

Tripping over freedom of information

Defendant PI Conference
12KBW & Veitch Penny
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TRIPPING OVER
FREEDOM OF
INFORMATION

Catherine Brown & Daniel Tobin
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Contents

- A little history
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- The Exemptions
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A Little History

- Freedom of Information legislation is not unique to the United Kingdom
- The UK is a little way behind many other countries in passing Freedom of Information legislation:
 - Japan (1999)
 - Australia, New Zealand and Canada (1982)
 - Holland and France (1978)
 - USA (1966)

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A Little History (2)

- 1995 – Code of Practice on Access to Government Information
- 1996 – Tony Blair pledges personal commitment to Freedom of Information legislation
- 1997 – a commitment to FOI legislation appears in the Labour Party manifesto for the General Election
- 1997 – Government White Paper – “Your Right to Know – The Government’s proposals for a Freedom of Information Act”
- 2000 – The Freedom of Information Act 2000 is passed
- 2005 – FOIA 2000 is fully in force

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How it works

- The aim of the FOIA is to grant a right to seek access to all recorded information held by a public body
- “Recorded information” includes information held manually and electronically
- “Public body” is defined in Section 3 and Schedule 1 to the FOIA 2000
- paragraph 7 of Schedule 1 – “in England, a county council, a London borough council, a district council or a parish council”
- paragraph 14 – “A fire authority constituted by a combination scheme under section 5 or 6 of the Fire Services Act 1947”

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How it works (2)

Examples of some of the other designated Public Bodies

- Inner and Middle Temple
- The House of Commons and the House of Lords
- Transport for London
- The Armed Forces (except special forces and those assisting GCHQ)
- The NHS
- The National Maritime Museum

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How it works (3)

Two stages:

(i) Do you have it? (section 1(a) of the FOIA 2000) -- "the duty to confirm or denial"

(ii) May I see it? (section 1(b))

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How it works (4)

- The request must be made in writing
- This includes e-mail
- The reason for the request is immaterial (i.e. it does not have to be stated)
- Address must be supplied

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How it works (5)

- Upon receipt of the request the public body has 20 working days in which to respond
- The public body is entitled to ask for a fee to be paid for the information
- Time stops running whilst payment is awaited
- Applicant has three months in which to pay the fee
- If it is going to cost more than "the appropriate limit" (£450) to provide the information public body can refuse to provide it, but it must offer to provide other information if it can do so at a lower cost
- However, the duty to indicate whether it is available does not cease simply because the cost of disclosing it will exceed the appropriate limit

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How it works (6)

- See Case Ref. No. FAC0065281
 - South Holland DC charged £25 for the disclosure of 296 pages of photocopied material about some proposed wind turbines. A complaint was made that this fee was excessive
 - the Commissioner dismissed the complaint

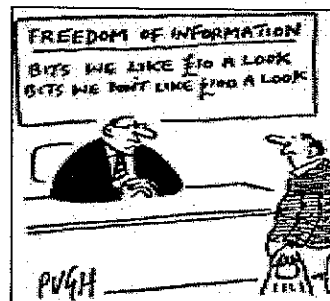
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How it works (7)

- See Case No. FER0074855
 - The London Borough of Harrow charged £188 for the disclosure of 8 A3 photocopies and 12 A4 photocopies dealing with two planning applications
 - this was £18 for each A3 sheet, £16 for each Decision Letter and £6 for each standard letter
 - the Commissioner held that these charges were reasonable

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How it works (8)



How it works (9)

- When refusing a request the public body must issue a Refusal Notice
- See Good Practice Guidance Note 1
- If the Public Body takes the view that it requires a longer period in which to consider the public interest test, it must still issue a Refusal Notice indicating both that more time is required and when the decision will be reached
- The Refusal Notice must also detail the complaints system (if there is one) and the right of appeal to the Commissioner
- See the Refusal Notice Checklist at the end of Good Practice Guidance Note 1.

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How it works (10)

- The duty to provide advice and assistance under Section 16
 - 16. - (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
 - (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

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How it works (11)

- The Information Commissioner
- Complaints lie to him
- He has the power to refer the matter to the High Court of Justice for contempt proceedings

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Rights are not unqualified

- The rights are not unqualified
 - fees
 - a vexatious or repeated request
 - one or more of the exemptions apply

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Vexatious/repeat requests

- Vexatious/repeated requests (section 14)
- Section 14(1): Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious
- Section 14(2): Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

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Vexatious/repeat requests (2)

- "vexatious" – not defined in the Act
- "has habitually and persistently and without reasonable ground" (see s.42 of the Supreme Court Act 1981)
- See Awareness Guidance Notes No.22

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Vexatious/repeat requests (3)

- A vexatious request may:
 - impose a significant burden; and
 - clearly does not have any serious purpose or value;
 - is designed to cause disruption or annoyance;
 - has the effect of harassing the public body;
 - can otherwise be characterised as obsessive or manifestly unreasonable

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Vexatious/Repeat Requests (4)

- Repeat requests – “*substantially similar*” and “*reasonable period*”
- Reasonable period is not defined
- Awareness Guidance Notes No.22 says it is for the public body to decide, by reference to the type of information sought and the information provided previously. Much depends on the type of public body and how often it updates its information.
- Having a policy is very important – the decision to treat as a repeat request is more likely to be successfully defended before the Information Commissioner

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The Exemptions

- Two types of exemptions arise:
 - Absolute exemptions
 - Qualified exemptions (subject to the public interest test)

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The Absolute Exemptions

- Absolute exemptions
- Where such an exemption applies, the public body is relieved of its duty to confirm or deny and to disclose (see s.2 of FOIA 2000)
- There are 8 absolute exemptions
 - (i) Section 21 – the information is accessible by other means
 - (ii) Section 23 – information supplied by, or relating to bodies dealing with security matters

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The Absolute Exemptions (2)

- (iii) Section 32 – information in Court records
- (iv) Section 34 – information protected by parliamentary privilege
- (v) Section 36 – information held by House of Commons/House of Lords, disclosure of which would prejudice effective conduct of public affairs
- (vi) Section 40 – personal information
- (vii) Section 41 – information provided in confidence
- (viii) Section 44 – information disclosure of which is prohibited by law

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The Absolute Exemptions (3)

- Section 21 (available by other means)
- See Case No. FS50063907
- The Complainant asked Hertfordshire CC for information regarding the circumstances surrounding his late mother's transfer from hospital to a care home. HCC said that the Section 21 exemption applied because the information was available by another means. The “other means” consisted of various items of correspondence previously sent to the Complainant and included the report of an internal investigation into the Complainant's mother's treatment.
- The Commissioner dismissed the complaint.

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The Absolute Exemptions (4)

- ❑ Section 32 (Information in Court Records)
- ❑ See Case No. FS50065282
- ❑ The Complainant asked Bridgnorth District Council for a copy of the transcript of some criminal proceedings involving some Council employees. Bridgnorth refused, citing the absolute exemption under Section 32.
- ❑ The Commissioner dismissed the complaint. It was clear that the information was based on the Court transcript and this was something which Section 32 applied to.
- ❑ Also see Awareness Guidance Note 9

The Absolute Exemptions (5)

- ❑ Section 40 (personal information)
- ❑ See Case No. FS50062124
- ❑ Corby Borough Council were asked for information regarding the remuneration of a former Temporary Finance Officer. They said that, *inter alia*, it was exempt under Section 40 on the basis that it was personal information under the data Protection Act 1998.
- ❑ The Complainant challenged Corby BC's reliance upon Section 40. The Commissioner upheld the complaint, concluding that the request did not breach the relevant principles of the DPA. He also observed that "it has been recognised for some time that individuals occupying senior posts within public authorities are likely to be subject to greater levels of scrutiny than those in more junior roles. This helps to ensure accountability of those individuals for their actions. We are satisfied that the Former Temporary Finance Officer could not have reasonably expected that the requested information would remain confidential."
- ❑ Also see Awareness Guidance Note 1.

The Qualified Exemptions

- ❑ The Qualified Exemptions
- ❑ This arises where the public body, having identified a possible exemption, must go onto consider whether there is a greater public interest in confirming, denying or (if appropriate) disclosing the document than in maintaining the exemption
- ❑ Some are called class exemptions and some are called prejudice exemptions

The Qualified Exemptions (2)

- ❑ There are 16 Qualified exemptions
- ❑ Those that are likely to be material at local government level are:
 - (i) Section 22 – information intended for future publication
 - (ii) Section 28 – information relating to the economy
 - (iii) Section 30 – information relating to investigations/proceedings conducted by public authorities
 - (iv) Section 31 – information relating to law enforcement
 - (v) Section 33 – information relating to audit functions
 - (vi) Section 36 – information which might prejudice the effective conduct of public affairs
 - (vii) Section 38 – information relating to health & safety
 - (viii) Section 39 – information relating to personal information
 - (ix) Section 42 – information relating to legal professional privilege

The Qualified Exemptions (3)

- ❑ Section 22 – Information intended for future publication
- ❑ See Awareness Guidance Note 7
- ❑ Only "if it is reasonable in all the circumstances"
- ❑ The intention to publish must be held at the time of the request
- ❑ Generally speaking, when considering the public interest, the sooner the intended date of publication, the better the grounds for relying upon the exemption
- ❑ Early release may result in unfairness to others
- ❑ An earlier than planned publication may result in staffing difficulties (i.e. where additional staff would otherwise have been employed to deal with increased queries/workload)

The Qualified Exemptions (4)

- ❑ Section 28 – Information relating to the economy
- ❑ See Awareness Guidance Note 15
- ❑ Section 30 - Information relating to investigations/proceedings conducted by public authorities
- ❑ See Awareness Guidance Note 16
- ❑ It is necessary to consider whether the wider public interest is served by disclosure
- ❑ Ceases to apply to information more than 30 years old (historical document)

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The Qualified Exemptions (5)

- Section 30
- Covers investigations and proceedings (i.e. proceedings brought by local planning authority under the T&CP Act 1990 or investigations, the purpose of which is to ascertain the cause of an accident – see s.31(2) of FOIA 2000)
- The Commissioner has identified some factors which be relevant to the question whether the exemption can be relied upon:
 - there is a strong public interest access to justice and ensuring that justice is done and seen to be done
 - it is harder to justify the exemption in respect of concluded investigations;
 - will disclosure of the information prejudice the outcome of an ongoing investigation?

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The Qualified Exemptions (6)

- Section 31 – information relating to law enforcement
- See Awareness Guidance Note 17
- Is subject to “prejudice” test – the information cannot be withheld unless its disclosure will prejudice one of the Sections specified purposes
- Ascertaining the causes of an accident is one of the specified purposes, as is securing the health and safety of people at work

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The Qualified Exemptions (7)

- Other Awareness Guidance Notes
- Section 33 (public audit) – Awareness Guidance Note 18
- Section 36 (public affairs) – Awareness Guidance Note 25
- Section 42 (legal professional privilege) – Awareness Guidance Note 4

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The Qualified Exemptions (8)

- Section 39 – Information relating to personal information
- See Awareness Guidance Note 1
- The exemption does not apply where the applicant is seeking information about himself
- The exemption applies if the disclosure would breach the Data Protection Act 1998
- The Commissioner says: *“In thinking about fairness, it is likely to be helpful to ask whether the information relates to private or public lives of the third party. Information which is about the home or family life of an individual, his or her private finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned”*

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The Qualified Exemptions (9)

- Section 38 – information relating to health and safety
- See Awareness Guidance Note 19
- Information is exempt if its disclosure would or is likely to endanger the physical or mental health or safety of any individual
- Even if exempt the public body must consider whether disclosure should nevertheless be made in the public interest
- Information relating to sites of controversial scientific research, information relating to the dead (harm the relatives) or information whose disclosure might have an adverse effect on public health

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The Codes of Practice - Origins

- FOIA 2000:
- Section 45:-
 - Guidance as to the practice it would be desirable for public authorities to follow in connection with the discharge of functions
- Section 46:-
 - Guidance as to the practice it would be desirable for public authorities to follow in connection with the keeping, management and destruction of their records

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Role of C.O.P.

- Section 47:
 - Duty of Commissioner "to promote the following of good practice by public authorities and, in particular, ... to promote the observance by public authorities of - ...
 - (b) the provisions of the codes of practice under sections 45 and 46"

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Non-compliance with C.O.P

- Section 48:
 - "If it appears to the Commissioner that the practice of a public authority ... does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a ..."practice recommendation" specifying the steps which ought ... to be taken for promoting such conformity"

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Sanctions for non-compliance

- If non-compliance results in breach of duty to provide advice and assistance under Section 16:
 - Information Commissioner can enforce compliance with duty
- If non-compliance does not result in breach of duty under Part 1 of the Act:
 - Only power of I.C. is to issue practice recommendation
 - No formal sanction for failure to comply with practice recommendation
 - I.C. can make adverse comment in annual report

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Section 45 C.O.P.

- Paragraph 1.3
 - Statutory Duty on Lord Chancellor to issue Code
 - Provisions of the Code themselves do not have statutory force
 - However, authorities are expected to abide by the Code unless there are good reasons, capable of being justified to the Information Commissioner, why it would be inappropriate to do so
 - If authorities comply with the Code, they will have complied with the Section 16 duty to provide information and assistance

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Section 45 C.O.P.

- Covers:
 - Provision of advice and assistance
 - Handling requests which appear to be part of an organised campaign
 - Timeliness in dealing with requests
 - Charging fees
 - Transferring requests for information
 - Consultation with third parties
 - Third party contracts/Accepting info in confidence
 - Refusal of request
 - Complaints procedure

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Section 46 C.O.P.

- Paragraph 1: Aims of the Code:-
 - Set out practices which public authorities should follow in relation to the creation, keeping, management and destruction of records
 - Also deals with public records and the Public Record Office

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Section 46 C.O.P.

- The records management function should be recognised as a specific corporate programme within an authority and should receive the necessary levels of organisational support to ensure effectiveness
- An authority should have in place an overall policy statement ... on how it manages its records, including electronic records
- Active records management re creation, keeping and maintenance of records
- Disposal arrangements
- Management of electronic records

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Section 46 C.O.P.

Is this your approach to information?



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Section 46 C.O.P.

The right approach to information management?



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