

Freedom of Information Podcast

Episode 6 – March/April 2007

Ladies and gentlemen welcome to episode 6 of the UK's first Freedom of Information podcast.

I'm Ibrahim Hasan and I'm here to guide you through the decisions of the Information Commissioner and the Information Tribunal published in March and April 2007

Amongst other things, in this episode we will be hearing about :

- The new consultation on the fees regulations
- When information is held on behalf of a public authority
- The link between the Enterprise Act and FOI
- The disclosure of surveillance information
- AND Tony Blair's Christmas card list

New Consultation on Fees Regulations

The DCA recently published a supplementary consultation paper on the draft fees regulations inviting views on the principle of amending the existing regulations. The paper follows strong criticism of the earlier consultation exercise, which closed on 8th March 2007. Many of the responses questioned the need to make any changes at all and also the tone of the consultation which suggested that the Government had already made up its mind to curtail FOI. The responses to both consultation papers will be published together.

Those who wish to comment are asked to do so by 21 June 2007.

Read the [supplementary consultation paper](#) and accompanying [DCA press release](#). The Campaign for Freedom of Information has issued a [press release](#) welcoming the announcement.

Let's move on to talk about the decisions made by the Commissioner and the Tribunal in March and April 2007.

EIR Decisions

Let's start off with decisions about EIR of which there have been three. Two of these involve:

Milford Haven Port Authority - [Case Ref: FER0072936](#) - regulations 5, 12 & 14

Nottingham City Council - [Case Ref: FER0091004](#) - regulations 5, 7, 13 & 14

Sometimes a request for information will require a public authority to consider the application of both FOI and EIR.

Case Ref: FS50132849 Date: 15/03/2007

District of Easington Council

The complainant made a request for a copy of a building survey commissioned by the management committee of a community centre. The council withheld the survey citing section 41(1) of the Act; information provided in confidence. The Commissioner decided that this was correct but a coal mining report that was attached to the survey should be released under EIR.

[View PDF of Decision Notice FS50132849](#)

Even though a coal mining report is a publicly available document, it can still be requested under EIR. Unlike section 21 of FOI, there is no exemption under EIR for information that is reasonably accessible to the applicant.

Act Now Training is running an update workshop on the EIR where these decisions will be discussed in detail. See: www.actnow.org.uk

In March and April ICO published fifty seven FOI decisions whilst the Information Tribunal published eleven.

Is Information Held?

FOI doesn't just apply to information held by public authorities. It also covers information held by another person on behalf of the authority (section 3(2)). This requires careful consideration of the contractual basis upon which third parties are engaged to work on behalf of a public authority especially when such work involves processing information.

Case Ref: FS50118044 Date: 10/04/2007

Leeds City Council

The complainant requested copies of the responses given to a market research exercise undertaken by Swift Research Ltd ("Swift") on behalf of Leeds City Council (the "Council"). The Council concluded that it did not hold the requested information, as it only asked Swift to provide it with a final report and not the completed questionnaires.

After examining the contractual relationship between the company and the council, ICO concluded that the questionnaire responses, but not the names and addresses of those taking part, were held by Swift on behalf of the Council. Consequently they had to be disclosed by the Council. [View PDF of Decision Notice FS50118044](#)

S.12 - Cost Exceeds Appropriate Limit

The Leeds decision also contains useful guidance on the matters that can reasonably be taken into account in assessing whether supplying information would exceed the £450 cost limit. The council tried to consider all sorts of "costs" outside of the fees regulations.

There have been a number of other decisions on the issue of fees:

Brockhampton Group Parish Council - [Case Ref: FS50135471](#)

Ofcom - [Case Ref: FS50112855](#)

Audit Commission - [Case Ref: FS50152478](#)

DoH - [Case Ref: FS50095636](#)

Colchester Borough Council - [Case Ref: FS50118870](#)

Two of these stress the importance not only of applying the fees provisions properly but also of providing advice and assistance to applicants under section 16. It is not enough to simply state that the costs will be over the appropriate limit.

Case Ref: FS50082220 Date: 27/03/2007

BBC

The BBC refused a request on the grounds that to supply the information requested would exceed the appropriate cost limit. The Commissioner found that the cost limit was applied correctly but the BBC failed to provide advice as to how to refine the request in order to bring it within the cost limit. [View PDF of Decision Notice FS50082220](#)

S.14 - Vexatious or Repeated Requests

Decisions on Vexatious and Repeated requests continue to keep the Commissioner busy.

Brockhampton Group Parish Council - [Case Ref: FS50135471](#)

Cabinet Office - [Case Ref: FS50134560](#)

Bretforton Parish Council - [Case Ref: FS50109184](#)

DWP - [Case Ref: FS50125496](#)

The Commissioner seems to be interpreting the provisions of section 14 quite widely to deal with nuisance requests. I suspect that he is also trying to tackle some of the criticisms the Government has made of FOI which, some commentators say, are being used by the government as an excuse for changing the fees provisions.

Case Ref: FS50086298 Date: 19/03/2007

BBC

The BBC received around ninety requests relating to the authority's hospitality expenditure and employee expenses claims during a short period of time. The Information Commissioner agreed that the requests were vexatious for a number of reasons: the volume of requests had the effect of harassing the public authority and some members of staff with whom the complainant had corresponded. In addition the Commissioner ruled that the requests could be characterised as obsessive.

Graham Smith, Deputy Commissioner said: "While giving full support to individuals seeking to exercise the right to know responsibly, the ICO is sympathetic towards public authorities receiving specific requests which impose a heavy burden on their resources, particularly where the public interest in the disclosure of the information is limited. The Freedom of Information Act recognises that there are limits to

compliance beyond which public authorities are not obliged to go and we encourage the appropriate use of these provisions by public authorities.”

[View PDF of Decision Notice FS50086298](#)

Section 30 – Investigations and Proceedings

Guardian Newspapers Ltd v Information Commissioner (Respondent) and the Chief Constable of Avon and Somerset Police (Additional Party)

On the 6th of March 2007, the Information Tribunal considered the decision of the Information Commissioner (Case Ref: FS50078588 Date: 22/02/2006) involving Avon and Somerset Constabulary.

The complainant requested copies of documents relating to the trial of Jeremy Thorpe, the former Liberal Party Leader, who was acquitted in 1979 of conspiracy to murder.

The Tribunal agreed with the ICO decision that Avon and Somerset Constabulary was entitled to rely on section 30 (Investigations and Proceedings) to withhold all the requested information. It made some useful points about the applicability of section 30 and the competing public interest factors which are worth reading especially when faced with a decision involving section 30. [Full Tribunal Decision](#)

Section 31 and Refusing to Confirm or Deny

It is always difficult for a public authority to justify refusing to even confirm or deny the existence of information requested under FOI.

Case Ref: FS50074348 Date: 27/03/2007 Department for Constitutional Affairs

The complainant requested information on the number and rank of judges and magistrates who had been disciplined for misuse of departmental computer systems, including those who had been found to use the internet to view pornography. The DCA informed the complainant that it would ‘neither confirm nor deny’ that it held the information requested and applied the exemptions in sections 31 (law enforcement) and 36 (effective conduct of public affairs). The Commissioner decided that the exemptions had been incorrectly applied. Consequently, the DCA should confirm whether or not it holds the information requested by the complainant.

In this decision, ICO relies heavily on the Tribunal decisions in Brooke and Hogan. It is a very valuable decision for those who are relying on any exemption to refuse to confirm or deny the existence of information. It contains some useful pointers as to the factors to be considered.

[View PDF of Decision Notice FS50074348](#)

Many local authorities are looking forward to inspections by the Office of the Surveillance Commissioners. The next case provides a timely reminder that surveillance information may also be the subject of an FOI request. Care needs to be taken when drafting a refusal notice since the applicable exemption (section 31 – law enforcement) is subject to the public interest test.

Case Ref: FS50121212 15/03/2007

Nottinghamshire Fire and Rescue Service

The complainant requested information relating to alleged surveillance of him by the public authority. The public authority neither confirmed nor denied the existence of such information as if it were to exist; it would be subject to the exemption at section 31 relating to law enforcement. Following consideration of the public interest, the Commissioner upheld the public authority's decision. [View PDF of Decision Notice FS50121212](#)

Section 35 - Formulation of Government Policy

ID cards or “Entitlement Cards”, as the Government prefers to call them, have been the subject of a number of FOI requests:

The Secretary of State for Work and Pensions v Information Commissioner

On the 5th March 2007, the Tribunal upheld the ICO decision notice dated 5th June 2006. It ordered the DWP to disclose the timescale and anticipated publication date for the feasibility study to establish the full impact, costs and benefits of the introduction of identity cards. The decision turned on the interpretation of section 35(1) (a) of FOI “formulation and development of government policy.” [Full Tribunal Decision](#)

Section 40 - Personal Data

As with every month, access to personal data featured heavily in March and April's decisions.

Gloucestershire County Council (13/3/07) - [Case Ref: FS50086626](#) – Disclosure of a petition
St Albans District Council (5/3/07) - [Case Ref: FS50075365](#) – Planning applications

The case involving the BBC (14/3/07) - [Case Ref: FS50078522](#) was about access to interview notes. The Commissioner ruled that information about the ethnic origin of an advisory committee's members and notes about each applicant made during the appointment process had been withheld correctly under section 40(2) of the Act (third party personal data).

Sometimes when considering disclosure of such data consideration may need to be given to whether the information is already in the public domain.

Case Ref: FS50144027 Date: 23/04/2007

General Medical Council

The complainant requested details of the number of complaints to the GMC against a particular

doctor and the dates of those complaints. The request was refused, except for the details of a complaint which had already been disclosed at a public hearing. The public authority claimed that the rest of the information was exempt from disclosure under section 40(2) as it was the personal data of the doctor in question and that to release the information would breach the data protection principles. The Commissioner agreed with this approach. [View PDF of Decision Notice FS50144027](#)

Of course not all third party personal information will be exempt under section 40.

Case Ref: FS50147863 Date: 17/04/2007

Calderdale and Huddersfield NHS Foundation Trust

The complainant requested information about a doctor who had previously worked for the Trust. Specifically he asked whether the doctor had been carrying out a six monthly rotation as part of her training for General Practice. The Trust refused to provide this information, claiming that the information was exempt from disclosure under section 40. The Commissioner concluded that the release of this information would not be a breach of the DPA, and that therefore section 40(2) was not engaged. [View PDF of Decision Notice FS50147863](#)

If you are interested in access to personal data under FOI, please see my article in the March issue of World Data Protection Report which is also available on the articles page of my website.

S. 42 - Legal Professional Privilege

Requests seem to continue unabated for legal advice received by public authorities. This is despite the fact that the Commissioner and Tribunal are yet to rule in favour of disclosure where legal professional privilege applies.

DWP - [Case Ref: FS50085950](#)

HMRC - [Case Ref: FS50133903](#)

CPS - [Case Ref: FS50130128](#)

St Albans District Council - [Case Ref: FS50075365](#)

Section 42 is, of course, a qualified exemption. Often the Tribunal decision in Bellamy is cited as evidence that there is a very high threshold to prove that disclosure of legal advice would be in the public interest. One further point to bear in mind is that where a public authority is asked for legal advice which has been commissioned by another party, section 42 cannot be claimed.

Case Ref: FS50098767 Date: 02/04/2007

Forest Heath District Council

The complainant requested a copy of legal advice held by the council regarding the quorum necessary for a properly constituted meeting of the local Licensing Sub-Committee. The Commissioner considered that as the council did not itself commission the legal advice and instead obtained it from another public authority, it was wrong to rely upon the section 42 exemption. However, he was satisfied that the public authority was entitled to rely upon the section 41 exemption as the legal advice was shared with it as part of a confidential agreement.

[View PDF of Decision Notice FS50098767](#)

Section 43 - Commercial Interests

Royal Mail - [Case Ref: FS50126145](#)

Export Credits Guarantee Department - [Case Ref: FS50087290](#)

BBC - [Case Ref: FS50105262](#)

The Commissioner has previously stated that public authorities do have commercial interests that the section 43 exemption can be used to protect (see the Post Office decision dated 30/11/05). However this exemption is subject to the public interest test and it also depends on what kind of information is being requested and the likely effect of disclosure. In a recent case involving the **Royal Mail** (Case Ref: FS50126145 Date: 28/03/2007) ICO agreed that disclosure of information about the Royal Mail's Smart Stamp service would prejudice its commercial interests. [View PDF of Decision Notice FS50126145](#)

Section 44 - Trading Standards and Enterprise Act 2002

Last month we discussed an ICO decision involving [East Sussex Council](#) that confirmed what many Trading Standards professionals have often claimed i.e. that Part 9 of the Enterprise Act 2002 provides a legal prohibition on disclosure of certain information they come across as part of their regulatory functions (Section 44 FOI).

Further confirmation of this interpretation has now been provided by the Information Tribunal in a recent decision involving the Office of Fair Trading (OFT).

[Mr M J Dey v Information Commissioner](#) (16 April 2007)

The complainant requested information concerning complaints made about a specific company. The OFT invoked section 44 (statutory prohibitions) as the information was provided under the Enterprise Act 2002. The Information Tribunal agreed with the Commissioner that Part 9 and in particular section 237 was a bar to disclosure. FOI made it exempt under section 44.

Interestingly the Tribunal considered and disagreed with the Scottish Information Commissioner's decision involving [Dumfries and Galloway Council](#), where he took the opposite view.

The Tribunal's decision will provide some comfort to trading standards and other local authority regulatory departments who often receive FOI requests. Care must however be taken to ensure that the information has been gathered pursuant to the specified functions set out in the Enterprise Act. It is also important to note that , if the request is for environmental information, EIR does not provide the same exemption.

And finally, just to prove that this is a topical and up to date podcast, I have to mention Tony Blair.

Case Ref: FS50080115 Date: 26/03/2007

Cabinet Office

Pursuant to an FOI request, the Cabinet Office refused to disclose the Prime Minister's Christmas card list for 2004. It claimed the exemptions under Section 27 (International relations), section 36 (Prejudice to effective conduct of public affairs), Section 40 (Personal information) and, just for good measure Section 38 (Health and safety). The Commissioner agreed that the majority of the names on the list should remain exempt for the reasons provided by the Cabinet Office. However, he ruled that the names of foreign leaders and heads of state on the list should be released, together with the headings used in the list and the number of recipients listed under each heading.

Sadly though, it seems we will never know if Gordon Brown was on Tony Blair's Christmas card list. [View PDF of Decision Notice FS50080115](#)

CONCLUSION

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 do not 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.

Ibrahim Hasan

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