

## **Freedom of Information Podcast**

### *Episode 9 – September 2007*

Ladies and gentlemen welcome to episode 9 of the UK's first Freedom of Information podcast.

I'm Ibrahim Hasan. In September and October the Information Commissioner published 38 decisions whilst the Information Tribunal published nine. I'm here to guide you through some of these.

Amongst other things, in this episode we will be discussing

- The possibility of private companies having to comply with FOI
- When a request can be treated as vexatious
- Disclosure of celebrity pay packets by the BBC
- Disclosure of staff names attendance at work
- Section 21 and disclosure of information on the web
- The link between the fees provisions and section 16
- The first Tribunal decision on disclosure of dead peoples' information
- AND disclosure of information about speed cameras

### **Vexatious Requests**

Over the past few months there have been many decisions which have clarified when a public authority can treat a request as being vexatious. The number of requests received, the language used and the previous record of the applicant can all be taken into account when deciding whether section 14 should be invoked. A recent ICO decision goes further. It suggests that the context and background of a request can make it vexatious even though, viewed in isolation, it may not be:

#### **Case Ref: FS50154968**

**Date: 27/09/2007**

#### **Public Authority: East Riding of Yorkshire Council**

The complainant requested information from East Riding of Yorkshire Council relating to its health and safety policy and procedures, particularly where the policies and procedures address how risk is assessed and managed. The Council refused to comply with the request on the grounds that it considered it to be vexatious.

The Council stated that dealing with the complainant's requests was extremely time consuming because he submitted multiple requests on the same theme, referred to different requests in one email, incorporated new requests into his email responses creating a snowball effect, combined questions and requests for information, and was trying to merge the freedom of information process with a separate process for pre-action disclosure in court proceedings.

The Commissioner agreed with the Council. In his view the available evidence demonstrated a pattern of requests, and even though the request in question may appear reasonable in isolation, considered in context, it can be justifiably judged as obsessive and unreasonable. The complainant

appeared to be using this request for information as a continuation of his previous requests and complaints to the Council. The Commissioner also based his view on the previous independent knowledge of the complainant's relationship with the Council gained during his investigation of the two other complaints regarding the issue of road inspections and risk assessment.

### **Section 12 and Fees**

The importance of complying with section 16 duty of advice and assistance when applying the fees provisions has recently been emphasised by the Information Tribunal.

In *Robert Brown v ICO and The National Archives* (2<sup>nd</sup> October 2007) about a solicitor who is taking High Court action to get the wills of Princess Margaret and her mother opened to public scrutiny. He claims he was her illegitimate son and so twelfth in line to the throne!

The complainant originally made the following request: for any information held by the National archives in relation to the Princess Margaret Townsend affair, and or any illegitimate child born on or about 05/01/55 to Princess Margaret." When this was initially refused, he subsequently made 637 requests "on the grounds previously stated" to individual closed documents displayed in the National Archives' (TNA) on-line catalogue.

TNA relied on section 14(2) to assert that all the Appellant's individual requests were identical or substantially similar requests, and that therefore, it was not obliged to comply with them. The Tribunal felt that this view misconstrues section 14(2). The Appellant's requests were for information from specific records. If TNA had complied with the request in relation to one specific record and the Appellant had then repeated the request for the information from the same record, section 14(2) would apply. However a request for information relating to the same subject from another record is not an identical or substantially similar request for the purposes of section 14(2).

TNA also tried to argue that the costs of complying would be over the limit. The Tribunal ruled that section 12 and 16 must be viewed together. If a public authority claims it is not obliged to comply with a request for information on costs grounds, it would need to consider whether, with reasonable assistance and advice, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits. Without doing this, it may mean that the public authority's estimate that the cost of complying with the request would exceed the appropriate limit has not been made on a reasonable basis.

In the present case the Tribunal found that it would have been reasonable to expect TNA to advise the Appellant to phase his request in intervals of more than 60 days, and to assist him to do so in a manner that was logical, took account of his priorities and the nature of the searches that TNA could offer, as well as TNA's knowledge of the time that would be involved. Failure to do so means TNA cannot rely on that estimate to relieve it of its obligation to comply with the Appellant's requests.

### **Section 21 and Information on the Web**

Section 21 of the Act allows a public authority to withhold information which is reasonably accessible by other means. Usually this means pursuant to another legal right of access or via the public authorities publication scheme. It now seems that information which is publically available on a website is also exempt under these provisions.

**Case Ref: FS50150319**

**Date: 27/09/2007**

**Public Authority: Cabinet Office**

**Summary:** The complainant made a request to the Cabinet Office for details of the person or persons who drafted the executive summary of the Iraq dossier. The public authority refused the request under Section 21 of the Act as it said that the issue of who drafted dossier, including its executive summary, had been considered as part of the Hutton Inquiry and that this information was available on the inquiry's website.

The Commissioner has considered the complaint and has found that the public authority applied section 21 correctly and that it holds no further information falling within the scope of the complainant's request. It is unclear however, whether the commissioner believes that the information was information "which the public authority ... is obliged by or under any enactment to communicate... (section 21(2)(b))".

### **Section 36 – Internal emails**

Many public authorities receive requests for internal e mails where officers may be discussing controversial issues quite frankly and often using colorful language. Section 36 (2)(b) allows information to be withheld if , in the reasonable opinion of the qualified person, disclosure :

“would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,”

**Case Ref: FS50077877**

**Date: 01/10/2007**

**Public Authority: South Tyneside Council**

**Summary:** The complainant asked the Council for information which it held about the Tyne and Wear Anti-Fascist Association (“TWAF”). In this instance the above exemption was applied to four internal emails in which the funding of TWAF was discussed

The Commissioner has decided that sections 36, 38 and 40 are engaged, and that the public interest lies in favour of maintaining the exemptions.

On the application of section 36, The Commissioner considered the arguments advanced by the qualified person and examined the information in question. The factors addressed by the qualified

person included the candid nature of some of the contents of the emails, and the likely impact on the quality and frankness of future advice on funding should the contents be made public. The Commissioner is satisfied that the qualified person gave proper consideration to those factors before reaching his decision, and that he came to a reasoned conclusion. The Commissioner therefore considers that the exemption is engaged.

With regard to the public interest test, the Commissioner acknowledges that, for the Council to deal with grant applications effectively, particularly in a case such as this where serious security concerns have been raised, a certain distance must be maintained in order to allow individuals to give their personal views without concerns about those views being subject to public scrutiny. It would not be in the public interest for decisions to be made on the basis of advice which was inhibited by such concerns. The Commissioner therefore believes that, in all the circumstances of this case, the public interest factors in favour of disclosure are outweighed by the public interest in maintaining the exemption.

### **Section 40 – Celebrities’ salaries**

In the past year we have discussed many decisions involving requests for disclosure of salaries, expenses and retirement packages. As far as salaries and payments go, I always felt that the if the subject of a request is senior enough, is in a public facing role, is paid substantial sums by the public purse, the public has a right to know what he/she does and how much they get paid for doing it.

Two recent ICO decisions involving two TV personalities introduce additional factors to be considered and it is fair to say makes the issue more complicated.

**Case Ref: FS50070466**

**Date: 08/10/2007**

**Public Authority: BBC**

**Summary:** The complainant requested details of the BBC’s financial agreement with Michael Parkinson, including details of his gross remuneration, for the past three years.

The BBC argued that the information was exempt under section 40 as being personal data disclosure of which would be unfair to Parkinson. So here we have a senior BBC personality, paid substantial sums by the public purse. Surely the public need to know what those sums are.

Not so according to the ICO. Whilst senior officials in public authorities should expect details of their salary bands to be disclosed because they are paid out of public funds commensurate with their level of responsibility. (Interestingly the Commissioner talks about salary bands whereas previously he has ordered disclosure of salaries (see Corby))

However here ICO gave credence to the BBC’s arguments that Parkinson is different to a senior BBC executive.

Payments made to talent (BBC/ICO words not mine) are not analogous to the salaries paid to senior employees in public sector organisations. This is because the sums paid by the BBC to

talent do not relate to the performance of a public function, but rather to individuals who are contracted to provide services to the BBC in an entirely private capacity. In the BBC's view disclosure of the requested information would therefore impinge on the private lives of the relevant individuals, particularly given that in the case of talent, their work forms part and parcel of their lives to such a degree that the professional and private aspects of their lives are often intertwined.

. In conclusion, the Commissioner is satisfied that Mr Parkinson had a reasonable expectation that the BBC would not disclose details of his financial agreement with the BBC and consequently to disclose details of this agreement would be unfair.

A similar decision was reached in the case of Gary Lineker.

**Case Ref: FS50070468**

**Date: 08/10/2007**

**Public Authority: BBC**

I find these decisions difficult to reconcile with the public right to know. Whilst I appreciate that talent don't spend public money or make public decisions, does it mean that any individual who provides services to a public authority, say training services, likewise has a right to privacy. Where does it leave public scrutiny .

**Staff Attendance at work**

**Date: 10/09/2007**

**Public Authority: Cambridgeshire County Council**

**Summary:** The complainant requested information from the public authority on the attendance in work of an individual on a specific day. The public authority refused the request by applying section 40(2) of the Freedom of Information Act. Following the Commissioner's intervention, the public authority confirmed to the complainant that it held the information but maintained its application of section 40(2) to withhold the information itself. The Commissioner upheld the public authority's application of section 40(2) but found that the public authority did not issue a timely or adequate refusal notice in accordance with section 17 of the Act. This Decision Notice is currently under appeal to the Information Tribunal.

**Section of Act/EIR & Finding:** FOI 40 - Complaint Not upheld , FOI 17 - Complaint Upheld

[View PDF of Decision Notice FS50107704](#)

### **Section 41 and Deceased Persons' Records**

Every month there are ICO decisions involving request for access to deceased persons' medical records. Finally we have an Information Tribunal decision in the area. In *Bluck v Information Commissioner and Epsom and St. Helier University Hospitals NHS Trust* (17 September 2007), Mrs Bluck sought access to her daughter's medical records to establish what happened when she died. The hospital refused to release them without the permission of her daughter's husband.

The Commissioner's decision to allow the use of section 41 to withhold the information was upheld by the Tribunal. It decided that all the requisite elements of breach of confidence were present. Disclosure was being sought of sensitive medical information gathered via the confidential relationship between doctor and patient. It would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of her private information. The Tribunal further ruled that the public interest in maintaining confidentiality in the medical records of a deceased outweighs the countervailing public interest in disclosure.

The Tribunal also agreed with the Information Commissioner that the duty of confidence between doctor and patient must survive the death of the patient even though there was no direct caselaw on this point:

"We agree with the [hospital] Trust and the Information Commissioner that, as a matter of principle, the basis of the duty in respect of private information lies in conscience."

The Tribunal drew upon European caselaw on Article 8 ECHR (the right to private and family life) to rule that the deceased's husband could take action for this potential breach of confidence. In *Plon v France* [2004] ECHR 200, the widow and children of the late President Mitterrand had brought an action in the French court to prevent the distribution of a book written by the deceased's doctor and describing his health over a number of years while he was in office. Although the court acknowledged that the lapse of time since the death of a major public figure might lead to the public interest ultimately overriding the late president's right to medical confidence, it nevertheless acknowledged the survival of that right and that it was appropriate for action to protect it to be brought on behalf of the deceased after his death.

### **Section 41 and 43: Speed cameras**

**AND FINALLY**, a decision about speed cameras.

**Case Ref: FS50083358**

**Date: 11/10/2007**

**Public Authority: Home Office**

**Summary:** The complainant requested a copy of an official speedometer handbook and also a copy of the associated approved setup manual. The Home Office (the "public authority") informed the complainant that he had already been supplied with the former document but refused the latter document claiming that the information was exempt from disclosure under sections 41 and 43 of the Freedom of Information Act 2000 ("the Act"). After conducting an internal review, the public authority later varied this to section 43 only. In further correspondence with the Commissioner the public authority sought to re-introduce section 41 and also section 31(1)(a) and (b). After considering the submissions of both parties the Commissioner concluded that none of the exemptions cited had been appropriately applied and that therefore the public authority was in breach of section 1(1) of the Act. Consequently, the complaint is upheld and the Commissioner has ordered the public authority to disclose the requested information to the complainant.

**Section of Act/EIR & Finding:** FOI 17 - Complaint Upheld , FOI 31 - Complaint Upheld , FOI 41 - Complaint Upheld , FOI 43 - Complaint Upheld  
[View PDF of Decision Notice FS50083358](#)

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](http://www.informationlaw.org.uk). Until the next time – Goodbye.

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