

Law Society Gazette 18<sup>th</sup> September 2008

## **Freedom of Information Update**

**By Ibrahim Hasan**

Requests to public authorities under the Freedom of Information Act 2000 (FOI) are becoming more challenging. Some are even getting requests about how they handle such requests. This has caused concern amongst information professionals that their often frank comments about requestors (and how to deal with them) may have to be disclosed. Section 36 provides a possible exemption. Subsection (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,”

This exemption was claimed by the Home Office (30/6/08 Ref: FS50174491) recently when a complainant requested documents relating to internal Home Office communications relating to his company’s use of FOI. So reluctant was the Home Office to release this information, even to the Information Commissioner, that the latter had to serve an Information Notice. Having assessed it, the Commissioner found that the section 36 exemption was engaged but the public interest favoured disclosure.

In reaching this decision, the Commissioner considered the severity, extent and frequency of the prejudice if the information was disclosed. He rejected the Home Office’s argument that disclosure would make officials responsible for providing advice and recording information less likely to perform their duties properly. He also considered that, in this case, the timing of the request was important. At the time of the request, all the complainant’s FOI requests to the Home Office, falling within the scope of this request, had been resolved one way or the other. He therefore did not consider that disclosure of the information would be circumventing the normal FOI review procedure. Disclosure could have the positive effect of increasing the complainant and the public’s confidence in the robustness of the Home Office’s internal procedures for handling information requests.

The long running saga of MPs' expenses finally came to a head in June when the High Court upheld the Information Tribunal's decision of 26<sup>th</sup> February 2008 to require MPs to disclose much more detail about how they spend their £22,000 second-home allowance. This is the now famous case about the John Lewis List (*Corporate Officer of the House of Commons v (1) The Information Commissioner (2) Heather Brooke (3) Ben Leapman (4) Jonathan Michael Ungood-Thomas [2008] EWHC 1084 (Admin)*).

The High Court agreed with the Tribunal and the Commissioner that the public had a right to know the information and the MPs' expectations of privacy were not reasonable. It also upheld a decision by the Information Tribunal that MPs' private addresses should be made public as part of the disclosures, except where they had a "special security reason", for example, "because of a problem with a stalker or a terrorist or other criminal threat".

Another interesting Tribunal decision sheds more light on this issue of disclosure of addresses. In [Anthony Turcotte v Information Commissioner and London Borough of Camden](#) (12<sup>th</sup> June 2008) the appellant challenged the council's decision to disclose redacted addresses of a housing association's (CHG's) properties. It had removed house and flat numbers on grounds of personal data (section 40). It argued that to disclose the full addresses of the properties (when taken with electoral roll information) would allow individual occupiers to be identified. Because the qualification criteria for housing by CHG included homelessness or significant housing need, the data would permit individuals to be identified as part of a distinct, and potentially vulnerable, group. The Commissioner agreed with this approach.

On 19<sup>th</sup> June 2008, the Information Commissioner ordered Mid Suffolk District Council (19/6/08 FS50131138) to release a contract with a commercial partner, including the financial details, concerning the work to carry out repairs and maintenance at Mid Suffolk Leisure Centre. The Commissioner dismissed the possibility that releasing the contract would be likely to prejudice the commercial interests of the council.

The council initially provided a redacted version of the contract but told the requester that it was unwilling to release the financial details. The Commissioner noted that these details were mainly the individual price quoted per task and the total price for each section of the contract. The

council provided a number of reasons including that disclosure would breach confidentiality, set a precedent and may prevent it from obtaining the best possible price for future work or projects.

The Commissioner refused to accept that disclosure would be likely to lead to any change in the tendering process or undermine the council's ability to achieve best value for money. The contract in question dated back to 2004. He also refused to accept the council's suggestion that disclosure would deter organisations from entering into business with public authorities on the basis that council contracts are a lucrative source of business for commercial organisations.

In rejecting the council's contention that releasing the contract would be likely to prejudice the commercial interests of the contractor, the Commissioner emphasised the importance of the Information Tribunal's decision in the case of *Derry City Council v Information Commissioner* (EA/2006/0014). This pointed out the need for convincing arguments to demonstrate the likely prejudice to third parties. The Commissioner stated that it may be the case that a public authority can provide evidence to indicate that a third party has been consulted. If this is not possible, it should at least be obvious that their arguments are the genuine concerns of the third party itself and not, for example, simply the Council's own thoughts on the matter.

Another interesting Commissioner decision on the application of the section 43 exemption concerns *Plymouth Primary Care Trust* (5/6/08 Ref: FS50084359). The complainant requested a copy of a contract agreed by the Trust for the provision of an independent treatment centre. He also requested copies of correspondence concerning the contract. The Trust refused to disclose some of the requested information on the basis of the various exemptions including 43(1) (trade secrets) and 43(2) (prejudice to commercial interests).

The Trust sought to rely on section 41 to withhold information in Schedule 9 of the contract on the basis that it contained confidential information provided by the Service Provider such financial models consisting of very lengthy and detailed computer spreadsheets on the financial projections of the Service Provider for the proposed five year duration of the contract.

The Commissioner determined that some of the information contained in the contract, relating to how the service provider had calculated its prices, was exempt under section 41 and a limited amount of information contained in the additional documents was exempt under sections 40 and

43(2). He ordered the disclosure of the remainder of the information. In coming to his view on section 43, the Commissioner considered the following factors which are useful to bear in mind for those considering similar requests and wishing to argue that disclosure would prejudice their authority's commercial interests:

- i. the degree of similarity between the contract for the treatment centre and other negotiations ongoing at the time of the request;
- ii. the nature of the information that was withheld;
- iii. additional arguments raised by the Trust relating to the prejudicial effect of the disclosure of the withheld information.

Every month there are an average of twenty decisions by the Information Commissioner and five by the Information Tribunal. It is vital that those who advise and practice in this area keep up to date with the latest developments.

*Ibrahim Hasan is a director of Act Now Training([www.actnow.org.uk](http://www.actnow.org.uk)) and a consultant with IBA Solicitor ([www.ibasolicitors.com](http://www.ibasolicitors.com))*

### **FOI Courses from Act Now Training**

<p><b><u>Freedom of Information: An A-Z Guide</u></b> <i>with Paul Simpkins and Ibrahim Hasan</i></p> <p><b>Belfast</b> - 31<sup>st</sup> Oct     <b>Manchester</b> - 11<sup>th</sup> Nov <b>London</b> - 6<sup>th</sup> Nov</p> <p>A complete guide to the Freedom of Information Act. Ideal for those who have little or no knowledge of FOI. Key issues including fees, exemptions and how to recognise, and practically deal with, an FOI request will be discussed. We will also examine the latest guidance from the Information Commissioner.</p>	<p><b><u>Freedom of Information, Contracts and Commercial Confidentiality</u></b> <i>with Ibrahim Hasan</i></p> <p><b>Manchester</b> - 8<sup>th</sup> Dec</p> <p>This highly practical workshop is designed to examine the key issues around giving access to commercially sensitive information, pursuant to FOI, owned by public authorities or received from private sector partners through contracts and tenders. All the latest decisions from the Information Commissioner and the Tribunal will be discussed.</p>	<p><b><u>FOI/FOISA Update: Latest Decisions &amp; the Public Interest Test</u></b> <i>with Ibrahim Hasan and Tim Turner</i></p> <p><b>Manchester</b> - 4<sup>th</sup> Dec     <b>London</b> - 2<sup>nd</sup> Dec <b>Edinburgh</b> - 20<sup>th</sup> Nov (FOISA)</p> <p>An advanced workshop examining the latest decisions of the Information Commissioner, the Scottish Commissioner and the Information Tribunal. It will also examine the factors to be considered when applying the Public Interest Test. Essential for all those wishing to keep up to date with FOI/FOISA.</p>
--	---	--

**More Details and online booking at: [www.actnow.org.uk](http://www.actnow.org.uk)**