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. Every 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 an 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 the information related to the deliberations of very senior officials did not mean that the minutes were automatically more sensitive. "To treat such status as automatically conferring an exemption would 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 the High Court decision *OCG v ICO & Her Majesty's Attorney General obo the Speaker of the House 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, after 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 example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out 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 Information 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 be 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 Government 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 introduce 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 on 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 normally 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 significant 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 pipeline 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 fact 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 kind 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 interest in 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 specific statutory duty, such as DEFRA, had properly fulfilled their duty" the ICO interprets the High Court's comments as follows:

- Where release of the particular information in question further informs the public, then the fact that there is already other information on the same subject in the public domain is not 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 further discussion of this point). However,

- the fact that "information of the kind requested" is generally in the public domain may be a 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 there 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 in 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 to be less candid when offering such opinions. The Tribunal stated that "…we are entitled to expect of [civil servants] the courage and independence that … [is]…the hallmark of our civil service". It 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 of 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. In the ECGD High Court case the judge criticised the IT for referring to the consideration of potential "chilling effects" as "ulterior considerations", commenting that "The considerations are not ulterior; 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 the information in question and the timing of the request. Disclosures of information relating to a given 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 of 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 never 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 find themselves discriminated against when there was a change of government or even just a change in ministers. The Tribunal's view was that we are entitled to expect our politicians to act fairly and not to remove a senior official simply because they have been identified with a policy that was no 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 reflect 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 more concerned with the public misunderstanding the role of civil servants, it stated that, "The answer to ill-informed criticism of the

perceived views of civil servants is to inform and educate the critic…". It may also be that greater emphasis should be placed on Tribunal's view in point 3 that there is no 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 the 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 policy on refusing to disclose the names of civil servants wherever they appear in departmental records 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 not have to be compelling for the public interest to favour maintaining the exemption in relation to the 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 in 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, this 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 public interest benefits that would flow from the release of the particular information in question are also 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 note ….the specific public interest in disclosure of the departmental response to the ECGD request for information which was in play" (para 39)

Personal Data Issues

The issues discussed at principle (vii)- Robustness of Officials, and in particular at principles (viii) – 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 that 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 the 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 v the ICO & DCLG*.

In the second, the information requested was withheld under regulation 12(4)(e) of the EIR which excepts internal communications. The Tribunal noted that there is no indication 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, it 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 by section 35 , then these guiding principles may be equally relevant to the EIR.

PREVIOUS / NEXT

Source	Details
	DfES / The Evening Standard (19 February 2007), DWP / Oaten (05 March 2007), Baker / DCLG (1 June 2007)
IT	ECGD / FOE (17 March 2008-High Court
High Court	OGC / Oaten (11 April 2008 -High 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**	**LTT43**

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 will 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) the 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 8 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. The 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 (para 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 should be accountable for the public money they spend or alter the fact that, because of the absence of 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 in 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 / NEXT

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**	**LTT57**

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 information 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 they 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 / NEXT

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**	**LTT59**

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

Line to take:

The Commissioner interprets "proceedings" as possessing a certain level of formality (i.e. they are unlikely to encompass every meeting held / procedure carried out by a public authority). They will 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 the 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" (paragraph 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 meeting, and we are not satisfied therefore, that it qualifies as "proceedings". Accordingly, we do not find 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 under 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 where proceedings deal with information that has not

been exclusively prepared for that purpose. In such cases, he will consider whether disclosure of information related to the proceedings (not limited to 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 regulation 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 / NEXT

Source	**Details**
Information Tribunal	Archer / Salisbury District Council (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 Reference	LTT60

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