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Freedom of Information: The Story So far

The Freedom of information Act 2000 (“the Act”) has now been in force for two and a half years. Every month there are around thirty decisions published by the Information Commissioner’s Office. Together with regular rulings from the Information Tribunal, these have guided public authorities when dealing with the more difficult information requests.

The first question when dealing with a request for information is whether it is actually held by the public authority. This is not always easy to answer. In *Marlow v Information Commissioner* (31/8/06), the Information Tribunal had to decide whether a local authority “held” information for the purposes of the Act which was contained in Butterworths Direct. The Tribunal ruled that any information selected, downloaded and saved on the council’s computer system was clearly held as well as information which had been printed off in hard copy. As to other information on the database, it depended on the terms of the contract between the Council and Butterworths and the technical means by which the council accessed the database. Lawyers working in public sector legal departments will need to consider this decision carefully.

Personal data is exempt from disclosure under Section 40 of the Act, if it would breach one of the eight Data Protection Act principles. In deciding whether it does, the Commissioner often makes the distinction between professional personal information and private personal information. According to a number of his decisions, the former should be disclosed. In a decision involving Calderdale Council (24/11/05), the Commissioner ruled that the names of officers who had been on a recruitment trip to Australia should be disclosed to the applicant. He considered it fair and lawful to disclose them taking into account the nature of the officers’ role, the amount of public money spent and the responsibility given to them to carry out the task. This has to be contrasted with a decision about the Commissioner’s office itself (10/10/06) refusing to disclose the private home addresses of all his salaried staff.

Many of the complaints to the Information Commissioner are about public authorities refusing access to information about contracts, tenders and procurement projects. This is an area of tension between the public and private sector. In his decisions, the Commissioner has attempted to strike a balance between the public’s right to know how

there money is being spent with the importance of protecting commercially sensitive information.

The leading decision in this area concerns an appeal by Derry City Council to the Information Tribunal (11/12/06) from a decision of the Information Commissioner. The complainant requested details about Derry City Airport's agreement with Ryanair for the use of its airport, as well as how much Ryanair pay to the Council for the use of its airport facilities. The Council refused to disclose the information citing, amongst others, the exemptions under section 29(1)(a)(Prejudicial to the Economy), section 41 (Breach of Confidence) and section 43(2) (Commercial Interests). The Tribunal ruled that the risk of prejudice to the Council's commercial interests and the economic interests of the region were not sufficient to outweigh the public interest in disclosing the information. The Tribunal also concluded that the Council would not have been vulnerable to a claim for breach of confidence if the information was released at the time of the request.

Public authorities sometimes complain that they often receive requests that are designed to waste their time, are malicious or clearly have no purpose or value. In recent months, the Commissioner has made many decisions deeming requests to be vexatious under section 14 of the Act. In a decision involving the BBC (19/03/07), 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.

The increase in decisions by the Commissioner upholding the use of section 14 may be designed to tackle some of the criticisms the government has made of the Act. Some commentators have argued that these criticisms are an excuse for the government to curtail freedom of information. It is currently consulting on amending the charging regime and a Private Members Bill is going through Parliament which is designed to exempt Parliament and MPs information from the Act.

Identity Cards, or "Entitlement Cards" as the Government prefers to call them, have been the subject of a number of freedoms of information requests. A recent Information Tribunal decision shows that the neither the Tribunal nor the Commissioner are afraid of making decisions against the government. In *The Secretary of State for Work and Pensions v Information Commissioner* (5/3/07), the Tribunal upheld the Commissioner's

decision and ordered the Department of Work and Pensions 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 the exemption in section 35(1) (a) of the Act which is about the “formulation and development of government policy.” Both the Tribunal and the Commissioner felt that it was in the public interest that this information be disclosed.

In the early days of the Act there was some confusion about access to information about the deceased. Recently there have been a number of decisions which shed light on this difficult area. In a decision involving Epsom and St. Helier University Hospitals NHS Trust (25/10/2006) the Commissioner ruled that consideration must be given to any duty of confidence owed to the deceased and this could make the information exempt under Section 41 (Breach of Confidence). Care must also be taken to ascertain what the wishes of the deceased were before they died. In County Durham NHS Primary Care Trust (26/02/07), 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 (breach of confidence), 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. The Commissioner concluded that the use of section 41 was valid.

Recent freedom of information decisions have provided some useful guidance to public authorities and those advising them on dealing with the more tricky information requests. The Information Commissioner still has a backlog of complaints so no doubt there is more to come.

Ibrahim Hasan is a director of Act Now Training and a consultant with IBA Solicitors (www.informationlaw.org.uk). He produces the UK’s first Freedom of Information podcast.
