

## **Freedom of Information Podcast**

*October 2006*

### **WELCOME**

Ladies and Gentlemen. Welcome to the October edition of the Freedom of Information podcast.

My name is Ibrahim Hasan.

You're listening to the second of a monthly podcast program designed to bring busy practitioners up to date with the latest developments in Freedom of Information law.

In this issue I shall be examining:

- The implications of the Government's proposals to change the FOI fees regulations
- The Information Commissioner's FOI Progress report
- The vexed question of access to information about dead people
- Whether details of a compromise agreement are disclosable
- And a number of other decisions from the information Commissioner's Office and the Information Tribunal.

### **Fees**

Let's begin by looking at the Government's recently announced proposals to change the FOI charging regime.

FOI requests are normally answered free of charge, but government departments can reject requests if they would cost more than £600. For local authorities and other public authorities, the limit is £450. At the moment in deciding whether this limit has been reached, authorities can take account of the cost of finding, retrieving and extracting the information.

Under the new proposals, public authorities would be able to include reading time, consideration time and consultation time when calculating this cost. This could mean that the cost limit is reached much more quickly, than at present, thereby allowing authorities to refuse more requests on costs grounds.

The government also proposes to change the aggregation rules which allow the costs of several requests to be combined when considering whether the costs limit has been reached. At present these rules apply to two or more requests received from the same person or different people acting in concert or in

pursuance of a campaign. In future, all requests made by the same individual or organisation to a given authority will be lumped together and refused if their combined cost exceeds the £600 or £450 limit. This could mean that one journalist from one newspaper asking a complex question could hit the limit and thereby prevent other journalist from the same newspaper making FOI requests for at least three months.

The government's proposals were based on a report from the Frontier Economics group and were published in a response to the Constitutional Affairs Select Committee into the workings of FOI.

All the relevant documents are available on the DCA FOI website:

[www.foi.gov.uk](http://www.foi.gov.uk)

Joining me on the line is Maurice Frankel, Director of the Campaign for FOI.

Maurice thank you for our time. What's are your thoughts about these new proposals

Insert Maurice 1

With regard to the changes in the aggregation rules these are going to hit journalists the most as they are the ones who make the most requests. This may result in public authority resources being directed towards ensuring that Jo public's requests are dealt with properly and more quickly. This has got to be a good thing would you not agree.

Insert Maurice 3

Finally Maurice the government, and even some FOI practitioners, seem convinced that change is needed. What would persuade you?

Insert Maurice 4

Maurice Frankel thank you for joining us.

More details about the Campaigns work can be found on their website at [www.cfoi.org.uk](http://www.cfoi.org.uk)

## **ICO FOI progress report**

The Information Commissioner recently published a new report on the progress made by his office (ICO) in carrying out its duties under the Freedom of Information Act.

Since the Act came into force the ICO has received over 4400 complaints. It has now closed 72% of these cases and an average of 245 cases are now closed each month. The number of backlog cases is expected to go down to 450 by the end of the financial year.

The report also includes the ICO's new enforcement strategy which sets out how a tougher approach will be used with recalcitrant public bodies from now on.

The report and enforcement strategy are on the ICO website:

[Freedom of information: ICO enforcement strategy \(PDF\)](#)

[Freedom of information: ICO progress report](#)

## **IT Decisions**

This month only one decision has been published by the Information Tribunal. Before we discuss it, I want to mention a Tribunal decision which was published towards the end of last month and which contains some useful learning points:

**Browbrick. v Information Commissioner and Nottingham City Council** was decided on 28<sup>th</sup> September 2006.

This is an important decision for a number of reasons. Firstly the Tribunal considers the issue of whether a public authority can raise new exemptions before the Commissioner and the Tribunal which are being claimed for the first time. It states clearly that this can be done and both ICO and the Tribunal have a duty to consider them before reaching their decision. However, neither body has a positive duty to look for exemptions that might have been claimed by the public authority, even though they have not been raised.

Secondly the Tribunal was quite scathing in its criticism of Nottingham Council and also of individual named officers in terms of the way the request had been handled and their conduct during the appeal. It goes as far as to award costs against the Council and also to recommend that ICO makes a practice recommendation to the Council specifying steps it should take to comply with S45 and S46 codes of practice.

This decision will be worrying for Freedom of Information officers having to deal with difficult issues of fact and law. The last thing they want is the added pressure of being named in a Tribunal decision.

I suggest that listeners, especially front line practitioners, carefully read this decision and perhaps even quote it to managers, if only to re in force the message that the Tribunal is not a toothless tiger.

The most recent Tribunal decision is **Hogan v Oxford City Council and Information Commissioner (dated 17<sup>th</sup> October 2006)**

The Tribunal agreed with the ICO when it ruled that the disclosure of VIN numbers of vehicles owned by the Council would be likely to prejudice the prevention and detection of crime and would not be in the public interest to disclose under section 35 of the Act. The decision contains some useful guidance (para 27-36) about the prejudice test. It also makes a useful point at paragraph 32 which I quote:

“...While the intended use or motive of the applicant is not relevant to a decision to grant or refuse access, this Tribunal accepts that where a public authority is aware of the intended use, it may be a factor for consideration when assessing the nature of the prejudice.”

### **ICO Decisions**

Let's move onto recent decisions made by the Information Commissioner. There have been 22 decisions this month and once again they are dominated by discussion of application of the section 40 exemption for personal data.

It is now settled law that purely private information about individuals will be exempt from access. To reinforce this point, this month the Commissioner upheld one of his own decisions to refuse access to the residential addresses of all the Information Commissioner's current salaried staff. (Case Ref: FS50128761 Date: 10/10/2006)

[View PDF of Decision Notice FS50128761](#)

But what about other personal information?

We discussed a number of decisions in last month's podcast.

A recent decision in this area involved **City and County of Swansea** was published on **02/10/2006 - Case Ref: FS50071454**

The Council refused to disclose the cash pay off figure, which was part of a compromise agreement, for Vivienne Sugar, a former Chief Executive who retired in 2002. This was on the basis that the withheld information was personal

information and that disclosure would breach the Data Protection Act (section 40) The Commissioner agreed with this approach. He took account of the fact that Mrs Sugar had entered into a compromise agreement which contained a confidentiality clause.

I asked Ilyas Bulbulia, an expert on employment law and principal of IBA Solicitors, his view on this decision:

Ilyas thank you for joining us.

What is your view on this decision?

Insert Ilyas 1

Is it common for an employee to insist on a confidentiality clause with in a compromise agreement?

Insert Ilyas 2

Finally Ilyas, if this decision stands, what do think will be its long term effect?

Insert Ilyas 3

Ilyas Bulbulia, Once again thank you. You can find more details about Ilyas and his employment law services at [www.ibasolicitors.com](http://www.ibasolicitors.com)

[View PDF of Decision Notice FS50071454](#)

Travelling round the country, I get a lot of questions about access to information on dead people. A recent ICO decision sheds light on this difficult issue.

**Epsom and St. Helier University Hospitals NHS Trust dated 25/10/2006 (FS50071069)**

concerned a request made for the records of an individual, now deceased. The request was refused, under section 41 of the Act, on the grounds that a duty of confidence was owed to the deceased.

ICO stated that the duty of confidentiality extends beyond death. If the information was disclosed there is, in theory at least, an actionable breach of confidence which would allow the personal representatives of the deceased to sue the Trust.

[View PDF of Decision Notice FS50071069](#)

This decision will assist health care and social services professionals who often have to consider access to such information and have to balance the competing interests of the public, relatives and the deceased.

In a decision involving **Gateshead Council Date: 04/10/2006 Case Ref: FS50066289**, the complainant asked the public authority for information which it held about the British National Party and the Tyne and Wear Anti - Fascist Association (TWAFSA).

In its response the Council said that it held no information about the BNP. It made available to the complainant all information held on TWAFSA but redacted the names and contact details of individuals and groups, citing the exemption contained in section 38 (health and safety) ..

The Commissioner decided that sections 38 are engaged in this case and that the public interest lies in favour of maintaining those exemptions. He has also decided that section 40 is engaged in respect of certain personal information.

[View PDF of Decision Notice FS50066289](#)

Finally a decision involving a request for information about Princess Margaret :

**National Archives Date: 17/10/2006 Case Ref: fs50102437**

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." He subsequently made 637 requests "on the grounds previously stated" to individual closed documents displayed in the National Archives' (TNA) on-line catalogue. The Commissioner considered representations from both parties and has decided that TNA has correctly applied sections 12 and 14 of the Act with regard to exceeding the cost limit and that they were repeated requests.

[View PDF of Decision Notice fs50102437](#)

This is interesting because of the story in the Times, on 25<sup>th</sup> October 2006, (<http://www.timesonline.co.uk/article/0,,2-2420493.html>)

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!

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

Don't forget Act Now Training is running a major conference FOI Conference where these decisions will be discussed in detail. It also runs workshops 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 pod cast.

This podcast was brought to you by me Ibrahim Hasan. I specialise in all aspects of information rights law particularly Freedom of Information and Data Protection. 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. This is the only podcast of its kind in the UK. There has been more than 800 downloads of last month's podcast. The script for that podcast is now available to download from the site.

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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Ibrahim Hasan is available for legal advice and in house training on all aspects of information law particularly freedom of information, data protection and surveillance law.

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