public interest in disclosure, usually revealing some wrong doing or preventing some public harm *1.

In *Derry* the Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*).

In the *LRT* case the judge at first instance said an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. The Court of Appeal did not expressly overturn this view but left the question open. Its final decision was to allow the disclosure in that case.

The Tribunal interpreted this as meaning :

- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
- All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.

The public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under the FOIA, i.e.:

The FOI public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.

The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. This is the test which will apply in all s41 cases.

The *Derry* case was considered in the context of commercial confidentiality and the Tribunal identified a particular circumstance in which, in its view, the public interest in maintaining a confidence could be set aside. This should not be taken to mean that this will always be the case for commercial confidentiality.. The view of the ICO is that an express obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. Public interest factors in favour of disclosure should always be clearly stated.

For further discussion on the public interest factors in favour of maintaining confidentiality and on information provided by individuals see LTT96.

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

Source	**Details**
Information Tribunal ICO view from GS	Derry City Council / Belfast Telegraph (11 December 2006)

Related Lines to Take

LTT40, LTT93, LTT94, LTT95, LTT96, LTT97, LTT98

Related Documents

FS50066753, EA/2006/0014, Awareness Guidance 2, e-mail [Redacted name] to FoI 13/12/06

Contact		LA	
Date	21/02/08	**Policy Reference**	**LTT41**

FOI/EIR	FOI	Section/Regulation	s2, s35	Issue	No inherent public interest in s35

Line to take:

There is no inherent public interest in withholding information that falls within the type of information covered by a class based, qualified, exemption.

Further Information:

DFES Case and s35(1)(a)

In *DfES v the Commissioner & the Evening Standard* the Tribunal had established that the minutes of a series of meetings did fall within the class of information described by s35(1)(a) – formulation & development of government policy. The Tribunal then addressed what is the correct approach when considering a class of documents to which Parliament has applied a qualified exemption (para's 60 – 66).

In broad terms the DfES argued that in creating class based exemptions parliament had accepted that "any disclosure of information within this class caused some damage…to the public interest". (para 45)

This was rejected by the Tribunal which found that there was no inherent damage caused by disclosing information covered by such a class based exemption, i.e. there is no inherent public interest in withholding the information.

"…inclusion within such a class of information simply indicates the need and right of the public authority to examine the question of the balance of public interests when a request…is received."

- Tribunal at para 63.

"The weighing [of the public interest] exercise begins with both pans empty and therefore level."

- Tribunal at para 65.

If, after the weighing exercise is complete, the scales are still level the public authority must disclose. "Such an equilibrium may not be a purely theoretical result: there may be many cases where the apparent interests in disclosure and maintaining the exemption are equally slight." Tribunal at para 64.

This approach means that even if there is only slight public interest in disclosure, this may still be sufficient for the Tribunal and the Commissioner to order disclosure. Indeed in this particular case the Tribunal commented, at para 87, that the information was "…unlikely to prove of major importance to any public debate on the issue".

It is noted that the Tribunal had already accepted that the wording of s35 had the potential to capture a large amount of information and so it seemed perverse to the Tribunal that such a potentially large amount of information could be considered inherently harmful to disclose.

The Tribunal's language when considering this matter suggests this approach to weighing up the public interest test would apply to all class based, qualified, exemptions. However in practice this approach will be most relevant to s35.

In *DWP v the Commissioner* which also related to the application of s 35(1)(a) the DWP ran a similar argument to that of the *DfES*. It contended that s35 was comparable to s 42 – LPP (para 60), i.e. that s35(1)(a) "…was an exemption of particular importance…[and that] greater weight should be attached to the public interests in favour of maintaining the exemption in order to protect Government space for deliberation on policy". The Tribunal rejected this comparison.

High Court ruling

The High Court has also considered this issue and endorsed the above approach in the case of *OGC v The Information Commissioner.*

It commented at para 79 that "I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to "the public interest in maintaining the exemption", which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms, and interpreted literally it covers information that cannot possibly be confidential. For example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to "the formulation or development of government policy", yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure. I therefore agree with the view expressed by the Information Tribunal in *The Department for Education and Skills v the Information Commissioner and the Evening Standard*"

Scotland Office cases and s35(1)(b)

In *Scotland Office v The Information Commissioner* (EA/2007/0070) the Tribunal applied the same principle in relation to s35(1)(b). It commented (at paragraphs 85 & 86) that "To the extent that the Appellant is suggesting that because of the importance of the convention [of collective Cabinet responsibility], there is some form of presumption against disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree. The notion that there is a public interest against disclosure inherent in section

35(1)(a) because of the status of any such information, was rejected both in the DFES and DWP cases. It was also rejected by the High Court in OCG (which we note was not limited to section 35(1)(a)), and we see no justification for a different finding in relation to section 35(1)(b).

In *Scotland Office v The Information Commissioner* (EA/2007/0128) the Tribunal similarly commented that "it is not possible to raise the exemption to a *de facto* absolute one simply because the information relates to, or is, ministerial communications."

See also LTT127 scope of s35(1)(a) & (b), LTT129 safe space, and LTT132 Public interest in protecting collective Cabinet responsibility for further discussion on when the convention of collective Cabinet Responsibility will be relevant and how to approach the public interest test in this context.

Source	Details
IT	DfES / The Evening Standard (19 February 2007) DWP / Oaten (05 March 2007) OGC / Oaten (11 April 2008) Scotland Office (08 August 2008) Scotland Office (05 August 2008)

Related Lines to Take

LTT15, LTT43, LTT46, LTT127, LTT129, LTT132,

Related Documents

EA/2006/0006 (DfES), EA/2006/0040 (DWP), FS5075489 (DfES), [2008] EWHC 737 (admin) (OGC), EA/2007/0070 (Scotland Office), EA/2007/0128 (Scotland Office)

Contact	RM / LA		
Date	07/11/2008	**Policy Reference**	**LTT42**

FOI/EIR	FOI EIR	Section/Regulation	s35(1)(a) s2(2)(b) Reg12(4)(e)	Issue	Guiding principles in relation to s35(1)(a) & Reg 12(4)(e) public interest

Line to take:

The weighing up of the public interest in s35 cases relating to information on the formulation or development government policy may be guided by eleven guiding principles as set out by the Information Tribunal.

For information falling under Regulation 12(4)(e), which, if it were not environmental information would be covered by section 35(1)(a), these guiding principles may be equally relevant.

Further Information:

In *DfES v the Commissioner and the Evening Standard (EA/2006/0006)* the DfES had appealed the Commissioner's decision to order the release of the minutes from senior management meetings on what the newspapers had described as a 'funding crisis' in schools. The information had been withheld under section 35(1)(a) – formulation & development of government policy. The Tribunal found that the exemption was engaged.

The Tribunal laid down a set of eleven principles which it said should guide the weighing of the public interest in such cases (para 75). In formulating these principles, the Tribunal sought in some cases to address the claim that disclosure of such information would have a wider damaging impact on good government. The way in which these principles feed into other issues is also discussed in further LTTs (LTT128 wider impact, LTT129 'safe space', LTT130 'chilling effect' and LTT131 'risk to integrity of civil service').

The principles have since been considered and commented on in other Tribunal cases and in cases heard in the High Court.

The 11 guiding principles from DfES / Evening Standard

(i) The information itself.

"The central question in every case is the content of the particular information in question. Ever decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case"

This comment from the DfES case was commended as a statement of principle by Mr Justice Mitting in the High Court decision *Export Credits Guarantee Department v Friends of the Earth.* The information in question in this EIR case related to Government Department comments on a application to the ECGD to finance the Sakhalin II oil pipeline project."

(ii) 'Status' of information not relevant

"No information within s35(1) is exempt from…disclosure simply on account of its status… classification …..nor ..seniority of those whose actions are recorded." In this case the fact that th information related to the deliberations of very senior officials did not mean that the minutes wer automatically more sensitive. "To treat such status as automatically conferring an exemption wo be tantamount to inventing within s35(1) a class of absolutely exempt information" (para 69). Although it is more likely that senior civil servants will grapple with sensitive issues, it is quite conceivable that on other occasions their discussions would not be sensitive.

The related principle that there is no inherent public interest in withholding information that falls within the type of information covered by a class based, qualified, exemption was confirmed in t High Court decision *OCG v ICO & Her Majesty's Attorney General obo the Speaker of the Hous of Commons* (see LTT42 for further detail)

(iii) Protection for Civil Servant not Politicians

There is a public interest in maintaining the exemption provided by s35(1)(a) in order to protect from compromise or unjust public criticism of civil servants, not ministers. It is not unfair to politicians to release information that allows the policy decisions they took to be challenged, aft the event. It was noted later at para 81, that it was not unknown for politicians to disclose what information they had based decisions on when perhaps to do so would protect the politician's position.

The Commissioner would generally accept this stance. However, before dismissing such arguments completely, it may be appropriate to also consider LTT132 (collective Cabinet responsibility), as it may be that arguments about the public interest in maintaining *collective* responsibility are also relevant.

See also LTT131 -risk to role & integrity of civil service - for further discussion about the accountability of civil servants

(iv) Timing

"The timing of a request is of paramount importance..." Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for examp would expose wrongdoing in government. Both ministers and officials are entitled to hammer ou policy without the "...threat of lurid headlines depicting that which has been merely broached as agreed policy."

This importance of timing and the DfES quote above were considered in *OCG v The Informatio Commissioner* where the information related to the Government's gateway zero review into the introduction of an identity cards Bill. The IT decision was appealed to the High Court and in the High Court ruling Mr Justice Stanley Burnton agreed with the Tribunal's position on this point (although the overall decision was quashed and returned to a differently constituted Tribunal to heard and determined afresh). He commented (at para 101) that " the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Governmer had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introdu the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished"

For further discussion on the relevance of timing see also (vii) the Robustness of Officials below and LTT129 safe space arguments.

(v) When is policy formulation or development complete

The Tribunal found this to be a question of fact and rejected arguments that there was a "seamless web", or policy cycle in which a policy is formulated following which any information c its implementation is fed into the further development of that policy or the formulation of a new policy. The Tribunal decided that a "parliamentary statement announcing the policy...will norma mark the end of the process of formulation. There may be some interval before development." However it should not be assumed that as soon as an announcement is made the information is no longer sensitive. See LTT62 for further discussion on this point.

(vi) Information in the public domain

The IT in DfES commented that if the information requested is not in the public domain, then the fact that other information on the same subject is already in the public domain is not a significan factor.

This issue was also considered in the *ECGD* decision by the IT and the High Court. The IT in ECGD rejected an ICO argument that the public interest in accessing information on the pipelin project had been substantially met by a large volume of information already in the public domain on the basis that the information actually requested was not already in the public domain

The High Court in ECGD commented (at paragraph 43) that "the Tribunal concluded that the fa that information about the Sakhalin II was in the public domain, and extensively so, was an irrelevant factor. Its conclusion is unimpeachable if I had in mind only the narrow questions of public interest to which I have already referred; that is to say, whether ECGD had been properly

advised and whether the government department giving the advice had properly fulfilled its statutory duty. But if the Tribunal is to be taken as saying that the fact the information of the kin requested is generally in the public domain is an irrelevant factor, then its views are mistaken."

As the High Court had already found (para 39) that the IT had identified a specific public interes disclosure; namely "the public interest in seeing whether the ECGD had been properly advised. Secondly, the public interest in seeing whether government departments charged with a specifi statutory duty, such as DEFRA, had properly fulfilled their duty" the ICO interprets the High Cou comments as follows:

- Where release of the particular information in question further informs the public, then th fact that there is already other information on the same subject in the public domain is no relevant, because there is a public interest in all information being made available to give the public the fullest possible picture (see also LTT61 Advice to Decision Makers for furth discussion of this point). However,

- the fact that "information of the kind requested" is generally in the public domain may be relevant factor to be weighed in the public interest, in so much as it may provide an indication of the likely harm or the likely public interest benefits that could result from disclosure.

In summary the ICO approach to information already in the public domain is :

- The mere fact that other information is in the public domain is not relevant as a general argument, What may be relevant is whether the disclosure will add to or enhance understanding of the issues at stake, already illuminated by the other information, but the is always a relevant weight to be given to the full picture argument.

- Information in the public domain may be relevant as an indication that no harm has occurred from this related information being in the public domain and it may be relevant i comparing what benefits already exist from the information in the public domain.

(vii) The robustness of officials

The DfES had argued that the threat of civil servants' advice being disclosed would cause them be less candid when offering such opinions. The Tribunal stated that "…we are entitled to expec of [civil servants] the courage and independence that … [is]…the hallmark of our civil service". I went on to describe civil servants as "…highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers c conflicting convictions." In short they should not easily be discouraged from doing their job properly.

However, arguments about loss of frankness and candour should not be dismissed out of hand the ECGD High Court case the judge criticised the IT for referring to the consideration of potent "chilling effects" as "ulterior considerations", commenting that "The considerations are not ulteri they are at the heart of the debate which these cases raise"

Such arguments should be considered as part of the public interest test and with reference to t information in question and the timing of the request. Disclosures of information relating to a gi

policy, whilst that policy making process is ongoing are potentially more likely to inhibit the frank and candid debate of those involved than disclosures made after the policy making process is complete, However, the final decision should always be made on the individual circumstances o the case.

See also LTT130 chilling effects for further discussion of this point..

(viii) Junior officials

However there may be grounds for withholding the names of more junior officials who would ne expect "their roles to be exposed to public gaze." This has to be decided on the particular facts, there should be no blanket policy to withholding such names. See also LTT131 'risk to role integrity of civil service' .

(ix) Relationship between Officials and Politicians

The DfES had expressed concern that officials who were identified with particular policies may themselves discriminated against when there was a change of government or even just a chang in ministers. The Tribunal's view was that we are entitled to expect our politicians to act fairly a not to remove a senior official simply because they have been identified with a policy that was n longer in favour. This point is also addressed in LTT131 'risk to role & integrity of civil service

(x) How will the public use the information

The Tribunal found that information should not be withheld simply through fear that it may reflec adversely and unfairly on a particular official.

On the face of it this seems at odds with point iii). However here the Tribunal were perhaps mor concerned with the public misunderstanding the role of civil servants, it stated that, "The answe ill-informed criticism of the perceived views of civil servants is to inform and educate the critic… may also be that greater emphasis should be placed on Tribunal's view in point 3 that there is n public interest in protecting politicians from criticism.

In *HM Treasury v the Information Commissioner*, the Tribunal again addressed this issue and commented (at para 62) that " We were wholly unpersuaded by Mr Neales's further point, that t public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a working assumption for the provision of advice, whereas the Ministers actual reason for adopting or rejecting it might be different, and that would lead to difficulties. Any Minister in that position would be able to explain the status of the official's assumption and what his own thinking was"

(xi) Names of Civil Servants.

Finally the Tribunal returned to the issue of releasing the names of civil servants. "A blanket pol on refusing to disclose the names of civil servants wherever they appear in departmental record cannot be justified…". That is not to say that there will not be situations where because of the particular sensitivity or controversial nature of the policy advice it should not be attributed to the official. "There must, however be a specific reason for omitting the name of an official where the document is otherwise disclosable". The Tribunal went on to comment that since there may be

little to be learnt from disclosing the officials' name, the arguments for withholding names may r have to be compelling for the public interest to favour maintaining the exemption in relation to th names.

See also LTT 131on 'risk to role & integrity of civil service for further discussion on this point.

Other points from DfES / Evening Standard

Public interest in disclosure (paras 86 - 88)

The public authority also commented, in relation to the public interest disclosure, that although i this particular case the minutes added little to the public debate on the perceived funding crisis, primarily because of the skeletal nature of the minutes, the Tribunal considered, amongst other things, that there was public interest in disclosing the information. This was because had the minutes been silent on the issue of the 'funding crisis' prior the news story actually breaking, thi may have been significant, i.e. it would have indicated that the DfES had been unaware of any problems.

It is important that when considering the public interest in disclosure that as well as taking into account general factors, such as increased openness and transparency, any more specific publ interest benefits that would flow from the release of the particular information in question are als considered.

In the ECGD High Court case, in reaching his conclusion that the Tribunals final decision had been made in accordance with the law, Mr Justice Mitting commented that "the Tribunal did not ….the specific public interest in disclosure of the departmental response to the ECGD request f information which was in play" (para 39)

Personal Data Issues

The issues discussed at principle (vii)- Robustness of Officials, and in particular at principles (v – Junior Officials & (xi)- Names of Civil Servants, are all arguments that raise Data Protection issues and therefore could have been made in relation to s40(2). The Commissioner's view is th Section 40 arguments, about fairness to individuals and breaches of the DPA should be considered under section 40. (for the Commissioner's approach to these issues see the various LTTs provided on s40) Arguments about risks to the role and integrity of the civil service, and th knock-on effect on effective policy formulation and decision making are relevant to section 35. See LTT131 risk to role and integrity of civil service for further discussion on this point

Application to regulation 12(4)(e)

These eleven LTT principles also guided the Tribunal in the cases of *DWP v the ICO* and *Baker the ICO & DCLG*. In the second, the information requested was withheld under regulation 12(4) of the EIR which excepts internal communications. The Tribunal noted that there is no indicatio that it is intended to have particular application to decision makers and advisers, and expressed concern that the principles in the *DfES* case be applied too rigorously to reg 12(4)(e). However, concluded that that they do provide broad guidance.

The ICO view (as set out in LTT104) is that there will be information covered by the EIR12(4)(e)

exception for internal communications, that would not fall under the FOIA exemption for section 35. However, for information which, if it were not environmental information, would be covered section 35 , then these guiding principles may be equally relevant to the EIR.

Source	Details
IT High Court	DfES / The Evening Standard February 2007), DWP / Oaten March 2007), Baker / DCLG (1 June 2007) ECGD / FOE (17 March 2008- High Court OGC / Oaten (11 April 2008 -H Court) DCMS (29 July 2008) HMT (7 November 2007)

Related Lines to Take

LTT42, LTT50, LTT51, LTT61, LTT62, LTT127, LTT130, LTT131, LTT132, LTT133,

Related Documents

EA/2006/0006 (DfES), FS50074589 (DfES), FS50088619 (HMT), Awareness Guidance 1, EA/2006/0040 (DWP), EA/2006/0043 (Baker), [2008] EWHC 737 (Admin) (OGC High Court), [2008] EWHC 638 (Admin) (ECGD High Court), EA/2007/0090 (DCMS), EA/2006/0064 (Evans EA/2007/0001(HMT)

Contact	RM / LA		
Date	07/11/2008	**Policy Reference**	**LT**

FOI/EIR	FOI	Section/Regulation	s1	Issue	Disclosure to public

Line to take:

Disclosure under the FOIA is disclosure to the public rather than to the applicant.

Further Information:

The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (following *Hogan and Oxford City Council v The Information Commissioner*) confirmed that, "Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions."*

This means that the circumstance of the applicant for information should not be taken into account when considering the exemptions under Part 2, **except** in the cases of s40, where the applicant is the data subject, and s21 where the information is reasonable accessible to the applicant.

The Tribunal in the case of *S v the ICO and the General Register Office* (GRO) further confirmed that, "FOIA is […] applicant and motive blind. It is about disclosure to the public, and public interests. It is not about specified individuals or private interests." (para 19)

Later in its ruling it stated, "In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used. Consequently, there is no provision for the public authority to create conditions of use* pursuant to a FOIA disclosure or to indicate that such disclosure should be treated in confidence." (para 80)

This approach was reaffirmed by the Tribunal in the case of PriceWaterhouseCoopers v IC and HMRC where it was said at para 50:

"Each request made under FOIA reflects a general right subject to certain exemptions enjoyed by every person to have disclosed to the public, all information legitimately disclosable within the terms of the request held by the requested public authority, irrespective of the requesting person's interest in the information and irrespective of the subject matter of the information".

*In the Commissioner's view, information under the Act or EIR can still be subject to copyright restrictions (either the PA's copyright or a third party's copyright)

PREVIOUS / **NEXT**

Source	Details
Information Tribunal	Guardian & Brooke / BBC (8 January 2007) PriceWaterhouseCoopers / HMRC (4 March 2010)

Related Lines to Take

n/a			
Related Documents			
EA/2006/0011 and EA/2006/0013 (BBC), EA/2009/0049 (HMRC)			
Contact		EW / HD	
Date	30/04/2010	**Policy Reference**	**LTT45**

FOI/EIR	FOI	Section/Regulation	s1, s2, s19	Issue	Assumption in favour of disclosure

Line to take:

The Freedom of Information Act assumes an assumption in favour of disclosure.

Further Information:

In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal stated that there is a presumption in favour of disclosure in the Act. In support of this, it put forward the following arguments*:

- The Act as whole involves a presumption in disclosure. The duties to disclose and to confirm or deny are expressed in general terms so that unless there is a relevant exemption, these duties will operate. In other words, "the "default setting" in the Act is in favour of disclosure" (para 82).

- Section 2(2)(b) states that where an exemption is qualified, information will only be exempt if the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that if the public interest is equally balanced, the information must be disclosed. Where the qualified exemptions are engaged, therefore, there is a presumption in favour of disclosure, though this only operates where the public interests are equal (para 83).

- Although there is no provision on the FOIA comparable to regulation 12(2) of the EIR which requires public authorities to apply a presumption in favour of disclosure, "there is an assumption built in to FOIA that the disclosure of information by public authorities on request is itself of value and in the public interest, in order to promote transparency and accountability in relation o the activities of public authorities." Therefore there is always likely to be some public interest in favour of disclosure (para 85).

- The short title of the Act – the Freedom of Information Act – "describes it as an Act to make provision for the disclosure of information held by public authorities" (para 86).

- Section 19, which requires public authorities to adopt and maintain publication

schemes, makes reference to "the public interest in allowing public access to information held by the authority."

It is important to recognise that in the cases of those exemptions with an inbuilt public interest test (s41 - confidentiality, and s40, in respect of DPA schedule 2 condition 6) the balance in that test is in favour of non-disclosure where the two sides are equally balanced.

In later cases, however, the Tribunal has indicated that this 'presumption' should more correctly be regarded as an 'assumption, as in the case of *DWP v ICO*, where Counsel for the ICO, "stopped short [...] of asserting that there existed a presumption in favour of disclosure, preferring to contend that there was an "assumption" in the Act that disclosure should be made, i.e. that there was a general or public interest to that effect."

The Tribunal accepted this position and commented at para 29 "It can be said, however, that there is an *assumption* built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis : section 2(2)(b) requires the balance to be considered "in all the circumstances of the case".

In the Commissioner's view the public interest in promoting transparency and accountability in relation to the activities of public authorities also means that there can be a public interest in revealing the paucity of information held in relation to a request. For example the absence of discussion on an important issue can of itself be an important matter to reveal.

The Tribunal referred to the above case in *FoE v the ICO and ECGD*, and confirmed that, "In the context of FOIA the presumption [in the EIR] has been described as an assumption or as a default setting so that relevant information must be disclosed unless FOIA specifies that it be withheld."

High Court Ruling

The High Court has also considered this issue in *OGC v The Information Commissioner* (para 68 to 71) and endorsed the approach followed in the DWP case.

It found that " In my judgement , it is both implicit and explicit in FOIA that, in the absence of a public interest in preserving confidentiality, there is a public interest in the disclosure of information held by public authorities. That public interest is implicitly recognised in section1, which confers, subject to specified exceptions, a general right of access to information held by public authorities……The public interest in disclosure is explicitly recognised and affirmed in section 19)(3) . Section 19(1) imposes on every public authority a duty to adopt and to maintain a scheme for the publication of information by it……Thus I agree with the statement of the Tribunal in

Secretary of State for Work and Pensions v The information Commissioner Appeal no. EA/2006/0040 [para 29] "

* The first three arguments were submitted by Counsel for the ICO. The Tribunal agreed with them in full.

PREVIOUS / **NEXT**

Source	**Details**
Information Tribunal, High Court	Guardian & Brooke / BBC (8 January 2007) DWP / Oaten (5 March 2007) FoE / ECGD (20 August 2007) OGC / Oaten (11 April 2008 - High Court)

Related Lines to Take

n/a

Related Documents

EA/2006/0011 and EA/2006/0013 (Guardian/Brooke) ,EA2006/0040 (DWP/Oaten) , EA2006/00073 (Foe /ECGD), [2008] EWHC 737 (admin) (OGC High Court)

Contact		EW/LA	
Date	18/06/08	**Policy Reference**	**LTT46**

FOI/EIR	FOI	Section/Regulation	s10	Issue	Working days and variations to time for compliance

Line to take:

Working days exclude days which are bank holidays anywhere within the UK. The time allowed for compliance with a request may be varied in accordance with the "Time for Compliance Regulations"

Further Information:

Working days

Section 10 of the Act defines a working day as "any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

This means that a day which is a bank holiday in any of the four nations of the UK is a non-working day for the purposes of the FoIA. Therefore a day which is say, only a bank holiday in Northern Ireland but not in England, Scotland or Wales (such as St Patrick's Day) will count as a non-working day in all countries covered by the FoIA.

Where offices close for privilege days in addition to bank holidays, these do not count as non-working days for the purposes of the FoIA.

In *Berend v ICO & London Borough of Richmond upon Thames (LBRT)* the Information Tribunal considered the length of a working day. It found that "working day" in the context of FOI referred to the definition given above, and that "There is no definition

within the Act as to the length of a day and in the absence of any such definition, we are satisfied that a day ends at midnight"

Time for Compliance Regulations (Statutory Instrument 2004 No. 3364)

In addition to the extensions to time allowed for the collection of fees and for consideration of the Public Interest Test for qualified exemptions, the Time for Compliance Regulations provide details of when the normal 20 working day requirement can be varied.

In all cases, whether or not a variation to the normal 20 working day limit is allowed, the Act requires a public authority to respond "promptly"

The variations allowed by the Time for Compliance Regulations are as follows:

Variations that may be applied without prior reference to the Information Commissioner :

Schools

The twentieth working day following the date of receipt can be read to mean the earliest of

- The twentieth working days following the date of receipt, excluding any day which is not a "school day", or
- The sixtieth working day following the date of receipt

A "school day" means any day on which there is a session (i.e. any day in which pupils are in attendance).

Effectively school holidays and "inset" or training days on which no pupils are in attendance, are not counted as working days.

It should be noted that the Time for Compliance Regulations do not extend to schools in Northern Ireland.

Archives

Where the request is received by an appropriate records authority or by a person at a place of deposit appointed under section 4 (1) of the Public Records Act 1958 and the request relates to information :

- That may be contained in a public record; and
- That has not been designated as open information for the purposes of section 66 of the FoIA.

then the time limit can be extended to the thirtieth working day following the date of receipt.

Effectively 30 working days are allowed for requests for transferred public records that haven't been designated as open information, so that the records authority has time to consult with the responsible or transferring public authority who may need to consider if any of the information is exempt.

Variations that may only be applied at the discretion of the Information Commissioner :

The following variations to the time limit are only available at the discretion of the Information Commissioner. They will only apply if a public authority has, within twenty working days following the date of receipt of the request, applied to the Commissioner for an extension of the time in which it must respond to a request, and the Commissioner has agreed to extend that time.

It is unlikely that actual requests for extensions would be dealt with by FoI Complaints Case Officers, as this issue would arise at a stage prior to a valid section 50 complaint being received. However, Case Officers may need to retrospectively consider whether this requirement has been met when deciding if a time breach has occurred.

Armed Forces

Where a request for information cannot be met without obtaining information (recorded or unrecorded) from any individual (whether or not a member of the armed forces) who is actively involved in an operation, or in preparation for an operation, of the armed forces then the time for a response can be extended at the discretion of the information Commissioner.

The Commissioner may extend the time for a response to one he considers reasonable in all the circumstances, but not exceeding the sixtieth day following the date of receipt of the request.

Information held outside the UK

Where a request cannot be complied with without obtaining information held outside the UK, and because of this the public authority is unable to comply within the normal time limit, then the time for a response can be extended at the discretion of the information Commissioner.

The Commissioner may, at his discretion, extend the time allowed for a response to one he considers reasonable in all the circumstances, but not exceeding the sixtieth day following receipt of the request.

Source	Details
FoI (Time for Compliance) Regulations	Statutory Instrument 2004 No.

Information Tribunal	3363 Berend / LBRT (12 July 2007)

Related Lines to Take

n/a

Related Documents

FoI (Time for Compliance) Regulations, Awareness Guidance 11, EA2006/0049&50 (Berend),

Contact		LA	
Date	21/08/07	**Policy Reference**	**LTT47**

FOI/EIR	FOI	**Section/Regulation**	s2	**Issue**	Relevant and non relevant public interest factors

Line to take:

Relevant factors in considering the public interest test are the likelihood of prejudice (if applicable), the specific circumstances of the case, the age of the information, PIT factors inherent in the exemption, and general arguments concerning transparency, accountability and participation. Non relevant factors include the identity of the applicant, private interests, and the complexity of the information.

Further Information:

In the case of *Hogan and Oxford City Council v The Information Commissioner* the Information Tribunal provided a number of considerations relevant to the application of

the public interest test. These were reiterated by the Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC*, and are as follows:

- In the case of prejudice based exemptions, the lower the likelihood of prejudice is shown to be, the lower is the chance that the public interest will favour maintaining the exemption. Although not mentioned by the Tribunal, the **severity** of the prejudicial effects will also be a factor.

- Public authorities may not maintain blanket refusals in relation to classes of information. Although a public authority may have a general policy that certain information is more likely not to be disclosed because the public interest favours maintaining the exemption, "such a policy must not be inflexibly applied and the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy" (para 57).

- In general, the public interest in maintaining the exemption will diminish over time. This is supported by the fact that s63 provides that a number of exemptions no longer apply after specified periods of time. The duration of each exemption is available in the annex to the DCA's guidance to the exemptions.*

- In considering the public interest in maintaining the exemption, only the public interest expressed explicitly or implicitly in that exemption should be taken into account. This is discussed further in LTT14.

- The public interest factors in favour of disclosure are, "broad ranging and operate at different levels of abstraction from the subject matter of the exemption" (para 60). Relevant considerations will therefore include the argument that disclosure promotes better government through transparency, accountability, public debate, better public understanding of decisions, and informed participation in the democratic process.

The Tribunal (in the *Hogan* case) also identified the following factors which are *not* relevant in considering the public interest:

- The identity or motive of the applicant.

- Private interests, as opposed to public interest.

- The possibility that the requested information could be misunderstood, or could be considered to be too technical and complex.

In addition, it should be noted that the public interest is not necessarily the same as what the public finds interesting. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC*, quoted Lord Wilberforce in *British Steel Corp v Granada Television Ltd* 1981 who stated that, "There is a wide difference between what is interesting to the public and what it is in the public interest to make known" (para 34).

*This should not be confused with the spurious argument that there is greater public interest in the disclosure of information which is nearly thirty years old (for example) simply because it is likely to be disclosed soon anyway. This is discussed further in LTT49.

Source	**Details**
Information Tribunal	Hogan / Oxford City Council (17/10/06), Guardian & Brooke / BBC (8 January 2007)

Related Lines to Take

LTT14, LTT49

Related Documents

EA/2005/0026 and EA/2005/0030 (Hogan/Oxford), EA/2006/0011 and EA/2006/0013 (Guardian/Brooke), Awareness Guidance 3

Contact		EW	
Date	06/06/07	**Policy Reference**	**LTT48**

FOI/EIR	FOI	**Section/Regulation**	s2, s63	**Issue**	Age of information

Line to take:

When considering the public interest test, the age of the information requested is a relevant factor to the extent that, in general, the public interest in maintaining the exemption will diminish over time. The fact that information is nearing the age at which an exemption ceases to apply is not, however, in itself, a relevant factor.

Further Information:

The age of requested information is a relevant public interest factor because in many cases it can be seen that its sensitivity decreases over time. Section 63 supports this general principle, in so far as it provides that certain exemptions will no longer apply to information contained in an historical record. Exemptions have durations of 30, 60, or 100 years or are unlimited.

The Tribunal in the case of *Hogan and Oxford City Council v the Information Commissioner* made this point, stating, "The passage of time will also have an important bearing on the balancing exercise. As a general rule, the public interest in preventing disclosure diminishes over time, as reflected by the fact that a number of FOIA's exemptions cease to apply after specified periods of time (see for example s.63)."

However, the simple fact that information is *nearly* thirty years old – and therefore the age at which the exemption ceases to apply – is **not** relevant.

This point was clearly articulated by the Tribunal in the case of *Guardian v the Information Commissioner and Avon and Somerset Police*. It stated, "Parliament decided on thirty years, not twenty-seven [the age of the information in this case]. To use proximity as an excuse for disclosure would be to erode the interval which Parliament chose." It further noted that future disclosure was not in any event certain as other exemptions may apply.

This supports the original DN where the argument that there may be a public interest in disclosing material where the 30 year limit is approaching was considered and rejected. The DN stated: "The fact that Parliament has explicitly provided, in section 63 (1) of the Act that information which is exempt under section 30(1) should lose that exemption thirty years after it was created suggests that there is a public interest in maintaining the exemption for the thirty year period unless there are strong public interest arguments in favour of disclosure. This may apply with greater force in situations where there have been expectations that the "30 year rule" will be applied and that date is approaching".

For example, in considering information which is 28 years old to which section 35 has been applied, it may be relevant to argue that the information is less sensitive than 'similar' information which is two years old, and that there is therefore greater public interest in its being disclosed. It will not, however, be relevant to argue that it should be disclosed because disclosure will occur in the near future anyway.

PREVIOUS/ NEXT

Source	Details
Information Tribunal	Hogan / Oxford City Council (17/10/06), Guardian / Avon & Somerset Police (05/04/07)

Related Lines to Take

LTT48			
Related Documents			
EA2005/0026 & EA/2005/0030 (Hogan), EA/2006/0017 (Avon & Somerset)			
Contact		EW	
Date	06/06/07	**Policy Reference**	**LTT49**

FOI/EIR	FOI	**Section/Regulation**	s35, s36	**Issue**	Disclosure of minutes

Line to take:

Because public authorities should keep proper minutes of meetings for the purposes of effective administration, the argument that disclosing minutes in one case may discourage proper minute keeping in the future is not compelling.

Further Information:

In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, which concerned a request for minutes of a BBC Board of Governor's meeting not disclosed by virtue of s36, it was argued that keeping proper minutes was, "part of the process of carrying out proper deliberations," and that disclosure in a particular case might discourage proper minute keeping in future.

The Tribunal did not accept this argument, stating that, "For purposes of effective administration a responsible public authority ought to keep suitable minutes of important meetings, whether or not the minutes may be disclosed to the public at a later date." (para 107)

In this case, the Tribunal further noted that the BBC had failed in any event to keep minutes of a meeting which took place the day after the meeting from which the minutes were requested. In consequence it said, "If a public authority does not follow satisfactory practices in keeping records of meetings, we are not inclined to think that the prospect of disclosure will make that situation significantly worse." (para 107)

The Tribunal drew similar conclusions in the case of *DfES v The Information Commissioner and the Evening Standard*. Here, it was suggested that standards in record keeping are already hard to maintain (without the 'threat' of disclosure); and the Tribunal noted that the minutes requested in the case were indeed 'fairly skeletal.'

It concluded however that, " We do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative [...] Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency." (para 83)

Further quotes from ICO decision notices on this subject, as well as the complete quotes from the above Tribunal decisions, are available in a briefing note prepared for a Select Committee on the impact of FOI on record keeping.

Source	**Details**
Information Tribunal	Guardian & Brooke / BBC (8 January 2007) Evening Standard / DfES (23 February 2007)

Related Lines to Take

LTT43

Related Documents

EA/2006/0011 EA/2006/0013 (Guardian), EA/2006/0006 (Evening Standard)			
Contact		EW	
Date	05/07/07	**Policy Reference**	**LTT50**

FOI/EIR	FOI	**Section/Regulation**	s35	**Issue**	Relates to

Line to take:

The term 'relates to' in section 35(1) can safely be interpreted broadly. Although this has the potential to capture a lot of information, the fact that the exemption is qualified means

that public authorities are obliged to disclose any information which caused no significant harm to the public interest.

Further Information:

DFES case and s35(1)(a)

In the case of *DfES v the Information Commissioner & the Evening Standard* the Tribunal considered whether minutes of senior management meetings concerning a funding 'crisis' in schools were exempt. The information had been withheld under s35(1)(a).

S35(1)(a) provides a class based exemption for information that **relates to** the formulation or development of government policy. In the DfES case the Tribunal found that the term 'relates to' could safely be given a broad interpretation because as the exemption was qualified public authorities are required to adopt a common sense approach to the disclosure of any information which caused "…no, or no significant damage to the public interest." (para 53).

This broad approach was demonstrated in para 58. The IC had argued that not all the information contained in the minute of one particular meeting related to policy development or formulation. The minute in question consisted of a brief summary of the background to the problem. In the Decision Notice we had taken the view that the information was more of a report on how the 'crisis' had arisen even though one of the points raised did suggest what approach was required in the future.

The Tribunal decided that, "If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."

The Tribunal's approach also demonstrates that the where the majority of information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to the s 35(1)(a) purpose.

Furthermore the Tribunal clarified at para 55 that the "immediate background to policy discussions is itself information caught by s35(1)(a), an inference which we believe, is readily drawn from the wording of s.35(4)." (s.35 (4) concerns the particular public interest in disclosing factual information, once a policy decision has been taken).

Scotland Office case and s35(1)(b)

In *Scotland Office v The Information Commissioner* (EA/2007/0070) the Tribunal applied this same principle to s35(1)(b). It commented (at paragraph 50) that " The exemptions in section 35(1) apply where the information "relates to" the matters set out in the sub-sections, so information is exempt if it relates to the formulation or development of government policy in the case of sub-section (a), or relates to Ministerial communication, in the case of sub-section (b). This means that the information in question does not have

to be, for example, Ministerial communications; it comes within the scope of the exemption if it "relates to" Ministerial communications.... In the context of this case, communications between a Private Secretary writing on behalf of his/her Minister and another Minster, constitutes Ministerial communications "

Scotland Office case (EA/2007/0128) confirmed the status to be accorded to letters written by one Private Secretary to another - "Such letters would contain the views of the relevant Ministers and so would, in our opinion, properly fall to be considered under section 35(1)(b)".

The Commissioner considers that the correspondence referred to in the two Scotland Office cases was effectively written 'on behalf of' a Minister and so would directly qualify as Ministerial communications. It would 'be' rather than just 'relate to' Ministerial communications.

Information that recounts or refers to specified Ministerial communications, whether written or verbal, would also engage section 35(1)(b) because it would 'relate to' ministerial communications.

This does not mean however, that all information which reveals Ministerial views will necessarily engage this sub-section, as if such information is not connected to an actual Ministerial Communication of some kind then s35(1)(b) will not apply. For example if correspondence between officials expresses what the official believes the Ministers view to be, but the official hasn't taken this view from a Ministerial communication, and isn't writing on behalf of the Minister then this information will neither 'relate to' nor 'be' a ministerial communication.

O'Brien case

In *O'Brien v the Information Commissioner* the Tribunal commented that "Section 35(1)(a) and (b) exempt information which "relates to" the formulation of policy and Ministerial communications. It is clear in our view that the information does not have to come into existence before the policy is formed for section 35(1)(a) to apply and that section 35(1)(b) is not confined to the Ministerial communications themselves.

Source	Details
IT	DfES / Evening Standard (19 February 2007) Scotland Office (08 August 2008 O'Brien / BERR (7 October 2008)

Related Lines to Take

LTT42, LTT43, LTT127
Related Documents
FS50074589, EA/2006/0006 (DFES), EA/2007/0070 (Scotland Office), EA/2008/0011(O'Brien)

Contact		RM / LA	
Date	07/11/2008	**Policy Reference**	**LTT51**

FOI/EIR	FOI	**Section/Regulation**	s35	**Issue**	Statistical Information

Line to take:

Statistical information is the product of some form of mathematical or scientific analysis and will include the facts/data which are fed into the analytical models. It is not simply a view or opinion that happens to be expressed numerically.

Further Information:

Background

In the Tribunal case *DWP v the Information Commissoner*, the applicant had requested a feasibility study on the impact that the introduction of ID cards would have on the DWP's business. It was accepted that the information fell within the class of information relating to the formulation and development of government policy. The Tribunal also found that the government had taken the policy decision (i.e. to introduce ID cards) by the time the request was made. It therefore became important in this case to determine whether or not it was statistical information.

This is because under s35(2) statistical information cannot be exempt under 35(1)(a) - formulation & development of government policy , or 35(1)(b) – ministerial communications, once the policy decision has been taken.

Statistical Information

Statistical information is broader than the term statistics. Statistics refer to the facts and figures whereas statistical information also includes the scientific or mathematical analysis of those facts (see para 77).

The Tribunal adopted the broad definition of what constitutes statistical information

contained in the MoJ's guidance on s35.

"Statistical information used to provide an informed background to the government policy and decision…will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, etc to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being;

i) derived from some recorded or repeatable methodology, and

ii) qualified by some explicit or implied measures of quality, integrity and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishesstatistical information is that the limitations of methodology, and the relevant measures of quality etc., allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy"

It should be noted that this definition originates from the Office of National Statistics and had already been adopted our Awareness Guidance on this exemption (No. 24).

The Information

In this particular case the information requested consisted of working assumptions; estimates of such factors as how many citizens would take up ID cards over a number of years, together with a whole range of scenarios on how the cards could/would be used by individuals etc. These working assumptions were then used to predict the impact ID cards would have on DWP business. Much of this information was expressed numerically. Tribunal found that these values had not been generated by some mathematical analysis. The Tribunal concluded that it did not constitute statistical information. It follows that it accepted that these predictions were based on judgements, views and opinions of officials.

Statistical Information and the factual information on which it is based.

From the MoJ's definition of statistical information it is clear that statistical information is the product of some form of mathematical or scientific analysis of facts and figures. A distinction could be drawn between the analysis and the actual facts upon which it is based, but if this approach was accepted then, it's conceivable that, although a public authority was required to provide the analysis, it could still claim that the data on which that analysis was based was exempt. However the we should adopt a more pragmatic approach which includes both the facts that are fed into the scientific model and the model itself, as well as the product of that analysis, as all being statistical information. It should be noted that although this is the line to take, it is not a matter that was addressed

by the Tribunal.

Accuracy of the Statistical Information.

It is noted that at para 77 the Tribunal commented that the Mr Pitt-Payne "helpfully contends that statistical information is information that is put forward with a high degree of confidence…" which suggest it had sympathy with this view. On the face of it this seems at odds with the final paragraph of the definition set out above. In essence it is not that the statistical analysis has to produce highly accurate predictions, rather its that its margins of error have to be understood so that it can be used with confidence.

Application of S35(2)

The Tribunal explained (at para 79) that since it had determined that the policy decision to which the information related had already been taken then, **had** the information been statistical information, it would have been obliged to go onto consider whether the information had been used to provide an informed background to that policy decision.

This illustrates the importance of checking that all 3 elements of s35(2) are in place when determining whether statistical information is exempt or not;

1) Is it statistical information?

2) Has the policy decision to which it relates been taken?

3) Did the statistical information provide an informed background to that decision?

Consistency with other DNs

In DN FS50105898 the complainant had requested the information on the variables that were fed into an economic model. The information in question was a range of predictions on factors effecting the economy, e.g., performance of the housing market. These predictions were expressed as numerical values.

The DN acknowledged the ONS's definition of statistical information and in particular the reference to 'projections'. However the DN also presented a dictionary definition of a statistic being a 'quantitative fact or statement', to argue that a projection into the future could not be a fact & therefore not statistical information. Although ultimately the DN took other factors into account when reaching its decisions, this particular approach is no longer a line we can follow in light of the Tribunal decision in the DWP appeal.

PREVIOUS/ NEXT

Source	**Details**
Information Tribunal	DWP / ICO (5 March 2007)

Related Lines to Take

n/a
Related Documents
FS50083103 (DWP), FS50105898 (HMT), EA/2006/0040 (DWP), Awareness Guidance 24, MOJ Guidance FOI s35

Contact		RM	
Date	28/09/2009	**Policy Reference**	**LTT52**

FOI/EIR	FOI	**Section/Regulation**	s23 s24	**Issue**	Reliance on s23(5) and s24(2) in conjunction

Line to take:

Security operations may be carried out by bodies both listed and not listed in s23(3). Because responses to requests for information on such matters should not disclose the involvement of either a s23(3) body specifically or, alternatively, a body not listed in that subsection, s23(5) and s24(2) should be relied upon consistently and in conjunction.

Further Information:

In the case of *Baker v the Information Commissioner and the Cabinet Office*, the Tribunal ruled that the ICO was right to decide that the Cabinet Office's refusal to confirm or deny whether it held requested information was in accordance with the Act. The complainant in this case had requested information firstly about whether or not the Wilson Doctrine* was still in operation, and secondly about the number of MPs subject to telephone tapping or other surveillance since the Doctrine was set out.

In its decision on the second request, the Tribunal quoted verbatim a substantial part of the witness statement of the Director of Security and Clearance at the Cabinet Office

who set out why both s23(5) **and** s24(2) were claimed in its refusal to confirm or deny whether information in relation to that request was held.

He explained that information concerning the telephone tapping of MPs (if it were held) could relate to the bodies specified in 23(3) **or** to other bodies not listed, such as the police, Defence Intelligence Staff and HM Revenue and Customs. This is because section 6 of the Regulation of Investigatory Powers Act 2000 lists the bodies permitted to carry out communication interceptions under warrant, and this list includes four of the bodies in s23(3) and others, such as those detailed above. In other words, the interception of communications can be carried out by bodies other than those provided by section 23(3).

The Cabinet Office argued (and the Tribunal concurred) that, "it is important that any response under FOIA does not allow any deduction as to whether or not there is any involvement by a section 23 body. It is equally important to protect the fact of whether or not an intercepting body which is not listed in section 23 is involved." It is for this reason that section 24(2) was also claimed.

It went on to explain that, "if the Cabinet Office were to rely solely on either section 23(5) or on section 24(2) in neither confirming or denying that information was held, in those cases where section 23(5) was relied upon alone that reliance could itself reveal that one of the bodies listed in section 23(3) was involved. That in itself would constitute the release of exempt information. Thus it is necessary to rely on both sections 23(5) and 24(2) consistently in order not to reveal exempt information in a particular case."

Although this case specifically relates to information concerning surveillance, other situations will arise where information not supplied by or relating to any of the bodies listed in s23(3) may nevertheless be withheld for the purpose of safeguarding national security. In such situations, the use of section 23(5) and section 24(2) in conjunction can be upheld.

* The Wilson Doctrine follows a statement made by Harold Wilson in the House of Commons on 17 November 1966 in which, in answer to a number of Parliamentary Questions, he said that he had given instruction that there would be no telephone tapping of MPs, and that if this policy changed he would make a statement to the House at such a moment as he deemed compatible with the security of the country.

Source	**Details**
Information Tribunal	Baker / Cabinet Office (12 February 2007)

Related Lines to Take

n/a			
Related Documents			
EA/2006/0045			
Contact		EW	
Date	05/07/07	**Policy Reference**	**LTT53**

FOI/EIR	FOI	**Section/Regulation**	s24	**Issue**	National Security

Line to take:

No definition of 'national security' can be found in any statute or judicial decision. Reference may be made, however, to a number of observations on the issue in a House of Lords decision, which the Information Tribunal has found to be useful.

Further Information:

In the case of *Baker v the Information Commissioner and the Cabinet Office*, which considered the application of sections 23 and 24 to information relation to phone tapping and the Wilson doctrine*, the Tribunal noted that it was unable to find an exhaustive definition of "national security" in either any statute or judicial decisions.

However, it referred to a House of Lords decision (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153) which makes a number of

observations on the issue, and which it stated that it found useful. These are as follows:

"(i) "national security" means the "security of the United Kingdom and its people" (para 50 per Lord Hoffman);

(ii) the interests of national security are not limited to action by an individual which can be said to be "targeted at" the UK, its system of government or its people (para 15 per Lord Slynn);

(iii) the protection of democracy and the legal and constitutional systems of the state is part of national security as well as military defence (para 16 per Lord Slynn);

(iv) "action against a foreign state may be capable indirectly of affecting the security of the United Kingdom" (para 16-17 Lord Slynn): and

(v) "reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security" (para 17 Lord Slynn)."

*The Wilson Doctrine follows a statement made by Harold Wilson in the House of Commons on 17 November 1966 in which, in answer to a number of Parliamentary Questions, he said that he had given instruction that there would be no telephone tapping of MPs, and that if this policy changed he would make a statement to the House at such a moment as he deemed compatible with the security of the country.

Source	**Details**
Information Tribunal	Baker / Cabinet Office (12 February 2007)

Related Lines to Take

LTT68

Related Documents

EA/2006/0045

Contact		EW	
Date	05/07/07	**Policy Reference**	**LTT54**

FOI/EIR	FOI	Section/Regulation	s43	Issue	Evidence from third parties

Line to take:

When considering prejudice to a third parties commercial interests, it will not be sufficient for the public authority to speculate about prejudice that may be caused, rather arguments originating from the third party itself will need to be considered.

Further Information:

In *Derry City Council v The Information Commissioner* Derry City Council claimed that section 43 applied as releasing the requested information would prejudice the

commercial interests of both itself and a third party, Ryanair.

Ryanair were not represented at the Tribunal nor were they joined to the proceedings.

The Commissioner had considered arguments put forward by Derry City Council in support of its assertion that Ryanair's commercial interests would be prejudiced by the release of the requested information. However it was accepted at the Tribunal that these were the Council's own thoughts on the matter and were not representations made to the Council by Ryanair.

The Tribunal did not take the commercial interests of Ryanair into account in reaching its decision commenting that "Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure if its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced."

It could be taken from this that when considering prejudice to a third party's commercial interests only arguments provided by the third party itself in relation to the request should be taken into account and any arguments formulated by the public authority should be disregarded.

However the Commissioner considers that whilst this approach was appropriate in the particular circumstances of the *Derry* case, in other cases it may be that, due to time constraints for responding to requests, arguments are formulated and argued by a public authority, based on its prior knowledge of the third party's concerns. The Commissioner accepts that these may be valid arguments and that where a public authority can provide evidence that they genuinely originate reflect the concerns of the third party involved then they may be taken into account.

If it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then any speculative arguments put forward by a public authority should clearly not be taken into account.

In any case it will be necessary to establish the source of and evidence for any arguments about the prejudice to the commercial interests of a third party and to weight them accordingly.

PREVIOUS / **NEXT**

Source	**Details**
Information Tribunal	Derry City Council / Hutton (11 December 2006)

Related Lines to Take

n/a
Related Documents
EA/2006/0014, FS50066753, e-mail [Redacted name] to FoI 13/12/06, Awareness Guidance 5

Contact		LA	
Date	05/07/07	**Policy Reference**	**LTT55**

FOI/EIR	FOI EIR	**Section/Regulation**	s40(2), Reg13	**Issue**	Second data protection principle

Line to take:
The second data protection principle relates to the business purposes for which a data controller intends to process personal data. Public authorities do not collect personal data in

order to respond to FOI/EIR requests and therefore there is no need for them to specify such disclosures as a purpose for which they are processing the data.

A disclosure of personal data that would not breach any of the remaining data protection principles or would not involve the disclosure of information that would be exempt under any other exemption/exception of the Act or EIR will not be incompatible with the business purposes that have been specified.

The second data protection principle only needs to be considered when raised by the public authority as a reason for withholding information.

Further Information:

The Second Data Protection Principle states that;

"Personal data shall be obtained only for one or more **specified** and lawful purposes, and shall not be further processed in any manner **incompatible** with that purpose or those purposes." (emphasis added)

The second principle in context

The second principle should only be considered if it has been raised by the public authority and it should be interpreted in the broader context of the Data Protection Act (DPA) i.e. the protection of the privacy rights of individuals. It is important to remember that the most important means for protecting these privacy rights is the first data protection principle and that this should be our focus when considering 40(2).

The problem

Some public authorities have argued that as they have not specified that they will disclose personal data in response to a request under either the Act or EIR, then to do so would breach the second principle or that such disclosures would be incompatible with the purposes they have specified. Such arguments should be rejected and this LTT sets out our approach to this problem.

Policy Rationale

Bearing in mind the aim of the DPA, i.e. protecting the privacy of individuals, it would be a very odd result if, after satisfying ourselves that a disclosure complied with the first principle and that therefore no privacy rights would be prejudiced, a disclosure could be blocked by the second principle because such disclosures had not been specified by the public authority or because the disclosure would somehow interfere with the business purposes of the data controller.

To allow these arguments would mean the second principle became an artificial barrier to disclosures that do not impact on the privacy of data subjects. It would allow public authorities to frustrate disclosures by omitting to specify such disclosures as a purpose for which information was obtained. Furthermore where a public authority is concerned that a

disclosure is incompatible with their business purposes then this should be addressed through the application of one of the other exemptions/exceptions available under the Act/EIR, not by the use of an exemption/exception designed to protect individual privacy.

Our approach

This line now breaks the second principle down into its two elements and considers how a disclosure under the Act would comply with each element in turn. First it will look at the requirement for data controllers to obtain information only for specified purposes and then considers whether a disclosure under the Act would be compatible with those purposes.

Obtained only for one or more specified purposes.

The second principle provides that data controllers must specify the purposes for which they are processing personal data. This can be achieved either through a fair processing notice provided directly to data subjects (see LTT 59 for further details) or by including the purpose in its entry on the Register of Data Controllers, a public register available for inspection on the ICO's website.

Public authorities need to collect personal data in order to pursue their business objectives. It is only these purposes which the public authority has to specify. Public authorities do not obtain personal data so that they can then provide it in response to a request. This is not one of their business purposes. It follows that there is **no** requirement to specify that disclosures may be made under the Act or EIR in either a fair processing notice or the Register of Data Controllers.

Shall not be processed in any manner incompatible with that purpose or purposes.

Even though public authorities are not required to specify that they may disclose personal data under the Act/EIR, the second principle still prohibits them from further processing personal data (including in response to requests) in any manner that would be incompatible with the purposes it has specified i.e. a disclosure in response to a request still needs to be compatible with the public authority's business purposes.

The Commissioner's view is that in order to consider this issue properly we have to take account of the ethos behind the Freedom of Information Act which aims to promote the public's understanding of, and confidence in, the public authorities that serve them, which in turn will drive up standards within the public sector.

On this basis it is difficult to see how a disclosure of personal information which would not breach any of the remaining data protection principles, and would not involve the disclosure of information that is covered by another exemption/exception, could possibly be incompatible with the public authority's business purposes. In fact such a disclosure should actually support the specified business purposes of the public authority by promoting confidence, driving up standards etc.

Further support for this approach can be taken by consideration of the second principle in the broader context of the DPA i.e. the protection of the privacy of individuals. There is an argument that we should interpret the second principle in a way that focuses on whether any

further processing would be incompatible with the privacy rights of the data subject rather than on the business purposes of the data controller, despite this approach straying away from a literal interpretation of the principle. Such an approach would mean that if, in all other respects, the disclosure is compatible with the remaining data protection principles then it would not contravene the second principle.

Where a public authority anticipates disclosing personal data under the Act.

It should be remembered that there will be occasions where a public authority has anticipated that some of the personal data it holds will be the focus of requests and therefore expressly advises data subjects that some personal data may be disclosed under the Act/EIR. Where this has happened it is important to recognise that any notice advising data subjects what information the public authority intends to disclose cannot be used to effectively limit the disclosure to only that information specified in the notice.

In the Information Tribunal case of House of Commons v ICO & Norman Baker MP the HoC appealed the Commissioner's decision that further details of the travel allowances claimed by MPs should be released in response to requests from Norman Baker MP and the Sunday Times. The overall amount claimed by each MP was already published. Norman Baker had requested a break down of those costs into the different modes of transport, e.g. how much each MP claimed in respect of cars, trains, planes. The HoC had withheld the information on the basis that the disclosure would breach the data protection principles.

The HoC had advised MPs that with the advent of FOIA it would publish the total figure claimed by each MP for travel expenses. It argued that to now disclose additional details, such as a breakdown of the modes of transport, would be a widening of this purpose and could amount to a new purpose. Disclosing this information, it argued, would therefore be unfair to MPs and might breach the second data protection principle.

The Tribunal found that, as the HoC was already publishing some information on expenses, one of the purposes for which the information was processed was to publish/disclose data on allowances to comply with FOIA. Therefore publishing the details of the mode of transport was not incompatible with that original purpose and was certainly not a new purpose.

The Tribunal decision appears to have been based principally on its finding that the broader disclosure would not be unfair to MPs. The Tribunal did not examine the second principle in any great detail.

What we can take from this decision is that where a public authority has already raised awareness amongst data subjects that their personal data may be disclosed in response to an FOI request (such as be including the required statement as to its status as a public authority in its DPA notification) then it will be easier to find that the FOI disclosure does not breach the 2nd principle.

It should be noted that in its consideration of the first principle the Tribunal made the point that simply because a public authority fails to advise data subjects that other disclosures were possible, this does not itself mean a disclosure is unfair. The Tribunal was concerned that, if it were to find otherwise, a disclosure that in all other respects was fair could

effectively be blocked by the data controller arranging data collection in such as way as to render the disclosure unfair (see paragraph 76 of the Baker case).

PREVIOUS / **NEXT**

Source	**Details**
IT Data Protection Practice	House of Commons / Baker (16 January 2007)

Related Lines to Take

LTT57, LTT58, LTT59

Related Documents

EA/2006/0015 and 0016, FS50072319, FS50071194, Awareness Guidance 1

Contact		RM	
Date	16/12/2008	**Policy Reference**	**LTT56**

FOI/EIR	FOI/EIR	**Section/Regulation**	s40, reg13	**Issue**	Schedule 2 Condition 6 of the DPA

Line to take:

The sixth condition establishes a three part test which must be satisfied;

- there must be **legitimate interests** in disclosing the information,
- the disclosure must be **necessary** for a legitimate interest of the public and,
- even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms & legitimate interests of the data subject.

Further Information:

Introduction

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 wi only need to refer to fairness (although where the information is to be disclosed, then fairness, the Schedules and lawfulness will all need to be considered). 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 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. In such cases the analysis of fairness should still be done first and so can be referenced when looking at the sixth condition. For example, 'legitimate interests' will have already been considered as part of the balancing exercise and the 'unwarranted intrusion' test will have been dealt with under the consideration of the consequences of disclosure on the data subject from the fairness line (see LTT163). This therefore means that the analysis under Schedule 2, condition 6 only needs to focus on the second limb of the test i.e. whether it is 'necessary' to disclose the requested information to meet the identified legitimate interests.

Background

Schedule 2, paragraph 6(1) of the Data Protection Act provides a condition for processing personal data where;

"The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

In previous cases, the Tribunal treated the sixth condition as a balancing test similar to that in the public interest test, balancing the legitimate interests of the public against the prejudice to the rights, freedoms and legitimate interests of the data subject. It only differed from the public interest test in that the arguments in favour of disclosure had to outweigh those in favour of preserving the privacy or interests of the data subject, i.e. the default position was in favour of

protecting the privacy of the individual i.e. withholding the information.

However in the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc) th Tribunal took a different approach. In this case the Tribunal said that the first thing to do when applying the sixth condition was to establish whether the disclosure was **necessary** for the legitimate purposes of the recipient (the public) and then to go on to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights & freedoms of the data subject. (paras 59 onwards).

Leapman, Brooke, Thomas involved requests to the House of Commons for details of the expenses that 14 named MPs had claimed for their second homes. In considering whether the sixth condition was satisfied the Tribunal asked itself two questions;

"(A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals),

(B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else)."

- In the Commissioner's view it is really question (A), which deals with the issue of necessity that introduces the change in the way the sixth condition is addressed.
- When taken with question (B) the resulting test is consistent with the approach to Article in the Human Rights Act (the right to privacy and family life), i.e. that interference with private life can only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued: i.e. whether a pressing public interest was involved and the measure employed was proportionate to the aim. This HRA approach makes sense when it is remembered that the DPA comes from a European Directive inspired by the European Convention on Human Rights.

Although the House of Commons appealed the Tribunal's decision to the High Court [2008] EWHC 1084 (Admin) the basis of the appeal had nothing to do with the Tribunal's approach to the sixth condition which was accepted by all parties and support for the Tribunal's position can be found at para 43 of the High Court's judgement. In any event the appeal was dismissed.

Necessity

In considering the issue of necessity, it is useful to consider whether there are any alternative means of meeting the identified legitimate interests and the extent to which those alternative regimes meet those legitimate interests. It may also be useful to consider whether the disclosure of the personal data would satisfy the legitimate interest in any event.

In considering these points, it is useful to look again at the Leapman, Brooke, Thomas case. Th Tribunal found that the system in place at that time for regulating MPs' expense claims was so seriously flawed that there was no public confidence in it. This was the main reason why the Tribunal found that the disclosure was necessary in order to achieve the objectives which it characterised as being transparency, accountability, value for money and the health of

democracy. The Tribunal chose not to take account of the public authority's stated intention to reform the allowance system because its focus, quite rightly, was on the circumstances that existed at the time of the request. The Tribunal refused to be drawn on whether it may have reached a different conclusion had the reforms been in operation at the time of the request (par 76). However it can be seen that if the means of overseeing the expense claims had been more rigorous at the time of the request then arguments that the disclosure was necessary for reasons of accountability and value for money would have been harder to sustain, i.e. it may have been possible to demonstrate that there was an alternative mechanism to satisfying the legitimate interests.

- On appeal the High Court also recognised *"… that if the arrangements for oversight and control of the ACA system were to change, then the issues of the privacy and security of MPs and their families might lead to a different conclusion to the one reached by the Tribunal. The Tribunal was required to act on the evidence available to it, and make its judgment accordingly. If the question were to arise again, the Commissioner, and if necessary the Tribunal, again, would have to make whatever decision was appropriate in the light of changed circumstances."*

The fact that the data subjects were elected representatives was also raised in this case. We would all recognise that there is a legitimate public interest in MPs being accountable for the amount of public money they spend and also to test the integrity of their decision-making in relation to the spending of public money. The House of Commons argued that MPs were ultimately accountable at the ballot box and that sufficient details were available in the Common's publication scheme to meet this purpose (para 25). However the Tribunal responded that in order for the accountability to be meaningful it was necessary for the details, rather than just headline figures, to be made available to the electorate so that they could make a more informed decision (para 76).

The Tribunal also took account of the scale of the amounts of money involved which was not large compared to other areas of public spending when considering necessity. However it's not clear how the amount of money involved would affect, for example, the principle that MPs shou be accountable for the public money they spend or alter the fact that, because of the absence o other effective controls, this accountability can only be achieved through full disclosure.

***Casework example – FS50090869 ***

The complainant asked for the names of the Persons in Charge for each child day care setting England. In considering Schedule 2, condition 6, the Commissioner found that there was a legitimate interest in the public, including parents, prospective parents and carers, in accessing details of the Persons in Charge when researching and deciding about potential child care places for their children as it is a legitimate interest to know and be able to verify that someone purporting to be registered with Ofsted is indeed registered. The Commissioner went onto consider the necessity test and did not accept that the information Ofsted provided to a number of government departments, as well as the police and child protection services, was available to the parents and carers and thus that this did not satisfy the legitimate interest. Therefore there was no alternative means of satisfying the legitimate interests and so the first and second limbs of the three part test were satisfied.

***Casework example – FS50169734 ***

The complainant requested statements, if held, which had been provided by named nurses during the Nursing and Midwifery Council's investigation of fitness to practice complaints. The Commissioner found that there was a legitimate interest in knowing whether individuals providing healthcare services were fit and proper to do so. However the Commissioner found that it is the NMC's role, as well as that of NHS Trusts and other establishments, to ensure that nurses and midwives maintain the required fitness to practice standards and that the legitimate interest is met by these bodies rather than disclosing individual complaint histories and thus found that it was not necessary to disclose the requested information as the legitimate interest could be satisfied by an alternative mechanism.

PREVIOUS / NEX

Source	**Details**
Information Tribunal, High Court	Leapman, Brooke, Thomas v ICO (16.05.08, 26.02.08)

Related Lines to Take

LTT59, LTT163, LTT164, LTT165

Related Documents

[2008] EWHC 1084 (Admin) (Leapman at High Court) , EA/2007/0060 etc (Leapman at IT)

Contact	RM / HD		
Date	19/01/2010	**Policy Reference**	**LTT5**

FOI/EIR	FOI/EIR	**Section/Regulation**	s40, reg13	**Issue**	Fair Processing Notices

Line to take:

The fact that data subject has not been advised that certain personal data may be disclosed under the Act does not in itself render the disclosure unfair.

Further Information:

Schedule 1, part 1 states:

"Personal data shall be processed fairly and lawfully……"

In broad terms, for the processing of personal data to be considered fair, a data subject should be informed of the identity of the data controller, the intended purpose(s) for which the data is to be processed as well as any other information relevant to the specific data subject and/or the circumstances of the case. This is set out in Schedule 1, part II, paragraph 2(3) of the DPA.

Where personal data is obtained directly from the data subject, paragraph 2(1) requires a data controller to provide a data subject with the fair processing information at the time the information is collected, so far as is practicable.

The first case that dealt with fair processing cases was the case of the House of Commons v ICO & Norman Baker MP. The House of Commons argued that disclosing additional informatio in relation to MPs' travelling expenses under FOI involved processing the information for a fresh purpose which MPs had not been advised about and so the processing would be unfair. Whilst this is an unusual case, the Tribunal rejected the argument that the disclosure was unfair because MPs had not been advised that additional information could also be released. The Tribunal found that simply because a public authority fails to advise that other disclosures were possible does not mean a disclosure is unfair otherwise a disclosure that in all other respects was fair *"could effectively be blocked by the data controller (…) arranging data collection in such as way as to render the disclosure unfair".* para 76.

However in most cases it is less likely that the data controller/public authority could anticipate personal data being requested under the Act and the personal data in question may even have been collected before the Act was in force.

It is the Commissioner's general rule that the details contained in a fair processing notice should concern the business purposes of the data controller/public authority. The Commissioner does not consider compliance with FOI requests as being a business purpose of a public authority. Therefore omitting to mention disclosures under the Act in a fair processing notice would not in itself mean a disclosure would contravene the DPA. In such cases compliance would be determined by a more general consideration of the fairness element of the First Principle.

***Casework example – Successful University Applications Details (FS50110885) ***

The complainant sought information concerning successful applicants to the University of Cambridge broken down by school/college, gender and course. The public authority advised that the data subjects were informed that their personal data would only be processed for the following purposes: (a) to collect statistics or monitor equal opportunities (or both); (b) for research purposes, but no information which could identify them as an individual will be published; and (c) the information provided will normally be treated as confidential.

The Commissioner found that whilst the data subject's expectations would be shaped by the fair processing notice, he did not believe that a specific notification of a disclosure under the FOIA was necessary. The Commissioner instead found that disclosure would be fair because there

are many circumstances where an individual would disclose details of the University course the studied i.e. applying for a job. Also the Commissioner did not believe that there would be any detriment to the data subject via disclosure and thus found that disclosure would be fair.

PREVIOUS / NEX

Source	**Details**
IT	Baker / House of Commons (16 January 2007)

Related Lines to Take

LTT56, LTT57, LTT163, LTT165

Related Documents

EA/2006/0015 and 0016, FS50072319, FS50071194, Awareness Guidance 1

Contact	RM / HD		
Date	21/01/2010	**Policy Reference**	**LTT5**

FOI/EIR	EIR	**Section/Regulation**	Reg12(5)(d)	**Issue**	Interpreting "proceedings" for t purposes of regulation 12(5)(d

Line to take:

The Commissioner interprets "proceedings" as possessing a certain level of formality (i.e. they a unlikely to encompass every meeting held / procedure carried out by a public authority). They w include (but may not be limited to):

- legal proceedings;
- formal meetings at which deliberations take place on matters within the public authority's

jurisdiction; and
- where a public authority exercises its statutory decision making powers.

Public authorities can only refuse to disclose information relating to proceedings where the confidentiality of those proceedings is provided by law. This includes common law or specific statutory provision. If the confidentiality of the proceedings is not provided by law, regulation 12(5)(d) will not apply.

Further Information:

Proceedings

As a starting point, it is useful to bear in mind Article 4(2) of the EU Directive from which EIR originates which states that "the grounds for refusal... shall be interpreted in a restrictive way" when considering what can be taken into account under "proceedings" in regulation 12(5)(d), which provides that:

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

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law."

Proceedings is defined in the dictionary as:

- an act or course of action;
- institution of legal action or any step taken in legal action;
- minutes of the meeting of a club, society etc;
- legal action/litigation;
- events of an occasion/day-to-day meeting.

With respect to the restrictive reading of exceptions, the Commissioner interprets that for the purposes of regulation 12(5)(d), proceedings require a certain level of formality (i.e. they are unlikely to encompass every meeting held / procedure carried out by a public authority). It will include (but not be limited to):

- legal proceedings;
- formal meetings where deliberations take place on a matter within a public authority's jurisdiction; and
- where a public authority exercises its statutory decision making powers.

In any of these circumstances, the proceedings will have a clear tenure, with a determined outcome. They potentially could be embodied in a public authority's constitution or the terms of reference of its governance.

The above interpretation corresponds to the Tribunal's consideration of proceedings in *Archer v*

The Information Commissioner and Salisbury District Council where it said: "we consider that "proceedings" would include legal proceedings. It would also include a formal meeting of the Council at which deliberations take place on matters within the Council's jurisdiction" (paragrapl 68).

Information which may have an adverse effect on the confidentiality of proceedings

In Archer v the Information Commissioner and Salisbury District Council, the requested information was a Joint Report referred to in the minutes of a particular Council meeting. The Tribunal went on to say that "[i]t is not clear to us from the evidence whether the Joint Report which was discussed at the meeting, was prepared exclusively for the discussion at the meetin and we are not satisfied therefore, that it qualifies as "proceedings". Accordingly, we do not fin that regulation 12(5)(d) applies to the Joint Report in this respect" (paragraph 70).

Although the Commissioner accepted that this information should not have been withheld unde regulation 12(5)(d), he does not agree with the Tribunal's suggestion that the Report in itself qualifies as "proceedings". The Commissioner anticipates that there will be circumstances wher proceedings deal with information that has not been exclusively prepared for that purpose. In su cases, he will consider whether disclosure of information related to the proceedings (not limited documents prepared exclusively for the proceedings) would have an adverse effect on the confidentiality of those proceedings. In such circumstances they would be exempt under regula 12(5)(d).

Confidentiality must be provided by law

Public authorities can only refuse to disclose information relating to proceedings where the confidentiality of those proceedings is provided by law. This includes common law or specific statutory provision. If the confidentiality of the proceedings is not provided by law, regulation 12(5)(d) will not apply.

PREVIOUS / **NE**

Source	**Details**
Information Tribunal	Archer / Salisbury District Cour (9 May 2007)

Related Lines to Take

n/a

Related Documents

EA/2006/0037, 2003/4/EC

Contact		LA / GF	
Date	08/05/2009	**Policy**	**LT**

		Reference	

FOI/EIR	FOI / EIR	**Section/Regulation**	s2(1)(b), r12(1)(b), s35, s36, r12(4)(e)	**Issue**	Advice to Decision Makers

Line to take:

The following considerations may help the weighing of the public interest test:

(i) arguments that disclosure will lead to poorer record keeping should be disregarded;

(ii) although the complexity of the issue may make the information more sensitive it may also increase the public interest in disclosure;

(iii) the fact that there is already information in the public domain explaining the decision in question does not mean there is no public interest in disclosure; and

(iv) by providing the full information behind a decision removes any suspicion of 'spin'.

Further Information:

Requests for information on the advice provided to decision makers, whether they be other officials, elected members or ministers are often refused under s 35, s36 or the exception under the Regs provided by r 12(4)(e) – internal communications. The validity of the arguments for and against disclosure are usually debated as part of the public interest test and commonly discuss issues around how officials will react to a disclosure of their advice in terms of the candour of any advice they give in the future and the way such advice will be recorded etc.

Lord Baker v the Commissioner and the Dept for Communities and Local Government (EA/2006/0043) concerned a request under EIR for information on a decision on whether or not to grant planning permission on a controversial development. Information on the advice given by civil servants to the Deputy Prime Minister when making his final decision had been withheld under reg 12(4)(e) – internal communications. This case adds to our understanding of how the Tribunal may view some of these arguments.

Record Keeping

In this case the Tribunal gave little weight to arguments that disclosure will lead to poorer record keeping and seemed to view this as an issue that could properly be addressed by staff management. (This approach is consistent to that taken by the Tribunal in the DfES case EA/2006/0006 see LTT43, also see LTT50 on the disclosure of minutes)

A witness for the Dept explained that although the contents of the advice would not change in response to the possibility of disclosure, there would be a, "greater tendency to give advice orally and not in writing. [The witness] explained that this is what happened when reports of local authority planning officers were first exposed to public inspection in the early 1990s. However, he added that it had been acknowledged that this represented bad practice and that it was less prevalent these days. He accepted that it was a matter of effective staff management, at both central and local government level, to ensure that complete advice was made available to decision makers and properly recorded."(para 18)

The Tribunal summarised another witness's evidence that "he believed [employees] had become more rigorous and disciplined in recognition of the fact that what they wrote might become the subject of public scrutiny – they were more aware of the need, in his words, to

get it right" (para 18).

The complete quotes from the above Tribunal ruling, as well as further quotes from the Tribunal and ICO on impact of FOI on record keeping are available in a briefing note prepared for a Select Committee on this subject.

Complexity of issue under consideration.

As stated above the case concerned planning consent for a high profile development. The Tribunal stated "The fact that the Secretary of State's decision represents the final stage … seems to us, if any thing, to increase the desirability of full disclosure, rather than to decrease it. Similarly, we consider that full disclosure of the deliberations underlying a decision on a complex matter is arguably more important than in a simple one, where the issues may be more immediately evident." (para 22)

This should not be interpreted as meaning that information on a simpler decision is less likely to be disclosed. Although there may be less compelling public interest in favour of disclosing such information, equally there may be little harm caused by its disclosure and so less public interest in maintaining an exception/exemption. (see LTT42)

Aid to understanding issues

The Department argued that there was less need to provide the advice provided to ministers because the Secretary of State's decision was accompanied by a fully reasoned letter, compared to decisions taken at local government level where the rationale for the decisions taken could not be understood without seeing the council officers' report to the planning committee, which is published. The Tribunal rejected this argument stating that there was no suggestion within;

"… EIR that the required disclosure is limited to material which is necessary to make a particular decision comprehensible or which serves any other particular function. And, even if it were limited to information needed to aid comprehension, it is difficult to maintain that a decision … has really been understood if the letter announcing it sets out apparently comprehensible rationalisation, but in fact avoids mentioning some of the background reasoning, which publication of the advice to the Minister would have revealed." (para 23)

Impact of transparency on promoting confidence on public authorities

The Tribunal continued, "It seems to us … that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; the outcome is in some way "spun" (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust). Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point." (para 24)

It is important to note when using this LTT that the points raised do not represent an exhaustive list of all the factors that need to be considered when balancing the public interest

in these cases. It merely identifies the arguments and counter arguments that were presented in the Lord Baker case that have a general application to cases where the information requested relates to advice provided to decision makers.

Source	**Details**
Information Tribunal	Baker / DCLG (1 June 2007)

Related Lines to Take

LTT42, LTT43, LTT50

Related Documents

EA/2006/0043, Awareness Guidance 24, Awareness Guidance 25

Contact	RM		
Date	07/08/07	**Policy Reference**	**LTT61**

FOI/EIR	FOI	Section/Regulation	s2, s35	Issue	Completion of policy formulation and development in relation to the PIT

Line to take:

Policy formulation/development is a series of separate decisions rather than a continuous process of evolution. A Parliamentary announcement will normally mark the completion of the formulation stage.

Further Information:

Although section 35(1)(a) is a class based exemption, consideration of the public interest in maintaining it must take into account the potential harm any disclosure would have on the process of policy formulation or development. That harm is likely to decrease once the process has been completed. Unfortunately it is not always easy to determine when this has happened. However there are a number of recent Tribunal decisions which provide useful guidance when considering this issue. DfES v IC & Evening Standard (EA/2006/0006) concerned access to minutes of the senior management meetings at which a funding 'crisis' in schools was discussed, DWP v IC (EA/2006/0040) concerned access to information on how the introduction of ID cards would impact on the Department's business, OGC v IC (EA/2006/0068 and 0080) concerned access to 'gate way reviews' in relation to the introduction of ID cards.*

Formulation & Development Vs Implementation

In Awareness Guidance No. 24, on section 35, the approach taken is to note that the terms 'formulation' and 'development' are often used interchangeably but adds that development may go beyond formulation to involve a process of improving existing policy. In practice whether or not the process is development or formulation may not affect the outcome of the case.

What will be important however is the distinction between policy formulation/development and its implementation, i.e. when the process of policy formulation/development has come to end, a decision has been made as to the policy to be adopted, and that policy is then implemented. It will have a bearing on the weight given to the public interest test in maintaining the exemption (see LTT 43), i.e. once a decision has been made on the policy to which the information relates, the risk of prejudicing the policy process is likely to be reduced and so the public interest in maintaining the exemption. (It will also important when considering subsections 35(2) & 35(4).)

In the DfES case the Tribunal itself commented that, "The distinction between formulation/development on the one hand and implementation on the other will prove to be a very fine one in some cases since implementation itself usually spawns policies. …Such cases will be more readily recognised when confronted than defined in advance." (para 56)

During the investigation of the DfES case (ref FS50074589) it was argued that there was a continuous cycle of policy being formulated, implemented, reviewed and developed. By applying this rationale, information on the implementation on of a current policy can also relate to development of that policy or even the development of a future policy. Such arguments can confuse the application of the public interest test.

When is policy formulation/development complete

In their appeal the DfES presented its argument that development of policy would often be a continuing process described as a "seamless web" (para 40). This argument was rejected by the Tribunal when weighing up the public interest in maintaining the exemption and how this was affected by the timing of the request (para 75 (v)).

The Tribunal found that, "When the formulation or development of a particular policy was complete … is a question of fact. However, s 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, …, will normally mark the end of the process of formulation. There may be some interval before development". (para 75 (v)) It should be noted that the Tribunal stressed that this did not mean the public interest in maintaining the exemption disappeared completely immediately upon an announcement of the policy.

The Tribunal, in the DWP case, agreed that s 35(2), "seemed to envisage policy formulation as a series of decisions rather than a continuing process of evolution" (para 56). In this case, at the time of the request, a Bill had been presented to Parliament which established the principle of introducing ID cards and paved the way for secondary legislation to establish the details of the scheme. Therefore the Tribunal considered the process of policy formulation could be split into a two stages, the first being the high level decision to introduce id cards, followed by policy decisions on the details of the scheme.

The Tribunal decided that the information requested had been created to inform the high level policy to introduce ID cards and therefore related to a policy decision that had already been taken, (para 57). This reduced the public interest in maintaining the exemption even though the information could be used to inform the more detailed policy issues that were still being considered.

*The OGC case is currently under appeal to the High Court.

NB. The Commissioner has noted that section 35(1)(a) has been applied to several different types or levels of policy, and that in some cases it could be argued that the information in question actually related to Departmental rather than Government policy, or to the implementation of an existing Government policy rather than to its formulation and development. For this reason the Commissioner has commissioned a research project to aid his understanding of the process of formulating and developing Government policy. Until this research is completed case officers should follow the line set out in this Line to Take and should not accept public authority "seamless web" arguments suggesting that policy formulation, development and implementation processes cannot be separated out or differentiated between.

Source	Details
IT	DfES/The Evening Standard (19 February 2007) DWP/Oaten (05 March 2007) OGC/ Dziecielewiski (02 May 2007)

Related Lines to Take

LTT42, LTT43

Related Documents

EA/2006/0006 (DfES), EA/2006/0040 (DWP), EA/2006/0068 & 0080 (OGC), Awareness Guidance 24

Contact		RM	
Date	07/11/2008	**Policy Reference**	**LTT62**

FOI/EIR	FOI / EIR	Section/Regulation	s17(1)(b), reg 14(3)	Issue	Failure to specify an exemption/ exception on which the pa later relies

Line to take:

A public authority's failure to specify in its refusal notice an exemption or exception on which it later relies – either during the course of the Commissioner's investigation or in its submissions to the Tribunal – is a breach of s17 in FOIA or of reg14 under the EIRs. This includes the situation where a public authority applies the wrong legislation.

Further Information:

Failure to identify the correct exemption / exception

A public authority will have breached s17 of the FOIA if it issues a refusal notice but fails to identify the exemption upon which it later relies, either during Commissioner's investigation or in its submissions to the Tribunal.

In *Bowbrick v the ICO* the Tribunal stated that "If a public authority does not raise an exemption until after the s17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect it is giving part of its notice too late. "

In the case of *Meunier v the ICO & NS&I*, the public authority initially relied upon s40, but in consultation with the ICO, decided to rely instead on s44. The Tribunal confirmed the above approach in this case by amending the DN to incorporate a finding on s17.

The equivalent breach for late application of an exception under the EIRs would be regulation 14 which deals with the duties of a public authority when a request for environmental information is refused under the exceptions provided at 12(1) and 13(1). Although the wording of the EIRs differs slightly from that of the FOIA - "refused by a public authority under" rather than "relying on a claim that " - the same principle applies . This is demonstrated in *Archer v The information Commissioner and Salisbury District Council* which is discussed further below.

Use of the wrong choice of legislation

In *Archer v The information Commissioner and Salisbury District* Council the Tribunal found that although the request had been considered and refused under the Freedom of Information Act by the public authority, and determined under the Freedom of information Act by the information Commissioner, it was the Environmental Information Regulations that actually

applied to the information in question.

The Tribunal asked for submissions from the parties "as to whether the Appellant's request comes within the scope of the EIR, and if so, how the exceptions….. apply, on the facts of this case." para 31.

The Tribunal went on to find that "The fact that the Council considered and refused the Appellant's request under the FOIA rather than the EIR means, inevitably, that where the requirements of the FOIA and EIR differ, the Council will not have complied with the provisions of the EIR. …..it is appropriate that we record a finding that the Council did not comply with all the applicable requirements. In particular they did not comply with regulation 14(3) which requires a public authority that refuses a request for environmental information, to specify the EIR exceptions relied on. "

At the point at which the submissions to the Tribunal were made the public authority was refusing the request under regulations 12(1) or 13(1) without having met the regulation 14 requirements to explain the reasons for the refusal to the applicant. Therefore a breach of regulation 14 applies.

In the reverse situation, if a public authority were to rely on an FOI exemption having initially refused the request under the EIRs, then (assuming that FOI is the correct legislation) the breach would be of s17 FOIA.

LTT5 discusses further the transferring of similar exemptions/exceptions from FOI to EIR.

Application of exemption / exception solely by the ICO

Where it is clear that a public authority is in no way relying on a claim that a certain exemption or exception applies, but the Commissioner's decision is that it does (most likely the Commissioner's own application of s40 or r13 for personal data) then the situation differs.

In practice this should be rare. In most cases we will normally have got some type of confirmation from the pa that it does wish to rely on the exemption / exception we have identified. Also if the pas arguments imply reliance on an exemption / exception it could be argued that this means it is to some extent relying on a claim that an exemption applies or refusing under an exception.

However if the public authority doesn't wish to rely on an exemption or exception identified by the Commissioner then it would be difficult to maintain that; under FOI the pa is "to any extent relying on a claim" that an exemption applies, or under EIR that the request "is refused by a public authority under regulations 12(1) or 13(1)". Therefore in this case it will not be appropriate to find the public authority in breach for the failing to identify an exemption / exception in its refusal notice.

Source	Details

Information Tribunal	Bowbrick / Nottingham City Council (28 September 2006) Meunier / NS&I (5 June 2007) Archer / Salisbury District Council (9 May 2007)

Related Lines to Take

LTT5, LTT21, LTT33, LTT39

Related Documents

EA/2005/0006 (Bowbrick), EA/2006/0059 (Meunier), EA/2006/0037 (Archer)

Contact		LA	
Date	07/08/07	**Policy Reference**	**LTT63**

FOI/EIR	FOI	Section/Regulation	s24, s27, 30, s31	Issue	Neither confirm nor deny

Line to take:

In certain cases confirming or denying that requested information is held can itself reveal exempt information. In such cases, it will generally be in the public interest to use a neither confirm nor deny response consistently. It should be possible to make a decision on this without knowledge of whether the information is in fact held.

Further Information:

In the case of *Baker v the Information Commissioner and the Cabinet Office*, the Tribunal ruled that the ICO was right to decide that the Cabinet Office's refusal to confirm or deny whether it held requested information was in accordance with the Act. The complainant in this case had requested (in part) information about the number of MPs subject to telephone tapping or other surveillance since the Wilson Doctrine was set out.

The Cabinet Office refused to confirm or deny whether it held such information in by virtue of s24(2). The Tribunal quoted the director of Security and Intelligence at the Cabinet Office to explain why this was in the public interest:

"If any particular category of people were engaged in activities that were damaging to national security and the Cabinet Office effectively announced that no interceptions had taken place in relation to that category, any person in that category could continue his or activities safe in the knowledge that they were not subject to interception and by extension under investigation [...]

"Conversely if a particular category of people were engaged in activities which were

damaging to national security and the Cabinet Office announced that a certain number of telephones had been tapped, such an announcement would effectively act to alert that person to avoid certain forms of communication to help escape detection."

In summary, the Tribunal stated that, "The use of a neither confirm nor deny response on matters of national security can only secure its purpose if it is applied consistently." (para 48)

The key point here is that knowing that **any** number of MPs or that **no** MPs were under surveillance would be of significant interest (and would or would be likely to endanger national security).

That this fact is significant can be determined by reference to the question itself, and it is for this reason that NCND is the appropriate response. This approach can be adopted in other cases where different exemptions may apply. Example requests of this kind might be for:

- Information regarding the investigation you are conducting into Company X.
- All information held concerning the disciplinary proceedings against Persons A, B and C.
- Minutes from meetings at which sanctions against Country Z were discussed.

It is important to note that a NCND response will not be required where the fact that investigations into a named person, etc. are taking place are already in the public domain.

Decisions on cases of this kind can be determined by reference to the public interest in consistency of use of neither confirm nor deny rather than to the actual information itself (if it exists). The existence or otherwise of a piece of information should not be a factor in determining the public interest in respect of neither confirming nor denying when the nature of the request is such that it is clear that a confirm or deny response would itself reveal potentially exempt information. This was the approach taken in the Baker case. It should be emphasised that this approach is only appropriate in cases such as the ones described here, and should not be adopted for all NCND cases.

Source	**Details**
Information Tribunal	Baker / Cabinet Office (12 February 2007)

Related Lines to Take

Awareness Guidance 21

Related Documents

EA/2006/0045, FS50086063			
Contact		EW	
Date	07/08/07	**Policy Reference**	**LTT64**

FOI/EIR	FOI	**Section/Regulation**	s14, s19, s21	**Issue**	Vexatious request for published information

Line to take:

Public authorities may not refuse a request for information which should be available through its publication scheme on the grounds that it is vexatious.

Further Information:

Where a public authority has committed to publishing information in accordance with its publication scheme and the means of publication is the provision of copies, a request for this information may not be turned down on the grounds that it is vexatious. In such a situation, it can never be the case that responding to the request could impose a significant burden.

Requests for information in a publication scheme should be refused on the grounds that it is information reasonably accessible to the applicant by other means. Any failure to publish information in accordance with a publication scheme will be a breach of s19(1)(b).

Where a public authority's publication scheme states that information will be published only by making it available to view on a parish notice board, for example, and it does in fact publish it in this way, it will still be exempt by virtue of s21, even if the applicant requests that they receive copies.*

* Inspection is a form a publication (see LTT25)

Source	Details
Policy Advice	Provided 11/06/07

Related Lines to Take

LTT25

Related Documents

Awareness Guidance 22

Contact		EW	
Date	07/08/07	**Policy Reference**	**LTT65**

FOI/EIR	FOI EIR	**Section/Regulation**	s35, s36 Reg 12(4)(e)	**Issue**	Minutes & agendas

Line to take:

- Contemporaneous notes taken at meetings, from which minutes are then produced, do not themselves fall within the definition of "minutes.
- An agenda does not have to be in a certain format to qualify as such, however material upon which an agenda might be based does not necessarily constitute an agenda.
- Attachments to agendas are not limited to physical or electronic attachments actually circulated with the agenda, where items are referred to in an agenda they are considered to be "attached by reference".

Further Information:

In *Berend v The information Commissioner and London Borough of Richmond upon Thames (LBRT)* the Tribunal gave some consideration to the meaning of "minutes" and "agendas".

Minutes

The public authority drew a distinction between the minutes of various meetings that had been prepared and circulated and the contemporaneous notes made by the minute taker at those meetings from which the minutes themselves were to be produced.

It argued that the minutes would be in "a readable format for circulation to members and contain the Task Group's conclusions , action points and certain formalities; the handwritten, contemporaneous notes would contain a semi-continuous record of the points made in the debate and other information the writer felt it was necessary to record at the time."

The IT was satisfied that the contemporaneous notes were not minutes.

Agendas

The public authority argued that an agenda would be headed as such and would include certain formalities such as the consideration of minutes and apologies.

The complainant argued that material upon which an agenda would have been based, such as emails referring to future meetings and circulating documents for comment, fell within the meaning of an agenda. He also argued that reference to topics under discussion made in the contemporaneous meeting notes constituted an agenda.

The IT found that that is no "pre-requisite format for an Agenda wherein certain items must be scheduled for discussion to constitute an Agenda." However it also found that "whilst there may have been the material upon which an Agenda would have been based, and treated as such by task Group members, the emails or references to topics under discussion on contemporaneous notes were not in fact Agenda and as such did not fall to be disclosed under that heading."

Attachments to agendas

Part of the complainants request was for "documents attached to agendas". The public authority considered attached to mean items physically affixed by staple or elastic band, or electronically attached by email attachment.

The Tribunal found that in addition to the above, documents already circulated but directly referred to in an agenda item, or documents that were referred to in an agenda item but were to follow are " 'attached by reference' in that the Agenda items requires consideration of the document referred to and it is for administrative convenience that they are nor re-duplicated or have not yet been copied."

PREVIOUS / **NEXT**

Source	Details
Information Tirbunal	Berend / LBRT (12 July 2007)

Related Lines to Take			
n/a			
Related Documents			
EA/2006/0049 & 50			
Contact		LA	
Date	21/08/07	**Policy Reference**	**LTT66**

FOI/EIR	FOI	**Section/Regulation**	s30(1), s31	**Issue**	Public interest in s30(1) & s31

Line to take:

The interest in principle in protecting information acquired during police investigations should be recognised when considering the public interest in maintaining the exemption under s30(1). This will be particularly pertinent where an investigation is still open.

This can also apply under s31, for example, where information normally held by the police is held by another authority.

Further Information:

Toms v the Information Commissioner

The Tribunal in the case of *Toms v The Information Commissioner* suggested that it recognised that there is a public interest in the protection of investigations by noting that in considering the public interest test it had had regard to the White Paper which preceded the

introduction of the 2000 Act*. It highlighted the following extract:

"[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt."(para 7)

Guardian v The Information Commissioner and Avon and Somerset Police

In the case of *Guardian v The Information Commissioner and Avon and Somerset Police*, the Tribunal similarly acknowledged, "the interest in principle, recognised by the exemption applying to s30(1), in protecting information acquired, often in confidence, in police investigations."

It should be noted that the Tribunal's wording here does not restate the actual wording of s30, though the implication appears to be that it reflects the sense and purpose of the exemption provided by that section.

This interest in principle is such that even in the two cases above – where the information requested in one case was the number and location of mail storage boxes broken into in a specified time and area, and in the other the closed police file relating to a 27 year old murder investigation – it overrode the public interest in disclosure.

In the *Guardian/Avon & Somerset* case, the Tribunal identified minimal public interest in either the maintenance of the exemption or the disclosure of the information requested. With all else being equal, therefore, it concluded that the interest in principle in protecting information acquired in police investigations was the overriding factor.

It is therefore clear that if the principle was considered an overriding factor in cases with the level of significance or sensitivity described above, then in cases where information pertaining to an open police investigation is requested, the public interest in maintaining the exemption will be considerable.

It should be noted that the Commissioner's stance in relation to where factors in the public interest balance are equal, remains that there is an assumption in favour of disclosure as per LTT46. Although the Tribunal identified that there was minimal public interest in either maintaining the exemption or the disclosure of the information, the Commissioner interprets that the Tribunal gave more weight in this case to the public interest factors for maintaining the exemption which tipped the balance in favour of maintaining the exemption.

DTI v the ICO

The Tribunal in the case of *DTI v the ICO*, which considered a request for a information relating to an investigation conducted under the Companies Act 1985, also highlighted that, "the Act has recognised that there is a public interest in recognising the importance of the proper conduct of investigative processes and procedures carried out by public authorities, particularly those which might lead to criminal proceedings, and moreover that in relation to

such procedures and possible proceedings, the maintaining of confidential sources must be respected."

Hargrave v the Information Commissioner and the National Archives

The line is also applicable where information acquired during police investigations is transferred from the police to another public authority as illustrated by the case of Hargrave v the Information Commissioner and the National Archives, where the applicant was refused information relating to an investigation of an unsolved murder in 1954. The case demonstrates that similar principles may apply when considering the public interest balance under s31 (if the police had held this information they could have claimed the exemption s30(1)(b)).

The Tribunal were clear that the information acquired in the investigations should remain protected. The Tribunal thought "it very likely that disclosure of this information would prejudice the investigation of the murder and the fair trial of an accused if such a trial were to take place now or in the reasonably near future" (paragraph 33). The Tribunal went onto say that the "critical issue... is whether there is indeed any substantial likelihood or the murderer being detected and/or a prosecution being undertaken" (paragraph 34) and were persuaded by the further evidence they heard in the private session that "there was a significant possibility" of a future identification and prosecution of the killer, "such as to satisfy the test imposed by section 31(1), as explained in Hogan" (paragraph 37).

*Your Right To Know: The Government's Proposals for a FOI Act (Cm.3818, 11 December 1997)

Source	Details
IT	Toms / Royal Mail (19 June 2006) Guardian / Avon & Somerset Police (6 March 2007) Hargrave / National Archives & Commissioner of Police of the Metropolis (3 December 2007) Hogan / Oxford City Council (17 October 2006)

Related Lines to Take

LTT14, LTT19, LTT20, L TT100,

Related Documents			
FS50072311 (Toms), FS50078588 (Guardian), EA/2005/0027 (Toms), EA/2006/0017 (Guardian), Awareness Guidance 16, Awareness Guidance 3, EA/2007/0041 (Hargrave), EA/2005/0026 and 30 (Hogan)			
Contact		EW / GF	
Date	14/11/2008	**Policy Reference**	**LTT67**

FOI/EIR	FOI	**Section/Regulation**	s24	**Issue**	Required for purposes of national security

Line to take:

The section 24 exemption only applies where the exemption itself is *required* for the purpose of safeguarding national security. The word *required* in this context means reasonably necessary and sets a high threshold for the use of this exemption. It is not sufficient for the information sought simply to relate to national security, there must be evidence of specific and real threats to national security before the exemption is

engaged.

Further Information:

The necessity test is illustrated in the Commissioner's decision in case reference number FS50074788. This decision concerned a request for the information held by the Northern Ireland Office which led the Chief Constable to attribute the Northern Bank robbery to the Provisional IRA. The NIO relied upon the section 24 exemption to withhold some of the information caught by the request. In that case the issue was around the timing of the information request and the fact that the police investigation into the bank raid had just begun and its impact on the NI peace process. The Commissioner found that the disclosure of the relevant information, given the sensitivities, posed a real threat to national security and therefore s24 was engaged.

The Commissioner in that decision stated that although the word 'required' is not defined in the Act , he is satisfied that in ' in this context it means something more than desirable, in effect it must be necessary to apply this exemption for the purposes of safeguarding national security'. (para 30). In the context of the Town and Country Planning Act 1990 (c.8)s.226, required was adjudged to mean more than merely convenient and less than 'indispensable'.

The Tribunal has not ruled on this issue to date*. The verb 'require' is defined in the Oxford English Dictionary as 'to ***need*** something for a purpose'. Given the close link between information rights and Human Rights it is deemed appropriate to consider the case law on the article 8(2) word 'necessary' where interference may be justified when it is *necessary* in a democratic society in the interest of national security' . The European Court of Human Rights has explained the adjective necessary as something which ' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as ''admissible'', ''ordinary'', 'useful', ''reasonable'' or ''desirable''

The necessity test is well defined in the Convention jurisprudence and equates with a pressing social need. Necessity is something less than absolutely essential but does connote a degree of imperative, see the construction of this word in the case of AG V Walker Ex 242 by Pollock J.

*The Information Tribunal has however considered the definition of 'national security' in a previous case, Norman Baker/Cabinet Office – see LTT54.

Source	Details
Decision Notice	[Redacted name] / Northern Ireland Office (27 February 2007)

Related Lines to Take

LTT54
Related Documents
FS50074788, Scottish Parliament Research Paper - ECHR Incorporation into domestic law, Stroud's Judicial Dictionary Page 1660 and Pages 2374 to 2377 Rv Leeds City Council, Ex parte Leeds Industrial Co-operative Society Ltd (1997) 73 P& CR 70, Sunday Times V United Kingdom (1979) 2 EHRR 245 at 275 E Ct HR para 59 , Handyside V United Kingdom (1976) 1 EHRR 737 at 753-754, E Ct HR, para 48, MOJ Guide to Data Sharing Legal Guidance Nov 2003

Contact		RM	
Date	21/08/07	**Policy Reference**	**LTT68**

FOI/EIR	FOI	**Section/Regulation**	s17	**Issue**	Partial breach of s17

Line to take:

Where a refusal notice is defective in some parts but not in others, this will not render the whole refusal notice invalid

Further Information:

In *Berend v the ICO & London Borough of Richmond upon Thames (LBRT)* the complainant argued that because the refusal notice issued by the public authority had not specified the relevant exemption the whole refusal notice was invalid.

The Commissioner had found that the public authority had breached:

- s17(1)(b) for failing to specify the applicable exemption and explain why it applied, &
- s17(7) for failing to provide details of its complaints procedure and of the complainant's right to appeal to the ICO.

But that it had complied with :

- s17(2)(b) in that it informed the applicant that it had not yet reached a decision as to the application of the public interest test and had advised him of an estimated date by which it would expect such a decision to have been reached.

The Tribunal commented that "the purpose of section 17 FOIA is to alert the Appellant to the fact that an exemption is being considered" and found that there "was substantial compliance in that:

- LBRT identified that no final decision had yet been made,
- The public interest was being considered
- A provisional estimate of a further 20 working days was provided"

The Tribunal considered that "The Act provides that where the Commissioner finds that a requirement of section 17 FOIA has not been complied with, the Commissioner can direct the action required to specify the breach. This Tribunal finds that requiring the Commissioner to find that the whole of section 17 FOIA must necessarily be found to be breached if one element is missing, is incompatible with this provision." A public authority can, therefore, legitimately be found to have complied with one subsection of s17 and breached another.

The Tribunal did note however that the use of section 17(2)(b) "as an attempt to "buy more time" to undertake the primary consideration of the material and thus circumvent the obligation under section 1(1) to confirm or deny what information was held within 20 working days is an inappropriate use of the provisions of the Act" that it would have expected the ICO to comment on. This suggests that in addition to making a decision on whether a s17 breach has occurred or not, it may also be appropriate to make additional comment in the "other matters" section of a Decision Notice in circumstances

where this applies.

PREVIOUS / NEXT

Source	**Details**
Information Tribunal	Berend / LBRT (12 July 2007)

Related Lines to Take

n/a

Related Documents

EA2006/0049&50

Contact		LA	
Date	24/09/07	**Policy Reference**	**LTT69**

FOI/EIR	FOI	Section/Regulation	s31(1)(a)	Issue	Public interest in preventing crime against individuals

Line to take:

The public interest in preventing crime against private individuals is greater than that in preventing crime against public authorities or bodies corporate. The impact of crime on individuals as an inherent part of the public interest will be a significant factor in favour of maintaining the exemption in the relevant circumstances.

Further Information:

In England & L B of Bexley v the Commissioner the applicant had requested a list of empty houses compiled by the council; these were both empty properties owned by public sector bodies and those owned by private individuals. The Tribunal established that providing such a list was likely to increase the risk of crime against those properties and so s31(1)(a) was engaged. In considering the public interest in maintaining the exemption the Tribunal heard evidence about the effects that crime had on private individuals.

It found that "…in relation to properties that are not owned by individuals but rather by the public sector…,whilst the issues concerning the damage to property are relevant and the impact on the area, the impact on the individuals as owners, is not a factor that will be in play. This in our view has the effect of lessening the public interest in maintaining the exemption… ." (para 79)

The Tribunal went on to say that in relation to properties owned by individuals, "The impact of crime on individuals as an inherent part of the public interest in this circumstance is a significant factor and leads to the exemption outweighing the public interest in disclosure in our view. However, for those properties that are owned by those other than individuals, including public authorities, our conclusion is that it does not, and the public interest is in favour of disclosure. This is because the impact of crime on an individual is not present and this inherent aspect of the public interest in preventing crime is therefore absent and changes the analysis of the balance." (para 86)

The Tribunal's decision was that the addresses of empty properties not owned by individuals should be released together with the names of those owners.

Although it is clear that the Tribunal placed greater weight on the public interest in protecting individuals from the impact of crime, this certainly does not mean there is little public interest in protecting public authorities or bodies corporate against crime. It's merely that there is a heightened public interest in protecting individuals.

Comment

The Tribunal certainly heard evidence that private residents who lived next door to empty property could suffer as a consequence of an empty property being targeted by criminals

(para 67). Such a risk would exist regardless of who owned the empty property. The Commissioner would agree that in weighing the public interest in favour of maintaining s31 it is valid to consider the indirect effects of crime.

It's not clear what weight the Tribunal gave to this consideration. It did however take account the fact if the information was released it could be used to put pressure on owners to bring empty property back into use or as it was "…owners being frightened into disposal…". The Tribunal found that this would have more impact on individuals.

Source	**Details**
Information Tribunal	England / LB Bexley (10 May 2007)

Related Lines to Take

n/a

Related Documents

EA/2006/0060 & 0066, FS50072190

Contact		RM	
Date	24/09/07	**Policy Reference**	**LTT70**

FOI/EIR	FOI	Section/Regulation	s40(2) Reg13(2)	Issue	Addresses of properties

Line to take:

The addresses of properties owned by individuals are personal data about those individuals

Further Information:

In England & L B of Bexley v the Commissioner the applicant had requested a list of empty houses compiled by the council, these were both empty properties owned by public sector bodies and those owned by private individuals. The council had applied s40(2) to the addresses of properties owned by individuals.

Having heard evidence on the subject, the Tribunal was satisfied that "…knowing the address of a property makes it likely that the identity of the owner will be found." (para 94)

The Commissioner had relied on the analysis of the Durant judgement to argue that although it may be possible to identity the owner, this did not make the address personal data. The reasons being two fold, (i) the focus of the information was the property not the owner and (ii) "even if it was possible to connect an individual to a particular empty property, this would not affect the privacy of the individual… ." (para 95).

The Commissioner would not now stand by this position and has published new guidance on what constitutes personal data, 'Data Protection Technical Guidance – Determining what is personal data' which provides a wider interpretation of personal data than was originally adopted following the Durant judgement.

Obviously the council could identify the owners from the Council Tax register and the Tribunal went onto conclude that, "The address alone, in our view, also amounts to personal data because the likelihood of identification of the owner…. In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore have a substantial asset. …The key point is that it says something about somebody's private life and is biographically significant." The Tribunal went on to say that the important question was "…what meaning or meanings the data may have in the context of someone's private life. Does the fact that Mr X owns a property potentially worth several thousand of pounds say something about Mr X? In our view it does, and the owner is the focus of that information." (para 98)

Following this rationale it can be argued that addresses of all properties owned by individuals

will be personal data, not just empty ones. However it should be noted that in some situations eg where an individual is the landlord of a rented house, the address of that property is likely to be both personal data of the landlord and the tenant.

Source	**Details**
Information Tribunal	England / LB Bexley (10 May 2007)

Related Lines to Take

n/a

Related Documents

FS50072190, EA/2006/0060 & 0066

Contact		RM	
Date	24/09/07	**Policy Reference**	**LTT71**

FOI/EIR	FOI	Section/Regulation	s11	Issue	Timing of reliance on s11

Line to take:

Section 11 can only be considered where the applicant expresses their preference for means of communication at the time the request is made. Applicants cannot therefore claim retrospectively that they required information to be provided by different means to the means by which it was, in fact, provided.

Further Information:

Section 11 clearly states that a public authority should (so far as reasonably practicable) give effect to an applicant's preference for the means by which requested information should be communicated where the applicant expresses their preference, "on making his request for information."

If an applicant only expresses this preference after receiving the information requested, public authorities have no obligations in respect of section 11.

The decision notice in case FS50094281 states that:

"With regards to the complainant's request to receive a further copy of the information supplied in a different format*, it is apparent that he did not specify at the time of making his initial request that he required the information to be communicated to him in a particular way. It is clear from the documentation available that the complainant's preferences to the way the information should be presented were submitted to the Council after its initial disclosure of the information held. Although section 11 states that a public authority should consider the applicant's preference for the method by which the information is communicated, the public authority is only obliged to do so when this preference is expressed, "on making the application." As the complainant made no specific request at the outset, the Commissioner is of the view that section 11 cannot apply in this case and therefore the Council was under no obligation to reconsider the way it presented the information or to comply with complainant's subsequent requirements."

The ICO considers that where an applicant expresses a preference after the original request but before the public authority has begun dealing with it, that expression of

preference should be regarded as having been made on making the request, and should therefore be given effect to.

*It should be noted that there is no reference to “format” in section 11.

Source	**Details**
Decision Notice	Bath & North Somerset Council / [Redacted name] (17 May 2007

Related Lines to Take

n/a

Related Documents

FS50094281

Contact		EW	
Date	24/09/07	**Policy Reference**	**LTT72**

FOI/EIR	FOI	Section/Regulation	s6(1)(b)	Issue	BBC America & BBC Worldwide - status

Line to take:

BBC America and BBC Worldwide are not public authorities for the purposes of the Act, as where a public authority is only listed in relation to particular information, then its wholly owned subsidiaries are not caught by the Act.

Further Information:

In Decision Notice FS50082246 the status of BBC America and BBC Worldwide in relation to the FOIA was considered.

BBC America is wholly owned by BBC Worldwide Ltd. BBC Worldwide is a wholly owned subsidiary of the BBC. The BBC is listed in Schedule 1 of the FOIA "in respect of information held for purposes other than those of journalism, art or literature"

Section 6 of the FOIA provides that :

(1) A company is a "publicly owned company for the purposes of section 3(1)(b) if –

(a) it is wholly owned by the Crown, or

(b) it is wholly owned by any public authority listed in Schedule 1 other than –

(i) a government department, or

(ii) any authority which is listed only in relation to particular information.

BBC America is not a publicly owned company for the purposes of section 3(1)(b) as it is

wholly owned by BBC Worldwide Ltd, who is not a public authority listed in Schedule 1 of the FOIA.

BBC Worldwide Ltd is also not a publicly owned company for the purposes of section 3(1)(b) as it is wholly owned by the BBC who is only listed in Schedule 1 of the FOIA in relation to particular information.

Source	**Details**
Decision Notice	BBC/ [Redacted name]

Related Lines to Take

n/a

Related Documents

FS50082246

Contact		LA	
Date	11/10/07	**Policy Reference**	**LTT73**

FOI/EIR	FOI	Section/Regulation	s41	Issue	Consistent treatment of confidential information

Line to take:

The fact that a public authority discloses information in breach of confidence does not mean that it is then entitled to disclose either that information again, or other information also provided in confidence.

Further Information:

In the case of *S v the ICO and the General Register Office* (GRO) the complainant had requested a copy of a letter from the individual (the Informant) who had registered the death of the complainant's brother, sent in response to a letter from the Registrar seeking clarification of the Informant's whereabouts at the time of death. The complainant submitted that confidential information provided by her own family had previously been disclosed to the Informant, and that therefore the information the complainant had requested should not be deemed to be confidential and should be disclosed to her in turn.

She argued that the disclosure of information provided by her family in confidence demonstrated that, "the asserted policy of confidentiality is not genuine and/or is applied selectively and that the stated policy is therefore a false basis for treating the information provided by the Informant as having been provided in confidence since it is

not ordinarily applied in practice." (para 85)

The Tribunal rejected this argument. It accepted that the complainant's family's correspondence had not been treated as confidential but considered that this had no bearing on its decision that s41 still applied to the information provided by the Informant. It decided that this inconsistency in approach indicated a lack of good practice or understanding rather than evidence that no duty of confidentiality exists.

Also in this case, the public authority had previously given the complainant information provided to it by the Informant in confidence, in breach of that confidence. The Tribunal confirmed however that a public authority that discloses confidential information is not then entitled to do so again. It stated that it was, "satisfied that if information has been disclosed in breach of confidence [...], the [public authority] would not be entitled to rely upon that earlier breach of confidence to support an additional or subsequent breach of confidence." (para 76)

PREVIOUS / NEXT

Source	**Details**
Information Tribunal	S / General Register Office (9 May 2007)

Related Lines to Take

n/a

Related Documents

EA/2006/0030

Contact	EW		
Date	11/10/07	**Policy Reference**	**LTT74**

FOI/EIR	FOI	Section/Regulation	s30, s31, s35, s36	Issue	Inter-relation of s35 &s36, and of s30 & s31

Line to take:

Section 36 only applies to information not exempt by virtue of section 35.
Likewise section 31 only applies to information not exempt by virtue of section 30
This means that if s35 / s30 does apply to the information – even where the public interest weighs in favour of disclosure – s36 / s31 cannot.

Further Information:

In respect of information held by a government department or the National Assembly for Wales, section 36 can only apply if that information is **not** exempt by virtue of section 35. In other words, if section 35 is engaged, section 36 is not.

In the same way, and for all information, section 31 can only apply to information that is not exempt by virtue of section 30. Although s35 and s36 are more

commonly applied in the alternative, the discussion below applies equally (with the exception of the last sentence) to sections 30 and 31.

Where a public authority has applied s35 and s36 in the alternative and the ICO finds that s35 does apply, we must find, as a necessary consequence of this that s36 does not. This will remain the case even where we find that the public interest weighs in favour of disclosure.

This is because in the ICO's view information is exempt if an exemption is engaged. The effect of the public interest test is to determine whether or not information should be disclosed, *even though it is exempt.* It is not the case that where the public interest favours disclosure the information ceases to be exempt.

This is supported by a literal reading of section 2 which states that Section 1(1)(b) – the duty communicate information which is held – does not apply to information which **is** exempt by any provision of Part II, if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it. The question here is not whether the public interest is such that the exemption no longer applies.

It is also supported by a pragmatic understanding of the public interest test in relation to, at least, s35(1) and s36. The ICO recognises that the interest being protected by these two sections is broadly the same. Even if a public authority could claim both s35 and s36 in respect of the same information therefore, it would necessarily be the case that if the public interest weighed in favour of disclosure in relation to section 35(1), it will also weigh in favour of disclosure in relation to s36.

The approach above was taken in case FS50086299, in which the public authority had claimed that the requested information was exempt under s35(1)(a), and to the extent that that did not apply, s36(2)(b)(i) and (ii). The Commissioner decided that all of the information related to the formulation or development of government policy.

The decision notice states: "Since section 36 does not apply to information which is exempt by virtue of section 35, and the Commissioner has decided that section 35 does in fact apply to all the information in this case, the information therefore cannot be exempt by virtue of section 36. This remains the case even though the Commissioner has concluded that, by virtue of the section 2 public interest test, the duty to disclose remains." (para 25)

In relation to the s36 PIT point, the DN goes on to say: "Even if section 36 had been engaged, the Commissioner considers that the public interest test would have raised similar issues and produced the same result, as in relation to section 35." (para 26)

Where a public authority has applied s35 and s36 in the alternative and the ICO finds that s35 does not apply to all or any of the information, s36 must then be

considered in relation to that information.

The ICO accepts that s35 public authorities may claim s36 as an alternative or fall back exemption to the extent that s35 is not engaged. A reasonable opinion in respect of all relevant information must however be given by the qualified person.

Source	**Details**
Decision Notice	[Redacted name] / Cabinet Office (30 July 07)

Related Lines to Take

n/a

Related Documents

FS50086299, Awareness Guidance 24, Awareness Guidance 25

Contact	EW		
Date	11/10/07	**Policy Reference**	**LTT75**

FOI/EIR	FOI	**Section/Regulation**	1	**Issue**	Third party on-line databases

Line to take:

Information which has been identified, selected, downloaded and saved or printed by a public authority from a third party's online database will be held by that public authority. In most cases public authorities will not hold any of the remainder of the information held in such a database.

Further Information:

In the case of *Marlow v the Information Commissioner* (heard in two hearings) the Information Tribunal considered whether a third party's online database – in this case the database of statutory material maintained by Butterworths Direct – could be said

to be held by a public authority which is able to access it.

It clearly distinguished between information specifically selected for use from the database, and all information or data held within it.

Information selected for use

In relation to the first the Tribunal stated that, "Once particular information on that database has been identified, selected, downloaded and saved on the subscriber's computer system then it is in our view clearly information that is "held" by the subscriber. Information printed direct from screen is also "held" by the subscriber who has possession of the printed version." (para. 3)

All information within database

In considering whether all information held within a third party's database would be held by a subscribing public authority, the Tribunal suggested that this would be dependent on the terms of the contract between the subscriber and database owner and the technical means by which the subscriber accesses the database.

While noting that it is conceivable that some cases will exist where the subscriber's rights to access, use and exploit the database are so unrestricted that they could be said to hold the information, the Tribunal was clear that, "in the great majority of cases the total body of information, held on a third party's database and capable of being accessed by a public authority under [limiting] subscriber rights […] should not be characterised as having been "held" by the public authority." (para. 3)

Unless there is any credible suggestion that the public authority's rights to access the database are completely unrestricted, it is the ICO's view that information in a third party database which has not been downloaded and saved or printed will not be held.

Butterworths

In the case of the Butterworths database (now Lexis Nexis), the Tribunal established that the restrictive nature of the single use licence is such that a public authority could not be said to hold the information within it.

Source	Details
Information Tribunal	Marlow / Melton Borough Council (31 August 2006)

Related Lines to Take

n/a

Related Documents			
FS50084406, EA/2005/31, FS50102786 ([Redacted name]/ Doncaster MBC)			
Contact		EW	
Date	11/10/07	**Policy Reference**	**LTT76**

FOI/EIR	FOI/EIR	**Section/Regulation**	s1, reg 5	**Issue**	Information held in electronic or manual files

Line to take:

The following applies to information recorded in both electronic and manual files:

The Commissioner's general position is that:

- Information is held notwithstanding that it requires any level of skill to retrieve and extract the relevant information although s.12 arguments may be engaged.
- Information is held where it is reasonable to expect the public authority to apply their knowledge to make a judgment to obtain the relevant information.
- Information is unlikely to be held where the public authority would be required to make a complex judgment which may require specialist knowledge.

However the Commissioner accepts that it will often be difficult to separate 'skill' from 'judgment' and that both activities may be needed to respond to a request.

Further Information:

In the case of Johnson & the Ministry of Justice ('MoJ'), the complainant asked for the 'number of claims allocated to individual Queen's Bench Masters for the years 2001-04 and the number of Strike Outs of claims by individual Queen's Bench Masters for the years 2001-04'. Having established that these sum totals were not held in the MoJ's database, they argued that carrying out such an exercise amounted to the creation of new information. The Commissioner found that the information was not held but that the level of difficulty involved in the exercise was a relevant factor. On appeal, the Tribunal considered whether information in raw data in manual files was held or whether this collation amounted to the creation of new information and said at paragraph 49:

"…we accept…that the degree of skill and judgment that must be applied to the building blocks may well have bearing on whether the information is held or whether what is being sought is more properly construed as being new information…."

The Commissioner adopted the Tribunal's approach of considering skill and judgment in relation to manual records but did not apply the same tests to information held in electronic records. However the Commissioner has reconsidered his approach and will now focus on the requested information itself rather than the format in which it is recorded i.e. the test will be the same regardless of whether the information is held in manual and electronic files. This is supported by the Tribunal in the later case of the Home Office & the Information Commissioner in which it was said that:

"…the legislation is concerned with information as an abstract phenomenon (i.e. facts which are recorded) and not with documents or records as such…" (para 13).

The Commissioner will then use the approaches outlined below to consider whether the requested information is held.

Skill

The Commissioner will find that the requested information is held regardless of whether any level of skill is required to retrieve and extract that information. This is on the basis that a skill

represents an ability acquired through training so that anyone can be taught to retrieve and extract the information. In any event, the Commissioner would expect most public authority employees to possess the basic skills to add, subtract, multiple, divide figures etc which are likely to be required to answer requests asking for totals/averages/percentages etc. Thus the Commissioner considers that the information is held if the public authority holds the information from which those totals/averages/percentage figures could be calculated.

This approach follows the Tribunal's decision in the Home Office case in which the complainant asked for the total number or work permits obtained in 2005 and 2006 by nine named employers in the IT sector. The Home Office argued that as they did not hold the requested information in the required format, they did not hold the information and the Act did not require the creation of new information. However the Tribunal concluded that the information was held and said:

"…since the Home Office's database undoubtedly contains a record of each of the work permits granted to the named employers in the years in question, it seems to us that it must follow that the Home Office hold information as to how many such work permits were granted….thus the fact that the total number of permits is not recorded anywhere as a number is in our view irrelevant, the number is implicit in the records…." (para 13).

Incomplete or inaccurate results

The Home Office also argued that even if they did hold the requested information, they could not guarantee that the database held full details of every work permit and thus that the results may not be 100% accurate. The Tribunal said *"…the same must be true of information produced from any database (which is after all dependent on human beings to input data)…"* (para 4) and further that *"…if the records are faulty or inadequate and the information turns out therefore to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate…."* (para 15).

Thus, where an applicant requests a 'complete list' or 'total number', the Commissioner will not accept arguments that this information is not held because the extraction process may only produce inaccurate or incomplete results. In any event, a public authority has the option of putting the disclosure in context by explaining that the information is incomplete or inaccurate.

Ambiguous scope of the request

Where complainants make requests asking for the 'top 10 cases' or 'the 5 most significant cases of 2005', the public authority simply needs to clarify the parameters of the request under s1(3). For example, in relation to the request for the '5 most significant cases', the public authority should clarify whether 'significant' means the most expensive cases, the cases that lasted the longest, the cases that attracted the most media attention etc. The Commissioner would then consider whether the public authority has complied with its section 16 duties and could order the public authority to provide advice and assistance although he would be unable to make any finding on whether or not the information was held without clarification of the request.

No business need to obtain the information in the way requested

In Johnson, the Tribunal said that as there was no requirement to record that a particular type of order was made, and as it was not consistent practice, the Tribunal felt it could reasonably be concluded that the information requested was not recorded and is not held.

The Tribunal in the later case of the Home Office however said that it was irrelevant whether or not there was a business need to record the requested information and said at paragraph 14:

"….we cannot see that the Home Office's normal business requirements have any relevance to the issue of whether they hold the information or to their obligations under the Act. The Act was clearly designed to impose on public authorities' obligations which may well go beyond those imposed by their normal business activities…."

If the Johnson case were to be considered now, the Commissioner would argue in front of the Tribunal that the public authority did hold the requested information and that this should be supplied to the complainant perhaps with a note to explain that the results may be inaccurate or incomplete.

Thus, the Commissioner will follow the approach taken by the Tribunal in the Home Office case and he will not accept arguments that the requested information is not held because there is no business need to record information in the way the applicant has asked for it, if they hold the constituent parts to create that information i.e. a list, an average number, a percentage etc.

Also see worked examples in table below.

Judgment

The Commissioner has noted the Tribunal's reference in the Home Office case to Lord Hope's comment in the House of Lords decision in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 that when considering whether answering a request would require the retrieval and extraction of the constituent parts already held or whether it would amount to the creation of new information, the Tribunal said:

"… "[t]his part of the statutory regime should…be construed in as liberal a manner as possible" (para 8).

The Commissioner's approach is therefore that he is likely to find that the public authority does hold the requested information albeit that it would require a reasonable level of judgment to determine either what 'building blocks' are required to compile the information or what needs to be done to the 'building blocks' once they have been collated.

For example, in the Johnson case, the Tribunal said: "*we find it likely that a staff member with even limited familiarity with such matters would have no difficulty in knowing that different descriptions refer to strike out orders. Alternatively, it would be a simple matter for the person reviewing the file to be provided with a list of three or four different descriptions that a Master might use….*" (para 49).

Also, in the Home Office case, despite the fact that no report was in existence to produce the

list of permits requested, the Tribunal found that *"….it would be relatively straightforward for [the Higher Executive Officer] or any member of his team (bar one trainee) to write a report that would produce the information…"* (para 3).

The Commissioner is also likely to find that a public authority holds the requested information where it is implicit in the information held, such as in the Home Office case where the Tribunal said that *"…the fact that the total number of permits is not recorded anywhere as a number is in our view irrelevant: the number is implicit in the records…"* (para 13). Although this is quite a simple example, the principle could also be applied in more complex cases, for example, where a public authority needs to apply some judgment as to which 'building blocks' need to be included albeit in a simple calculation or which computer programmes need to be run in order to obtain the information requested.

In summary therefore, the Commissioner is likely to find that the public authority does hold the raw data to answer requests which would involve some calculation or forecasting although there will be requests that go beyond a reasonable exercise of judgment and instead cannot be answered without creating new information. Thus where a public authority would be required to make a complex judgment (perhaps based on specialist knowledge) or where a public authority needs to formulate or apply complex mathematical formulae (for example, in order to produce a financial model), the Commissioner is unlikely to find that this information is held.

Also see worked examples in the table below.

TABLE OF WORKED EXAMPLES

N.B. Case officers MUST read the line and further information – do not rely solely on this table.

	Example	Suggested Response
1	'Please provide me with the total number of residents in Scarborough with two or more children who pay Council tax in band B'. For actual examples, see: FS50130517 (paras 19-25) FS50070854 (paras 27-28) FS50182559	The pa is unlikely to have separately recorded this total figure but the information is held if the public authority holds (either manually or electronically) the raw data from which the total can be calculated (although s.12 may be a consideration). = Minimal skill (irrelevant) = No judgment (info is held)
2	'What percentage of teachers in Greater Manchester earn more	The pa is unlikely to have this percentage recorded but the information is held if the

	than £30k'	public authority holds (either manually or electronically) the raw data from which the percentage can be calculated (although s.12 may be a consideration). = Minimal skill (irrelevant) = No judgment (info is held)
3	'I request a list of the top five legal cases defended by your authority over the last year' For actual example, see: FS50127519 (paras 27-30)	Under s1(3), the pa should clarify with the complainant what they mean by the phrase "top legal cases". Then if the complainant refines the request to indicate that s/he is looking for the cases that were the most expensive, for example, the information is held if the public authority holds (either manually or electronically) the raw data from which the list can be compiled (although s.12 may be a consideration). The Commissioner would also consider whether the pa had compiled with its s.16 duties and could order the provision of some advice and assistance in the 'steps required' section of the decision notice, if this was appropriate. = Minimal skill (irrelevant) = No judgment (info is held)
4	*"Please can you provide me with the number of Strike Outs of claims by individual Queen's Bench Masters for the years 2001 – 2004"* Johnson & Ministry of Justice EA/2006/0085	*"…we find it likely that a staff member with even limited familiarity with such matters would have no difficulty in knowing that different descriptions refer to strike out orders…"* (para 49). = Minimal skill (irrelevant) = Minimal judgment (info is held) *"….Alternatively, it would be a simple matter for the person reviewing the file to be provided with a list of three or four different descriptions that a Master might use…."* (para 49). = No skill (irrelevant)

		= Minimal judgment (info is held)
5	How many work permits were obtained in 2005 & 6 by nine named employers in the IT sector? Home Office EA/2008/0027	*"…the total number of work permits is not recorded anywhere as a number…the number is implicit in the records of the relevant permits when put together and whether it comes in the form of a list of individual work permits or a total figure seems to us to be simple a matter of the form…"* (para 13). *"…We accept that obtaining the information which [the complainant] wants from the database will involve some skill and judgment [but this is not] of any relevance to the issue in question…"* (para 14). = Some skill (irrelevant) = Some judgment (info held as compliance does not require a high level of judgment)
6	You have provided a financial forecast for the coming financial year of oil prices in countries A & B. Please provide a similar forecast for oil prices in country C. Hypothetical example from barrister in the Johnson case (see para 46)	*"…to arrive at a forecast for country C, the raw data that the public authority holds would likely have to be subjected to complex mathematical formulae, and also, a high level of skill and judgment would likely be required, in order to take account of political and other considerations…"* (para 46). = High level of skill (irrelevant) = High level of judgment (info not held)

Source	**Details**
IT	Johnson / MoJ (13 July 2007) Home Office (15 August 2008)

Related Lines to Take

LTT31, LTT78, LTT87, LTT116, LTT137

Related Documents

FS50086919, EA/2006/0085 (Johnson), EA/2008/0027 (Home Office)

Contact		HD	
Date	02/02/2009	**Policy Reference**	**LTT77**

FOI/EIR	FOI/EIR	**Section/Regulation**	s1, s11, s12, reg 5	**Issue**	Information held in electronic databases

Line to take:

If information can be retrieved either through the query tools within the software or a query language, the information will be held as the query operation should be regarded as retrieval or extraction rather than the creation of new information. Although, s.12 arguments may be relevant.

Information which has literally not been input into an electronic database cannot be retrieved and as such is not held. Although, the information may be held in manual files (see LTT77).

Further Information:

Please see LTT77 for the main line on information held in electronic and manual files.

Public authorities often receive requests for lists of information. In many cases this will not be information which the public authority holds in list form. Instead, the constituent data parts will be held in a database.

Example, fictional, requests of this kind are:

- The names of judges who had more than 10% of their judgements overturned on appeal in 2006;
- The number of times an ambulance has been sent via a 999 call to given postcodes; or
- The postcodes of all drivers who have been convicted of speeding offences on the M6, M56 and M62.

A common response to such requests is that the information is simply not held because the public authority is not in possession of a physical list, as requested. A number of public authorities have further claimed that responding to such a request would involve the creation of new information. The Commissioner does not accept this position.

Databases

Databases hold information in one or more tables (usually many). An orders database, for example, may contain tables of customers, orders, stocks and invoices. Tables contain records which consist of multiple fields, e.g., the customer table may hold the customer number, name, address and telephone number. Key fields in each table are used to establish links to records in other tables – the customer number (primary key) in the customer table would link to the customer number (secondary key) in the orders table.

Query tools within the software use these linked fields to extract data from databases into reports. Even where particular requested information is not available through standard reports, query languages (such as SQL) can usually be used to combine data from multiple tables and/or databases.

Requests for calculations

Public authorities also receive requests which require calculations to be performed on information/data held in databases. Often these types of request will involve extraction of specific records and calculations on certain fields or temporary working data.

Thus in a fictional example of a request for 'the names of judges who had more than 10% of their judgments overturned on appeal in 2006', compliance with the request would be likely to involve retrieving the judgements and appeal outcomes of each judge, totalling these by judge to calculate the relevant percentage, before finally extracting those where this percentage was greater than 10%.

Although requests for calculations may involve more complex queries than requests for lists, in all cases, if the information can be retrieved either through the query tools within the software or a query language, the information will be held as the query operation itself should be regarded as extraction or retrieval.

Information not recorded on the database

In the case of Johnson v the ICO and MoJ, the Tribunal considered whether information requested by the complainant was held within a database. The complainant had requested:

- "The number of claims allocated to individual Queen's Bench Masters for the years 2001, 2002, 2003 and 2004.
- The number of 'strike outs' of claims by individual Queen's Bench Masters for the years 2001, 2002, 2003 and 2004."

In relation to the second element of the request, the Tribunal found that the requested information was not held in the database. Its primary reason for this finding was that *"….the information as to the number of claims struck out by each Master cannot be obtained from the database because this information is not routinely input into the system. It is not possible to 'get out' from the system information that has never been 'put in'….."* (para 29).

The Commissioner obviously accepts in principle the proposition that information which is not entered onto the database in the first place is not held, although see LTT77 for details on whether the information is held in manual files.

Source	Details
IT Policy Team European Ombudsman Ruling	Johnson / MoJ (13 July 2007) Home Office (15 August 2008)

Related Lines to Take

LTT77,

Related Documents

1693/2005/PB, EA/2006/0085 (Johnson), EA/2008/0027 (Home Office)

Contact	SW / HD		
Date	02/02/2009	**Policy Reference**	**LTT78**

FOI/EIR	EIR	Section/Regulation	Reg 2(1)	Issue	Defining environmental information

Line to take:

In deciding whether information is "environmental information" or not close reference must be made to the provisions of Regulation 2(1)(a) to (f). It is not necessary for the information itself to have a direct effect on the environment, in order for it to be environmental.

Further Information:

In some early cases the ICO adopted the approach that where a complaint was likely to have the same outcome under both FOIA and EIRs, then an FOI Decision Notice should be issued stating this view but not making a formal decision as to whether or not the EIRs applied

Our approach now, on cases of this kind, is to always give full consideration to whether or not the information falls within the definition of environmental information. If the information is found to be environmental then the decision should be made and any Notice

issued under the EIRs. It will not be acceptable to adopt the "same outcome rule" previously applied.

Where ever possible the decision on whether the information is environmental or not should be made based on a review of the actual information that has been identified as held by the public authority, rather than on an assessment of the request. An assessment based on the wording of the request should only be made where this is unavoidable, for example where the public authority claims that information is not held *.

The trigger for considering whether a request should be dealt with under the EIRs rather than under FOI will usually be that the information "looks" environmental or has an environmental feel. Whilst this may be a necessary starting point it should not be used as the final basis for treating the requested information as environmental and the following approach should be taken to validate that the EIRs do in fact apply. It should also be noted that information that does not immediately "look" environmental could also fall under the EIRs when considered in detail

Linking via the Regulations

Close reference should be made to the provisions of Regulation 2(1)(a) to (f) and the information must be linked via the relevant section(s). However, it is not necessary for the information itself to have a direct effect on the environment, in order for it to be environmental.

To define as environmental information under 2(1)(a):

- the information itself must be **on** the state of the elements of the environment.

To define as environmental information under 2(1)(b):

- the information itself must be **on** a factor.
- the factor (not the information itself) must affect or be likely to affect the elements in 2(1)(a).

To define as environmental information under 2(1)(c):

- the information itself must be **on** a measure or an 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), or be designed to protect the elements in (a).

To define as environmental information under 2(1)(d):

- the information itself must be **on** reports on the implementation of environmental legislation.

To define as environmental information under 2(1)(e):

- the information itself must be **on** "cost benefit and other economic analyses and assumptions"
- the "cost benefit and other economic analyses and assumptions" must be used within the framework of the measures and activities referred to in 2(1)(c).

To define as environmental information under 2(1)(f):

- the information itself must be **on** one of the following :
    1. the state of human health and safety (which may include contamination of the food chain)
    2. conditions of human life
    3. cultural sites and built structures
- the information is environmental inasmuch as the state of the elements in 2(1)(a) or, through those elements, the matters in 2(1)(b)&(c) may affect 1. to 3. above.

The link back to 2(1)(a)

Using the linking process detailed above, each of the sections 2(1)(b)(c)(e) & (f) will ultimately link back to one or more element(s) under 2(1)(a) as follows:

(b) must link back to (a)

(c) must link back to (a), either directly or via (b)

(e) must link back to (c), which in turn must link back to (a) either directly or via (b)

(f) must link back to (a), either directly or via (c) and/or(b)

For example under 2(1)(f) it is not sufficient for information to be on the state of human health and safety, it must be on the state of human health and safety *as affected by the state of the elements of the environment.* This may be a direct effect or via a relevant factor, measure or activity. It should be noted that the linking process for 2(1)(f) is slightly different than for (b)(c)&(e) in that it works the opposite way around. I.e. the elements in (a) ultimately affecting the things listed in (f), rather than the things listed in (b)(c)&(e) ultimately affecting the elements in (a).

2(1)(d) is worded differently and does not require the same explicit linking process, rather it identifies a specific category of information.

Defra's guidance

Defra has recently updated its guidance on defining environmental information, and the current version broadly concurs with the ICO approach.

However, it should be noted that Defra's previously published guidance on this issue suggested that in borderline cases, consideration should also be given to the principle of "proximity/remoteness" and that, at least for information falling under 2(1)(c) to (f), the

information itself would have to have a direct effect on the environment. Some public authorities may still advance arguments of this nature, however the Commissioner would not accept such arguments and would instead follow the line as set out in this LTT.

ICO view of the " Tests" to be used

Our view is that a proximity / remoteness test as previously articulated by Defra does not apply.

We think that there is a proximity / remoteness style test, but that this is a test of the proximity / remoteness of the information itself to the relevant element, factor, measure, activity, analyses etc under 2(1)(a) to (f). This "information on" test would apply in every case. LTT82 provides further guidance on this point.

Under 2(1)(a) and 2(1)(d) there will be no further test.

For 2(1)(b) (c) (e) and (f) there will also be a second test. This will be a test to see whether the identified factor, measure, activity etc can ultimately be linked back to the elements of the environment under 2(1)(a). This "linking" test is briefly outlined under the heading "The link back to 2(1)(a)" above. Separate LTT(s) will be produced providing further guidance on "affecting or likely to affect" and "designed to protect"

*** Defining as environmental information without viewing the information**

As stated above, wherever possible the decision on whether the information is environmental or not should be made based on a review of the actual information that has been identified as held by the public authority, rather than on an assessment of the request. An assessment based on the wording of the request should only be made where this is unavoidable.

Where this does occur, for example where the public authority claims that information is not held, or where section 12 or section 14 are being claimed and so the public authority has not extracted the information, then in may be useful to consider and /or ask the public authority the following types of question :

- Can a sample of information be provided?
- Does the wording of the request suggest EIRs would apply (e.g. request for information about waste disposal)
- Does the context of the request suggest EIRs would apply? (e.g. if the complainant has been corresponding with a public authority about a proposed building development and then asks for all for copies of correspondence between the pa and the building contractor)
- Has the complainant made arguments that suggest the information would be environmental?
- How does the public authority hold the information and for what purpose is it held (e.g. information is held by the planning department in a planning file

- The public authority in question (e.g. DEFRA)

These suggestions may not help in every case, and shouldn't be taken to mean, for example, that everything that DEFRA holds is environmental information, However considering the overall context in this way may assist in making a judgement in this situation.

PREVIOUS / NEXT

Source	**Details**
Policy team, line agreed in meeting with GS (18/05/07)	

Related Lines to Take

LTT82, LTT83, LTT84, LTT122

Related Documents

Boundaries between EIR & FOI -Defra, C-316/01, Council Directive 90/31EEC & 2003/4/EC, Aarhus Implementation Guide

Contact	LA		
Date	24/08/2009	**Policy Reference**	**LTT80**

FOI/EIR	FOI	**Section/Regulation**	s31	**Issue**	Parking enforcement

Line to take:

Section 31(1)(a) and (b) do not apply to the decriminalised enforcement of parking restrictions. The relevant exemption will be 31(1)(g) in conjunction with 31(2)(c.

Further Information:

In *Reith v The Information Commissioner and London Borough of Hammersmith and Fulham (LBHF)* the request was for the Council's policy relating to the towing of vehicles under parking regulations.

The public authority refused to disclose this information citing s31. The Commissioner found s31(1)(a) prejudice to "the prevention or detection of crime" and s31(1)(b) prejudice to "the apprehension or prosecution of offenders" to be the relevant subsections.

At Tribunal the Commissioner accepted that s31(1)(a) and (b) did not apply to the decriminalised enforcement of parking restrictions, and that the exemption which pertained was in fact s31(1)(g), prejudice to "the exercise by any public authority of its functions for any of the purpose specified in subsection (2)", in conjunction with s31(2)(c), "the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise"

The Tribunal was satisfied that the relevant exemption would be s31(1)(g) in conjunction with s31(2)(c).

PREVIOUS / NEXT

Source	**Details**
Information Tribunal	Reith / LBHF

Related Lines to Take

n/a

Related Documents

EA/2006/0058

Contact		LA	
Date	11/11/07	**Policy Reference**	**LTT81**

FOI/EIR	EIR	Section/Regulation	Reg 2(1)	Issue	Any information on

Line to take:

In order to be consistent with the purpose stated in the first recital of Council Directive 2003/4/EC - from which the Regulations are derived - "any information…on" in Regulation 2 of the EIR should be interpreted widely.

Further Information:

Environmental information is defined in regulation 2 as :

"any information in written, visual, aural, electronic or any other material form **on** –

- the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- reports on the implementation of environmental legislation;
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

LTT80 on defining environmental information makes it clear that, for 2(1)(b) to (f), it is not necessary for the information itself to have a direct effect on the elements of the environment. What is relevant instead is that the information should be **on** something falling within these sections.

In order to establish this connection consideration must be given to the meaning of **any information …on** in the context of regulation 2.

This point was considered by the Tribunal in *Ofcom v the ICO and T-Mobile* where the applicant had requested information about the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information "*about either the state of the elements of the environment….or the factors…..that may affect those elements.*"

The Tribunal disagreed and commented (at paragraph 31) *that " The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information…on….radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "… a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making…". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime."* At further appeal (to the High Court and the Court of Appeal) Ofcom did not challenge the Tribunal 's finding that the names were environmental information.

The ICO agrees with the Tribunal's comments and would not accept the approach of separating out (as non environmental information) details such as names, which form an integral part of information falling under the EIR.

The Commissioners more general approach will be to interpret "any information… on…" fairly widely. The relevant Oxford English Dictionary definition of "on" is *"In reference to, with respect to, as to, concerning, about".* The ICO view, in line with the purpose expressed in the first recital of the Directive, is that "any information …on…" will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information (subject to the linking process set out in LTT80).

The following examples from recent ICO case work should assist in the application of this judgement.*

Examples :

- Payments made under the Common Agricultural Policy – see Policy Advice Request Form for advice given.
- Information on tolling/road congestion charging and a proposal to build a new bridge – see Case Review Panel notes for details of discussion and decision.

Comment on Kirkaldie

In *Kirkaldie v the ICO and Thanet District Council* the IT found that the EIR applied and said that "The Legal Advice……related to the enforceability of the s106 Agreement, land usage and other planning matters. The Tribunal finds that for the purposes of Reg

2(c) EIR this agreement was an “environmental agreement under the Town and Country Planning Act 1990…”

This ICO view is that the argument articulated by the IT up to this point was sufficient to bring the information within the definition of environmental information. The information is “on” an environmental agreement, and the environmental agreement is a measure affecting or likely to affect the elements in 2(1)(a) and (b).

The Tribunal continued however that “ Entering into and extending such an agreement is the sort of measure envisaged by the rule which is “likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements”. “

The ICO view is that it is not necessary to say that “Entering into and extending such an agreement” is also a measure. Once it is established that the s106 Agreement is a “measure affecting or likely to affect the elements and factors referred to in (a) and (b)” then the legal advice is environmental information because it is “information on” this measure.

Planning decisions

In a similar way, when thinking about planning decisions 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 and elements in 2(1)(a) and (b). It will 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 become environmental information because they are information on the implementation of the particular planning regulation in question. This mirrors the approach taken in the example of the Common Agricultural Policy payments given above.

This shouldn’t be taken to mean that all information contained within planning files will inevitably be environmental information. It will be necessary to identify what measure the information is on (i.e. the particular planning regulation being applied) and ensure that this is a measure; affecting or likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements .

An alternative approach would be to consider if the planning application is a measure (a plan) likely to affect the elements of the environment.

*It should be noted that the ICO line on this subject has developed and changed over time and that there is some inconsistency in the Decision Notices issued to date. The examples provided have been chosen as they reflect the ICO’s current position.

Source	**Details**
IT, policy team, European Parliament	Ofcom/ Health Protection Scotland Kirkaldie / Thanet District Council Council Directive 2003/4/EC

Related Lines to Take

LTT80, LTT 83, LTT84

Related Documents

EA/2006/0078 (Ofcom), EA2006/001 (Kirkaldie), 2003/4/EC

Contact	LA		
Date	09/03/09	**Policy Reference**	**LTT82**

FOI/EIR	EIR	Section/Regulation	Reg 2(1)	Issue	Future likely effects

Line to take:

When a measure is a proposal for the future the relevant consideration will be whether, if it were to go ahead, it would be likely to affect the elements and factors referred to in Reg 2(1)(a) & (b). The likelihood of a plan actually coming to fruition is not a relevant consideration.

Further Information:

Regulation 2(1)(c) includes in the definition of Environmental Information :

"Information on –

Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements."

The EIR implement Council Directive 2003/4/EC on public access to environmental information and the source of the directive is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention.

Article 1 of the Aarhus Convention provides that :

" In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision–making, and access to justice on environmental matters in accordance with the provisions of this Convention."

Article 7 of the Aarhus Convention includes that :

" Each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public."

The 1st recital of Council Directive 2003/4/EC states that :

"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, participation by the public in environmental decision-making and, eventually, to a better environment."

Affecting or likely to affect

It has been argued that a measure only becomes a measure likely to affect the elements of the environment at the point at which it is likely to go ahead (see case review panel FS50158551). This would require a 2 part test to consider the likelihood of :

- an effect on the environment occurring if the measure/activity did go ahead, and
- the measure/activity actually going ahead

The current ICO view is that - as Aarhus seeks to involve the public during the preparation of plans and programmes relating to the environment, and the Directive acknowledges the connection between access to environmental information and effective participation in environmental decision-making - the Regulations should not be interpreted to only consider information to be environmental at the point at which a plan is likely to go ahead. This would effectively exclude information relevant to participation at the preparation stage of plans relating to the environment.

Therefore, when the measure under consideration is something that is proposed for the future the relevant consideration will be whether, if the measure were to go ahead, it would be likely to affect the elements and factors referred to in Reg 2(1)(a) & (b). The likelihood of a plan actually coming to fruition is **not** a relevant consideration.

Further, because Article 7 of Aarhus states that the necessary information should be provided to allow public participation during the **preparation** of plans and programmes relating to the environment then it is not only completed plans that fall within the definition of Environmental Information. Once it is established that there is an intention* to initiate a plan or to develop a policy then this is sufficient to bring information which will contribute to the preparation of that plan within the intended scope of the Aarhus convention, the Directive, and so within the Regulations.

Before this point, when all that exists is an idea, a problem or an issue*, then there would be no intended plan or programme for the public to participate in the preparation of, and no identifiable measure or activity likely to affect the elements of the

environment.

Using this principle - Where a range of options (that would be likely to affect the elements of the environment if they went ahead) are considered, but it is known from the outset that one at most will be developed further, then information on all the options still falls within the definition of environmental information. If this were not the case then provision to allow the public access to information relevant in the preparation of plans and programmes relating to the environment would not have been made. Article 6, paragraph 4 of the Aarhus convention provides that "Each party shall provide for early public participation, when all options are open and effective public participation can take place."

* where a public authority is to formulate a plan then the intention must be the public authority's organisational intention (rather than just the personal idea of an individual within the pa)

**Although 2(1)(c) would not apply in this situation, if the information was on the existing state of the elements of the environment then 2(1)(a) would apply . E.g. information on the location of flood plains in an area is environmental information by virtue of 2(1)(a) regardless of whether any plan to combat flooding is proposed.

Source	**Details**
European Parliment	EIRs, Council Directive 2003/4/EC, Aarhus Convention 1998

Related Lines to Take

LTT80, LTT82, LTT84

Related Documents

Aarhus Convention, 2003/4/EC

Contact	LA		
Date	11/01/08	**Policy Reference**	**LTT83**

FOI/EIR	EIR	Section/Regulation	Reg 2(1)	Issue	Threshold of likely to affect and may be affected

Line to take:

The threshold for "likely to affect" under 2(1)(b), (c) is that the effect on the elements of the environment (assuming for 2(1)(c) that the measure/activity goes ahead) need not be more likely than not, but must be substantially more than remote. The test under 2(1)(f) for "may be affected" is a lower test.

Further Information:

As discussed in LTT83 the "test" for "would be likely to affect" under 2(1)(c) is not a 2 part test and is only a consideration of the likelihood of an effect on the environment occurring if the measure/activity did go ahead.

When applying this test, the ICO considers that the threshold of likelihood will be similar to that in the FOI prejudice test as discussed by the Information Tribunal in *John Connor Press Associates Limited vs The Information Commissioner* (see LTT13). This will be that the likelihood of an effect on the environment if the measure /activity went ahead need not be more likely than not, but must be substantially more than remote.

Similarly under 2(1)(b) the threshold will be that the likely effect of the factor on the elements of the environment need not be more likely than not, but must be substantially

more than remote.

2(1)(f) provides that information on "the state of human health and safety, including the contamination of the food chain where relevant, conditions of human life, cultural sites and built structures" is environmental information "inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements by any of the matters referred to in (b) and (c)"

The ICO view is that "may be affected" denotes a lower threshold of likelihood. So there must be some likelihood of the state of human health and safety being affected by the elements of the environment but this likelihood need not be substantially more than remote.

Source	**Details**
Policy Team	

Related Lines to Take

LTT13, LTT80, LTT82, LTT83,

Related Documents

EA/2005/0005 (John Connor Press assoc)

Contact	LA		
Date	11/01/08	**Policy Reference**	**LTT84**

FOI/EIR	FOI EIR	Section/Regulation	s3(2)(a) Reg 3	Issue	Held otherwise than on behalf of

Line to take:

Under FOIA, where information is held by a public authority to any extent for its own purposes, then even if it is also holding that information for someone else, it is nevertheless holding the information for the purpose of the Act. Under the EIR information is held if it is in the possession of the public authority.

Further Information:

FOI

Section 3(2) of the FOIA provides that :

"For the purposes of this Act, information is held by a public authority if –

- it is held by the authority, otherwise than on behalf of another person, or
- it is held by another person on behalf of the authority"

Where information is held by a public authority, to any extent for its own purposes, then it

holds that information otherwise than on behalf of another person, and therefore it holds the information for the purposes of the Act.

The only circumstance in which information would not be held by a public authority by virtue of section 3(2)(a) would be where information is only held on behalf of another person, and is not held to any extent for that public authority's own purposes.

Examples of this might be:

Where a public authority provides a storage facility for another public authority during an office move.

- Where an IT Contractor provides IT support for a public authority from that public authority's premises, and so uses the public authority's storage space (either physical or IT systems) for its own information. In such circumstances although the public authority might be said to physically hold information it would only hold it on behalf of another person and so s3(2)(a) would apply.
- Where an elected councillor uses council computer and office facilities for his constituency business.

This has always been the Commissioner's view as is reflected in our Awareness Guidance 12. An alternative argument would be that the wording of s3(2)(a) contemplates two mutually exclusive situations; those in which information is held by the public authority, and those in which information is held by it on behalf of another person. However, the Commissioner does not accept that s3(2)(a) must be read in this way.

In practice it will often be the case that a public authority holds information partly for its own purposes and partly on behalf of another person. In this situation, because the information is held in part otherwise than on behalf of another person then in the Commissioner's view it is held for the purpose of the Act.

A public authority that receives a request will be responsible for responding to that request. If the information is held partly on its own behalf and partly on behalf of another person then, whilst the public authority may wish to consult with the other person before providing a response, it still retains the responsibility for responding.

If the "other person" is another public authority, and separate but identical requests are sent to both authorities, then both will have a duty to respond under FOIA. This could mean two responses relating to the same information being provided by two different public authorities in response to the two separate requests. Again the public authorities concerned may wish to confer before responding.

Where a public authority holds information **only** on behalf of another person, and thus does not hold it for the purposes of the Act, then its duty under section 1 will be advise the applicant that it does not hold the information. If it is holding the information only on behalf of another public authority then, in accordance with Part III of the section 45 code of practice, it should also consider transferring the request or directing the applicant to the appropriate public authority.

Ennis McBride & the Ministry of Justice (formerly the Privy Council Office ('PCO'))

In this case, the applicant requested information from the PCO relating to the 'Visitor' of the University of London. The Visitor's role is to determine disputes arising between the University and its members, e.g. students who were dissatisfied with their teaching. The PCO maintained that some of the information requested was held by them on behalf of the Visitor and therefore, by virtue of section 3(2), it was not subject to the Act. The Commissioner upheld this decision.

The Tribunal found that the PCO "*…performed all the administrative and management functions in relation to the office of Visitor….*" and set out at paragraph 28 full details of these functions. These circumstances allowed the Tribunal to conclude that "*…we are entirely satisfied that the PCO held the information on its own behalf…*" (para 31) although they did comment that whether a public authority holds information on behalf of another is:

"*….not an issue that turns on who owns the information, nor on whether the PCO has exclusive rights to it, nor indeed on whether there is any statutory or other legal basis for the PCO to hold the information. Rather, the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence…*" (para.27).

Digby-Cameron v Information Commissioner

In this case, the applicant requested a transcript of a hearing concerning the death of his son from Hertfordshire Coroner's Service, the administration of which is run by Hertfordshire County Council. The Coroner's Service is not a public authority for the purposes of FOIA. The Tribunal referenced the McBride v Information Commissioner case above and in light of this, considered the relationship between the Council and the Coroner, and whether the Coroner can be said to control the information:

"The Tribunal has regard to the entirely separate information regime that is set out in the Coroner's Rules 1984. The Tribunal noted first that it is the Coroner's statutory duty under rule 56 to retain inquest documents for at least fifteen years. It is for the Coroner to decide, under rule 56 who has access to information" (paragraph 15). Therefore, the Tribunal concluded that "the decision whether or not to disclose information was for the Coroner, not the Council."

The Tribunal stated that the *"Coroner had in this case made the decision what was or was not to happen in relation to this information. This was consistent with the statutory regime under the Coroner's Rules and indicated that 'ownership' of and control over this information lay both in fact and law with the Coroner"* (paragraph 17). The Tribunal went on to explain the nature of the relationship between the Council and the Coroner by the fact that the Coroner is an *"independent judicial office holder, whose decisions are made independently of the Council"* (paragraph 17).

The Tribunal were satisfied however that *"the Council held the information in the tapes solely on behalf of the Coroner, such that the information fell outside the jurisdiction of FOIA. This was not a question of reasonableness or degrees of co-operation – it was a narrow question to be judged on the facts of the matter and in the light of the different legislative regimes"*

(paragraph 19).

It should be noted however, that the ICO considers that there may be situations where a local authority could hold information originating from the coroner in its own right. For example it is conceivable that following a road traffic accident a local authority might obtain a copy of the coroner's report in order to consider, in its capacity as highway's authority, whether any road safety measures are required.

EIR

Regulation 3(2) of the EIR provide that :

" (2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- is in the authority's possession and has been produced or received by the authority.
- is held by another person on behalf of the authority. "

The EIR do not include a provision, equivalent to that available under FOIA, to consider information held solely on behalf of another person as not held

Under the EIR information is held by virtue of being in the public authority's possession. This means that information that is held by a public authority solely on behalf of another person is still held for the purposes of the Regulations (unless one of the specific circumstances set out in Regulation 3(3) and 3(4) apply).

Source	**Details**
Policy Team IT	Ennis McBride / MoJ (formerly the Privy Council Office) Digby-Cameron / IC

Related Lines to Take

n/a

Related Documents

Awareness Guidance 12, EA/2007/0105 (McBride), EA/2008/0010 (Digby-Cameron)

Contact		LA / HD / GF	
Date	05/01/2009	**Policy Reference**	**LTT85**

FOI/EIR	FOI	Section/Regulation	S40	Issue	Personal Data disclosed in open court

Line to take:

The disclosure of personal data may still breach the data protection principles even after it has been disclosed in open court.

Further Information:

The first data protection principle states that personal data should be processed fairly and

lawfully.

Where offences are prosecuted in open court, personal data (of any kind and including sensitive personal data) will be disclosed to those in attendance. It may be consequently be reported in the media and will be recorded and transcribed.

In a small number of cases, the Commissioner has considered whether a further request for personal data already disclosed in open court represents fair and lawful processing. The principle seems to be that the more time that has elapsed since the date of the court case/conviction, the less likely any disclosure of that information will be fair and/or lawful.

Situations where the processing would be unfair

In case reference FS50075171, which concerned information about prosecutions relating to bus fare irregularities, the DN recognised that data is disclosed in court and could be reported, but the DN concludes that later disclosure would be unfair. It states:

"…in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders.

"To create such a database would prejudice the principle of the rehabilitation of offenders. There is established public policy on controlling access to the records of those who have been involved with the criminal justice system as demonstrated by the creation of the Criminal Records Bureau. It is clearly not desirable for the Freedom of Information Act to undermine these principles."

The notice also points to the fact that personal data of this kind will be sensitive. Sensitive personal data shall not be processed unless at least one condition in Schedule 2 and one condition in Schedule 3 of the DPA can be satisfied. This further limits the possibility of disclosure.

In another case, reference FS50076855, which concerned the legal aid costs awarded to one of the parties, and did not therefore relate to the details of an offence the DN issued explains that, "*disclosures that are required as part of the court proceedings are, in practice, only disclosures to a limited audience*." (para. 26)

The notice also refers to the reasonable expectations of the data subject. It advises that expectations will be shaped by what an individual is told about how their data will be used. It argues that though the individual in question would have realised that his personal information would have been disclosed in court, this is a far more restricted disclosure than disclosure to the general public under FOI, and not what the individual would have envisaged.

In yet another case DN (ref: FS50123489) 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. The Commissioner referred to Home Office guidance on ASBOs which suggested that publicity was the norm, not the exception, and that not only should it be expected that the local

community would learn of the ASBO, indeed the effectiveness of the measure would depend on the community being aware of the orders. The Commissioner accepted that the guidance related to local publicity at the time the order was made but felt that this advice could also be applied to disclosure to the general public and during the lifetime of the ASBO.

However this decision was not upheld by the Information Tribunal (ref: EA/2007/0021).

The Tribunal indicated 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.

Situations where the disclosure may be unlawful

It may also be unlawful to disclose details of past convictions if they are deemed to be 'spent' under the Rehabilitation of Offenders Act 1974. This states that a conviction is spent if an individual does not re-offend within a specified rehabilitation period. This principle gives effect to the public policy idea of allowing people to start with a clean slate after they have served their time/repaid their debt to society.

Please refer to the Rehabilitation of Offenders Act for specific details of when and how a conviction will be 'spent' as the rehabilitation periods vary depending on the original offence and there are exceptions to the general policy however as a general rule, it will be unlawful, and thus breach the first data protection principle, to disclose details of spent convictions.

For cases involving prosecutions by the Environment Agency for breaches of environmental legislation and the EA's specific public and non-public registers of prosecutions, see correspondence on FS50074871 dated 19 February 2007 onwards.

For completeness:

(DN ref: FS50074871)

In January 2005, a Sheffield newspaper asked for details relating to excessive expenses claims submitted by Doncaster Council's councillors which in the late 1990s/2000 resulted in a number of the councillors being convicted of falsifying expenses claims whilst others volunteered to repay monies. The case, nicknamed "Donnygate", was widely reported in the area at the time and remains in the consciousness of the local communities.

The Commissioner found that details of the criminal convictions could be disclosed without breaching the data protection principle because the *"….information [was] the result of a conviction which had followed due process and took place in the relatively recent past …"*

(para 56) despite the convictions being several years old at the time of the request.

Following advice in the DP surgery and taking into account the particular circumstances of this case, it was felt that the details of the convictions could be disclosed without breaching the first data protection principle but this approach will not be routinely followed in other cases.

Armstrong v the Information Commissioner and HMRC

The case of Armstrong v the Information Commissioner and HMRC, where the applicant, an investigative journalist, requested documents referred to in court in the 2001 trial of Abu Bakr Siddiqui, illustrated similar principles, albeit in relation to s30, which support the IC'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 on to note its agreement with the Commissioner that, similar to the bus fare irregularities case referred to earlier, *"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); the context of the case should be taken into consideration

Source	Details
IT	[Redacted name]/ Legal Services Commssion [Redacted name] / Transport for London London Borough of Camden Armstrong / HMRC

Related Lines to Take

LTT139

Related Documents

FS50075171, FS0076855, Awareness Guidance 1, EA/2007/0021 (Camden), EA/2008/0026 (Armstrong) _

Contact		HD / GF	
Date	05/01/2009	**Policy Reference**	**LTT86**

FOI/EIR	FOI	**Section/Regulation**	s16 s45 code of practice	**Issue**	Limits of s16

Line to take:

Where a public authority conforms with the provisions of part II of the section 45 code of practice in relation to the provision of advice and assistance, it will be held to have complied with section 16.

Further Information:

N.b. The wording of the section 45 code of practice (as opposed to that of the EIR regulation 16 code of practice) means that there are fundamental differences in the approach to advice and assistance under FOI and the EIRs. For the EIR approach see LTT91

section 16(1) of the Act provides that :

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it"

section 16(2) states that :

"Any public authority which in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection(1) in relation to that case"

In *Berend v the Information Commissioner and London Borough of Richmond upon Thames (LBRT)* the Tribunal confirmed in relation to s16 that "Where the public authority has complied with the Code they will be held to have fulfilled their obligations",

This confirmed that the 16(1) duty to provide advice and assistance "so far as it would be reasonable to expect the authority to do so" is limited by 16(2) to the requirements of the section 45 code of practice. Whilst a public authority might choose to go beyond the provisions of the code it doesn't have to do so in order to comply with section 16.

The Commissioner's line accords with the Tribunal's decision in this case, where s16 was considered as a main point of appeal, rather than looking to cases where s16 may have been briefly commented upon as a side issue.

Requirements of the code

Generally the code is about good practice by public authorities, rather than "obligations" which arise through its links with the Act. However, because Part II relates specifically to the duty to provide advice and assistance under section 16, failure to comply with this part of the code can mean a breach of section 16. It should be noted that Part I and Parts III to VI are **not** linked to section 16 in this way.

The provision of advice and assistance to persons who propose to make or have made, requests for information is dealt with in Part II of the section 45 code of practice which comprises :

- Introductory paragraph (para 3)
- Advice and assistance to those proposing to make requests (paras 4 to 7)
- Clarifying the request (paras 8 to 11) (see also LTT88)
- Limits to advice and assistance (para 12)
- Advice and assistance and fees (paras 13 to 15)

The overall approach to section 16 should be to firstly refer to the code and establish which, if any, paragraphs are relevant and what is triggering the duty to provide advice and assistance. (i.e. which of the above bullet pointed situations are you in?)

If there is no trigger to provide advice and assistance (i.e. you are not in any of the situations above) then there is no section 16 duty and therefore no breach. If you still have concerns about how the public authority dealt with the request then these can only be addressed in a Decision Notice under the "Other matters" heading.

If a trigger is established then the next step will be to consider whether the public authority has conformed with the provisions in the **relevant paragraphs** of the code.

Limits of the code

The Code explicitly states in paragraphs 7 and 10 that the lists of examples given are not exhaustive and that public authorities should be "flexible in offering advice and assistance most appropriate to the circumstances of the applicant."

If an explicit statement had been made to the effect that Part II of the code, or the whole of the code was not exhaustive, then it could be argued that to comply with section 16 a public authority must be flexible in its general provision of advice and assistance and that situations other than those detailed in the code might lead to a s16 breach.

However this is **not** the case. Paragraph 7 promotes flexibility where a person is unable to frame their request in writing, and paragraph 10 promotes flexibility when there is a need to clarify a request (as detailed under the heading Clarifying Requests above). Whilst the section below headed "Reasonable to expect and the section 45 code" is relevant in this respect it does not confer any duty to go beyond the code in order to comply with s16.

Good practice

This does not mean that we would not wish public authorities to be flexible and helpful in a more general manner. Indeed we would encourage public authorities to go beyond the

provisions of the code as a matter of good practice. However failure to follow such good practice is not a breach of section 16.

Where a public authority has satisfied the provisions of the section 45 code it will not be in breach of section 16.

16 (1) "Reasonable to expect" and the section 45 code

As discussed above *Berend* confirmed that compliance with the code means compliance with section 16. This was reiterated in *Brown v The Information Commissioner and The National Archives.*

The IT in *Berend* further commented that " failure to comply with the Code does not inevitably mean that a public authority has breached section 16 FOIA.", and again this was reiterated in *Brown.*

In *Brown* the IT went on to comment that "The duty on a public authority to provide assistance and advice under section 16 is expressly qualified by the words *"only in so far as it would be reasonable to expect the authority to do so."* It is clear from this that the advice and assistance that it would be reasonable to expect depends upon the particular public authority in question. The issue is about what it is reasonable for "*the"* public authority in question to do."

It then found that it would have been reasonable for The National Archives, as a public authority whose core functions included searches, to advise the applicant to phase his requests in order to conform with the provision under paragraph 14 of the section 45 code of practice. This paragraph provides that where a request exceeds the cost limit a public authority should "consider providing an indication of what, if any information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no fee. "

This suggests that although compliance with the section 45 code will always mean compliance with s16, there is still some judgement to be made about how far it is reasonable for a particular public authority to go in order to conform with any particular provision of the code that has been triggered.

It may also be that certain provisions or examples of desirable practice within the code are not deemed reasonable for every public authority to follow, hence the comments that failure to meet the code doesn't inevitably lead to a section 16 breach.

Source	Details
Line agreed by GS IT	Berend/ London Borough of Richmond upon Thames Brown / The National Archives

Related Lines to Take
LTT88, LTT89, LTT90, LTT91

Related Documents
EA /2006/0049&50 (Berend), EA/2006/0088 (Brown), s45 code of practice

Contact		LA	
Date	04/02/08	**Policy Reference**	**LTT87**

FOI/EIR	FOI	Section/Regulation	s16 S45 code of practice	Issue	Clarifying requests

Line to take:

Some of the provisions in part II of the section 45 code of practice are restricted to circumstances where there is a need for a public authority to clarify the request with the applicant so that it can identify and locate the information sought. These particular provisions do not apply where the public authority is able to identify and locate the information without further clarification.

Further Information:

N.b. This LTT should be read in conjunction with LTT87 limits of section 16

Clarifying Requests

Paragraphs 8. to 11 of the s45 code deal with "clarifying the request" and relate specifically to circumstances where a public authority needs more detail to enable it to identify and locate the information sought.

Paragraph 8. says that public authorities are entitled to ask for more detail ***if needed*** to enable them to identify and locate the information sought. In this circumstance public authorities should assist applicants in describing more clearly the information requested. The code does not require public authorities to assist applicants in describing the information more clearly if they don't need more detail to identify and locate the information sought..

Paragraph 9. says that "the aim of providing assistance is to clarify the nature of the information sought" and specifies that "it is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail ***where more information is needed to clarify what is sought.***". The code does not require a public authority to contact the

applicant in this way where more information is not needed to clarify what is sought.

Paragraph 10. lists some examples of what appropriate assistance might include "***in this instance***" . The phrase "in this instance" refers to the circumstance detailed in points 8. and 9., where more information is needed to clarify what is sought. The examples provided do not constitute an exhaustive list and public authorities should be flexible on their approach to the provision of advice and assistance in this instance.

This means that in circumstances where a public authority is able to identify and locate the information sought without any further detail, then it is not incumbent upon it to contact the applicant and volunteer, for example, access to indexes or details of other related information that it holds. Nor does the code require the public authority in this circumstance to contact the applicant to discuss their request with them and check that they have actually asked for what they want.

The Tribunal in *Berend v The information Commissioner and London Borough of Richmond upon Thames (LBRT)* confirmed that "the only obligation to initiate contact with the applicant under the Section 45 Code relates to the situation that arises where the request requires clarification" and accepted that in the circumstances of this particular case " the request appeared plain when read objectively by the public authority …….consequently there was no requirement for LBRT to seek a second meaning or ask for clarification"

It should be noted however that although the Tribunal was satisfied that the public authority's objective reading of the request meant that no section 16 duty arose, it did find that the request could be objectively read in 2 ways, which gave rise to a section 1 breach. This issue is discussed further in LTT89

Other sections of part II of the code

The same principle as demonstrated above should be applied when considering the section 16 duty in relation to other sections of part II of the code. For example paragraphs 4 to 7 only apply to the provision of advice and assistance **to those proposing to make requests** and are not requirements for compliance with s16 in other circumstances.

Source	**Details**
IT, Line agreed by GS	Berend / London Borough of Richmond upon Thames

Related Lines to Take

LTT87, LTT89, LTT90

Related Documents

EA2006/0049&50, s45 code of practice

Contact		LA	
Date	04/02/08	**Policy Reference**	**LTT88**

FOI/EIR	FOI	**Section/Regulation**	s1, 16, 45	**Issue**	More than one objective reading of a request

Line to take:

Where a public authority is aware that an information request can be objectively read in more than one way and it therefore needs further information in order to identify the information requested, then it will have a duty under section 16 to assist the complainant in clarifying the request.

Where a public authority is only aware of one objective reading of a request then no s16 duty arises. If it is later found that the request can be objectively read in 2 or more ways then there will be a breach of section1 to the extent that information relating to the complainant's intended alternative objective reading of the request has not been provided.

Further Information:

In *Berend v the Information Commissioner and London Borough of Richmond upon Thames (LBRT)* the complainant and the public authority disputed the meaning of the information request that had been made. The complainant intended a different interpretation of the request than was acted upon by the public authority.

The request was worded " Copy Minutes and Agendas of all 15 meetings of the Task force re Squires and Fulwell together with all working papers and documents attached to Agendas"

The public authority (and the ICO) took this to mean:

1) copy minutes & agendas.

2) all working papers attached to agendas and

3) all documents attached to agendas.

The complainant maintained that he meant :

1) copy minutes and agendas

2) all working papers of the Task Group and

3) documents attached to agendas.

At the Tribunal the complainant maintained that his request read objectively included a request for "all working papers". However, without prejudice to this position, he also argued that in light of LBRT's reading of the request it had breached s16 by failing to assist him to reformulate his request to include a request for documents relevant to the task group investigations.

The Tribunal found that where a public authority has complied with the section 45 code of practice in the provision of advice and assistance it will be held to have complied with section 16. It then considered whether the requirements of the code in relation to clarifying a request were relevant to this circumstance. (See LTT87 for further information on the limits of s16 and clarification of requests under the s45 code).

The need to clarify & the duty under s16

The Tribunal commented at paragraph 47 that "Section 1(3) FOIA provides for a situation where the request is not clear and further information is sought in order to comply with the request for information. In this case the Tribunal accepts that the request appeared plain when read objectively by the public authority who considered it to mean "working papers attached to Agendas" and "documents attached to Agendas", and that consequently there was no requirement for LBRT to seek a second meaning or ask for clarification."

The Tribunal did not find the public authority in breach of section 16. As there was no need to seek clarification under s1(3) in this case, it follows that there was no corresponding duty under s16 to assist the applicant in providing such clarification.

Although the Tribunal did not explicitly state that the right under s1(3) has a corresponding duty under s16, in this case, and in *Meunier v ICO & NS&I* and *Barber v ICO*, it found that that the duty under s16 arose in a circumstance where there was a need to clarify under s1(3). The Commissioner's view is that the two sections are linked in this respect.

More than one objective reading

In considering the complainants argument that his request included a request for "all

working papers. the Tribunal found that in the particular circumstances of this case "there are 2 ways that the request can be read objectively and upon one of the objective readings, the original request included a request for "all working papers".

Although it did not criticise LBRT for its reading of the request it did find the public authority in breach of s1, to the extent that information relating to the alternative objective reading of the request had not been provided. It said that "In light of this Tribunal's findings as to the ambit of the request, LBRT have not completed their obligations under section 1(1) FOIA in that no consideration has been given to working papers which were not attached to Agendas."

The Tribunal stated that "In a case where 2 objective readings were apparent to a public authority (which it is accepted was not the case here) they would be entitled to seek clarification of which one applied and then rely upon any clarification received in considering the request" (para 89). The Commissioner's view is that this would be the exercising of the public authority's right, under section 1(3), to require further information in order to respond to a request.

Whilst the Tribunal did not expand upon this point this implies that where a pa is aware of more than one objective reading then it would need clarification in order to identify and locate the information sought. The Commissioner would consider this to then trigger the corresponding duty under section 16 to provide advice and assistance to enable the applicant to "describe more clearly the information requested" (section 45 code of practice, part II, paragraph 8).

ICO approach to cases

In cases where the meaning of the request is in dispute and the request was not clarified, case officers will need to consider both the complainant's and the public authority's interpretations and decide whether each of these are objective readings of the request.

If the complainant's intended interpretation is an objective reading of the request, then there will be a breach of section 1 to the extent that information relating to this alternative objective reading has not been provided.

If the complainant's interpretation is not an objective reading then, as we are effectively deciding that the pa's interpretation was the only objective reading, there will be no breach of either s1 or s16 in this respect.

If both interpretations are objective readings of the request then, in addition to any breach of s1 already identified, there may also be a breach of s16. Case officers will need to decide whether the public authority was aware of another objective reading or not. If it was aware but failed to clarify then this will be a breach of s16. If it was not aware of another objective reading then there will be no s16 breach in this respect.

Effect on the statutory time limit

Where the public authority is only aware of one reading of a request and so does not seek clarification under s1(3), and it is later found that there is an alternative objective

reading, the statutory time period for compliance will not be affected. In such cases, it will remain that it commenced on the date of the original request. This is because the alternative reading has not been provided via a clarified request (therefore new request see LTT137) the original request included the alternative objective reading and s1(3) does not apply.

No objective reading

Where the request as phrased simply does not make sense, or has to be rephrased in order for it to make sense then there is effectively no objective reading of the request available and this Line to Take will not apply. In this circumstance the public authority will need to clarify under s1(3) and will have a duty to assist the applicant in providing this clarification under s16. It will not be acceptable for the public authority to speculate about what the applicant might mean, it will have a duty to contact the applicant and clarify the meaning with them.

N.B This LTT should be read in conjunction with LTT90 which discusses further the concept of objectivity / subjectivity in the reading of a request.

Source	**Details**
IT	Berend/ LBRT (12 July 2007) Meunier / NS&I (5 June 2007) Barber / Inland revenue (11 November 2005)

Related Lines to Take

LTT87, LTT88, LTT90, LTT137

Related Documents

EA/ 2006/0049 & 50 (Berend), EA/2006/0059 (Meunier),

EA2005/004 (Barber), s45 Code of practice

Contact		LA	
Date	14/11/2008	**Policy Reference**	**LTT89**

FOI/EIR	FOI	Section/Regulation	s1(3), s8 s16	Issue	"Duty" to read a request objectively

Line to take:

Whilst a public authority has a duty to read a request objectively, this does not mean that it is not permitted to seek clarification under s1(3) FOIA, or Regulation 9 EIR, in circumstances where it thinks that an applicant may in fact be looking for something other than what has been asked for.

If when making a request an applicant draws the public authority's attention to their contemporaneous dealings with the pa, and it is clear that the request should be considered in this context, then if this renders the request ambiguous or unclear the duty to provide advice and assistance will be triggered.

Further Information:

Berend v the ICO & London Bororugh of Richmond upon Thames:

In the case of *Berend v the ICO & London Borough of Richmond upon Thames (LBRT)* the Tribunal found that, "the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request" and "there was no requirement for LBRT to seek a second meaning or ask for clarification"

In support of its position, the Tribunal referred to the definition of a request provided at s8(1)(c), and found that contained, "no caveat or imputation of subjectivity."

Section 8(1)(c) provides that:

"In this Act any reference to a request for information is a reference to a request which –

(c) describes the information requested."

Whilst the ICO accepts that a public authority is only ***required*** to read a request objectively, our view is that this does not mean that it is ***not permitted*** to seek clarification under s1(3) in circumstances where, because of a public authority's prior knowledge of an applicant's interests, it thinks that they may in fact be looking for something other than, or in addition to, what has been asked for.

We are of the view that a public authority, if it is aware that an applicant may require information other than that which is requested, may claim under s 1(3) that it reasonably requires further information to identify the information requested.

If a public authority claims that it needs further information to identify the information requested under s1(3) then the duty to provide advice and assistance under s16 is triggered. The public authority ***may*** seek clarification where it has prior knowledge and reasonably requires further information to determine what is actually being requested, even if the request as worded is objectively clear.

However if a public authority in this situation reads the request objectively and responds to the request as phrased without exercising its right to require further information under s1(3) then no duties under s16 arise. It is **not** the case that a public authority ***must*** look for other possible readings of a seemingly clear request or check previous correspondence.

Section 8

The ICO does not agree that reference to s8 is relevant. Section 1(1) provides the right to have information communicated etc. to any person making a "request for information." Section 8 defines a "request for information". Section 1(1), however, has effect subject to the provisions of the rest of the section, subsection (3) of which removes the obligation to comply where a public authority reasonable requires further information in order to

identify and locate the information requested.

This means that, contrary to the Tribunal's conclusions, a request for information may "describe the information requested" yet still be one for which a public authority requires further information to identify it.

Boddy v the ICO and North Norfolk District Council :

A similar situation arose in relation to advice and assistance under the EIR in the Tribunal case of *Boddy v the iCO and North Norfolk District Council.*

Here the IT stated that the "correct approach to the law is that a request for information ought to be "taken at face value", i.e. it should be read objectively" (para 25), and " "we do not see that there can be any legal obligation on the Council to "second guess" what was a clear request" (para 26). This is in line with the IT's comments above in relation to s16 FOIA in the *Berend* case.

However the IT in *Boddy* added a qualification to this approach saying that "if an applicant had been in discussions or correspondence with the public authority about a particular matter……..then we would expect the public authority to take into account the contemporaneous dealings with the applicant to clarify the information that was being requested." (para 25).

The ICO line remains as detailed above, that if a request is clear but a public authority suspects, from its prior knowledge of the applicant that they may require different or additional information to that specified in the request, then the pa is **permitted** but **not required** to seek clarification of the request. We would not expect the public authority to check for previous correspondence when an otherwise clear request is received.

However, if when making a request the applicant draws the public authority's attention to the contemporaneous dealings and makes it clear that the request should be considered in this context, then if this renders the request ambiguous or unclear the duty to provide advice and assistance will be triggered. This will apply equally to FOIA and EIR.

N.b. This LTT should be read in conjunction with LTT 89- More than one objective interpretation of a request, where the particular circumstances of the *Berend* case are considered in more detail.

Source	**Details**
IT, agreed by GS	Berend / LBRT (12 July 2007) Boddy / North Norfolk District Council (23 June 2008)

Related Lines to Take

LTT87, LTT89, LTT91,			
Related Documents			
EA/2006/0049 & 50 (Berend), EA/2007/0074 (Boddy)			
Contact		LA	
Date	28/07/08	**Policy Reference**	**LTT90**