Freedom of Information Podcast

Episode 8 – July/August 2007

Ladies and gentlemen welcome to episode 8 of the UK's first Freedom of Information podcast.

I'm Ibrahim Hasan. In July and August the Information Commissioner published sixty four decisions whilst the Information Tribunal published seven. I'm here to guide you through some of these.

Amongst other things, in this episode we will be discussing

- The first appeal against an Information Notice
- Disclosure of staff names and contact details
- The first Commissioner decisions involving GPs
- Disclosure of bids received for the purchase of council land
- Whether statistics can still be personal data
- Disclosure of dead peoples' information
- AND when retrieval of information amounts to the creation of new information

First Information Notice Appeal

The first appeal against an Information Notice issued by the Information Commissioner was heard in July. In Ministry of Justice (formerly the Dept for Constitutional Affairs) v Information Commissioner (6th August 2007) the MoJ refused to confirm or deny whether it held information about the Attorney General's advice on the "public interest" test and its interpretation under the Freedom of Information Act. It applied the s.35 (1) (c) exemption, information held by a government department relating to "the provision of advice by any of the Law Officers or any request for the provision of such advice".

The Commissioner issued an Information Notice under s.51 of the Act requiring the MoJ to confirm whether or not such information was held and, if it was, to provide it with a copy.

The Information Tribunal ruled that the MoJ, in refusing to comply with the Information Notice, was correct to rely on s.51(5) of the Act. This states that a public authority does not have to comply with such a notice in respect of any information which is covered by legal professional privilege.

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Is Information held? Manipulating the Information Requested

Often public authorities receive FOI requests where technically they don't hold the information in the form it's requested. To produce it would require other information in their possession to be manipulated or processed in some way. To what extent are public authorities obliged to do this? The issue has been clarified by the Information Tribunal in Mr M L Johnson v Information Commissioner and Ministry of Justice (13th July 2007). Mr Johnson asked MoJ for summary information relating to the numbers of cases allocated to each High Court Queen's Bench Master by year since 2001 and the number of cases which each Master had "struck out". The MoJ informed the appellant that these statistics had never previously been compiled and could only be obtained by manually examining some 17,000 files to extract them. On this basis, it stated that the information requested was not "held" under the terms of the Act.

The Tribunal ruled that if manipulation of the raw data to produce the requested information would require a level of skill and judgment then it could be said that the information is not held. All that was required in the present case was for a member of staff to look through the paper files and know that there were three or four possible terms that might be used to replace the term "Strike Out", but which meant the same thing. Therefore it could not be said that the information was not held by the MoJ. However, the Tribunal accepted that collating the requested information would have significantly exceeded the cost limit.

Vexatious Requests

August saw the first decisions by the Information Commissioner involving GPs who are, of course, public authorities in their own right. Two of these decisions concerned vexatious requests.

In a decision dated 9th August 2007 (Ref: FS50170171) **Dr A R Daitz** refused to answer a request for information on the basis that it was vexatious. The Commissioner was satisfied that the request was vexatious because, when taken in the context of the complainant's previous correspondence and other actions, it imposed a significant burden on the GP and also had the effect of harassing him. A similar the decision was reached in the case of **Dr Tessa Buckman** (09/08/2007 Ref: FS50170245).

Unfortunately these are all the facts we have of both cases. The Commissioner decided that, due to the nature of the information requested, it is not possible to publish the full decision notices on his website as to do so would involve the disclosure of personal data about the parties involved.

The Commissioner has published an updated version of his Guidance No 22 on vexatious and repeated requests. It's available on his website or click here (Pdf)

Section 30 and 31

On 9th August the Commissioner ruled in a case involving a request to the **Royal Mail** (Ref FS50118873) for information relating to the use of private vehicles to deliver mail and thefts from such vehicles. Royal Mail did release some of the requested information on the use of private vehicles, but argued that the section 31 exemption applied to the disclosure of statistics on thefts as this would raise awareness that private vehicles are being used for mail delivery and would increase the likelihood of these vehicles becoming targets for criminals. It also applied the section 30 exemption, arguing that disclosure would interfere with Royal Mail's investigations into such thefts. The Commissioner decided that disclosure of the statistics would not prejudice, or be likely to prejudice, the prevention or detection of crime. He further considered that disclosure would enhance the public's understanding of the risks of delivering mail by this method and their ability to assess Royal Mail's performance. These are matters of public interest. He also concluded that section 30 was not applicable in this case

View PDF of Decision Notice FS50118873

Section 40 - Personal Data

In three decisions dated 13th June 2007 (e.g. Case Ref: FS50070469) involving the House of Commons, the Commissioner ruled that the total amounts claimed by some individual MPs under the additional cost allowance – the regime for MPs to reclaim expenses for running one home close to Westminster and one in their constituency - should be released under specific headings. These include: mortgage costs; hotel expenses; service charges; utilities; furnishings; maintenance & service agreements. However the Commissioner ruled that it is not necessary to disclose the full itemised details of expenditure on the running of an MP's private household. To do so would invade the privacy of MPs and their families.

This issue has been examined further in a recent Tribunal decision dated 9th August 2007. The Corporate Officer of the House of Commons v the Information Commissioner concerned a decision by the Commissioner to order disclosure of a breakdown of Anne Moffat MP's travel expenses. The requests went beyond a previous Tribunal ruling ((see The Corporate Officer of The House of Commons v Information Commissioner and Norman Baker (16th January 2007)) in that it required six further categories of disclosures, including spouse's expenses, mileage for car travel, number and cost of taxi journeys etc. The Tribunal ruled that such information should be disclosed. Whilst some of it was personal data, the data protection principles would not be breached.

Staff Names and Contact Details

Does FOI require the names of staff and their contact details to be disclosed? This question is often the subject of debate (and worry) amongst public sector professionals, especially in local authorities, who regularly receive requests to disclose the contents of the internal staff directory. A Tribunal decision dated 20th July 2007 involving the Ministry of Defence v Information Commissioner and Rob Evans clarifies the situation. It involved a request made by a journalist for a staff directory which included the names and contact details of individuals working for the Defence Exports Services Organisation (DESO).

The MoD refused to disclose the information citing the exemptions under section 36 (prejudice

to effective conduct of public affairs), section 38 (health and safety) and section 40 (personal information).

The Tribunal ruled that that the MoD could only withhold names of staff if they are particularly junior (below Civil Service B2 Level), not immediately responsible for the requested information and their name is not already available elsewhere (or would be expected to be through their performing a public-facing duty); or there is a clear and demonstrable threat to that individual's health and safety if their name is made public.

The Tribunal was not minded, however, to sanction the disclosure of all telephone and email contact details of staff, save for those contact details which appear in the Civil Service Year Book and similar publications. If there is a public interest inherent in the public's ability to contact anyone, even those above B2 level directly by email, the same is outweighed by countervailing risks of disclosure such as the speed of disruption, the fact that there is likely to be continuous interruption and the risk of inadvertent loss or leakage of information.

This decision provides welcome clarification for many local authorities having had similar requests. There is no absolute rule that names should never be disclosed. The seniority of the persons involved, the availability of the information elsewhere and any credible risks to the subject are relevant considerations when deciding whether to releases the names. With regard to contact details, it seems that unless the details have been made publicly available, they can be withheld if there is a likelihood of possible disruption that could be caused from staff being e mailed and telephone directly as opposed to going through normal contact channels such as switch boards etc.

Another interesting decision involves **NHS Direct** (30th July 2007 FS500108885) where the Commissioner agreed that disclosure of geographic telephone numbers for NHS Direct contact centres, as opposed to the usual 0845 number, would be exempt under section 38 (health and safety). It was in the public interest to ensure that calls were routed to the most efficient call centres managed by trained staff appropriate to the medical need. This could only be done by use of the central 0845 number.

I doubt though whether the same decision would be made where a local authority received a request for a geographic number for one of its call centres. The issue of health and safety would probably not be relevant.

Anonymised Data

For data to be personal it does not necessarily have to name an individual. In a decision involving the **University of Cambridge** (30/07/2007 FS50110885) the Commissioner ruled that anonymised information may constitute personal data where it is possible to identify individuals using previous knowledge combined with the information under consideration.

The facts of this decision are that the complainant requested information concerning successful applicants to the university, broken down by school or college, gender and course. The university provided the majority of the information requested, but withheld information showing less than five successful applicants to the same course of the same gender and from the same school or college. It stated that it was exempt under section 40 as being personal data disclosure of which would be unfair.

The Commissioner agreed that the information was personal data. However he found that disclosure would not breach any of the data protection principles. In coming to this view he took account of, amongst others things, the impact of disclosure on the data subjects, whether negative or otherwise. He considered that, in the majority of cases, information about the course studied would not be considered sensitive. Neither would the data subject have strong concerns about disclosure of such information.

The Commissioner has recently released a guidance note setting out his revised position on the definition of personal data. This can be found on his website.

Section 41 GPs and Deceased Persons' Records

Another recent GP decision involving **Dr IM Gilmour** (08/08/2007 FS50143838), shows the importance of PCTs raising awareness and knowledge of FOI amongst GPs.

The complainant made a request for a copy of the complete medical records of a patient of his surgery now deceased. This request was originally made by reference to the Access to Health Records Act. The GP refused the request on the basis that the information was confidential and the complainant had not provided evidence that the personal representatives or executors of the deceased patient had given consent for the information to be disclosed to him. It also pointed out that the family of the deceased had expressly refused consent to disclosure of the information.

The Commissioner ruled, as in other cases involving deceased persons' records, that there was a duty of confidentiality owed to the deceased which was enforceable by his personal representatives . This in turn meant that the information was exempt under section 41 of the Act (Breach of Confidence).

View PDF of Decision Notice FS50143838

The Commissioner recently published a guidance note on access to deceased persons' records which is available on his website www.ico.gov.uk.

Section 42 and Waiving Legal Privilege

We have previously discussed a number of decisions which show that whilst the exemption under section 42(legal privilege) is a qualified exemption, the Commissioner has yet to rule in favour of the applicant where it applies. However, care must still be taken to ensure that legal privilege is not waived by the public authority publishing the information or otherwise making it available.

In a decision involving **Dover District Council** (03/07/2007 FER0082136) the complainant requested a copy of the legal advice received by the council. The council applied section 42 to withhold it. The Commissioner found that the request should have been dealt with under the Environmental Information Regulations 2004. However he considered that the corresponding exemption under regulation 12(5)(b) of those Regulations did not apply. Legal professional privilege had been waived due to the council publishing a summary of the legal advice in a report available on its website.

Section 43 and Job Evaluation

Last month we examined the decision involving the London Borough of Southwark's refusal to disclose information about its application of the Hay job evaluation scheme. It unsuccessfully claimed section 43, that disclosure would prejudice the Hay group's commercial interests,

A similar decision involves **East Hampshire District Council** (04/07/2007 FS50085777). The complainant asked the council for information concerning the job descriptions of employees who had attended particular training courses. He also requested information concerning the Council's application of the Hay job evaluation process. The council withheld the job description information under section 40 (personal information) and the information concerning the Hay job evaluation process under section 36 (prejudice to the effective conduct of public affairs). The Commissioner agreed with the use of section 40 but decided that the information withheld under section 36 should be released. View PDF of Decision Notice FS50085777

Section 43 and Land

The sale of council land and the circumstances surrounding it is a constant subject of FOI requests to local authorities.

In **Trafford Metropolitan Borough Council** (**Ref: FS50153399 09/07/2007**), the complainant requested information regarding the individual bids the council had received when offering a property for sale by informal tender.

The Council refused to supply the information on the grounds that to do so would prejudice its commercial interests and that therefore it was exempt under section 43 (commercial interests) of the Act. It planned to sell a number of similar properties in the future and so argued that future purchasers would be minded to lower their bids once the requested information was disclosed.

The Commissioner considered that the council failed to demonstrate how its commercial interests would be prejudiced by disclosing the information requested. It took account of the fact that the council had already disclosed two of the bids and that other factors such as timing, location and condition of the properties t be sold would have a greater effect on their value than the release of the requested information.

View PDF of Decision Notice FS50153399

AND FINALLY, there are no funny stories this month so I would like to tell you about Act Now Training's Autumn program of courses. I shall be speaking on many of them including a workshop examining the latest FOI decisions and how to use them to draft Refusal Notices. For full details see the Act Now Training website www.actnow.org.uk

That concludes this month's podcast.

This podcast was brought to you by me Ibrahim Hasan. I specialise in all aspects of information rights law particularly Freedom of Information, Data Protection and Surveillance Law. My clients include local authorities, the NHS and government agencies. If you would like specific advice or training on any of your information law issues please don't hesitate to contact me. Please continue to let me have your feedback. The scripts for all previous podcasts with clickable links are available on my website.

If you would like a copy of this month's script please contact me via my website: www.informationlaw.org.uk. Until the next time – Goodbye.