

## **Freedom of Information Podcast**

*Episode 5 – March 2007*

Ladies and gentlemen welcome to episode 5 of the UK's first monthly 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 February 2007

Amongst other things, this month we will be hearing about

- the first Practice Recommendation issued by the Information Commissioner
- the review of the Records Management Code of Practice
- the disclosure of salary information
- the release of ASBO information
- access to dead peoples' information
- the link between the Enterprise Act and FOI
- when a request can be treated as vexatious
- AND the case of the speeding police bus

We also have an interview with Susan Healy of the National Archives and comment and analysis from Tim Turner of Wigan Council.

### **PRACTICE RECOMMENDATION**

Records management is continuing to climb up the corporate agenda as more Information Commissioner decisions are published. In Episode 1 (September 2006) we discussed the Information Tribunal's decision in *Browbrick. v Information Commissioner and Nottingham City Council* (28<sup>th</sup> September 2006)

The Tribunal recommended that ICO should make practice recommendations to the Council. The first Practice Recommendation (PR) has now been issued. This is the first such PR that ICO has ever made and it requires Nottingham City Council to take various steps relating to aspects of the S45 FOI Code of Practice including advice and assistance, transferring requests and the complaints procedure.

In addition, the Commissioner has asked the National Archives to conduct an assessment of the records management capabilities of the Council. This assessment will take place later this year and will form the basis of a separate PR under the section 46 FOI Code of Practice on the management of records.

Full details are on the Information Commissioner's website:

<[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/notices/nottingham\\_city\\_council\\_practice\\_recommendation.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/nottingham_city_council_practice_recommendation.pdf)>

## **RECORDS MANAGEMENT CODE**

Work is now getting under way to review and revise the Section 46 FOI Code of Practice on records management. Susan Healy is an Information Policy consultant at the National Archives. She is leading the review and has particular responsibility for part 1 of the code (records management).

Susan joins me on the line to discuss her work.

Hello Susan. Welcome

1. What are the reasons for the review – what's wrong with the current code?
2. How long will the review take and when can we expect a final version?
3. Is that the only way that practitioners can get involved in the review?
4. Finally Susan, in a number of decisions the Commissioner has considered the records management of the public authority. Any views on these?

Susan Healy thank you very much for your time.

Comments and suggestions on the code can be emailed to [susan.healy@nationalarchives.gov.uk](mailto:susan.healy@nationalarchives.gov.uk)  
The deadline is Friday 6<sup>th</sup> April.

## **ICO DECISIONS**

There have been no decisions by the Information Tribunal in February, so let's move on to decisions made by the Information Commissioner, of which there were thirty one. Three of these have been about EIR.

Public authorities still seem to be confused as to when to apply FOI and when a request should be dealt with under EIR. ICO has now stated that it will not enter into academic discussion about which regime applies as long as the end result is the same.

### **EIR Decisions**

**Ref: FS50091315 Date: 12/02/2007**

**Public Authority: Harlow Council**

**Summary:** The complainant asked the public authority for a copy of legal advice supplied to it by its legal adviser in connection with a planning issue. The public authority withheld it under section 42 FOI claiming legal professional privilege. The Commissioner found that the requested information should have been considered under the Environmental Information Regulations 2004. Nevertheless the claim that the information was subject to legal professional privilege still applied and the information was exempt from disclosure by virtue of regulation 12(5)(b).

[View PDF of Decision Notice FS50091315](#)

Regulation 12(5)(f) of the EIR is the same as section 40 of FOI and requires the same factors to be considered.

**Case Ref: FER50086605 Date: 15/02/2007**

**Public Authority: Lincolnshire County Council**

**Summary:** The complainant requested copies of statements made by individuals about their use of the supposed route of a public footpath. The public authority released copies of statements where the writers consented but refused to release the remaining statements on the basis they were exempt under section 40 of the Act. The Commissioner was satisfied that the information was appropriately withheld although the Environmental Information Regulations should have been applied and the information withheld under Regulations 12 (5)(f).

[View PDF of Decision Notice FER50086605](#)

Act Now Training is running a full day update course on the EIR. Full details on the Act Now website: [www.actnow.org.uk](http://www.actnow.org.uk)

### **Section 40 – Personal Data Exemption**

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

**Case Ref: FS50090631 Date: 05/02/2007**

**Public Authority: Transport for London**

The complainant requested details of compensation payments made to residents of a specific road under the Land Compensation Act following the building of the A12 Hackney M11 Link Road. The public authority confirmed to the complainant the number of compensation offers that had been accepted by residents but refused to disclose details of the size of compensation payments made to each resident on the basis of the exemptions contained at section 40 and 43. The Commissioner's decision is to uphold the public authority's application of 40(2) to withhold the information. He did not see the need to consider section 43.

[View PDF of Decision Notice FS50090631](#)

This month there have been two very interesting ICO decisions in this area. They concern the disclosure of salaries and information about those who have been given ASBO's.

With me to discuss these cases is Tim Turner, Data Protection Officer at Wigan Council.

Hi Tim . Thanks for joining us. Let's take Birmingham NHS decision first.

- Please tell us what it was about.
- What does it show about the Commissioner's approach to disclosing information about staff and salaries?
- How much data can public sector employees now expect to be disclosed about them?

**Case Ref: FS50092819 Date: 22/02/2007**

**Public Authority: University Hospital Birmingham NHS Foundation Trust**

**Summary:** The complainant submitted a request to the public authority for the names, job titles, working patterns and various salary details of a number of doctors working on a specific hospital ward. The public authority initially considered all of the requested information to be exempt under section 40. However, during the course of the Commissioner's investigation the public

authority released the doctors' names, job titles and salary bands. The Commissioner's decision is that the public authority is correct to continue to rely on section 40 as a basis to refuse to release details of the doctor's gross salaries, additional payments and average number of hours each doctor worked. With regard to the information about the additional payments and average number of hours worked, the public authority also explained to the Commissioner that to provide this information would exceed the appropriate cost limit and therefore was also refusing to provide this information on the basis of section 12. The Commissioner has investigated this claim and accepts that this information could not be provided within the cost limit. However, the Commissioner has decided that when originally refusing the request, the public authority provided the complainant with an inadequate refusal notice.

[View PDF of Decision Notice FS50092819](#)

Let's turn to the decision involving Camden Council:

- Again, please remind us of the facts and the outcome
- What kind of information about ASBOs can now be legitimately be published?
- In the light of this decision, do you think ASBO information should be included publication schemes?
- Finally Tim, a more general question: what effect is FOI having on Data Protection?

Tim Turner. Thank you very much for your time.

**Case Ref: FS50123489 Date: 13/02/2007**

**Public Authority: London Borough of Camden**

**Summary:** The complainant asked Camden Council to provide him with the identities of all residents who had been made the subject of Anti-Social Behaviour Orders (ASBOs). The council provided the complainant with an edited version of its ASBO database. Information that could identify individuals was withheld by the council under sections 31 and 40 of the Act. The Commissioner is not satisfied that section 31 was engaged. He decided that the council was wrong to rely on section 40 to redact the names of all the individual recipients of ASBOs but that redaction could be justified in some cases. The Commissioner requires the public authority to provide the complainant with a full version of its ASBO database but after redaction of names in those cases where: reporting restrictions were imposed by the court at the original ASBO hearing or at any hearing for breach; the ASBO did not proceed beyond interim status; the public authority is satisfied that the ASBO recipient is particularly vulnerable and would be put at real risk by disclosure; or the ASBO has now expired.

[View PDF of Decision Notice FS50123489](#)

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.

### **Section 44 Exemption – Trading Standards**

Trading Standards professionals have often claimed Part 9 of the Enterprise Act provides a legal prohibition on disclosure of certain information they come across as part of their regulatory functions.

A few months ago the Scottish Information Commissioner released a decision (210/2006), involving Dumfries and Galloway Council, indicating that he does not consider Part 9 to be a bar on disclosure under FOISA.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6210.htm>

A recent decision shows that ICO's view is that Part 9 does provide a bar to disclosure.

**Case Ref: FS50082765 Date: 05/02/2007**

**Public Authority: East Sussex County Council**

The complainant requested information from the public authority trading standards section about its dealings with a named company including complaints it had received about the company. The public authority refused to disclose relying upon section 44 of the Freedom of Information Act 2000. The Commissioner considered that the public authority had applied section 44 correctly.

[View PDF of Decision Notice FS50082765](#)

### **Section 43 Exemption**

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 and it also depends on what kind of information is being requested and the likely effect of disclosure.

**Case Ref: FS50088494 Date: 05/02/2007**

**Public Authority: Royal Mail**

**Summary:** The complainant requested, firstly, the number of complaints made to a delivery office of the Royal Mail over a specific period of time and, secondly, details of how many of these complaints were investigated and what action was taken as a result. Both parts of the request were refused on the basis that the information was exempt from disclosure under section 43(2) (prejudice to commercial interests). The Commissioner concluded that section 43(2) was not applicable. He took account of the fact that this was not particularly detailed information and on its own it would not have the suggested effect of being so useful to the competition that it would prejudice the public authorities commercial interests.

[View PDF of Decision Notice FS50088494](#)

Local authorities continue to receive requests about the sale of land and it's fair to say in most cases, considering the public interest in transparency and openness in the spending of public money, the information will have to be disclosed.

**Case Ref: FS50090744 Date: 01/02/2007**

**Public Authority: Oxford City Council**

**Summary:** The complainant requested details in relation to the sale of land at Minchery Farm (subsequently developed as the site for a football stadium and a cinema complex), bought from Oxford City Council by Firoka companies. The public authority refused to supply some of the information requested, citing section 41, information supplied in confidence, and section 43, commercial confidentiality. Following consideration of all relevant factors, the Information Commissioner's decision was that the authority could not rely on the exemptions and required the authority to make the information available to the complainant.

[View PDF of Decision Notice FS50090744](#)

### **Dead Peoples' Data**

There have been a number of recent decisions about access to dead peoples' information. Where the information is about medical records then the Access to Health Records Act 1990 will allow the PA to claim that the information is reasonably available elsewhere and so exempt under section 22.

**Case Ref: FS50127442 Date: 19/02/2007**

**Public Authority: Liverpool Womens NHS Foundation Trust**

**Summary:** The complainant requested a copy of a medical report written by a Consultant regarding the care of his late mother. The public authority offered to provide the complainant with a copy of the report under the Access to Health Records Act 1990, on receipt of proof that he was the deceased person's personal representative. The public authority refused to disclose the information under the Freedom of Information Act 2000, and cited the exemption at section 21 of the Act.

ICO agreed with this approach.

[View PDF of Decision Notice FS50127442](#)

See also

**Case Ref: FS50128269 Date: 05/02/2007**

**Public Authority: The Royal Surrey County Hospital**

**Summary:** The complainant made three requests to the public authority for copies of two x-rays taken during the course of the medical care given to her late husband. The complainant alleged that the public authority failed to respond to the first of these requests within 20 working days. The complainant also complained that the information provided in response to these requests was inadequate because of the poor quality of the first x-ray and the fact that the second x-ray did not fulfill her request. Having investigated the matter, the Commissioner has decided that the information provided did fulfill the complainant's requests although the public authority did not respond to the first request within 20 working days. The Commissioner has also decided that the information was exempt under section 21 of the Act because it was accessible to the applicant under the Access to Health Records Act. The Commissioner has established that the public

authority failed to provide the complainant with a refusal notice citing section 21.

[View PDF of Decision Notice FS50128269](#)

As we have discussed in Episode 4, recent ICO decisions state that when a public authority is considering giving access to a dead person's personal information, consideration must also be given to any duty of confidence owed to the deceased. Care must be taken especially to ascertain what the wishes of the deceased were before they died.

**Case Ref: FS50111780 Date: 26/02/2007**

**Public Authority: County Durham NHS Primary Care Trust**

**Summary:** The complainant requested a summary of the medical care provided to her late daughter. In order to provide this information it would have necessitated providing information from the deceased person's medical records. The public authority refused to provide this information and cited the exemption at section 41 of the Freedom of Information Act 2000 (the "Act"), stating that the applicant was not the deceased person's next of kin. Further to this the public authority noted that the deceased person had expressed a wish to her GP for details of her healthcare not to be disclosed to her parents. After examining the submissions by both parties the Commissioner concluded that the use of section 41 was valid.

[View PDF of Decision Notice FS50111780](#)

### *Vexatious Requests*

A useful body of ICO decisions have now developed in the area of when a request is vexatious. Decisions involving Birmingham City Council and Warwickshire County Council (to name a few) have really helped public authority's deal with nuisance requests and requests which clearly imposed an unreasonable burden. Two recent cases provide further guidance:

**Case Ref: FS50110741**

**Date: 30/01/2007**

**Public Authority: West Midlands Passenger Transport Executive**

Between January and November 2005 the same person made 15 requests to the West Midlands Passenger Transport Executive (Centro) concerning the authority's financial relationship with four bus companies. Centro provided a range of information to the requester. In November and December 2005 Centro received the 14th and 15th requests and informed the requester that it would not be answering any further questions on this issue. Centro highlighted that it had already provided detailed responses to requests, made offers of direct discussion and had already spent a considerable amount of time on this issue.

The Commissioner was satisfied that replying to the complainant's 15th request would have imposed a significant and unreasonable burden on Centro. He also concluded that the 15th request was tantamount to harassing the public authority and that it was manifestly unreasonable.

[View PDF of Decision Notice FS50110741](#)

However a recent case suggests that the aggregate effect of a number of requests on different public authorities is not a relevant consideration in deciding whether a request is vexatious.

**Case Ref: FS50117259**

**Date: 15/02/2007**

**Public Authority: Derbyshire Constabulary**

**Summary:** The complainant made requests for over 50 pieces of information to the member organisations of Derbyshire Safety Camera Partnership ('DSCP'). The requests were made over a total of 19 occasions and were all related to an alleged road traffic offence. The complainant received relevant information and advice in relation to his requests, until he made a request dated 7 March 2006 to Derbyshire Constabulary. This request was considered by the police to be vexatious and repeated. DSCP responded on behalf of the Constabulary and refused to provide information citing section 14 of the Freedom of Information Act. The Commissioner considered that the requests were made to different DSCP partners, each separately recognized by the Act, and determined that the requests could not be aggregated for the purpose of applying section 14.

[View PDF of Decision Notice FS50117259](#)

**Section 30 Exemption**

And finally to the case of the speeding police crew bus

**Case Ref: FS50117048**

**Date: 22/02/2007**

**Public Authority: South Yorkshire Police**

**Summary:** The complainant requested a copy of a photograph of a police crew bus caught speeding. The public authority refused to release the information on the basis it was exempt under sections 30, 38 and 40 of the Act. The Commissioner decided that the exemptions at sections 38 and 40 were not engaged, since the occupants could not be identified, and that whilst section 30 (investigations and proceedings conducted by a public authority) was engaged, the public interest in disclosing the information was not outweighed by the public interest in withholding it. Consequently, the complaint was upheld.

This is a useful decision because it provides detailed guidance on the factors which should be taken into account when deciding on public interest issues when applying section 30. Paragraph 21 and 22 are worth a read.

[View PDF of Decision Notice FS50117048](#)

That's all the decisions we have time for this month.

Don't forget Act Now Training runs a workshop series throughout the UK where these decisions will be discussed in detail. It also runs seminars on data protection, surveillance law and records management. Full details at [www.actnow.org.uk](http://www.actnow.org.uk)

**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 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 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](http://www.informationlaw.org.uk)

Until the next time – Goodbye.

**Ibrahim Hasan**  
**Solicitor and Trainer**

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