FOIA without the Lawyer

Freedom, Information and the Press

by Brendan Montague and Lucas Amin

The Request Initiative and Centre for Investigative Journalism
Guide to the UK Freedom of Information Act

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This is a guide to the Freedom of Information Act 2000, which applies to England, Wales and Northern Ireland. In **Scotland**, Scottish public authorities are covered by the Freedom of Information (Scotland) Act 2002. The two acts are similar but the Scottish legislation is discernably different in places and considered generally to be more transparent. For more information visit the Scottish Information Commissioner's website: www.itspublicknowledge.info > For Public Authorities > Briefings and Guidance > Differences between FOISA and FOIA

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Foreword

Robin Hopkins, 11KBW

"This freedom should... be regarded as one of the best means of improving morality and promoting obedience to the laws, when abuses and illegalities are revealed to the public through the press..."

– Adolphus Frederick, King of Sweden, in proclaiming the first Freedom of Information Act, 2 December 1766

If they knew then what they know now, British politicians and civil servants would not have given us the Freedom of Information Act 2000. They have celebrated the Act's seventh birthday (since coming into force) with a post-legislative scrutiny process in which Jack Straw, Gus O'Donnell and others have echoed Tony Blair's casting of the Act as a lamentable Frankenstein's monster that undermines good governance. Perhaps this reaction is unsurprising, given the Act's pivotal role in many of the defining scandals and public controversies of early 21st-century Britain. Consider for example MPs' expenses, information on the Iraq War decision and the extent of phone hacking practices.

On the one hand then, it is something of a miracle that the Act is available to us as a tool for scrutinising the acts and decisions that affect us. Viewed this way, the Act is a precious gift for which the public should be grateful. The tone of most submissions during the post-legislative scrutiny also suggests it is a fragile gift which might readily be taken away, or at least curtailed.

On the other hand, however, it's hard to imagine a modern liberal democracy which lacks a tool like this, and it seems odd that Britain took so much longer than many other countries to introduce this legislation. The FOIA-related scandals and controversies that have caused such anxiety in political and governmental circles show why we needed the Act in the first place: accountability requires the public seeing not only what was intended for publication, but also what happens behind the scenes. This makes the Act an essential complement to rigorous investigative journalism. Viewed this way, the Freedom of Information Act is genuinely a democratic right rather than a gift.

This is underscored by the fact that so much of the Act turns on an assessment of the overall public interest. Lawyers do not have a monopoly over public interest arguments. The Information Commissioner recognises this, and so do the tribunals. The Act is fundamentally democratic both in its aims and in its mechanics.

The strong moral case for the Freedom of Information Act will – hopefully – make it politically unattractive for any government to repeal or emasculate. If so, the Act is here to stay. It is worth understanding, and will continue to reward those who use it well.

This guide seeks to encourage and help with effective use of the Freedom of Information Act. That requires targeted and well thought-out requests, efforts to work with (rather than against) public authorities and their information officers in particular, and a sound knowledge of the law. The hope is that this guide makes a meaningful contribution on all of those fronts. Better and more effective FOIA requests make for enhanced public accountability of those who wield power or influence. And the more results the Act delivers in the public interest, the stronger the case for retaining or even extending it.

Robin Hopkins
14 June 2012

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There have been some real trailblazers in Freedom of Information who have set the standard to which we aspire and we would like to congratulate them on their excellent work generally and the advice they have given us in particular. They include Maurice Frankel of the Campaign for Freedom of

Information, Rob Evans of the *Guardian*, Martin Rosenbaum of the BBC and Heather Brooke. The guide has benefitted hugely from the feedback from journalists James Illman, Christine Ottery and Elizabeth Thomson.

Finally, we would like to thank the members of the Request Initiative advisory board not already mentioned: the brilliantly encouraging Gavin MacFadyen from the Centre for Investigative Journalism, the awe-inspiring Duncan Campbell, the peerless Nick Davies, the wonderfully supportive Genevieve Maitland Hudson and the dedicated Des Freedman of the Campaign for Press and Broadcasting Freedom. Finally we must thank UnLtd, the foundation for social entrepreneurs, who gave Request Initiative financial support when it was merely an idea, and Healthy Planet, whose assistance also makes our work possible.

How to use this Guide

The guide comes in two sections.

In the **first section** you will find general advice about making a Freedom of Information request, including ten "top tips" for more advanced requesting. You can then read about the more advanced methodology, which suggests how to build a legal case for disclosure.

In the **second section** you will find an overview of six exemptions, which can be used as examples of how our methodology works in practice. This advice is aimed at investigative journalists with a broad knowledge of government and high standards of reporting and has been written from the perspective of supporting a requester in developing a skills base rather than producing an exhaustive overview of the primary legislation and how it should be interpreted. Those entirely new to the Act may benefit from reading the introductory guide of the Campaign for Freedom of Information and the introduction to Heather Brooke's *Your Right to Know: A Citizen's Guide to the Freedom of Information Act*.

Section One

Making Requests

The first section of the guide provides broad advice on making a Freedom of Information request. Journalists on deadline or with little time can read this section on its own and will learn how to significantly improve the likelihood of disclosure.

1: How to use the Freedom of Information Act

"Openness is not an absolute good in itself... Openness is good where openness is of benefit, crucially of benefit to the public [that] governments are here to serve... The job of the Government is not to provide page leads for the papers but information for the citizen. Freedom of Information was never considered to be, and for our part will never be considered to be, a research arm for the media."

– Lord Falconer, sponsor of the Freedom of Information Bill, Lord Williams of Mostyn Memorial Lecture, 21 March 2007

Investigative journalists and campaigners for the Freedom of Information Act (FOIA) in their most optimistic moments expected the new transparency legislation to unlock hundreds of thousands of sensitive government documents and begin a new era of openness and accountability. Reporters also privately hoped the Act would provide a rich and endless seam of stories that would interest the reading public, regardless of whether the disclosure would serve the public interest. It was a dream.

The Act gives 20 days for authorities to respond to a request and includes a broad range of exemptions which can be relied upon to prevent sensitive information from being released on grounds of national security, a safe space for the discussion and development of public policy, investigations, tax receipts and – as a final failsafe – the ministerial veto. It is therefore considerably weaker than campaigners and reporters had originally hoped.

At the same time, the never ending reduction of resources in newsrooms has meant many staff journalists do not have the time to familiarise themselves with the legislation enough to become so proficient in making requests that the time spent brings sufficient rewards in terms of page leads and rich information to supplement investigations. Few journalists use the Freedom of Information Act regularly and some have never used it successfully.

However, there is still considerable potential for using transparency legislation for journalistic research. Tony Blair once said that introducing the Freedom of Information Act was "naive, foolish, irresponsible", suggesting that it has a degree of power, while the Ministry of Justice is currently engaged in a post-legislative review. The MPs' expenses scandal and the imminent release of parts of the telephone conversation between Blair and George W Bush ahead of the Iraq war are both examples of hugely significant stories coming to light as a result – indirectly and directly – of the Act.

Grazing

Request Initiative has developed two different ways of using the Freedom of Information Act to achieve disclosure. The first is to target information that does not fall within the scope of any of the exemptions. This could be characterised as a "grazing" approach. Information unlikely to be covered by the exemptions includes large datasets that have been collected by public bodies. Others have hit on great stories simply by asking for spreadsheets already

compiled by public authorities. There is a huge amount of information that public authorities will happily publish, when asked.

Some journalists have been successful in using the Act to deliver what are essentially surveys of public authorities, for example asking for costs spent by all police forces, hospitals or central government departments. The Centre for Investigative Journalism is currently compiling a database of all the current contact details of FOIA officers at public bodies precisely to facilitate such a journalistic endeavor. However, this technique does come with an important warning: emailing 43 police forces asking how much they have spent on police informants is simple and quick, but dealing with up to 43 refusals or understanding data presented in different formats can be complex and resource-heavy.

The simplest, but by no means the worst, method is to simply make requests that have been successful in the past. Requests can be made to follow up good stories from the archives, updating datasets that are already in the public domain, and refreshing and taking ownership of good requests by members of the public. The best resource for this is *WhatDoTheyKnow?*

The Request Initiative has taken this approach to the extreme. We are currently using the Freedom of Information Act to map the data storage systems of central government departments down to their file plans and the column headings of datasets so we can then sift through for interesting and important documents. Some knowledge of the law and subsequent High Court rulings, tribunal cases and guidance from the Information Commissioner can go a long way. For example, it has been established that salaries of senior public servants must be disclosed (within a £5,000 band).

Mining

The second approach to the Freedom of Information Act is the polar opposite, and can be characterised as "mining". This involves identifying information that you want and then stopping at nothing until you get it. This can include asking for police reports, government legal advice, memos from meetings. Mining is the classic investigative journalist mode. This approach does mean understanding the law to a much greater degree.

Some exemptions are qualified, which means that information will be released when the public interest is served by disclosure, while others are

"prejudice based" which means exemptions can only apply when the public body can show there could be harm or damage. The definition of such crucial terms as the "public interest" and "would, or would be likely to, prejudice" interests are not defined by the Freedom of Information Act. This means there is scope to challenge refusals and bring about disclosure. However, you do not want to start out asking for information that simply will not be disclosed: the secret services are exempted under the Freedom of Information Act; people's tax returns are exempted by virtue of being covered by specific legislation; there is no hope of changing these facts through the process of making a request. Nor do you want to spend years caught up in the tribunals system for a story that will excite no one and change nothing.

Devising a Freedom of Information Act request that sits just beyond the periphery of what is currently accepted to be information that should be disclosed will prove hugely advantageous. Done well, this can set a precedent with the potential to liberate an entire seam of new and important information of a particular quality that has never been disclosed. The brilliant and tireless Campaign for Freedom of Information is investing considerable time and expertise in identifying cases of this kind and would be ecstatic to hear from journalists working in this way. Having case law with her or his name in the title that is cited can only enhance a journalist's reputation. For example, the author and campaigner Greg Muttitt has forced the disclosure of more than 1,000 UK and US documents, in part by representing himself at an information tribunal, resulting in front page coverage and providing material for his book. *Muttitt v Cabinet Office* is sewn into the history of freedom of information.

The two methods outlined above – grazing and mining – are both effective and neither is inherently more valuable than the other. The question is whether the news environment you are working within demands quick, clever, catchy stories or thorough, robust and complex investigation.

2: How to make a Freedom of Information Act request: Grazing

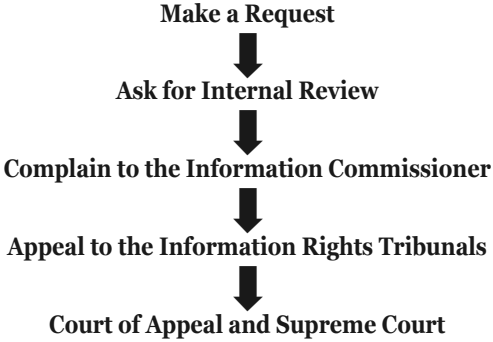
"Greater transparency across Government is at the heart of our shared commitment to enable the public to hold politicians and public bodies to account... The Government must set new standards for transparency..."

– David Cameron, letter to government departments, 31 May 2010

Introduction

The Freedom of Information Act is simultaneously simple and agonisingly complex, like staring at a fractal. In this chapter we are going to provide an extremely short overview of the *process* of making a request followed by ten "top tips" which are equally applicable to grazing and mining style requests. In the next chapter we will outline the four stages of Request Initiative's protocol for delivering comprehensive requests. The following advice is based on our communication with information barristers, staff at the Information Commissioner's Office, national print and broadcast journalists and data managers from universities, national institutions and regional government.

As stated above, there are two different approaches to making a request. One is to dream up a good headline, identify the least information needed to substantiate it and then bang out a three-line request. The Freedom of Information Act covers all national and local government departments, quangos and even extends to some public functions delivered by private companies. A full list of public authorities covered by the act is listed on www.legislation.gov.uk. You can find a less comprehensive but more accessible list of over 5,700 public bodies covered by the act on *WhatDoTheyKnow?*



Making a Freedom of Information Act request is as easy as sending an email. You don't have to specify that it is a request under the legislation. You don't even have to email it to the Freedom of Information officer or the press team. You can simply ask for information, for example: *"Who is your highest paid employee and how much are they paid?"* This puts the burden of knowing the law and locating the information on the public authority. If the request is refused you can simply reply to their email with the words, *"I would like an internal review"* – or drop the request and quickly move onto something easier. If the request is refused following an internal review, you can complain to the Information Commissioner's Office (ICO) using its simple online form. And if the Information Commissioner does not give you the information you need, you can appeal to the Information Tribunal by filling in another form (see chapter 3). This method is low cost and dozens of requests will bring in some results. The Freedom of Information Act really is that simple.

But.

A more targeted and informed request will take considerably more time to compose, but is much more likely to be successful. Each stage in the FOIA process will take at least 20 days and can take months and even years. There are some simple steps that can be taken to significantly increase the potential for disclosure.

The Freedom of Information Act was introduced to support the public's right to know. However, this right is limited. We would all agree that sensitive medical notes held by a hospital should not be disclosed to anyone and everyone. The public sector would not be able to function and would be at a fatal disadvantage against the private sector if commercially sensitive information had in all instances to be disclosed. For these reasons, and many more, a series of exceptions were written into the legislation. The less charitable would suggest that the Act has become a battlefield between journalists and some members of the public who demand total transparency against government and public authorities with traditions and cultures of secrecy or awareness of the risks involved in disclosure. To extend the metaphor, the Act presents a series of trenches that must be traversed in order to obtain information. The following "top tips" are designed to help a moderately expert requester obtain information without investing too much effort.

1) A good call. Section 16(1) of the Freedom of Information Act states there

is a "duty to offer advice and assistance." This may include providing guidance in refining or rephrasing a request so at least some information is forthcoming. The first step for any Freedom of Information request should be calling the FOIA team at the public authority. A few moments on the telephone can help focus requests to make disclosure more likely and can prevent weeks of waiting before being told the information is being withheld. On some occasions, they will simply email a document over.

2) The freedom of information team is not the enemy. The clearest signal we have heard from our contacts is that information officers would in the most part have applied for the job precisely because they are interested in open and accountable government. They may often be battling with cultures of secrecy and politics within their own organisation. Make them an ally and support them in their endeavours by being precise, organised and taking the time to provide specific and dispassionate public interest arguments and information about where relevant cases where similar information has been disclosed. Don't patronise them by saying simply that transparency is a "good thing" – they know that. Turn the information officer into a source, a partner in the endeavour, and not into an enemy gatekeeper. Threats and pompousness will inspire only intransigence. Always thank them – because often nobody else does.

3) Time is on their side. The first hurdle for journalists is the fact that authorities can and almost always do take 20 days to respond to requests. Where there are public interest considerations they will often tell you they need a further 20 days – and perhaps even longer. Complaining about such delays to the Information Commissioner will almost certainly be futile because he will take months to consider the case and at best will simply agree the authority took too long. Call the authority within three days of the request if you have not received an acknowledgement. Call them on the day the response is due. Indicate clearly but cheerfully that a prompt reply is important. Explaining that you are a journalist and need the information quickly can be effective, especially with smaller organisations.

4) Think ahead. Consulting forward planning diaries and requesting ahead of national events such as the Olympics or a general election should mean that information that has taken months to obtain will be topical when released.

5) Consider the costs. Section 12 of the Act allows authorities to refuse to disclose information where cost of compliance exceeds [the] appropriate limit", which for central government departments and similar is £600, while for smaller authorities the limit is £450. The cost of dealing with a request is accepted to be £25 an hour, giving you 24 and 18 hours respectively. Requests need to be focused and clear. Don't ask for every file in the building. At the same time, you don't always want to be too specific. The costs relate to locating, retrieving and extracting information. Finding one sheet of paper in a file will take longer than disclosing the whole file. These costs are met with taxpayers' money so do consider the public interest in disclosure. The cost of redacting information is not currently included in the cost estimate.

6) A document state of mind. Advice from our information officers is to ask for data and specific files rather than asking abstract or broad questions. For example, don't ask, *"Is there evidence of racism in the way pupils are excluded?"* Or even, *"Are more black pupils than while pupils expelled from schools?"* Start by calling up the information officer and asking, *"How do you record the ethnicity of students who have been disciplined?"* Then ask for the dataset and interrogate the information yourself. This increases the chances of any disclosure and also means you are interpreting the data, not the public body. This approach allows for a much richer source of information being made available, from which many issues might arise. For example, alongside data about ethnicity you may find more girls are being excluded from schools than boys for the first time in living memory.

7) Exemptions are the rule. The Freedom of Information Act has 24 exemptions each set out in different sections of the legislation. A full list of the exemptions is available from the Information Commissioner's Office and include: national security, defence, international relations, the economy, investigations and proceedings, law enforcement, audit functions, formulation of public policy, public affairs, communications with the Royal Family, health and safety, personal information, legal privilege and commercial interests. If the information you require falls under one of these exemptions, decide whether you are going to invest the time arguing the case or whether there are other methods of getting the documents. Try and find out if similar information has been released previously, through Google, newspaper archives or by using the Information Commissioner's archive of decision

notices under "tools and resources."

8) The public interest. Some exemptions are "qualified", which means the authority has to balance the benefits of withholding the information against the public interest in disclosure. At the very least, put forward some arguments as to why it serves the general good to disclose the information you want. You can mention transparency and accountability in a democracy but very specific arguments relating to the actual information requested will be considerably more powerful. More advice about the public interest can be found in the following chapters.

9) Show me the money. Every authority will track every penny spent. Information judges have explicitly stated that there is a strong public interest in transparency in relation to government expenditure. The public interest in disclosing the salaries of senior public sector staff – those who make decisions and decide policy – is well established. At the same time, the accounts or spends of departments and quangos are less likely to fall under an exemption. At Request Initiative we ask for "cost codes" for specific activities and then for the amounts recorded under each code; for example, specific police investigations or taxi expenses.

10) Access all areas. Section 11(1) of the Act allows for you to express a preference as to the form the information is provided to you, including "a reasonable opportunity to inspect a record containing the information". This option should allow access to the records office where you can meet the staff and see how the information is held. This can provide an excellent opportunity to find information and make contacts beyond the original request. You can also ask for "a digest or summary of the information". The current government has been explicit in its drive to make pubic sector information available in a form where private individuals can mine, filter and publish the raw data – so think of requesting spreadsheets such as Excel files rather than asking a question.

3: How to make a Freedom of Information request: Mining

"Open government, Prime Minister. Freedom of information. We should always tell the press freely and frankly anything that they could easily find out some other way."

– Sir Humphrey Appleby (fictional), *Yes, Prime Minister*, 1986

Introduction

The mining approach to making requests involves developing an understanding of the quality and form of data held by public authorities and then constructing a well researched legal case for disclosure. The FOIA process ends in the courts and the case presented should resemble a skeleton argument used by lawyers in a trial. It should: a) quote the original legislation in order to establish the tests which need to be met; b) present case law from tribunals and decision notices from the Information Commissioner to support that interpretation; c) use Information Commissioner and government guidance; and finally, d) set out reasons in favour of disclosure, including arguments that i) the exemption should not apply; ii) where it is a "prejudice based" case that any harm or damage is not significant; and iii) where there is a public interest test that this weighs towards disclosure.

This "case" can be presented at any stage in the FOIA process. If you are making a request for controversial information held by a major government department that falls under an exemption, it would be appropriate to present this legal case right at the initial request. This is the most time-intensive method, but has the advantage of displaying your understanding of the law from the beginning and could reduce the time spent going through the various stages of complaint and appeal. This also demonstrates that you are invested in gaining the information, that disclosure is important to you as a journalist and you are not just fishing around for an easy "news-in-brief".

However, it may be more strategic to make a simple first request and then to invest the time building a case as part of the request for an internal review. This allows you to present your case based on the exemptions and arguments the authority has used in its refusal. Some FOIA officers may take umbrage at having the basic law quoted at them, while requests covering several pages can delay responses. As a former Met Police information officer said: "We

know the law and we know our jobs. If there is a public interest in disclosing the information we will do everything we can. Sometimes we just can't give out what people are asking for."

The best advice is, however, that you do construct a good case when complaining to the Information Commissioner. Information Commission Office caseworkers have told us privately of their frustration when requesters bring out good arguments, fantastic supporting evidence and highly qualified legal representatives only when they reach the information tribunals. If the arguments had gone to the caseworker, they would have been able to rule in favour of disclosure.

Request Initiative has produced a protocol with four clear stages for making a case for disclosure. This protocol is a sledgehammer. You can see an example of a mining request at documentcloud.org/documents/369230-example-of-a-mining-request.html.

Step One: The Law

The Freedom of Information Act is accessible and easy to understand. The legislation is available online and it does not take that long to read each specific exemption. The Act does refer to other legislation, and has its own sections and subsections; following these references can be tricky. However, the legislation includes vital indicators of when exemptions should be applied. For example, Section 40 (2) exempts personal information from being disclosed by deferring to the Data Protection Act, which in turn dictates that data must be processed (including published) "lawfully and fairly." If you can argue that publishing personal data would be fair, you have a chance (see Section Two, chapter 5).

Step Two: Case-By-Case

The Freedom of Information Act came into force in 2005 and there has been a steady stream of cases before the Supreme Court and the upper and lower information tribunals. These rulings provide evidence of where the Act has been interpreted in a way that has resulted in disclosure. If you can provide cases where information similar to yours has been published you are much more likely to persuade the authority that your data should be released. No authority wants to be taken to court and lose. Cases that are often cited and

long standing will have more sway.

Cases can be difficult to search, but the subscription service JustCite is fantastic for those who can afford it. You can also refer to the inexpensive Blackstone's Guide to The Freedom of Information Act Fourth Edition (or later when available) by John Wadham, Kelly Harris and George Peretz. The book is not aimed at journalists but does include the law and significant tribunal cases. The Information Commissioner's Office (ICO) website provides access to all its decision notices helpfully arranged by exemption.

The tribunal's decisions can be found on its website, but the search function is difficult to use. The specialist information law barristers at 11KBW chambers offer Panopticon, the leading legal blog in this area, which contains commentary on all the important cases and can be searched by keyword. It is worth noting that each ruling turns on its facts and the rulings of the First-Tier Tribunal or ICO are not legally binding. Just because the council of the London Borough of Camden has released information relating to empty properties doesn't mean Islington will automatically have to do the same.

Step Three: Lines To Take

The Information Commissioner is the independent authority on the Freedom of Information Act and his staff is knowledgeable and dedicated. The ICO publishes and updates guidance for the public that is clear and precise. Searching *"ICO guidance"* on Google and the relevant exemption is often the easiest way to find them. The guidance is particularly useful when navigating public interest arguments, which can be specific to each exemption. The ICO's lines to take", the internal guidance for ICO caseworkers, has been disclosed following a request and is now available online. This gives insight into how the ICO reaches its decisions and revises its own stance in response to new case law. The ICO guidance can be quoted to suggest to the public authority that a complaint to the Information Commissioner would be successful. The Ministry of Justice publishes guidance for practitioners, including government information officers, but, we believe, this can lean towards non-disclosure. The Ministry of Justice advice can be useful background in understanding why an FOIA officer may be reluctant to provide information. Often their hands are tied.

Step Four: Reason

The request should outline any "reasons in support of disclosure." You can argue that: a) the exemption is not engaged (does not apply); b) the exemption does apply but is "prejudice based" and therefore the authority must show that harm or damage would result from disclosure; and c) where the exemption is qualified the public interest weighs towards disclosure.

Is the exemption engaged?

You need to present a case as to why any exemption does not apply to the information you have requested. Authorities have used exemptions that are irrelevant or inappropriate. Reading the primary legislation, case law and ICO advice gives vital indicators of what information falls under an exemption. For example, there is an exemption for confidential information contained within the legislation. The law says the information must have the "quality of confidence." A High Court ruling unrelated to information law established some of the tests for confidence including the fact there must be some potential harm in disclosure. As the law now stands, potential harm does not need to be demonstrated where private and personal information is concerned: the breach of privacy will suffice. With other, non-personal types of information however, this exemption can only be relied upon where some harm is likely to follow from disclosure. Therefore, if the public authority cannot provide evidence that disclosure will actually damage commercial interests it cannot rely on the exemption.

What harm from disclosure?

Exemptions fall into two categories – those where authorities have to prove some harm may follow disclosure (prejudice based) and those where such harm is assumed (class based). The Act does not state what kind of harm must arise, how harmful it must be nor how likely it is that any such harm will arise. Journalists seeking information where the exemption is prejudice based would do well to argue that any suggested harm from disclosure is insignificant and highly unlikely. Prejudice based exemptions state in the legislation that information should not be disclosed where this "would, or would likely to cause prejudice" to a person or interest. The Information Commissioner has stated that "prejudice" can be taken to mean "harm" or "damage."

The burden of proving potential harm rests with the authority so if a prejudice based exemption has been deployed; make sure they have satisfied the

following tests:

- **Have they stated which specific interests may be harmed?** The authority needs to identify the relevant exemption rather than harm generally, according to the judge in *Christopher Martin Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026, EA/2005/0030).
- **The public body needs to show a causal relationship between the disclosure and the harm.** Lord Falconer of Thoroton stated during the formulation of the Act that the harm must be "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827).
- **Is any such harm really likely?** Mr Justice Munby went some way to define what is meant by "likely" in the case *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), which looked at the Data Protection Act. He said the word "likely" *connotes a degree of probability where there* ***is a very significant and weighty chance of prejudice*** *to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."* However, the prejudice test "is not always restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge." Tribunals have consistently adopted this approach.
- **How much harm would be caused?** The Information Commissioner has advised that although prejudice need not be substantial, it should be more than trivial.

Four of the exemptions explored in section two of the guide are prejudice based: international relations (Section 27(1)); law enforcement (Section 31); commercial interests (Section 43(1)) and the provision of advice (Section 36(2) (b)). Defence (Section 26); relations with the United Kingdom (Section 28); the economy (Section 29); audit functions (Section 33) and health and safety (Section 38) are also prejudice based.

Some "class based" exemptions, where the authority must show harm, are also "qualified" which means that disclosure must still take place where the public interest from disclosure outweighs the suggested harm.

How does disclosure serve the public interest?

Many exemptions are "qualified" rather than "absolute", which means that the authority must apply a public interest test (PIT). The definition of "public interest" is not clearly defined in law but has a common sense application. As Judge Potter Stewart said in 1964 when describing hardcore pornography: it's impossible to define "but I know it when I see it". Put simply, if you can argue convincingly that the disclosure of the specific information you have requested will have some positive social outcome, or prevent some tragic or negative impact for a large number of people, you have a significantly higher probability of achieving disclosure.

The public interest can be as simple as "greater transparency" and "accountability". It can be as specific and as sophisticated as arguing that if public officials know their deliberations will be made public they will not discuss proposals that would be hugely unpopular or susceptible to ridicule. This is one area where the approach of the Information Commissioner and the tribunals favour requesters: requesters can rely on both general and specific factors in support of disclosure, but public authorities are required to focus on the particular interests protected by the exemption being relied upon when arguing that the public interest favours maintaining that exemption. In other words, where a public authority tries to use public interest arguments concerning commercial sensitivity to support their reliance on an exemption to do with investigations, this should not carry very much weight. Similarly, where public authorities rely on public interest arguments that are overly general, requesters can and should point this out and ask what specific factors apply to the particular information in dispute. General factors can carry some weight, but by far the best arguments are those that are specific to the information requested and the actual, identifiable impacts that disclosure will have. Note that, where a number of exemptions are engaged, it appears that the public authority can add up or "aggregate" the different types of public interest being protected by each exemption and make a cumulative case for non-disclosure. Sometimes public authorities will use more than one qualified exemption to prevent disclosure, and therefore provide more than one public interest argument. We have decided it is clearer and easier to add a heading "public interest" towards the end of a request and round all the public interest points together. This prevents confusion and repetition. The

public authority should also consider the overall balance between the public interest in disclosure and non-disclosure when reaching a decision.

Conclusion

Journalists seeking to obtain specific files or information, rather than fishing for page leads on any topic, may need to resign themselves to a more complex and exhaustive approach to freedom of information. This can involve investing hours in reading the primary legislation, the case law, government and ICO guidance. In some cases it is worth providing the public authority with the relevant sections of the law and the relevant court and tribunal cases before going on to make arguments in favour of disclosure. This communicates the fact that you know your rights and that the arguments you make are relevant. However, it may be strategically advisable to do the background work and simply include your arguments in the request. Either way, you need to address three key points:

- Does the exemption really apply?
- For "prejudice based" exemptions can the public authority really show that harm will result from disclosure?
- Can you show that the public interest would be served by publishing the information?

The legal case will also be sufficient when making a complaint to the Information Commissioner. This can be done by filling in a form on the ICO website. The point is to make these arguments relevant and specific to the information you are requesting. You may also privately consider whether it would be better to pursue another story or line of inquiry if the information would cause harm and would not serve the public interest.

4: Years of Refusal: Appealing to the Information Tribunals

"Unnecessary secrecy in government leads to arrogance in government and defective policy decisions."

– Labour party manifesto, 1997

Introduction

If you have made a complaint to the Information Commissioner's Office and

have received a decision notice that you do not agree with, the next step is to appeal the ICO's decision to the Information Rights Tribunal. The Information Rights Tribunal is part of the First–Tier Tribunal in the General Regulatory Chamber and is referred to as the First–Tier Tribunal (Information Rights). A panel composed of the tribunal judge and two other non–legal members hears appeals.

You have 28 days to appeal the Information Commissioner's decision to the tribunal from the date of the decision notice. The tribunal will confirm receipt and will send the ICO a copy of your appeal. The ICO then has 28 days to respond to your appeal. You may then make a written submission and provide further documents within 14 days in reply to the ICO response and must send copies to the ICO as well as the tribunal.

As soon as you decide to appeal the commissioner's decision it as advisable to immediately submit a FOIA to the ICO to request all information relating to your case.

The tribunal will often invite the ICO to join the public authority as a second respondent to the case. After all, it is the public authority's information which is in dispute. Where there are two respondents, each is separately represented and puts in separate responses to the grounds of appeal.

The tribunal will then issue directions, including the actions that the parties are required to take and the timetable for this, up to and including the hearing of the appeal. In some instances the tribunal will ask for more information or copies of documents to be provided. The case may require an administrative hearing called a "directions hearing" if the case needs further management such as narrowing the issues to be addressed, but this is usually not necessary for most appeals, as the parties are encouraged to communicate by email and agree the timetable and directions for preparing bundles of documents for the tribunal hearing, exchanging witness statements and so on. Where there is a directions hearing, this will normally be done on the telephone.

Appeal hearings require the preparation of bundles of documents: correspondence relating to the request and the public authority's responses, the internal review, the complaint to the ICO and so on, as well as any relevant background about the subject matter of the request that might help to show why it is important and what is already in the public domain on the issue.

Where an appellant is a non-lawyer representing themselves, the ICO or the public authority will usually take responsibility for preparing the bundle and sending copies to the tribunal. Make sure you ask the respondent(s) to agree to this and, if they do not, ask the tribunal for a direction to that effect.

In open session, requesters have the chance to give evidence themselves, to cross-examine the public authority's witnesses and to make submissions as to why, when relevant case law is taken into account, the evidence before the tribunal should lead them to order disclosure.

If an appeal raises particularly complex or important issues, such as when a minister has issued a certificate on grounds of national security, it may be transferred to the Upper Tribunal (Administrative Appeals) (UT(AAC)), but this is rare.

The Hearing: The appeal hearing will either be "on the papers", where the tribunal makes a decision entirely on the documents provided without the parties (if both parties agree and the tribunal is satisfied that it can properly determine the issues without a hearing); or an oral hearing. Appellants need to decide how they think they can best present their case.

An oral hearing is open to the public except when a "closed session" is needed. In closed sessions, the tribunal asks everyone not entitled to the information to leave and then explores the disputed information with the ICO and the public authority. This means that the requester cannot be present. Requesters should, however, think about the particular issues they would like the tribunal to explore with the other parties and witnesses in closed session. This may involve clarifying for the tribunal the particular issues in which you are interested. For example: suppose an official has made a public statement explaining the reasons for a policy change. If you have reason to believe that the publicly stated reasons are incomplete or inaccurate, then show the tribunal evidence in the open bundle upon which you base that suspicion and then ask them, when in closed session, to pay particular attention to any material that seems to support your suspicion.

Preparation: A tribunal appeal can be time-consuming and requires careful preparation. Be clear before you start preparing your case, gathering witness statements and selecting documents about what is at issue in the hearing.

The closed bundle: The closed bundle is prepared by the ICO or the public

authority and contains the disputed information that is the subject of the appeal.

The open bundle: In the hearing the tribunal will have an agreed open bundle that includes supporting documentation, such as witness statements, correspondence between the parties and any information that has already been disclosed. The open bundle is created in co-operation between the parties as directed by the tribunal. If a document is not in the bundle of documents it will not normally be considered at the hearing.

- Only include the documents that are essential and relevant to the points that you are making – the fewer documents you include, the more likely they are to be properly considered in the tribunal's decision.
- Index and paginate the documents in the open bundle to assist the tribunal members in locating the documents when you refer to them in your witness statement or in the oral hearing itself.
- Where possible, arrange the documents in some sort of order – this is often date-order, or the order in which you refer to the documents in your witness statement, but the circumstances of your appeal may require something else.
- Once you have organised the documents you should insert page references into the witness statement where you have referred to them.

If you do these simple (but time-consuming) things, you will be in the tribunal's favour; if you do not, your hard work may be for nothing. There is no point in laboriously gathering huge numbers of documents in support of your appeal, and then providing these to the tribunal members as a large pile of anonymous documents to be sifted through, with no indication as to what they are.

Skeleton arguments: A skeleton argument is the appellant's outline arguments to show how the law interacts with the evidence that the tribunal panel has heard. They are usually submitted seven days in advance of the hearing. You can see an example of a skeleton argument documentcloud.org/documents/369237-ea-2011-0177-skeleton-argument.html

Witness statements: If you intend to rely on any written witness statements to support your appeal, these will be exchanged some time before the hearing according to the directions of the tribunal. Witness statements are your evidence and should contain the core evidential points upon which you

are relying.

- Be focused and only use relevant witnesses with the appropriate level of expertise to address the issues in the case and who will be taken seriously by the tribunal.
- List each piece of evidence that supports your assertion together with quotes and references where the information can be found.
- Use numbered paragraphs. Do not write a 40-page witness statement of block text with no paragraphs or page numbers. This will greatly irritate the tribunal and any good points you have may be lost in such an approach.
- The witness statement must be signed by the witness and should include a Statement of Truth.

Outcome: The tribunal can overturn the Information Commissioner's decision and issue a substitute decision notice if it decides that the decision was wrong in law, or that he exercised his discretion wrongly. The tribunal's substitute decision notice would have the same legal status as the ICO's original decision notice.

Costs: There is no fee for appealing to the tribunal and each party normally pays their own costs. However, the tribunal does have the power to award costs and may do so where a party has acted unreasonably in bringing the case or in the way that they conducted themselves.

The Upper Tribunal (Administrative Appeals Chamber)

If you are unhappy with the tribunal's decision, you can appeal to the Upper Tribunal (Administrative Appeals) (UT(AAC)). You must first ask for permission to appeal from the tribunal that dealt with your case within 28 days of their decision, and in most cases you must show an arguable case that the original decision was wrong in law. However, if permission to appeal is refused, you can apply directly to the UT(AAC) for permission, but must do so within one month of the First-Tier Tribunal's refusal.

Section Two

Exemptions are the Rule

In this section we apply the methodology of "mining" requests – where the primary legislation, the rulings of the courts and tribunals, the advice of the Information Commissioner and the Ministry of Justice are used to support requests – to six exemptions. This section is specialised and aimed at investigative journalists willing to really understand the law and its practice in order to obtain and publish information in the public interest. We have, however, tried to be as brief and simple as we can and would encourage reporters to use this methodology to find cases and advice that directly support their requests. We are entirely happy for journalists and researchers to copy and paste "off the peg" the sections of the legislation, case law and advice provided in this section directly into requests. We suggest that the "reasons in support of disclosure" are "tailor made".

Copies of tribunal rulings and guidance produced by the Information Commissioner and Ministry of Justice are hosted on Document Cloud. You can read these source documents by visiting the site (**http://www.documentcloud.org/public/search/group:%20requestinitiative**) and either search using the case reference numbers and guidance titles or find Request Initiative's public documents and scroll through.

1: Overseeing overseas: Section 27 of the Freedom of Information Act

"Freedom of Information Act. Three harmless words. I look at those words as I write them, and feel like shaking my head 'til it drops off. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it."

– Tony Blair, *A Journey*, September 2010

Introduction

Revelations of world historic importance relating to the Iraq war, the lobbying of the oil industry and the sale of arms to repressive Middle East regimes have been achieved using the Freedom of Information Act. The private conversation between the then British prime minister, Tony Blair, and the US president George W Bush, eight days before shock and awe rained down on Baghdad are, as we write, about to be disclosed in part.

While the Freedom of Information Act has arguably proven less effective in revealing the secret deals and private relations between states than Julian Assange with his Wikileaks cables, they have provided insight into events of global significance. This is despite the fact the provisions for exemption under Section 27 of the Act are comprehensive. Section 27(1) covers everything from "communications between public authorities in the UK and other states, international organisations or organs of other states" to "the exchange of political views between states", and from "UK policy and strategic positioning in relation to other states or to international organisations" to "international trade partnerships." However, Section 27 is subject to the public interest test, while the first subsection (Section 27(1)) is "prejudice based", which means the government needs to prove harm or prejudice would result from disclosure. This has allowed journalists and members of the public to force some quite extraordinary disclosure by using the tribunals and courts.

The law

Section 27(1) of the Freedom of Information Act states:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

Section 27(2) states:

Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

While Section 27(3) continues:

For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

The terms used in Section 27(1) are clarified later in the exemption under Section 27(5). "International organisation" is defined as *"any international organisation whose members include any two or more States, or any organ of such an organisation."* Examples include the UN, EU, NATO, World Bank, IMF and the Commonwealth. An international court is an entity that is established by a resolution of an international organisation or an agreement to which the UK is a member or a party, respectively. The legislation adds that the term State *"includes the government of any State and any organ of its government and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."*

Relevant tribunal hearings

The public interest in favour of disclosure will be strong where there is evidence to suggest UK officials have been involved with corruption and bribery. In *Gilby v IC and FCO* (EA/2007/0071, EA/2007/007, EA/2007/ 0079) the appellant requested information from the National Archives relating to the sale of tanks and arms to the Saudi Arabian National Guard in 1968 and 1969. In 2006 documents accidentally released by the Ministry of Defence to the National Archives suggested that other deals involving Britain and Saudi

Arabia were corrupt.

The appellant presented the tribunal with evidence showing that corruption was a prominent feature of Anglo-Saudi arms deals at that time, and that British government officials had been mixed up in it. The tribunal remarked: "[I]n addition to the general public interest in transparency and accountability for the reasons referred to above we believe that in the present case there is a particular consideration, which is the possible involvement of UK officials directly or indirectly in the payment of commissions or agency fees in connection with arms sales, particularly following the King's edict dated 20th October 1968 making such payments unlawful in the KSA."

In *All Party Parliamentary Group on Extraordinary Rendition v IC and MOD* (GIA/150-152/2011). the appellant requested information related to the extraordinary rendition involving the UK, including a "memoranda of understanding" of the practice with the US. The Upper Tribunal allowed most of the appeal and, in relation to the memoranda, stated: "Since the maintenance of the rule of law and protection of fundamental rights is known to be a core value of the government of the United Kingdom, it is difficult to see how any responsible government with whom we have friendly relations could take offence at open disclosure of the terms of an agreement or similar practical arrangements to ensure that the law is upheld."

The Upper Tribunal felt its disclosure would not prejudice UK interests significantly despite the fact the information was of diplomatic importance. The culture of the country Britain is engaged with can impact on whether communications will be disclosed under the UK legislation. In the case cited above, the judge stated: "By contrast to the secretive nature of the [Saudi Arabian] regime in *Campaign Against the Arms Trade* [hearing] where the Tribunal noted… that the concept of freedom of information and transparency is alien to the culture, the USA is a constitutional democracy with its own well established traditions of free speech and freedom of information."

In *Muttitt v IC & Cabinet Office* (EA/2011/0036), author and campaigner Greg Muttitt requested documents relating to Tony Blair's Baghdad meeting with Nouri al-Maliki, the new Iraqi prime minister, on the latter's first day in office in May 2006. The tribunal criticised evidence provided by Julian Miller, the UK Deputy National Security Adviser and a witness for the Cabinet Office in the case. The tribunal remarked: "In short, the unrealistic and inconsistent

positions adopted by the Cabinet Office and by Mr Miller severely damaged the credibility of the Cabinet Office's case, and of Mr Miller's evidence, in regard to the documents remaining in dispute." In this case the tribunal was unimpressed with the Cabinet's blanket approach to withholding the information and felt that much of it was not particularly sensitive while other parts were already in the public domain. The tribunal analysed the information sentence by sentence and ruled that the majority should be released. The Cabinet Office has appealed the decision and the documents are yet to be released.

In *Plowden and FCO v IC* (EA/2011/0225 & 0228), Stephen Plowden requested a transcript of a phone call between George W Bush and Tony Blair dated eight days before the invasion of Iraq began. Plowden argued that Bush and Blair may have willfully misinterpreted a statement by the then French president Jacques Chirac to ensure an immediate declaration of war. Plowden cited this and other evidence from the Chilcot Inquiry and called former minister Clare Short as a witness to support his case. It is hard to conceive of a stronger public interest in disclosure yet at the same time the tribunal considered the public interest in protecting the diplomatic intimacies of a president-prime minister conversation as extremely strong. The tribunal largely upheld the ICO's initial decision and ruled that the 'Blair information' was covered by Section 27(1) but should be disclosed in the public interest. However, the 'Bush information' was classified under 27(2) and was withheld. Interestingly, it criticised the FCO for appearing to treat a qualified exemption as an absolute one: "[W]e note that with respect to the Blair information, the FCO has (a) focused too much on type and insufficiently on particularity, and (b) adopted an approach which is tantamount to saying that, as regards the US (or at least as regards communications with the US at head of state level), no information which engages ss. 27(1) or (2) should ever be released. In other words, when it comes to the US, the FCO appears to treat qualified exemptions as absolute ones" (paragraph 87). Where public authorities fall into this pitfall, requesters should point it out to them, to the commissioner or to the tribunal.

Information Commissioner's guidance

The current guidance from the Information Commissioner does not outline

specific examples of where the public interest would favour disclosure in relation to Section 27. However, the ICO guidance updated in January 2006 does emphasise the fact that Section 27(1) is prejudiced based and therefore harm or damage to UK interests needs to be evidenced. The ICO's *Freedom of Information Act Awareness Guidance No14 International Relations* (Version 1, October 2004: Updated, January 2006) states: "The exemption at Section 27 **does not necessarily focus on the scale or importance of the issue but its effects on the international interests of the UK** and whether the international relations or interests of the UK would be prejudiced through the disclosure of the information relating to the issue."

The Information Commissioner points out that it is the interests of the UK generally and not any single government department that are protected. The guidance states: "Section 27 allows for the exemption of information held by public authorities, the disclosure of which would prejudice the international relations or interests of the UK, **not** the interests of the public authority itself" and "not of a part of the UK, or a sector or group in the UK."

The culture and legislation of the foreign partner should also be considered when considering how disclosure might impact on relations. The guidance adds: "Differences in culture, religion, legislation and infrastructure will determine the type and level of prejudice that may occur to the international relations between the UK and another state or states, international organisation or international court."

Ministry of Justice guidance

Information in the public domain relating to foreign policy and international relations can have a decisive impact on the decision whether to disclose documents under the Act. The MOJ's Freedom of Information exemptions guidance Section 27: International relations (14 May 2008) states: "The fact that similar or related information is already in the public domain may reduce or negate any potential prejudice." However, disclosure by government may substantiate information already leaked, increasing the prejudice to UK interests by confirming its veracity. Moreover, the MOJ states: "In some circumstances [disclosure] could give rise to prejudice that would not otherwise have existed (for example where reading the disclosed information alongside information already in the public domain allows deductions to be

made that could themselves be prejudicial)."

Case study

Greg Muttitt, author of *Fuel on the Fire - Oil and Politics in Occupied Iraq*, achieved disclosure despite the use of Section 27 to reveal that the UK government and international oil companies had conspired to exploit Iraq's oil reserves as early as 2002. Muttitt obtained hundreds of documents that prove that oil supplies were a key consideration for the UK government ahead of the invasion of Iraq. Edward Chaplin, the Middle East director at the Foreign Office, noted in October 2002, six months before the war started, that: "Shell and BP could not afford not to have a stake in [Iraq] for the sake of their long-term future. We were determined to get a fair slice of the action for UK companies in a post-Saddam Iraq." A second memo, dated November 2002 and released under the Freedom of Information Act, added: "Iraq is the big oil prospect. BP are desperate to get in there and anxious that political deals should not deny them the opportunity to compete. The long-term potential is enormous." Tony Blair had said in February 2003: "Let me just deal with the oil thing because the oil conspiracy theory is honestly one of the most absurd when you analyse it. The fact is that, if the oil that Iraq has were our concern, I mean we could probably cut a deal with Saddam tomorrow in relation to the oil. It's not the oil that is the issue, it is the weapons."

Conclusion

The scope of Section 27 is truly global and covers almost every aspect of UK foreign policy and international relations imaginable. However, the fact that the exemption is qualified and therefore subject to the public interest test is crucial for journalists. Geopolitical events inherently impact millions – if not billions – of people, while wars, the sale of arms and international agreements are profound on their impacts on populations both at home and abroad. Moreover, the first subsection of the Act is also prejudice based which means the Foreign Office – or other public authority – needs to show that there would be harm or damage to UK interests abroad. From Tony Blair's conversation with George W Bush to BP's interests in the Middle East, vital and highly sensitive information of truly epoch-defining proportions has been disclosed thanks to the diligent work of reporters and campaigners.

2: Investigators: Section 30 of the Freedom of Information Act

"Given the time that has passed since Blair Peach's death, I have asked for a detailed review of the reasons why we should not release the report... I want to make it clear my starting point is a desire to publish unless there are reasons that cannot be overcome of fairness, legality and so on."

– Sir Paul Stephenson, then Metropolitan Police commissioner, before releasing the Cass report, 25 June 2009

Introduction

Police forces, regulatory bodies and even local councils spend millions in taxpayers' money investigating criminals, tax fiddlers and general miscreants, and their efforts result in swathes of information being gathered and held. Editors would like nothing more than to have unfettered access to this rich, publicly-funded trove of information. Newspapers germinated in Fleet Street precisely so reporters could write up and quickly publish the scandals and horrors that emerged at the nearby High Court following high profile police and state investigations.

The Freedom of Information Act offers a tantalising prospect of journalists having access to the files on wrongdoers, suspects and offenders compiled or held by the Metropolitan Police, the Crown Prosecution Service, the Serious Fraud Office, the Food Standards Agency, the Health and Safety Executive and the Environment Agency. It may seem obvious and compelling that damning information about people who break the law, who are cruel to others or benefit through dishonesty should be exposed. It seems alien to reporters that statutory law in the form of the Freedom of Information Act – together with the Data Protection Act – should protect criminals, liars and the corrupt.

But reporters may be better remaining in the press benches of the law courts rather than turning to the Act to deliver news – even when represented themselves by barristers and QCs. Sections 30 and 31 are among the most robust of the exemptions under the Freedom of Information Act. Section 30 protects the files of information gathered by public bodies – the police, regulatory bodies and agencies and local authorities – while Section 31 "mops up" any information which does not fall under Section 30 but would, if dis-

closed, prejudice law enforcement in 19 different ways. The exemptions in Section 30 are designed to protect informants and to keep investigatory techniques secret from criminals, among other considerations.

However, information gathered in the course of police and government agency investigations has been disclosed under certain circumstances and the Information Commissioner and tribunals have forced disclosure when agencies have cited Sections 30 and 31. In this chapter we examine the primary legislation and outline some of the cases where it has been shown that the public interest in disclosure outweighs the need for confidentiality. What we have found is that files relating to miscarriages of justice, failed investigations – events where the authorities themselves have not proven they have acted in the public interest – are deserving of journalistic scrutiny and this has been recognised in the application of the Act.

The law

Section 30 exempts information that is held for the purpose of investigations and civil proceedings and is regularly used to protect the identities and testimonies of those assisting an investigating authority, such as police informants. Section 31 exempts information that would prejudice factors relating to law enforcement. Section 30 and Section 31 are very closely linked but cannot apply to the same information so authorities will usually consider Section 30 first.

Section 30(1) states that *"information held by a public authority is exempt information if it* ***has at any time*** *been held by the authority for the purposes of (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained, (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or (c) any criminal proceedings which the authority has power to conduct."*

Section 30(1)(a) applies to criminal investigations conducted by authorities who have prosecution powers such as the police, HMRC, local councils and the Office of Fair Trading. 30(1)(b) applies to an even broader set of public bodies for whom investigation may be a secondary function and where the outcome could be penalties and sanctions or disqualification from a profes-

sional register. These public bodies may also conduct statutory investigations and pass files on to prosecutors who decide whether to institute criminal proceedings.

Section 30(1)(c) focuses on criminal court proceedings themselves and applies to information held by prosecuting authorities for the purpose of prosecution. Historic files are available to journalists: Section 30(1) does not apply to information that is more than 30 years old. Section 30(2) covers information gathered under investigations *"by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment…[or] civil proceedings which are brought by or on behalf of the authority and arise out of such investigations" and "the obtaining of information from confidential sources."*

Section 30 is considered a class based exemption, which means that authorities are not obliged to show that harm would arise from disclosing information. Authorities do not have to tell the requester whether they hold the information if they believe doing so would harm their investigations. There is a public interest test but there is no presumption in favour of disclosure.

Relevant tribunal rulings

There is a strong public interest in disclosing information relating to wrongful convictions and rotten police investigations, a tribunal judge has said. In *Guardian Newspaper Limited v IC and Chief Constable of Avon and Somerset Police* (EA 2006/0017) Rob Evans, a journalist at the *Guardian*, attempted to obtain a police file on a controversial 1970s investigation involving Liberal Party leader Jeremy Thorpe, his alleged former male lover, a hit-man and a dead dog. Naturally, the contents of this file would be fascinating but in this case, the exemption was upheld. The tribunal found that the investigation was conducted thoroughly and in a proper manner and there was a public interest in protecting the investigatory process. The tribunal also felt there may be risk of retrial in the media.

Yet the tribunal did acknowledge "**there will always be a public interest in revisiting a possibly unjustified conviction**" and **"any inference of a lack of vigour or proper vigilance in this investigation which might properly be drawn from them [should be considered] as a decisive argument in favour of disclo-**

sure." Information from investigations or trials that return a "not guilty" verdict are more likely to be withheld since disclosure could cause damage to the reputation of an individual whom the law has ruled to be innocent.

The tribunal has repeatedly recognised the following summary of the public interests protected by Section 30(1) that was raised in *Digby-Cameron v IC and Bedfordshire Police and Hertfordshire Police* (EA/ 2008/0023 & EA/2008/0025): "The general public interest served by the section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular (a) the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised, (b) the maintenance of the independence of the judicial and prosecution processes and (c) the preservation of the criminal court as the sole forum for determining guilt. In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include (a) the stage a particular investigation or prosecution has reached, (b) whether and to what extent the information is already in the public domain, (c) the significance or sensitivity of the information requested and (d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information."

In *Ian Cobain v IC and CPS* (EA/2011/0112 & 0113) another *Guardian* journalist successfully overturned part of the Crown Prosecution Service reliance on the Section 30(1) exemption and obtained information about the 1998 trial of Nick Griffin from the British National Party, for inciting racial hatred. The tribunal summarised some important factors in favour of disclosure: "**[T]he public has a legitimate interest in criminal investigations and resulting court proceedings, especially where the defendant was a prominent political figure charged with an offence of great current importance** in proceedings that he was keen to publicise. The passage of time is also a consideration. Legitimate public interest in such a case continues due to the profile of the defendant but the risk of any impact on the resulting proceedings disappeared long ago." The tribunal added: "[I]mportantly, the relevant information in this appeal does not include statements from potentially vulnerable witnesses or highly sensitive material" (see also Chapter 5: Name and shame: Section 40(2) of the Freedom of Information Act).

In *Marriott v IC and Metropolitan Police* (EA/2010/0183) a policeman turned historian was denied access to ledgers from the 1880s that named police informants who were assisting the Metropolitan Police in its Jack the Ripper investigation. The investigation was closed more than 120 years ago but the tribunal was not satisfied that this time period was long enough to prevent reprisals against informants and their families, which may in turn deter others from co-operating with the police. However, the amount of cash paid to the informants was disclosed, proving that information can be obtained even when relating to police investigations.

Information Commissioner's guidance

The public interest test in Section 30 is balanced toward withholding information. The ICO's guidance, *Freedom of Information Act 2000: The exemption for criminal investigations, criminal proceedings and confidential sources*, (Version 3, August 2009) states: "There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters nor dissuade individuals from coming forward to report wrongdoing. It is also not in the public interest to undermine the prosecution process and the role of the criminal courts as the bodies responsible for determining guilt. **Where it is quite clear that disclosure could prejudice the right to a fair trial, it would not be in the public interest to release it.**"

There are several instances when the public interest in disclosure is heightened and the ICO outlines some of these scenarios. For example, procedural failure and mismanagement by authorities should be exposed to public scrutiny. The guidance states: "In cases where a prosecution has collapsed for reasons of procedural failure or mismanagement on the part of the investigating or prosecuting authority, the public interest in favour of the disclosure of information about the investigations may be stronger."

Ministry of Justice guidance

The Ministry of Justice states that it should be easier to obtain information about proceedings and investigations that are completed or closed, particularly when there is no chance of re-opening them. The MOJ's *Freedom of Information exemptions guidance Section 30: Investigations and proceed-*

ings conducted by public authorities, (14 May 2008), states: "The timing of disclosure may have an effect on the public interest. **Once an investigation has reached a conclusion there may be greater public interest in understanding how it was reached than while it is in progress**." The same guidance states: "Confidence in the investigations and litigation can be increased through greater transparency of their processes. **This may be particularly true in cases where justice was not seen to be done**."

Case study

The family of Blair Peach had campaigned for almost 30 years for the disclosure of a report by Commander John Cass of the Metropolitan Police into the circumstances surrounding the teacher's death after he was struck on the head by a police officer during anti-racism protests in Southall in 1979. Following the introduction of the Freedom of Information Act several requests were made. However, officers cited Section 30(1)(a) alongside the Data Protection Act and the Human Rights Act. In responding to one request on 18 July 2008, Damion Baird, the Information Manager at the Directorate of Professional Standards of the Metropolitan Police stated: "In applying this exemption, I have taken into account the fact that no person has been convicted in connection with this death and that where a suspicious death has occurred, that investigation could be re-opened at any stage following review or receipt of new information. Whilst I accept that the likelihood of this investigation being re-opened is unlikely, this cannot be ruled out by the MPS." However, following public pressure in the wake of the death of Ian Tomlinson after he was struck by a police officer in London more than 30 years later, the force dropped its use of the exemption and published the report – with the names of the officers most likely to have killed Peach redacted. Celia Stubbs, Peach's partner at the time he was killed, said after its release: "Blair, we have fought for justice for you for 31 years, and I hope that we have, even if only partially, got it."

Conclusion

Protecting the integrity of the courts and the investigation process means that the Information Commissioner and tribunals will often give substantial weight to maintaining the exemption in Section 30 cases. However, public

and journalistic scrutiny is necessary in the miscarriage of justice and where there is evidence of procedural failure and mismanagement and "any inference of a lack of vigour or proper vigilance in [an] investigation." This is recognised by the tribunals, the Information Commissioner and public bodies including the Metropolitan Police. Information arising from investigations that have been closed or completed is more likely to be disclosed.

Public authorities can, when Section 30 is not engaged, turn to Section 31 to protect investigations with "*the purpose of ascertaining whether any person has failed to comply with the law*," "*is responsible for any conduct which is improper*" in "*circumstances which would justify regulatory action*" in establishing "*a person's fitness or competence in relation to the management of bodies corporate*" and so on. Section 31 also protects information when it's disclosure would prejudice general functions of law enforcement such as the prevention and detection of crime and apprehending and prosecuting offenders. However, the public interest must be considered. Information has been released even in cases where it was shown that disclosure may lead to criminal activity. For example, in *Voyias v IC and LB Camden* (EA/2011/0007), a member of the Advisory Service for Squatters was given a list of properties owned by the council rather than individuals, to the outrage of housing minister Grant Shapps and the *Daily Mail*. The tribunal recognised "the strong public interest in bringing empty properties into reuse" and was satisfied that publishing the list would support this. Even though the tribunal has to consider the implication of disclosing the information to the public generally, and not just the requester, the judge ruled that the potential criminal damage and metal stripping arising from disclosure in this case were crimes "at the lower end of victim impact."

3: The Hilton Exemption: Section 35 of the Freedom of Information Act

"I perceived that private secretaries were quite anxious about what was going to happen to their notebooks, where, as it were, the personality and stream of consciousness of their Secretary of State would be displayed in every horrific detail. There was understandable anxiety that those notes might be disclosable under FOI."

– Jack Straw, who as Home Secretary guided the FOIA to the statute book, gives evidence to the House of Commons, 17 April 2012

Journalists have a fascination for the deliberations and discussions taking place among Britain's most senior politicians and their advisors both in the civil service and the private sector. However, a significant amount of information recording such conversations falls under Section 35 of the Freedom of Information Act.

This section could easily become known as the "Steve Hilton exemption" as it is designed to allow those involved in government policy "a free space" to "think the unthinkable"…"without the fear that policy proposals will be held up to ridicule." Guidance is clear that policy must be "based on the best advice available and a full consideration of all the options without fear of premature disclosure." Political journalists will be familiar with the *Financial Times* story revealing in July 2011 that Steve Hilton, David Cameron's strategy director, suggested abolishing maternity cover and suspending consumer rights legislation. These deliberations were leaked and did not come to light under the Freedom of Information Act. Section 35 could be used to prevent journalists breaking stories of this kind using transparency legislation.

Section 35(1) of the Act lists all the exempt information and, unfortunately for journalists, this includes some of the most fascinating and newsworthy documents generated by government, such as legal advice, communications between ministers, Cabinet papers and the private offices of ministers.

Case law has established that the scope of the exemption should be considered to be very broad. They have also confirmed that Section 35 is designed to protect ministers and the civil service often in terms that could have been drafted by Sir Humphrey Appleby. This means that public authorities will

usually be well placed to argue that the exemption is engaged. However, the cases have also established that lobbyists should not be protected from public scrutiny and, importantly, that once policy is enacted the public has a right to access information relating to how they were formulated. This means that there are often very compelling public interest factors in favour of disclosure which comes within Section 35.

In fact, a significant number of the Section 35 cases have resulted in disclosure of the requested information. These include: *Department for Education & Skills v IC* (EA/2006/0006) (copies of all minutes of senior management meetings regarding the setting of school budgets in England); *Department for Work & Pensions v IC* (EA/2006/0040) (the feasibility study undertaken to establish the impact of the proposed identity card scheme); *Cabinet Office v IC and Lamb* (EA/2008/0024 and EA/2008/ 0029) (minutes of the Cabinet meeting at which the UK's entry into war against Iraq was deliberated, the Tribunal ordered disclosure but the Justice Secretary, Jack Straw, vetoed this); *Cabinet Office v IC* (EA/2010/ 0031) (minutes of the Cabinet meeting where Michael Heseltine resigned over the Westland helicopter matter); *Department of Health v IC, Healey and Cecil* (EA/2011/0286 and EA/2011/0287) (the NHS risk registers case).

Journalists will be better placed to bring about disclosure if they can show the information they seek would enhance public participation in government decisions and greater accountability in how these decisions are reached. Public participation in government cannot be meaningful without access to information. Non-disclosure also allows selected groups to have an unduly privileged position through inside knowledge, while disclosure may expose wrongdoing, show that wrongdoing has been dealt with and – a vitally important consideration for journalists requesting information – dispel suspicions of wrongdoing.

The law

Section 35 is partly designed to protect the principle of collective responsibility of Cabinet ministers who will defend policy decisions in public, having argued against them at Cabinet meetings. It is also included to provide comfort to those who might be reluctant to provide full and frank advice when this would later be disclosed. Section 35(1) of the Act sets out four main areas

where information is exempt: a) the formulation and development of government policy; b) ministerial communications; c) advice by law officers and d) the operation of ministerial private offices.

The exemption is qualified, which means the public interest in disclosing the information can outweigh considerations in favour of secrecy. A number of decisions by the tribunal and Information Commissioner confirm the public interest can fall in favour of disclosure. There is clear guidance about public interest factors that may lead to disclosure of documents and information. The exemption can only be used by central government departments. Section 35 is class based, which means the government does not have to demonstrate harm to any particular interest arising from disclosure – as long as the information meets the description in Section 35, the exemption is engaged regardless of what harm, if any, would arise from disclosure. Harm is, however, fundamental to the public interest test.

Timing is a decisive factor in the application of Section 35 and there are specific types of information which may be disclosed once the process of policy formulation has come to a close, for example with the granting of Royal Assent for a bill. Statistical information relating to the formulation of government policy and ministerial communications should under Section 35(2) of the Act be released after they have been considered to formulate policy.

The Act states that factual information used to inform policy should be disclosed if this is in the public interest, outlined in Section 35(4): "*In making any determination required by Section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking*."

Relevant tribunal rulings

One of the most significant and often cited tribunal decisions relating to Section 35 is *Department for Education and Skills v Information Commissioner and Evening Standard* (EA/2006/0006). The tribunal found that: "Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been

merely broached as agreed policy." The same ruling confirmed that the scope of information falling under Section 35 is broad and that authorities do not have to implement a line-by-line analysis of minutes or memos. At paragraph 58 it states: "[W]e are firmly of the view that, when asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior or a minister or a note of advice fall within s. 35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s. 35(1)(a) activities, then **everything that was said and done is covered**."

The ruling did make clear that information should be disclosed even if it does fall within the scope of the exemption **where it would cause little harm**. The tribunal confirmed that timing is crucial to the consideration of the public interest, so that it cannot be assumed that information considered sensitive while policy is being formulated would automatically be withheld indefinitely.

In *Scotland Office v Information Commissioner* (EA/2007/0128) the judge provided further clarity on when the policy formulation process should be considered closed. The tribunal stated: "The policy making process must reach a point where it can properly be regarded as having come to an end, although how that point is identified or categorised may vary. It seems to us that once an Act has received Royal Assent the policy has been enshrined in an Act of Parliament and that particular policy making period has come to an end. It is inevitable that many policy decisions, particularly if they are controversial or effecting a dramatic change, will be subject to further debates and perhaps development of a new policy to amend the existing one, but that does not mean that the policy itself is still being formulated or developed."

It has been argued that when there is a change of government more information should be disclosed. Discussing *Home Office v Information Commissioner* [2010] UKFTT 309 (GRC) paragraphs 58-9, the, Blackstones guide to the Freedom of Information Act 2000 (Fourth edition, 2011) states: "Lapse of time, and a wholesale change of administration, may also significantly reduce the public interest in maintaining the exemption."

Another highly significant tribunal found lobbying should **not** be protected **even though** there was a recognition during the formulation of the Act that external experts or stakeholders might be reluctant to provide advice that

would later be disclosed.

In *BERR v Information Commissioner and Friends of the Earth* (EA/2007/0072) the tribunal recorded that: "BERR argues that there is a need for a private 'thinking' space for the formulation and development of policy. However BERR are asking us in this case to consider that the CBI, a significant lobbyist and influencer, and other similar lobbyists, can be placed in the same category. In our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy. Also there is a strong public interest in ensuring that there is not, and it is seen that there is not, any impropriety."

Information Commissioner's guidance

The Information Commissioner's Office published *Freedom of Information Act Awareness Guidance 24: Policy Formulation, Ministerial Communications, Law Officers' Advice, and The Operation of Ministerial Private Office* (Version 2, 11 September 2008). The document provides specific examples of public interest arguments that would support disclosure.

It states: "These are essentially arguments related to **public participation** in and **accountability** and quality of government decisions. Participation refers to the ability of people to input into policy prior to a final decision being taken, whereas accountability refers to the need for government to explain why something has happened, or show that it has been **rigorous in taking into account all relevant considerations**, or **addressing legitimate objections**, or that it is keeping to its word and delivering **what it has promised**."

The advice states that in relation to participation the public authority must consider that: "**Participation cannot be meaningful without access** to relevant recorded information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred; without the ability of the wider public to participate in key policy decisions, there is a **potential for selected individuals or groups to have an unduly privileged position** of influence in these policy making processes; a key driver for FOI legislation is allowing people access to information that will allow **informed participation in the development of government proposals** or decisions which

are of concern to them. Information disclosed prior to a decision being taken will lead to more informed public debate."

In terms of accountability the public authority should consider that: "Disclosure of the information **may expose wrongdoing**, or the fact that **wrongdoing has been dealt with**, or **dispel suspicions of wrongdoing**; government press offices control the dissemination of information about achievements, services and processes which they wish to make known to the public. Access to information under the FOI Act which has **not been 'spun' by government media units** would better enable the public to make objective judgements [sic] on the facts; where a policy decision is going to lead to large amounts of **public expenditure** on a particular project there is probably going to be a strong public interest in disclosure, and; where a policy decision involves a **departure from routine procedures** or standard practices are deviated from there is again going to be a strong public interest in disclosure."

Finally, the authority states public authorities can consider whether "future releases act **as a deterrent against advice** which is **ill-considered, vague, poorly prepared or written in an unnecessarily brusque or defamatory language**?" It asks: "Would the prospect of future release in fact enhance the quality of future advice?".

Ministry of Justice guidance

In order to achieve disclosure journalists need to address factors that weigh towards non-disclosure. The 2008 document, *Freedom of information guidance: Exemption guidance Section 35 – Formulation of government policy* (14 May 2008) contains good and bad news for journalists. It confirms the scope of the information falling under the exemption but also gives clues as to what public interest considerations must be taken into account.

The guidance states: "The exemption does not need to be confined to strategic policy, such as long-term reform. It could equally include decisions on responding to more immediate challenges – so long as it involves policy development or formulation. It is not necessary that the information relates to a policy that is ultimately agreed. The exemption would apply to early ideas that are discarded as policy is developed... The information may not be purely internal; a suggestion, or advice received from a third party in the course of policy development will be covered by the exemption."

Moreover, this advice also provides a list of "considerations which may weigh against a decision to disclose." This includes:

- "good government depends on good decision-making and [...] a full consideration of all options **without fear of premature disclosure**.
- there may be a deterrent effect on external experts or stakeholders who **might be reluctant to provide advice** because it might be disclosed.
- **the impartiality of the civil service might be undermined** if advice was routinely made public. Officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision-making.
- there needs to be a **free space** in which it is possible to 'think the unthinkable' **without the fear that policy proposals will be held up to ridicule**.
- disclosure of interdepartmental consideration and communications between ministers **may undermine the collective responsibility** of the government."

The guidance adds: "Considerations which may weigh in favour of a decision to disclose include: **greater transparency makes government more accountable to the electorate and increases trust**; as knowledge of the way government works increases, the **public contribution to the policy making process** could become more effective and broadly-based; the public interest **in being able to assess the quality of advice** being given to ministers and subsequent decision-making; **the greater the impact** on the country or on public **spending the greater the public interest** may be in the decision-making process being transparent."

The same advice states: "Disclosure of factual background information will assist in discharging the public interest in disclosure outlined above – it will allow **more informed debate, give a wider number of people the opportunity to contribute to that debate and increase trust in the quality of the decision-making**."

Research

The exemption in Section 35 of the Act is designed to ameliorate any "chilling effect" on the full consideration of all the options without fear of premature disclosure among politicians, civil servants and third parties. Therefore when

making a request it is useful to provide evidence to support the argument that disclosing particular information is unlikely to have this impact. The study by Ben Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, published in *Governance* volume 23 issue 4 (October 2010) is the most relevant research to date in this area. It found that, following the implementation of the Freedom of Information Act: "The dominant view is nothing has changed, with a minority describing a slightly positive alteration where, for example, 'inappropriate' comments were removed from minutes or notes. Nor was there evidence for a 'chilling effect'. Many of the officials pointed out that the dangers of not having a decision outweighed the dangers of having one and it being released."

Case study

John Healey MP requested the NHS "transition risk register" (TRR) relating to the radical government reorganisation under the Health and Social Care Bill, and Nicholas Cecil requested the "strategic risk register." The Department of Health refused both requests citing Section 35 and arguing there would be a "chilling effect" on the development of risk reviews relating to government policy. Ultimately, the ministerial veto under Section 53 of the Act was used by Andrew Lansley, the Secretary of State for Health, to prevent disclosure. This was the first veto used for a document other than Cabinet minutes. The Cabinet agreed to use the veto on 8 May 2012 and two days later Lansley issued a statement to parliament, which included the following argument: "If risk registers are routinely or regularly disclosed at highly sensitive times in relation to highly sensitive issues, or there is legitimate concern that they could be, it is highly likely that the form or content will change: to make the content more anodyne; to strip out controversial issues or downplay them; to include arguments as to why risks might be worth taking; to water down the RAG system."

The complexity and sensitivities of Section 35(1) were starkly illustrated in the conjoined cases *Department of Health v IC and John Healey MP and Cecil* (EA/2011/0287 and 0286). In these cases the public authority, the Information Commissioner, the tribunal, and the Cabinet all reached different conclusions in relation to the public interest. The Information

Commissioner ruled that both documents should be published in the public interest. However, his decision was appealed at the Information Tribunal where the judge found that the transition risk register should be published – but ruled that the strategic risk register must remain private.

The tribunal finding in particular demonstrates the complex analysis needed when considering the public interest. The ruling stated: "We consider that during the progress of a government introducing a new policy that the need for a safe space will change during the course of a Bill. For example while policy is being formulated at a time of intensive consultation during the initial period when policy is formed and finalised the need for a safe space will be at its highest. Once the policy is announced this need will diminish but while the policy is being debated in Parliament it may be necessary for the government to further develop the policy, and even undertake further public consultation, before the Bill reflects the government's final position on the new policy as it receives the Royal Assent. Therefore there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options."

Other important points arise from this decision. One is that the tribunal noted that independent research carried out by the Constitution Unit at University College London has concluded that there is little evidence of FOIA leading to a "chilling effect". As in the *Plowden* case (under Section 27 above), the tribunal criticised the Department for approaching a qualified exemption as if it were absolute. Requesters should consider both of these points when assessing a refusal notice based on Section 35.

Conclusion

A request likely to come under the scope of Section 35 must demonstrate the public interest in disclosing the specific information in question. The public interest will be served where it will increase public participation, accountability and quality of government decisions. In order to be successful the requester should argue greater transparency makes government more accountable to the electorate, increases trust, allows more informed debate, and allows fair assessment of the quality of advice being given to ministers. Failure to address the public interest tests outlined above will make it easy for highly paid government barristers to undermine a journalist's case. More-

over, the public interest in disclosure can change over time – the situation **at the time of the request** will dictate whether the information should be disclosed.

4: Prejudice to the conduct of public affairs: Section 36 of the Freedom of Information Act

"On FOI, a chorus of distinguished Whitehall insiders would have us believe, against all the evidence, that the Act threatens good government because nobody dares to write anything down any more. But it's nonsense to say that FOIA threatens to make public what really ought to remain secret for 30 years..."

– Christopher Graham, Information Commissioner, 19 February 2012

Introduction

The exemption at Section 36 prevents disclosure where it would prejudice the conduct of public affairs and is, in part, designed to prevent the "chilling effect" where politicians and civil servants limit the scope of what they will discuss for fear that minutes and records will be disclosed to the public. Section 36 is designed to protect the "unsettled" advice and opinions of government officials lest disclosure prevents them from 'thinking the unthinkable' in the future. It can be understood as the Big Brother to Section 35 (see above). The key differences are that Section 36 can be wielded by any public authority and not just central government and is broader in the range of information it can cover. Moreover, Section 36 is prejudice based so the authority needs to demonstrate that disclosure would likely cause prejudice or harm, in this case to the conduct of public affairs.

To make the law even more Byzantine, Section 36(2) states that the "reasonable opinion" of a "qualified person" must be sought in order to establish whether disclosure would cause harm or damage and is therefore engaged. It is theoretically possible that the very person who may be "exposed" by the release of documentation is given the power to prevent any such transparency. However, an information officer working in regional government has advised us that it is often used as a "last resort" by authorities and fre-

quently misapplied. Moreover, the exemption even when engaged is subject to the public interest so the authority still needs to establish that the harm identified by the reasonable person is greater than the general good that would come of disclosure, from general principles of transparency to specific benefits of public access to the specific information requested. The authority does not have to confirm or deny whether it holds the information if it falls under the scope of the exemption.

The law

Section 36(2) is unusual in Freedom of Information because it requires the "reasonable opinion" of a "qualified person," rather than a fact-based test of harm or prejudice. Note that 36(2)(b) protects information relating to government process and is not concerned with the content of advice. Section 36(2)(b) also cannot be used to protect factual information. Section 36(2)(b) exempts information where disclosure "*would, or would be likely to, inhibit… the free and frank provision of advice, or… the free and frank exchange of views for the purposes of deliberation*" and is designed to defend against the so-called "chilling effect" of transparency on the inner workings of government. Finally, Section 36(2)(c) prevents disclosure where it would "*otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs*." The definition of who is a qualified person is complex but well established, so if a journalist is challenging a refusal under Section 36(2) they would do well to interrogate and quote the primary legislation.

The Information Tribunal has defined the terms in Section 36 and ruled that where an authority fails to meet its tests it may not rely on the exemption. Section 36 can be overturned on appeal to the Information Commissioner and the tribunal because the reasonable opinion of a qualified person cannot be sought after an internal review has been conducted. As the law currently stands, any errors the public authority makes when applying 36(2) cannot be corrected after the event. When the requested information is statistical, authorities are not required to seek the reasonable opinion of a qualified person but instead must provide their own reasoning in accordance with the rest of the Act.

Relevant tribunal hearings

In *Thackeray v IC* (EA/2011/0069), the tribunal gave further clarity about who is qualified to give an opinion. The judge stated: "It is clear in the Tribunal's view that this responsibility is intended to be entrusted to a suitably senior official or representative within the relevant public authority. Indeed, the Tribunal would accept that there is a strong argument for saying that the qualified person should be at or towards the very top level of accountability." Procedure is of central importance to 36(2). An authority cannot later rely on an opinion following a complaint to the ICO or appeal to the tribunals and courts where it did not provide the statement during the request and internal review process. In *Roberts v IC and BIS* (EA/2009/0035), the tribunal stated: "An opinion formed later cannot justify the refusal, because the information was not exempt at the time when the challenged decision not to release it was made." This position was upheld in later decisions including *Chief Constable of Surrey Police v IC* (EA/2009/0081).

Finally, the opinion given must be "reasonable." The Information Commissioner must, when considering a complaint, examine again whether the qualified person was reasonable and if their opinion stands. In *Guardian Newspapers Limited and Brooke v IC and BBC* (EA/2006/0011 and EA/2006/0013), the tribunal stated: "[T]he commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."

Information Commissioner's guidance

The Information Commissioner's guidance *Freedom of Information Act: Prejudice to effective conduct of public affairs* (Version 1, November 2011) makes it clear that there is a distinction between the role of the qualified person's opinion and the public interest test. He states: "The public interest test is separate from the qualified person's opinion. The qualified person is not required to carry out the public interest test themselves, although they may do so. It is possible for officers of the public authority, having received the qualified person's opinion, to carry out the public interest test themselves. In that case they should be aware that **the fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the informa-**

tion should be withheld. There should be an objective consideration of the public interest factors on either side."

Ministry of Justice guidance

"Ministers accepted during the debates on the Bill that one of the purposes of Section 36 was to provide for **individual situations which had not yet been envisaged** but where it became clear, on the facts, that disclosure would not be in the public interest," according to the Ministry of Justice *Freedom of Information exemptions guidance: Prejudice to effective conduct of public affairs* (14 May 2008). Journalists applying for information that falls under Section 36 will need to present the case that disclosure would serve the public interest. The Ministry of Justice guidance is instructive in terms of what is agreed to be in the public interest. This includes the following arguments: "Open policy making may lead to increased trust and engagement between citizens and government; the desirability of citizens being confident that decisions are taken on the basis of the best available information; knowledge that the arguments relating to a debate will be disclosable will in fact improve the quality of those arguments." The advice adds: "**Far from inhibiting the frank provision of advice, there might be circumstances where the prospect of disclosure would enhance the quality of advice**; the response to new policy initiatives may improve, and government generally may become 'better'; more open policy making can result in better policy formulation. A wider range of views and opinions, including expert knowledge, may be canvassed."

Further reasons given, including those relating to wrongdoing, include: "As knowledge of the way government works increases, public contribution to the policy making process could become more effective and broadly-based; the public interest in knowing that ministers are adhering to the Code which regulates their conduct; the information would expose wrongdoing on the part of government; the information would demonstrate that wrongdoing had been effectively dealt with."

Case study

Author and Freedom of Information campaigner Heather Brooke and *Guardian* journalist Matt Wells requested the minutes of two separate BBC board of governors meetings related to Greg Dyke's departure as director-

general. Dyke resigned on 29 January 2004 in the wake of the Hutton report's findings on the BBC's reporting of the Iraq war and the death of David Kelly. The BBC refused the request under 36(2)(b)(ii) and the Information Commissioner upheld the decision. However, the Information Tribunal ruled that while the exemption was engaged it would be in the public interest to disclose the information. The minutes from one meeting revealed that Dyke had asked for his job back just a week after leaving. Dyke contacted the secretary of the board of governors and said: "I believe I have been mistreated and I want to be reinstated." Dyke resisted what was essentially a forced resignation. In the first of the two meetings he withdrew his offer to resign and members of the board had to persuade him for several hours that it was the right thing to do. The then vice chairman of the BBC governors Richard Ryder warned Dyke that he would be a "lame duck" if he continued in his role, that "his stock in Whitehall was very low" and his "internal authority would be compromised by recent events."

Conclusion

The evil twins of Section 35 and Section 36 could, if misused, result in nullifying any positive impacts the Freedom of Information Act may have in terms of transparency and accountability at the heart of government. However, both exemptions are qualified and public interest arguments that are both relevant and precise do often result in disclosure. Section 36 is available to all public bodies but is weaker than Section 35 in the sense that it is "prejudice based", requiring evidence of some potential harm or damage from disclosure and relies on the opinion of a qualified person. A named senior executive, most likely at the highest rank, must put their name to the assertion that releasing information would harm or prejudice the conduct of public affairs. If a journalist were to successfully challenge this opinion by complaining to the Information Commissioner or further to the tribunals and courts it would be personally embarrassing for them: the drama could prove a more compelling story than the information originally sought and will certainly raise public awareness about issues of genuine interest and concern.

5: Name and shame: Section 40(2) of the Freedom of Information Act

"IF THERE IS FREEDOM OF INFORMATION - CAN I HAVE YOUR NUMBER."

– Loesje, a fictional character signing slogans
for a Dutch free speech organisation, 2008

Introduction

Investigative journalists spend much of their time on the battlefield between the need to publish highly damning and acutely unflattering information about people against their wishes and an appreciation of the right to individual privacy. This conflict is played out within the European Convention on Human Rights, with Article 8 guaranteeing privacy and Article 10 the right of expression, including the right to receive and share information without interference from the state. The same clash of rights and interests is contained within the Freedom of Information Act at Section 40, which relates to personal information.

Section 40(2) is where the Freedom of Information Act waves the white flag and concedes defeat at the hands of the Data Protection Act 1998. The DPA exists mainly to protect privacy rather than to facilitate publicity. In essence, it says that where a request is made for the "personal data" (a term defined under the Data Protection Act) of another person, then it cannot be disclosed if doing so would breach the "data protection principles" (a set of rules for the obtaining, handling and disclosure of personal data, set out at Schedule 1 to the Data Protection Act). This is a severe limitation, not least for journalists trying to fulfill the key tenet of the trade: to establish **who**, where, what, why and when. While public bodies have come to understand that Section 40 cannot be used universally and that the [more] senior a member of an organisation is, the more they should expect to be subjected to public scrutiny, all too often officers will take the precautionary approach and refuse to disclose names.

The Data Protection Act does recognise there are circumstances when personal information about an individual – called the "data subject" in the legislation – may be disclosed. This means that disclosure of personal data under the Freedom of Information Act will not *always* contravene the Data Protection Act. Specifically, it is possible that sensitive personal data could

be disclosed, in circumstances where disclosure is in the public interest, in connection with unlawful acts, malpractice or corporate mismanagement, and the person requesting the information is a journalist intending to publish. In a key provision, the Act says that personal data must be processed "fairly and lawfully." However, the term "fair" is not clearly defined in law and therefore becomes a site of argument and debate.

The law

The relevant passages from Section 40(2) of the Freedom of Information Act 2000 state that "*any information to which a request for information relates is also exempt information if it constitutes personal data…[and]…the disclosure of the information to a member of the public otherwise than under this Act would contravene… any of the data protection principles*." The first principle of the Data Protection Act, which is found in Schedule 1, Part 1, states clearly: "*Personal data shall be processed fairly and lawfully*." In short, the Freedom of Information Act can only allow for the disclosure of personal information if this can be shown to be "fair" and "lawful" and if a condition from one of the other Schedules is met.

The word "lawfully" used here would, for example, rule out the disclosure of tax information held by HMRC without permission as the taxman is covered by Section 23 of the Commissioners for Revenue and Customs Act (2005). However, the real site of dispute is the word "fairly" which is generally understood as a route through which to argue the public interest in disclosing the information. While the emphasis remains whether it is "unfair" on the data subject the authority must also consider if it would be "fair" on everyone else to publish or withhold the information.

The same sort of balancing exercise applies to the condition from Schedule 2 that arises most frequently. This is condition 6(1), which provides that "the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

As the snapshot above suggests, the law governing the disclosure of personal data is exceptionally complex. Most commonly, however, requesters

seeking such information should, if refused on Section 40 grounds, ask:

- Is this really "personal data"? It is not enough that the data subject is identifiable from the information requested. The data subject must be among the focuses of that information; the information must be "biographical in a significant sense" about that individual, and it must have implications for their privacy (as suggested by the Court of Appeal in the long-standing leading case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746).
- Even if it is personal data, would disclosure nonetheless be fair? For example, what evidence is there that the data subject reasonably expected this information to be kept private? What evidence is there that disclosure would lead to any significant damage or distress for the data subject?
- Do the legitimate public interests in disclosure outweigh any detriment to the data subject from disclosure? If so, disclosure may be "fair" and condition 6(1) may be met, meaning that disclosure would be in accordance with the data protection principles.

The Data Protection Act also defines some personal data as sensitive, this being: "*The racial or ethnic origin of the data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992), his physical or mental health or condition, his sexual life, the commission or alleged commission by him of any offence*" and "*any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings*."

The conditions for processing sensitive personal data are more restrictive than for non-sensitive personal data, and crucially do not include the "legitimate interests" condition quoted above. They do, however, permit disclosure if it is in the "substantial public interest", with a view to journalistic publication and if it is in connection with unlawful acts, or dishonesty, or malpractice, or corporate mismanagement: see condition 3 in the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000. Where requesters are seeking sensitive personal data, they are advised to emphasise that condition in particular.

Relevant tribunal hearings

One of the most significant tribunal decisions in relation to the release of personal data under the Freedom of Information Act is *Corporate Officer of the House of Commons and IC v Leapman, Brooke and Thomas* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131), which was confirmed on appeal to the High Court. In considering the application of this condition to a disclosure under the FOIA, the tribunal, having established that the information sought – MPs' expenses under the parliamentary Additional Costs Allowance scheme – was personal data, then applied a three-stage test: 1) Is there a legitimate public interest in disclosure? 2) Is the disclosure necessary for that legitimate public interest? 3) Is the disclosure nevertheless unwarranted because of an excessive or disproportionate adverse effect on the legitimate interests of the individual(s) concerned?

The tribunal stated: "The public interest factors which we have listed, all of which we accept as genuine and relevant, are concerned with objectives of transparency, accountability, value for money, and the health of our democracy. These are legitimate interests of considerable importance… [W]e conclude that the disclosure of full detailed information is necessary to meet these objectives. In our judgment these aims cannot be achieved by means that interfere less with the privacy of the MPs' personal data."

A further case opened up the possibility of sensitive personal data being released where there was a "substantial public interest." The case is particularly interesting because the judge ruled information should be disclosed because the requester was a journalist – when usually the Freedom of Information Act is applicant-blind. In *Cobain v IC and Crown Prosecution Service* (EA/2011/0112 and 0113), the judge ruled that information relating to BNP leader Nick Griffin's criminal conviction should be disclosed. Cobain, a reporter at the *Guardian*, succeeded in persuading the tribunal his interest as a journalist was legitimate.

The judge said: "Given [Griffin's] marked preference for publicity, not least as to the trial, and his prominent and sensitive political role since, we conclude that disclosure to the world at large of the personal data requested would be fair and lawful. We do not doubt, nor was the point seriously contested, that disclosure **is necessary for a legitimate investigative purpose of journalism**. Given his position and his own attitude to such publicity, we find

no prejudice to Mr Griffin's rights and freedoms or legitimate interests."

Personal data is much more likely to be disclosed where it can be shown that the individual has been implicated in wrongdoing. An Information Tribunal ruled that the personal data of senior management, some staff and even customers of the collapsed BCCI Bank should be disclosed under the Freedom of Information Act 15 years after the case had been before the courts in the case *Sikka v IC and HMT* (EA/2010/0054). Robin Hopkins, writing for the Panopticon blog, said the ruling is "a good illustration of how FOIA exemptions may be trumped by the overwhelming interest in the public being informed about corporate wrongdoing on a massive scale – including the public knowing the names of those involved in that wrongdoing. It is also another useful illustration of how personal data should not be assessed on a 'one size fits all' basis, but should (where appropriate) be analysed by category."

The Bank of England in March 1991 relied on a draft of the "Sandstorm" report by Price Waterhouse to force BCCI into insolvency, owing creditors almost US$10 billion. A request was made for the report in March 2006 as the copy leaked online had names removed and sections redacted. The Bank of England relied upon Section 40(2) (personal data) and Section 27(1)(a) (prejudice to international relations) in refusing to disclose this remaining information and was supported by the Information Commissioner. However, the tribunal ruled that the names of companies, top managers, more senior staff and customers implicated in wrongdoing should be named.

Information Commissioner's guidance

The Information Commissioner has gone further to define what is fair and to give guidance on what information should be disclosed. The most recent and extensive advice comes in *Freedom of Information Act, Environmental Information Regulations: The exemption for personal information* (Version 4, 18 March 2011). This document is worth reading in full. It states: "Personal data of any other person (third party data) is exempt under Section 40(2) if disclosure would breach one of the data protection principles. Generally this will mean balancing the legitimate interests of the public in having access to the information against the interests of the individual under the first principle and, in particular, considering whether it is unfair to release the information."

Under the section *Fairness* it adds: "In the context of disclosing personal information under the FOIA it will usually mean considering: the possible consequences of disclosure on the individual; the reasonable expectations of the individual, taking into account expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; the 'freedom of information' principles of transparency and accountability; and any legitimate interests in the public having access to the information relevant to the specific case."

The earlier publication, *Practical Guidance: When Should Names be Disclosed?* (Version 1, 15 August 2008), states that the following question must be considered before subject data is published: "Would disclosure cause unwarranted damage or distress to the individual? This includes risks to a person's safety and security. It may also include unfair damage to their career or reputation. It does not include embarrassment, legitimate criticism, or the risk of misunderstanding or misrepresentation."

The Information Commissioner, relying on a tribunal hearing and a case heard before the High Court, also states that disclosure should take place to meet Condition 6 of the Data Protection Act when there is a "pressing social need." Under the heading *Condition 6* it states: "It should be noted that the Tribunal, and later the High Court, said that 'necessary' in Condition 6 implies the existence of a pressing social need, reflecting the European Convention on Human Rights (in particular Article 8, the right to private life). However, there will be circumstances where relatively innocuous information is under consideration where the need for transparency will be sufficient to meet the test of necessity."

There is specific guidance about the publication of salaries. Request Initiative successfully established that the chief executive of Academies Enterprise Trust, which runs academy schools, earns more than the Prime Minister, but information about his exact salary was not obtained. The guidance *Public Sector Salaries: How and When to Disclose* (Version 1, 23 February 2009) states: "Salary scales should usually be published as a matter of routine… Disclosure should only be to the extent necessary to fulfill a legitimate public interest. This may involve narrowing down advertised scales, for

example to the nearest £5,000. Only in exceptional circumstances is disclosure of exact pay likely to be justified. More senior staff who are responsible for major policy and financial initiatives can expect greater scrutiny of their pay than more junior employees."

When it comes to naming senior civil servants or the directors and leaders of major public bodies, the ICO's *Data Protection Technical Guidance: Freedom of Information: Access to information about public authorities' employees* (Version 2, 25 April 2007) is useful. It states: "In general, more senior staff and those carrying out public functions should expect more information about them to be disclosed... Is the requested information about disciplinary action involving a particular employee? Arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality."

Ministry of Justice guidance

The Ministry of Justice guidance for information officers gives a clear insight into the dangers facing public employees who disclose personal data unlawfully, and it is useful for journalists to understand this when making requests or demanding information. The publication *Freedom of Information: Exemptions guidance Section 40 – Personal information* (14 May 2008) states: "You should consult experts where the application of Section 40 is difficult or unclear. Getting a decision wrong may result in breach of the Data Protection Act. It is unlawful to release information under the Freedom of Information Act in breach of the Data Protection Act. This is not discretionary. Even where accidental, if the breach causes damage or distress and damage to the individual data subject they may be entitled to compensation. In most cases, personal data will be exempt if disclosure would be 'unfair'. Disclosure of personal data relating to a third party will often breach the fair processing principle if there was a legitimate expectation by a third party that this information would remain confidential."

The guidance adds: "A disclosure will be unlawful if it breaches a statutory provision or other legal principle. For example, if disclosure to a member of the public would constitute a breach of confidence at common law, or a breach of a statutory bar, it will be 'unlawful'."

However, the same MOJ guidance does give very clear examples of when information should be disclosed: "A distinction can be drawn between information that relates to the private and public lives of the third party when considering whether disclosure would be fair. Details of expenses incurred in the course of official business and information about pay bands (but not individual salaries) should usually be disclosed. While this information clearly does relate to staff personally, it is likely to be 'fair' to disclose such information about how a public authority has spent public money."

Case study

Brendan Montague, the director of Request Initiative and one of the authors of this text, attended the Information Rights Tribunal in January 2012 in a bid to overturn the Information Commissioner's decision not to disclose the identity of the seed donor to the Global Warming Policy Foundation, a climate-sceptic charity founded by the former chancellor Lord Lawson *writes Lucas Amin*. Montague argued that the public had a legitimate interest in knowing who was funding what he described as "climate denial" because of the dramatic impacts globally if the government were to heed Lawson's advice and stop attempts to regulate carbon emissions. His barrister, Robin Hopkins, emphasised the point that the Freedom of Information Act required an act of balancing the public interest against the private interests of the donor. Lawson had earlier argued that his donor "preferred" not to be named and this was used as evidence that disclosure would not cause significant unwarranted damage or distress to the donor. The judge ruled against disclosure because, among other reasons, Lawson's think tank was not so influential that the public interest would be so great as to warrant a private donor having their name published in the context of media interest in his identity.

Conclusion

The Freedom of Information Act presents fewer solutions for journalists seeking to name and shame than the Data Protection Act presents problems. However, investigative journalists acting in the public interest should still turn to transparency legislation when attempting to gather information. When filing a request for personal data it will in almost all cases be sensible to outline the law as we have in this chapter and then give sound and specific

arguments as to why the information should be published, under the heading "factors in support of disclosure." These should stress why it would be "fair" and why the public would have a "legitimate interest" in having access to the information, including a substantial public interest if the personal data is sensitive. The requester would also have to address the issue of any damage or distress to the data subject being unwarranted. It must be acknowledged that private citizens have a right to conduct their affairs in private. At the same time, the public interest is often generally served when this right is infringed.

6: Money Changes Everything: Section 43 of the Freedom of Information Act

"It is not sufficient for a body simply to mark a document commercial in confidence for the information in it to be exempt."

– Ministry of Justice, guidance on Section 43 [PDF], May 2012

Introduction

Billions in taxpayers' money is spent every year with private companies, from contractors to consultants. Often the terms of the deals are covered by confidential contracts. Government is in some areas of commerce a monopoly buyer and decisions relating to which firms to hire and on what terms are inherently socially significant. Secrecy in government procurement can lead to corruption. For these reasons, contracts between government and private companies can be requested under the Freedom of Information Act. Government procurement data, outsourcing contracts for public services and information relating to an authority's own trading position can be accessed. Crucially, public authorities cannot contract out of their responsibilities under FOIA. Moreover, public bodies frequently obtain, and therefore hold, information about businesses, which is therefore potentially available under FOIA.

At the same time, it is argued that public authorities have a legitimate interest in keeping negotiations and tenders secret in order to drive the best deal for the taxpayer. This is one of the key reasons for the inclusion of Section 43 of the Act. The exemption is subject to the pubic interest test so once

again journalists need to prove that the general good will be served through the disclosure of the specific information requested.

In May 2012 the Commons Public Accounts Committee suggested that, "where private companies provide public services funded by the taxpayer, those areas of their business which are publicly funded should be subject to the Freedom of Information Act provision." However, this view is yet to be fully recognised by the interpretation of the Freedom of Information Act. Some commentators have gone even further, arguing that private companies should be subject to FOIA, especially when they have received public funds. However, this looks unlikely to happen in the near future.

The Law [353]

Section 43(1) states simply that "*information is exempt information if it constitutes a trade secret*," but the term "trade secret" is not defined by the Act. Section 43(1) is a prejudice based exemption, which means that authorities are not obliged to show that harm would arise from disclosing information to which the exemption applies. It is subject to a public interest test.

Section 43(2) exempts information "*if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)*." This is one of the most commonly cited exemptions under FOIA and potentially captures an extremely broad amount of information. However, authorities cannot simply claim that the commercial interests of a person would be damaged *a priori*. Public bodies should consult with any relevant third parties and ask how their interests would be harmed.

Relevant tribunal rulings

In *Department of Health (DoH) v Information Commissioner* (EA/2008/0018) the tribunal quoted advice produced by the Office for Government Commerce (now Government Procurement Services) on transparency and public interest factors relating to procurement. It stated: "**There is a strong public interest in showing who public money is being spent with, how much public money is being spent on a particular service or good, and how the supplier arrived at the price that is being charged**." Information that helps the public evaluate and scrutinise government procurement decisions is therefore

likely to warrant disclosure. However, the tribunal added: "Care must be taken to ensure that no information is released which would allow the supplier's internal pricing structure to be deduced, prejudicing its commercial interests."

Section 43(2) can be engaged to exempt contractual information but this should not result in the blanket exemption of whole contracts. In the same case the tribunal analysed a contract clause-by-clause and provided a "case for redaction", a "case for disclosure" and a decision for each individual clause of the contract. This approach has been upheld by tribunals in other appeal cases, including as *Channel 4 v IC and BSkyB* (EA/2010/0134). We recommend requesters cite this approach in your requests.

In *Derry City Council v Information Commissioner* (EA/2006/0014) it was established that to engage Section 43(2) authorities should consult any parties whose interests might be affected if the information were disclosed. Failure to obtain the views of affected third parties can invalidate the authority's reliance on the exemption. Derry City Council claimed that disclosing information would damage the interests of RyanAir but the council reached this conclusion without contacting the company. The tribunal remarked: "Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced." The *Derry* case is arguably the most important on this particular exemption. It sets out the key types of argument and should be referred to in building an argument for disclosure.

Information Commissioner's guidance

There is a clear and compelling public interest in disclosing information about the spending of taxpayers' money and this is recognised by the Information Commissioner. In *Freedom of Information Act Awareness Guidance No 5, Commercial Interests*, (Version 3, 6 March 2008) he states that this "will be equally true whether a public authority is purchasing goods or services or responsible for awarding grants to private sector companies."

The guidance note adds: "Transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved. Where a public authority is purchasing goods or services there is a public interest in ensuring it gets value for money. **This is particularly relevant at a time when there is a public debate around the increasing role private companies have in delivering public services**."

Moreover, there is also a public interest in disclosing some commercially sensitive information about private companies that is held by public authorities, especially when it would protect the public. The ICO states: "In the course of its role as a regulator, a public authority may hold information on the quality of products or on the conduct of private companies. There would be strong public interest arguments in allowing access to information which would help protect the public from unsafe products or dubious practices, even though this might involve revealing information that is likely to harm the commercial interests of a company."

Ministry of Justice guidance

The Ministry of Justice's *Freedom of Information exemptions guidance: Section 43 – Commercial interests* (14 May 2008), recognises the balance between private commercial interests and public accountability when it states: "At a very general level, there is a public interest in protecting the commercial interests of both the private sector (which plays an important role in the general health of the economy) and the public sector (whose commercially-related functions need in any event to be exercised in the wider context of the public interest)." It also provides general guidance as to when commercial information should be disclosed. Information should be released where disclosure would ensure "there is transparency in the accountability of public funds; there is proper scrutiny of government actions in carrying out licensing functions in accordance with published policy; public money is being used effectively and that departments are getting value for money, departments' commercial activities, including the procurement process, are conducted in an open and honest way" and where it would help "business can respond better to government opportunities."

Case study

David Colquhoun, professor of pharmacology at University College London, fought for three-and-a-half years to obtain teaching material from the University of Central Lancashire (UCLan) homeopathy course as part of a campaign attacking "pseudo-science." *The Times Higher Education Supplement* covered his victory following a three-day Information Tribunal in Manchester during which UCLan vice-chancellor Malcolm McVicar and senior managers appeared before the judges. Professor Colquhoun made his FOIA request in 2006 but the university claimed the documents were commercially confidential and could be reasonably accessed by enrolling on the course. It also argued the release of the information may prejudice the effective conduct of public affairs. The tribunal agreed that course material could be "properly described as commercial" but added that UCLan could not demonstrate the commercial value of its homeopathy course. The tribunal ruled: "It was not clear to us how a competitor could significantly exploit access to this material without infringing UCLan's copyright or brazenly aping the content of a course, which would surely attract the scorn of the wider academic community."

Conclusion

The *private* sector could be named such because commercial interests often require confidentiality. Companies compete on the basis that they have invested in research and development, or have formulated strategies and operational techniques that are more efficient than rivals. It is also accepted almost universally that people have a right to conduct business in private and that money should retain anonymity even where its holder is subject to public scrutiny. This culture is entirely at odds with the concept of Freedom of Information and for this reason the legislation applies only to the public sector. It is accepted that in a democracy where taxes are levied involuntarily the public has a right to know how money is spent. In the public sector at least it is recognised that the light of transparency bleaches corruption and wrongdoing. The conflict between these two cultures is played out in Section 43 and the conflagration is likely to become more intense and more widespread as the current administration continues the trend of providing public services through tenders to the private sector. The Freedom of Information Act forces

journalists to consider the public interest and to argue for transparency and openness. Challenging the use of Section 43 through the tribunals and courts can assist in redefining the scope of information currently withheld and allowing the public greater access to information relating to the use of private contractors, ensuring value for money and exposing those cases where private companies fail to deliver to the standard of pre-existing public sector services.

Conclusion

"And while accepting the fact that some of our press, our radio commentators, our prominent citizens and our movies may at times be blamed legitimately for things they have said and done, still I feel that the fundamental right of freedom of thought and expression is essential. If you curtail what the other fellow says and does, you curtail what you yourself may say and do."

– Eleanor Roosevelt, 29 October 1947

The Freedom of Information Act is like working with a potential whistle-blower: you have to nurture a relationship and understand their innermost concerns; you have to persuade them of the benefit of their giving you information and ultimately you have to reconcile yourself with the fact that after months of late nights and heartfelt letters they may in the end decide there is too much harm in disclosing sensitive documents. Therefore, the Act is very rarely a useful tool in providing immediate and easy news hits. Brilliant, snappy stories based on information and datasets that public bodies are happy to publish will make entertaining reading, but they are unlikely to provoke real and lasting change. Surveys are a great way of raising awareness of issues and creating a rough and ready form of social research for those willing to put in the hours making hundreds of requests and battling with databases, but they rarely expose corruption or lead to resignations.

The real value of the FOIA is for journalists, researchers and campaigners who seek documentation and information related to government, where the disclosure would clearly serve the public interest. Even where the public authority – from the Cabinet Office and the Ministry of Defence to the local

parish council – resists disclosure, there is the Information Commissioner, the tribunal judges and beyond that the Supreme Court to interrogate and rule on a request. This is powerful in the right hands.

The Freedom of Information Act is, like all legislation, a living entity and can be changed, if only subtly, through challenge in the tribunal and courts. The more journalists and other interested parties prove the public interest in releasing various types of information, the more transparent and accountable government will have to become. Reporters need a sense of entitlement and determination so that in making requests and challenging the more secretive government bodies they continue to the very end because they appreciate that they have a *right to know*. We hope this guide will prove useful to those journalists willing to utilise their skills and resources in the public interest, even when that means working on long term investigations that will not necessarily make the front page of the *Daily Mail*.

The reality of transparent and accountable government has proven uncomfortable for politicians and civil servants in high office. Jack Straw, who acted as midwife to the Freedom of Information Act as Home Secretary, has stated that because of the legislation, "you are going to get a lot of quasi decision-making through text and Blackberry message." Tony Blair has said FOIA has been "utterly undermining of sensible government." More recently, David Cameron has said the "discovery process" of FOIA "does fur up the arteries" of government. Sir Gus O'Donnell, when Cabinet Secretary, argued FOIA had had a "very negative impact." The Act itself appears to be in jeopardy with the Ministry of Justice conducting a post-legislative review where we have witnessed the prospect of pay-per-view government transparency being introduced.

Simultaneously, the Leveson Inquiry has proven a timely focus on journalistic integrity that has moved the news agenda away from MPs' expenses – as exposed through Freedom of Information. To some degree it has also proven fantastic theatre and a distraction from the austerity programme and its associated risks – where in the case of the NHS the ministerial veto was used to prevent the public reading what civil servants believe may happen to their health service. The Leveson moment threatens to have a chilling effect on investigative journalism when politicians still transgress beyond the boundaries of what is honest and in the public good.

Freedom of Information shines a disinfecting light on government corruption, incompetence and misfeasance. At the same time, the fair and free flow of information to journalists and members of the public through legislative powers delivered by independent commissioners and judges has the potential to end the era of monopoly media influence. Releasing documents through the Freedom of Information Act in a way which is "applicant blind" reduces the need and opportunity for cosy off-record meetings between Prime Ministers and proprietors, spin doctors and editors, secret backroom briefings to a pliant Westminster lobby, notes slipped under the parliamentary office doors of sycophantic journalists, and whispers between MPs whose peccadilloes have been established through phone hacking and the news editors who commissioned the hack, as exposed by Leveson.

The Freedom of Information Act and the culture of transparency it is supposed to crystalise needs to be extended, not curtailed, to encourage sound and honest government in Whitehall and in City Halls across the country. If the exchange of information between politicians, police and other public bodies and press is open and fair this may also curtail the corrupting influence of some sections of Fleet Street.

Brendan Montague and Lucas Amin
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