

Freedom of Information – Recent Developments Anya Proops

INTRODUCTION

1. Given that the Conservative-Lib-Dem coalition agreement provides that the new government intends not merely to retain but also to ‘extend the Freedom of Information Act to increase transparency’,¹ it appears that FOIA is here to stay, at least for the foreseeable future. In the circumstances, there is every reason for information lawyers to stay abreast of recent developments in the FOIA field. With that thought in mind, this paper aims to highlight some of the more important developments in the case-law under FOIA and the Environmental Information Regulations 2004 (“EIR”). Themes which will be touched on include:

- the issue of aggregating public interest considerations where multiple exemptions are in play (*IC v Office of Communications*);
- protecting confidential and commercially sensitive information (*South Gloucestershire v IC*; *University of Central Lancashire v IC* and *Higher Education & Funding Commission for England v IC*);
- how the tribunal approaches cases under FOIA where the health and safety of the public may be put at risk as a result of disclosure (*People for Ethical Treatment of Animals v IC & Oxford University* and *Kalman v IC & Department for Transport* (forthcoming));
- the timing of obtaining the opinion of the qualified person for the purposes of s. 36 FOIA (the prejudice to public affairs exemption) (*Roberts v IC & DBIS* and *University of Central Lancashire v IC*);
- the application of the personal data exemption under s. 40 FOIA, particularly in respect of statistical data (*Department of Health v IC & Pro-Life Alliance* and *Magherafelt DC v IC*);
- late reliance on exemptions (*CPS v IC* and *DEFRA v IC & Birkett*);

¹ See the agreement dated 11 May 2010 at http://www.libdems.org.uk/latest_news_detail.aspx?title=Conservative_Liberal_Democrat_coalition_agreements&pPK=2697bcdc-7483-47a7-a517-7778979458ff. See also Tim Pitt Payne’s Paper ‘Information Law in the New Parliament’.

- allowing a complainant's representative to access closed material and participate in the closed session (*PETA v IC & Oxford University* and *DEFRA v IC & Birkett*); and
 - access to property search records (*East Riding v IC & York Place* and *OneSearch Direct v City of York Council*).
2. In addition to consideration of these themes, this paper also includes a section which outlines some practical tips for those who are involved in bringing or defending appeals in the information tribunal.

I. DEVELOPMENTS IN THE CASE-LAW UNDER FOIA

Aggregating Public Interest Considerations

3. It will often be the case, under both FOIA and the EIR, that a public authority will seek to justify its decision not to disclose particular information to an applicant on the basis of more than one exemption. In such cases and particularly where the exemptions in issue call for an application of the public interest test, a question arises as to whether:
- (1) it is open to the public authority to aggregate all the public interest considerations which arise under the different exemptions in a single public interest balancing exercise; or
 - (2) the authority must conduct discrete public interest balancing exercises under each individual exemption, taking into account only the public interest considerations which are relevant to the particular exemption in issue.
4. This is a question which the Supreme Court was recently called upon to answer in the case in *IC v Office of Communications* [2010] UKSC 3. In *Ofcom*, which was decided under the EIR, a request had been made for disclosure of information as to the location of mobile telephone base stations throughout the UK. Ofcom decided that the information was exempt from disclosure under both r. 12(5)(a) (the public safety exception) and r. 12(5)(c) (the intellectual property exception) EIR. An issue arose in the case as to whether it was open to Ofcom to aggregate all the public interest considerations relevant to these two very different exemptions into a single public interest balancing exercise, particularly having regard to the wording of the public interest test as provided for in r. 12(1)(b) EIR. Both the tribunal and the High Court held that such aggregating of the public interest considerations was impermissible, (EA/2006/0078) and [2008] EWHC 1445 (Admin). In a rather controversial judgment, the Court of Appeal overturned the

High Court's judgment and concluded that aggregation was permissible under the EIR, [2009] EWCA Civ 90. The Commissioner, who was seeking to argue against the aggregation approach, appealed to the Supreme Court.²

5. Many hoped that the Supreme Court would clearly determine this issue so that the position would be clear-cut in the context of extant or forthcoming appeals. However, those hopes were dashed when the Supreme Court delivered a judgment which confirmed that it was referring the issue to the European Court of Justice. The referral was made on the basis that this was an issue which required a determination to be made under the Directive 2003/4/EC on public access to environmental information, the EIR itself having been enacted to give domestic effect to the Directive.
6. Notably, the reference to the ECJ notwithstanding, the Supreme Court did confirm, by a majority of three to two, that it favoured the approach adopted by the Court of Appeal. The majority's views, as outlined in Lord Mance's judgment, were based on the analysis set out below.
 - (1) Article 4(2) of the Directive provides that 'In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal' (emphasis added).
 - (2) The reference in Article 4(2) to the 'particular case' required the factors relevant to the particular case to be taken into account but did not require different exceptions to be treated separately.
 - (3) In terms of the 'interest served by the refusal', given that all facets of the interests in disclosure may be weighed on one side of the balance, all facets of the interests served by the refusal can and should equally be weighed on the other side.
 - (4) The fact that the interests in favour of the refusal may be diverse was itself a factor counting in favour of their all being weighed together, although consideration may need to be given in any particular case to whether there was a risk of double counting.
 - (5) The fact that some exceptions provided under individual paragraphs of r. 12 (particularly the multiple exceptions provided for under paragraph (b) of Art 4(2))

² It is presently largely accepted that, if aggregation is permissible under r. 12(1)(b), it is likely that it is also permissible under s. 2(2) FOIA, not least given the similarity of wording in the two provisions and the fact that EIR is generally regarded as a more permissive regime than FOIA.

were themselves so diffuse in nature also tended to indicate that a cumulative approach was legitimate.

7. The minority rejected this analysis on the basis that:
 - (1) at the very least, it cannot have been intended that the very different types of exceptions provided for under Art 4(1) and Art 4(2) would have been treated cumulatively. Reading Article 4 in light of the Aarhus Convention makes clear that the exceptions contained in Article 4(1) and 4(2) are intended to be alternative;
 - (2) there is no common factor behind the exceptions which enables any sensible accumulation. The exceptions serve disparate interests which must each be weighed separately. Thus, a public interest in limiting criminal activities impacting on public safety which is insufficient to outweigh the public interest in disclosure cannot sensibly be put into the balance in favour of maintaining some other exception;
 - (3) accumulating disparate public interests would lead to incongruities and it was far from clear how this would work in practice;³
 - (4) the natural language of the Directive regards each exception as a separate potential reason for refusal. If the interest in maintaining the particular exception is insufficient to outweigh the public interest in disclosure, it ceases to be relevant. If it is sufficient to outweigh the public interest in disclosure, the information will be exempt under that exception;
 - (5) the illogic in Ofcom's case is that it could produce a result whereby, although no individual exception applies, viewed collectively two or more exceptions apply.
8. In light of these developments, we remain for the time-being in a state of limbo as to whether the aggregate approach is lawful under the EIR. As a precautionary measure, public authorities may wish to consider whether, in the context of individual cases, they are able to confirm in their refusal notices that the result would be the same even if an aggregate approach had not been adopted.

³ See further the case of **South Gloucestershire v IC** (EA/2009/0032) referred to below. In this case, which was cited before the Supreme Court, the Tribunal was at pains to outline its concerns about the workability of the aggregate approach.

Protecting Confidential and Commercially Sensitive Information

9. Both the EIR and FOIA contain exemptions which are designed to afford a measure of protection where disclosure of the requested information may breach confidences or otherwise damage commercial interests. Thus:
 - r. 12(5)(e) EIR provides for a qualified exception where disclosure would adversely affect *'the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest'*;
 - s. 43 FOIA provides for a qualified exemption where disclosure of the information: *'would or would be likely to prejudice the commercial interests of any person (including the public authority holding it)'*;
 - s. 41 FOIA provides for an absolute exemption in respect of information obtained by the authority from another person where the disclosure of the information would give rise to a *'breach of confidence actionable by that or any other person'*.
10. The application of these exemptions has been considered in a number of recent cases.
11. In ***South Gloucestershire CC v IC*** (EA/2009/32), a request had been made for disclosure of information contained in a report which the local authority had commissioned from a consultant. The report had been commissioned to assist the council in adopting a robust position in its negotiations with a developer (Bovis) in respect of a major section 106 planning agreement. The request for disclosure of the report had been made by Bovis. The council refused to disclose the requested information on the grounds that it was exempt under r. 12(4)(e) (the internal communications exception) and r. 12(5)(e) (the confidential/commercial information exception) EIR. The council's reliance on r. 12(5)(e) was based in particular on concerns that, if the report were to be disclosed, Bovis would seek to exploit the information in the report to undermine the council's negotiating position, with the result that either the council (and by extension taxpayers) would end up having to make a larger investment in the relevant development than would otherwise have been the case or the entire development would become stymied.
12. The Commissioner upheld Bovis' complaint against the council's decision. On appeal, the Commissioner sought to argue that the disputed information was not exempt under r. 12(5)(e) because:

- (1) r. 12(5)(e) would only be engaged in respect of information where the information was confidential and the duty of confidentiality was owed by the authority to a third party (i.e. it would not apply to the authority's own confidential information);
 - (2) in any event, it could not be accepted in the circumstances that disclosure of the information would risk damaging any commercial interests; and, furthermore,
 - (3) with respect to the application of the public interest test, any public interest in maintaining the exemption would be outweighed by the public interest in disclosure.
13. The tribunal rejected all of these arguments.
 - (1) It held that r. 12(5)(e) would apply in respect of confidential information, irrespective of whether it was or was not the authority's own confidential information. In reaching this conclusion, the tribunal contrasted the language of r. 12(5)(e) with the more restrictive language found in s. 41 FOIA.
 - (2) It also concluded that the evidence presented to it by the council's witnesses demonstrated:
 - (a) that the commercial risks identified were real and significant risks, such that r. 12(5)(e) was engaged and, further,
 - (b) that, not least in view of the significance of those risks, the public interest balance tipped in favour of maintaining the exception.
14. The tribunal rejected the council's case that the report was an 'internal communication' for the purposes of r. 12(4)(e) EIR). In reaching this conclusion, the tribunal distinguished the case from *Secretary of State for Transport v IC* (EA/2008/0052). Notably, the tribunal is currently hearing an appeal on the question of whether correspondence and minutes of a meeting between Lord Hunt and the Mayor of London constitute 'internal communications' for the purposes of r. 12(4)(e) and 12(8), the Commissioner having found that they were not on the ground that the Mayor's office is a public authority which is separate from government (*DEFRA v IC & Birkett* (EA/2009/0106)).
15. In *University of Central Lancashire v IC* (EA/2009/0034), a request was made for disclosure of university course materials in respect of a BSc degree course in homeopathy. UCLAN refused to disclose the materials on the basis they were exempt under two FOIA provisions: s. 43 (commercial interests) and s. 36 (prejudice to

commercial affairs). The Commissioner concluded that the university's refusal was unlawful. The university appealed to the tribunal.

16. On appeal, the university advanced a number of arguments as to why the information was exempt under s. 43, including not least that any disclosure of the course materials would be exploited by competitors so as to deprive UCLAN of the competitive advantage it would otherwise enjoy in respect of its homeopathy course and that disclosure would increase the risk that copyright in the information would be infringed.
17. The Tribunal rejected the university's case under s. 43. The following aspects of the judgment are worthy of note:
 - (1) The tribunal rejected the Commissioner's argument that, as a charitable educational institution UCLAN could not have commercial interests for the purposes of s. 43. It held that, on the available evidence, modern universities were required to function very much on a commercial basis and, hence, they could have commercial interests for the purposes of s. 43. In reaching this conclusion, the tribunal accepted the university's argument that the concept of 'commercial interests' should be construed broadly.
 - (2) The tribunal was not persuaded on the evidence that disclosure of the course materials would create a real and weighty risk of prejudicing the university's commercial interests for the purposes of s. 43. It held, in effect, that the risk that the university would lose any meaningful competitive advantage was in the circumstances more illusory than real. It also held that concerns about breach of copyright were overstated. In reaching the latter conclusion, the tribunal took into account that disclosures of information under FOIA would not dilute or extinguish any copyright enjoyed by any third party and that competitors would be reluctant to infringe copyright in the material given that this would expose them to civil and possibly also criminal penalties in accordance with the Copyright Act 1998.
 - (3) The tribunal concluded obiter that, even if s. 43 had been engaged, the public interest would have weighed in favour of disclosure. This was so not least given:
 - (a) the strong public interest in members of the public being able to examine for themselves the quality of publicly funded courses and, further,
 - (b) the intensity of public debates over the validity of homeopathy as a form of treatment.
 - (4) Notably, in the course of reaching its conclusions on the public interest test, the tribunal rejected arguments advanced by UCLAN with respect to the Re-Use of

Public Sector Information Regulations 2005. In essence, the regulations impose on public authorities a scheme under which they must consider whether to permit third parties to re-use their own copyrighted documents. The aim of the regulations is to facilitate the sharing of information generated by public authorities, essentially in the public interest. The university argued that it was significant that universities had been exempted from the scope of the regulations, not least because this suggested that universities had a particular interest in protecting their commercially sensitive information. The tribunal did not find this argument to be persuasive, particularly in view of the facts that: (a) disclosure under FOIA did not itself equate to the university authorising any re-use of its copyrighted information; and (b) a relevant explanatory memoranda did not suggest that universities had been excepted from the regulations because there were concerns about loss of competitive advantage.

- (5) The tribunal also rejected the university's case under s. 36. In reaching this conclusion, the tribunal rejected arguments advanced by the university to the effect that, if it responded to this particular FOIA request, it would have to respond to many similar FOIA requests and this would have a disabling effect on its administration. The tribunal considered that such an argument was fundamentally at odds with the philosophy of public access which underpinned FOIA.
18. Whilst the judgment in ***UCLAN*** was clearly reached on the basis of its own particular facts, it does raise interesting questions about whether FOIA can operate to permit access to university course materials more generally.
 19. In ***Higher Education & Funding Commission for England v IC & Guardian News*** (EA/2009/0036), a request was made for disclosure of information relating to the state of buildings at higher education institutions (HEIs). The information in question had been obtained by HEFCE from the HEIs. HEFCE refused to disclose the information on the ground that its disclosure would give rise to an actionable breach of confidence and, hence, it was exempt under s. 41 FOIA. The Commissioner concluded that s. 41 was not engaged in respect of the information because the disclosure would not give rise to an actionable breach of confidence. In reaching this conclusion, the Commissioner had in mind the requirements for an actionable breach of confidence identified by Megarry J in ***Coco v AN Clark (Engineers) Ltd*** [1968] FSR 415, namely:
 - (1) the information had the necessary quality of confidence;

- (2) it was imparted in circumstances importing an obligation of confidence; and
- (3) disclosure would be an unauthorised use of the information and to the detriment of the confider.

20. The Commissioner took the view that the first two requirements were met but that the latter requirement had not been met because disclosure of the information would not cause the HEIs to suffer any detriment. HEFCE appealed. Guardian News was joined as an additional party. The following is a summary of the central principles emerging from the tribunal's judgment

- (1) In order to establish that there was an 'actionable breach of confidence', the public authority had to establish that a breach of confidence claim was likely to succeed. It was not sufficient that the claim was merely properly arguable, i.e. that it would survive a strike out. Whilst the language of s. 41 did not itself indicate this conclusion, as the language was ambiguous, *Hansard* gave a clear answer on the point: 'actionable' for s. 41 purposes means, in the words of the bill's sponsor, Lord Falconer, 'being able to go to court and win'.
- (2) As per the approach in **Coco**, in order to prove that information had the 'necessary quality of confidence', what needed to be established was simply that judged objectively the information was not otherwise accessible and was not trivial. Contrary to the case being advanced by Guardian News, the authority did not also need to be established at this stage of the analysis that the party claiming confidentiality could demonstrate some value which it would derive from the information being kept confidential, not least because this was something which could be considered at the third stage of the **Coco** test.
- (3) In cases involving commercial information of the kind in issue in the instant case, the concept of 'actionable breach of confidence' required that the disclosure give rise to some form of detriment, as had been suggested in **Coco**. However, the standard of detriment was not particularly onerous and reputational damage would suffice for these purposes. The position on detriment may well be different where the information in issue is information affecting the privacy rights of individuals. However, there was no question of the case law on privacy rights operating to dilute or remove the requirement for detriment in cases involving commercial information.

- (4) A breach of confidence would not be actionable if there would be an effective public interest defence to the claim. Following **HRH Prince of Wales v Associated Newspapers Ltd** ([2006] EWCA Civ 1776 (CA)), the test of whether disclosure was in the public interest so as to give rise to a public interest defence was whether the disclosure was proportionate in all the circumstances.⁴
21. Applying these principles to the facts of the case, the tribunal found that there would be no actionable breach of confidence in disclosing the requested information because, whilst the information was confidential and its disclosure might give rise to some detriment, HEFCE would have a valid public interest defence in all the circumstances of the case.

Public Health & Safety

22. As a matter of common sense, it is likely to be a rare case where a public authority will be required under FOIA to disclose information where there is good evidence that the disclosure itself would risk public health and safety. The question of how the tribunal should approach cases where the public authority is arguing that there is such a risk has been considered in two recent cases: **People for Ethical Treatment of Animals v IC & Oxford University** (EA/2009/0076) and **Kalman v IC & Department for Transport** (forthcoming).
23. In **PETA**, a request was made by PETA for disclosure of information about particular animal experiments being conducted at Oxford University. The request was made after the BBC screened a documentary which examined the merits and demerits of particular animal experiments being conducted in Oxford, including experiments conducted on a monkey named Felix. The BBC film included footage of Felix and interviews with the professor conducting the experiments. PETA requested disclosure of information contained in the project licence which governed the experiments being conducted on Felix.
24. The university refused to disclose the information on the ground that the information was exempt under s. 38 FOIA (the health and safety exemption). Section 38 provides for a qualified exemption where disclosure '*would or would be likely: (a) to endanger the physical or mental health of any individual; or (b) endanger the safety of any individual*'.

⁴ In the **Prince of Wales** case, the Court of Appeal held that, where the Article 10 right to freedom of expression was engaged, the question of whether that right should be fettered had to be determined by a proportionality test. In **London Regional Transport v Mayor of London** [2001] EWCA Civ 1491, Sedley LJ held at para. 55 that Article 10 rights included the right to receiving information as well as the right to disclose it. Although this latter judgment was not referred to by the tribunal in its reasons, it is presumed that it is the basis of the tribunal's conclusion that the proportionality test applies to disclosures under s. 41.

25. The university's view was that the information was exempt under s. 38 because there was a real and significant risk that, if disclosed, the information would be used by animal extremists to incite acts of violence against persons directly or indirectly connected with the experimentation.⁵ The background to the university's refusal was that certain animal extremists had been waging a violent campaign in Oxford for some time; their activities had included, for example, arson attacks and placing an incendiary device on college grounds. Importantly, following screening of the BBC documentary, extremist websites had published statements to the effect that Felix had become the symbol in the struggle against animal experimentation.
26. Following a complaint to the Commissioner, some information from the project licence was disclosed. However, the Commissioner refused the complaint in respect of the remainder of the information. PETA appealed the Commissioner's decision to the tribunal. The tribunal heard evidence from a number of individuals including, on behalf of the university, a Detective Chief Inspector who gave detailed evidence as to the particular risks posed by animal extremists.
27. A summary of the tribunal's judgment is set out below.
- (1) The evidence showed that disclosure of the withheld information would in a real and significant way increase risk of endangerment to human health and safety resulting from animal extremist activity. Accordingly, s. 38 was engaged.
 - (2) Once it had been established that s. 38 was engaged, and hence the disclosure would risk endangering human health and safety, the public interest test would require a strong public interest in disclosure to avoid a conclusion that the public interest balance lay in favour of the exemption being maintained.
 - (3) In the instant case, the nature of the endangerment to health and safety, which included the risk of bombings and arson attacks, meant that there was in any event a particularly strong public interest in maintaining the exemption. Whilst this did not mean that s. 38 operated as an absolute exemption, it did mean that there would need to be an extremely strong public interest in disclosure to avoid the conclusion that the information should be withheld.
 - (4) The public interest scale in favour of withholding the information was given additional weight by virtue of the fact that the evidence showed that scientists would be so concerned about the dangers of disclosure that they would be

⁵ It was not suggested that PETA itself was such an organisation.

deterred from engaging in work involving animal experiments. This risk, whilst only indirectly related to the s. 38 exemption, was not so remote that it could not be taken into account.

- (5) On the facts of the case, there was no equally strong counter-veiling public interest in disclosure.
28. The tribunal's approach as outlined in **PETA** is not altogether surprising given that it would be an odd result if FOIA could readily be used for accessing information where the access itself risked endangering human health and safety.
29. **Kalman** was not concerned with the application of s. 38 but rather the application of s. 24 FOIA (the national security exemption).⁶ The exemption was prayed in aid by the Department for Transport in respect of a request for disclosure of certain directions given by the Secretary of State to airports on the subject of airport security searches. Like s. 38, s. 24 is a qualified exemption and, hence, calls for an application of the public interest test. The Department for Transport refused to disclose the directions on the ground that s. 24 was engaged in respect of the information and the public interest balance weighed in favour of the exemption being maintained. The Commissioner refused Mr Kalman's complaint against that refusal. Mr Kalman appealed to the tribunal.
30. Whilst the exemption in issue in **Kalman** was s. 24 rather than s. 38, issues of public safety lay very much at the forefront of the analysis. This was not least because it was the Department for Transport's case that disclosure of the directions would risk jeopardising the integrity of airport security searches and, hence, the safety of the flying public. The **PETA** judgment was cited in argument before the Tribunal. Judgment in **Kalman** is currently awaited.

Opinion of the Qualified Person – It's All in the Timing

31. Section 36 FOIA provides for a number of qualified exemptions. In broad terms, they are aimed at ensuring that, as a result of disclosures under FOIA, there is no undue prejudice to the effective conduct of public affairs. The exemptions provided for under s. 36 are unique in the sense that the question whether they are engaged turns on whether a 'qualified person' ("QP") has given the necessary 'reasonable opinion' that disclosure would or would be likely to cause the relevant prejudice. Thus, s. 36 provides that

⁶ In fact, **Kalman** is the first appeal in which s. 24(1) FOIA has been considered – cf. **Baker v IC** (EA/2006/0045) where the tribunal considered the application of the 'neither confirm nor deny' provision in s. 24(2).

information: *'is exempt information if, in the reasonable opinion of the qualified person, disclosure of the information [would or would be likely to cause the relevant prejudice]*.

32. An interesting question arises as to how s. 36 is to be applied in cases where: (a) no QP opinion was obtained when the request was originally responded to; but (b) such an opinion has been obtained subsequently, for example in the course of the Commissioner's investigation or during an appeal to the tribunal. The reason this question arises is because:

- (1) it is now well established that the question of whether information is to be treated as exempt is to be determined at the time the request was responded to, or at the latest by the time of the review, and
- (2) if the relevant opinion had not been obtained by this time then arguably the information cannot be treated as exempt under s. 36 at any time thereafter (i.e. as the relevant triggering condition which enables the information to be treated as exempt for the purposes of s. 1 FOIA has not been met at the relevant time).

33. The question of whether s. 36 can be invoked after the time of the response/review has been considered in a number of cases.

- (1) In ***Student Loans v IC*** (EA/2008/0092), the tribunal was called upon to consider this question in circumstances where the public authority had not relied on the exemption before the Commissioner but had sought to rely on it during the appeal. The tribunal concluded that it had no jurisdiction to consider the application of the exemption as: (a) its jurisdiction was confined to determining whether the Commissioner's decision was correct in law and (b) the Commissioner's decision could not be impugned for failing to take into account an exemption which had not been engaged at the time when the public authority was responding to the request.
- (2) In ***Roberts v IC & DBIS*** (EA/2009/0035), the public authority did not rely on s. 36 when dealing with the request. However, it sought to place reliance on the exemption before the Commissioner. The tribunal took the view that s. 36 could only be invoked if the relevant opinion had been obtained at the time the authority was dealing with the request. In reaching this conclusion, the tribunal compared the s. 36 exemption, which uniquely is only triggered only where the authority has taken specific action to obtain a QP's opinion, with other

exemptions in FOIA which do not depend on any comparable ancillary action on the part of the public authority in order to be engaged.

- (3) In ***UCLAN v IC*** (referred to supra), the public authority did not rely on s. 36 at the response stage but sought to rely on it before the Commissioner. No point was taken by the Commissioner on the timing of the invocation of s. 36. The tribunal confirmed (in a footnote) that it was not minded to follow ***Roberts***.
34. Not least given the tribunal's decision in ***UCLAN***, It is highly likely that the reasoning in ***Roberts*** will be subject to further challenge in the future. In the meantime, it would be prudent for public authorities to ensure that they are always considering the application of s. 36 at the response stage.

Statistical Information and Personal Data

35. Section 40(2) FOIA affords an absolute exemption in respect of any information which:
- (1) amounts to personal data for the purposes of s. 1 of the Data Protection Act 1998 ("DPA") and
 - (2) would, if disclosed, breach any of the data protection principles contained in schedule 1 to the DPA.
36. Under s. 1 DPA, even if an individual cannot per se be identified from particular data, that data will still constitute 'personal data' for the purposes of s. 1 if a living individual can be identified *'from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller'*.
37. In the case of ***England & Bexley LBC v IC*** (EA/2006/0060), the information tribunal took the view that data confirming that particular properties in a local authority's area were vacant constituted 'personal data' for the purposes of s. 1 DPA. This was because, whilst that data did not per se identify any individuals, it could be married up with data held by the authority in its council tax records so as to reveal the identity of persons who owned the vacant properties.
38. The question of the extent to which ostensibly anonymous statistical data can, despite their apparent anonymity, constitute 'personal data' for the purposes of s. 40 DPA was recently considered in the case of ***Department of Health v IC & Pro-life Alliance*** (EA/2008/0074). In that case, a request was made by the Pro-life Alliance for disclosure of certain statistical information held by the Department of Health in respect of abortions

carried out in the UK. In essence, the request was aimed at obtaining information which would reveal a breakdown of the number of abortions which had been conducted under 'Ground E' (abortions where there is a substantial risk that the child, if born, would be seriously handicapped). The Department refused to disclose the information on the ground that it was exempt under s. 40 (s. 44 FOIA was also relied on). The Commissioner upheld a complaint against the Department's refusal. The Department appealed to the tribunal.

39. A summary of the tribunal's conclusions on the application of s. 40 is set out below.

Is the statistical data 'personal data'?

- (1) The requested data amount to 'personal data' for the purposes of s. 40 because, whilst the data did not itself identify any individual, it could be read together with other data held by the Department so as to enable individual patients and doctors to be identified.
- (2) This result could not be avoided by the Department 'barnadising' the data.⁷ This is because the Department would still have access to other information enabling it to effectively de-barnadize the information and, hence, identify individuals. (In reaching this conclusion, the tribunal took into account the judgment of the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47);
- (3) the data would not cease to be 'personal data' merely because third parties (e.g. members of the public) would not have access to information enabling identification to take place. If the Department itself had access to such information then the data constituted 'personal data';
- (4) even cells with a zero count amounted to personal data because, through a process of inference, they could reveal information about individual cases falling within other cells.

Would disclosure of the data breach the data protection principles?

- (5) On the question of whether disclosure of the data would contravene the data protection principles, the central issue was whether the disclosure would contravene the first data protection principle (fair and lawful processing).

⁷ Barnadising data entails taking the data and adapting any low cell count figures so as to ensure that information about individuals cannot be extrapolated.

- (6) So far as fairness was concerned, what was critical was whether mere disclosure of the data would itself create a real and significant risk that individuals would be identified or traced (i.e. as opposed to a scenario where identification came about as a result of additional information being provided by an insider within the Department or a scenario where a hospital inadvertently disclosed additional information enabling the individual to be identified). The evidence suggested that mere disclosure of the data itself at best created only a remote risk of identification.
 - (7) So far as the lawfulness of the disclosure was concerned, the issue was whether the disclosure would risk breaching Article 8 rights to privacy. Given that there was no real and significant risk of identification, Article 8 rights were not engaged. In the alternative, given the small nature of the risk, any interference with Article 8 rights was justified.
 - (8) On the facts of the case, a schedule 2 condition would be met in respect of the disclosure, namely the legitimate interests condition set out in paragraph 6 of schedule 2.
 - (9) Moreover, insofar as the data constituted 'sensitive personal data' a schedule 3 condition would also be met, namely the condition set out in paragraph 7(1)(b) of schedule 3 (disclosure necessary for the discharging of statutory functions).
 - (10) Accordingly, disclosure of the data would not contravene the data protection principles and, hence, the data was not exempt from disclosure under s. 40 FOIA.
40. The Department is currently appealing the judgment to the High Court on the ground that the tribunal erred in its conclusion that the first data protection principle would not be contravened by the disclosure of the data. The Commissioner is cross-appealing the tribunal's conclusion that the requested data constituted 'personal data' for the purposes of s. 1 DPA.
41. The judgment in the *Pro-life* case should be read alongside the judgment of the tribunal in *Magherafelt DC v IC* (EA/2009/0047). *Magherafelt*, which was decided after the *Pro-life* case, concerned a request for disclosure of statistical information drawn from the disciplinary records of council employees. Following the approach adopted in *Pro-life*, the tribunal held that the statistical data did amount to 'personal data' for the purposes of s. 1 DPA. It then went on to consider whether disclosure of the data would breach the

first data protection principle. It concluded that it would because this was a case where it would not be difficult for members of the public (e.g. journalists) to use the data to work out the identity of individual employees who had been disciplined. In other words, in contrast with *Pro-life*, this was a case where disclosure of the data itself would create a real risk of identification, even if the data taken in isolation did not per se reveal the identity of any employees.

...And In other News

Late Reliance on Exemptions

42. It is not at all uncommon for a public authority which is party to an appeal to the tribunal to seek to pray in aid exemptions which were not previously relied upon. To date, the tribunal has taken the view that it has a discretion as to whether to allow late reliance and that late reliance should only be permitted in exceptional circumstances (see further the recent case of *Crown Prosecution Service v IC* (EA/2009/0077)).
43. In *Home Office & Ministry of Justice v IC* [2009] EWHC 1611 (Admin), the Home Office sought to argue before the High Court that, in fact, the tribunal had no discretion to refuse late reliance on an exemption. Thus, it argued that having regard to the legislative scheme embodied in FOIA if, at the time of the request, the information was exempt under FOIA, it was open to the public authority to rely on that exemption at any time, whether before the Commissioner or the tribunal. The High Court refused to rule on these arguments on the basis that they had effectively become academic in the context of the appeal.
44. In the recent case of *DEFRA v IC & Birkett* (EA/2009/0106), the tribunal followed the existing tribunal orthodoxy and refused to allow DEFRA late reliance on a number of exceptions contained in the EIR. It is understood that DEFRA may well seek to appeal this decision to the Upper Tribunal on the ground that, as was argued in the *Home Office* case, the tribunal has no discretion to refuse late reliance.

Counsel-Only Access to Closed Material

45. It is obviously the case that tribunal's should seek to safeguard the confidentiality of any disputed information pending the outcome of the appeal. In practice, this generally means that any individual applicant/complainant who is party to the appeal will be denied access to the disputed information and also any closed session where that information is to be considered. But what of any counsel representing the applicant/complainant, should the tribunal as a matter of course exclude him/her from accessing the closed material and

participating in the closed session? This is a question which the tribunal has considered in two recent cases.

46. In **PETA**, referred to supra, an interlocutory application was made by PETA's counsel that he be granted 'counsel-only' access to the closed material in the case and, further, that he be permitted to participate in the closed session. The application was made on the basis that counsel would undertake not to relay any closed information or closed evidence to his client. The application was refused by the tribunal. In refusing the application, the tribunal took the view that it had powers to give the necessary directions under r. 5 of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. However, it considered that the application should be refused particularly because:

(1) there were unavoidable risks that closed information/evidence might be conveyed to PETA through an accidental slip by counsel and, further, the difficulties which counsel would face in taking instructions from his client in circumstances where he knew those instructions could not be squared with the closed information/evidence; and

(2) it would be disproportionate to allow counsel-only access given that the tribunal itself operated on an inquisitorial basis and it could challenge any evidence being given by the public authority.

47. A similar approach was adopted in the very recent case of **DEFRA v IC & Birkett** (EA/2009/0106) where again an application was made for counsel-only access by the applicant/complainant.

48. It is interesting to compare these decisions with the recent judgments by the Court of Appeal in **Home Office v Tariq** [2010] EWCA Civ 462; **Bank Mellat v HM Treasury** [2010] EWCA Civ 483 and **Bisher Al Rawi v Security Service & Ors** [2010] EWCA Civ 482.

(1) In **Tariq**, the Court of Appeal held that it was not unlawful for an employment tribunal to hear evidence on issues affecting national security in closed session, albeit with the assistance of a special advocate to represent Mr Tariq's interests. This was particularly in view of the fact that such arrangements were specifically permitted under the tribunal's statutory rules of procedure. However, the claimant, who would not be given access to the closed session, had to be told

the gist of the closed material so that he could fairly and effectively pursue his claims.

- (2) **Bank Mellat** was similarly concerned with how the court should approach a case which, under relevant statutory rules (in this case CPR 79), the court could hear evidence and submissions in closed session. An issue arose as to whether HM Treasury was entitled to refuse to disclose to the Bank relevant documents which HM Treasury wished to have treated as closed evidence. The Court of Appeal held that it was permissible for the documents to be withheld, provided that the Bank was informed as to the gist of the information being withheld so that it could give effective instructions.
 - (3) **Al Rawi**, by way of contrast, was concerned with a civil claim for damages where there was no overarching statutory regime allowing for evidence to be dealt with in closed session. The claims had been brought by former Guantanamo Bay detainees in respect of their alleged treatment at the hands of the Security Services. In this case, the Court of Appeal, overturning the High Court's judgment, held that it was not open to the defendants to adduce evidence in closed session: either they sought to have the evidence excluded from the proceedings altogether under the public interest immunity procedure or they were obliged to disclose the evidence to the claimants.
49. Query whether in particular the judgments in **Tariq** and **Bank Mellat** require a reconsideration of the way in which the information tribunal approaches the handling of closed evidence and submissions in appeals which come before it.
 50. Interestingly, the European Court of Human Rights has very recently considered the question of whether the highly restrictive procedures adopted by the Investigatory Powers Tribunal⁸ were compliant with Article 6: **Kennedy v UK** (application no. 26839/05).⁹ The IPT procedures allow for the use of closed evidence; for evidence to be heard in closed session and for parts of the determination to be withheld from the complainant.
 51. The Court did not decide the question of whether Article 6 rights were engaged in respect of the procedures. However, it did conclude that, if Article 6 rights were engaged, the procedures would be Article 6 compliant, not least given the strong public interest in safeguarding the integrity of the system of State-sanctioned surveillance operations. In

⁸ The IPT hears complaints by citizens of wrongful interference with their communications under RIPA, including claims that any interference breached their human rights.

⁹ The judgment also contains a detailed examination of the interception regime under RIPA. 11KBW's Ben Hooper acted as junior counsel on behalf of the UK government.

reaching this conclusion, the Court held that whilst the need to protect the integrity of secret surveillance operations justified the need for restrictions in the judicial process, the question was whether the restrictions operating within the IPT were 'disproportionate or impaired the very essence of the applicant's right to a fair trial' (para. 186). Having considered the relevant procedures, the Court took the view that they were Article 6 compliant. The Court went on to confirm that it was proportionate and otherwise lawful for the Government to withhold documents and evidence which, if revealed to the applicant, would effectively disclose the sensitive information which ought, in the public interest, to be withheld.

52. This judgment reinforces the argument that, if and insofar as the information tribunal is required to disclose the gist of any withheld material to an applicant/complainant, it should only do so to the extent that that disclosure would itself not reveal, whether directly or inferentially, information which ought to be withheld pending the outcome of the appeal.

Property Search Information

53. It is well known that, in order to be able to sell a property, you have to obtain property search information. This information is typically held by local authorities. Given that much of the relevant property search information constitutes environmental information, the EIR will often be relevant to any application to access property search information held by a local authority.
54. In ***East Riding Council v IC & York Place*** (EA/2009/0069), the information tribunal was called upon to determine whether a local authority had erred under the EIR when it refused to allow a property search company to inspect certain property search information in situ in the council's office free of charge. The local authority had sought to argue that that it was entitled to charge for permitting access to the information under r. 8 EIR. In particular, it argued that:
- (1) it was not reasonably practicable to allow the applicant to inspect the information in situ in the council's offices, particularly because the information was mixed with other information which should be withheld, including personal data; accordingly
 - (2) copies would have to be provided to the applicant; and
 - (3) the council was entitled to impose a reasonable charge for those copies under r. 8 EIR.

55. The tribunal rejected the council's case. It did so on the basis that the council's own evidence did not come up to proof on the question of whether it was reasonably practicable to permit inspection of the disputed information.
56. The judgment in ***East Riding***, should be considered alongside the High Court's judgment in ***OneSearch Direct v City of York Council*** [2010] EWHC 590 (Admin). OneSearch is a property search company. It sought to gain direct access to unrefined data held by the council which would enable it to answer relevant property search questions. The council refused to permit this direct access on the ground that it was entitled to provide the relevant property search information at a charge under the Local Authorities (England) (Charges for Property Searches) Regulations 2008. OneSearch sought to judicially review this decision. OneSearch's application for judicial review was rejected by the High Court. The High Court held that it was entirely lawful for the council to provide the relevant information in accordance with the statutory scheme rather than by means of direct access. Notably, OneSearch did not seek to rely on the EIR in the context of this claim.

II. INFORMATION TRIBUNAL – PRACTICAL TIPS

57. As in any other litigation context, the more familiar practitioners become with the inner workings of the tribunal appellate process, the better placed they will be to represent their clients' interests in individual appeals. In my experience, there are a number of aspects of the litigation process which are often overlooked by parties and their representatives. Sometimes, this merely irritates the tribunal but in other cases it can make the difference between winning or losing on a particular appeal. Points which you may wish to consider in this context include those set out below.

Scope of the Appeal

58. Particularly where appeals are brought by individual complainants, it may be difficult to decipher what matters are genuinely in issue for the purposes of the appeal. It is very important that, before the appeal hearing commences, the parties endeavour to resolve what matters are in fact in issue for the purposes of the appeal. Failure to do this can result in appeal hearings operating on a misconceived basis. If no agreement can be reached on the issues, the question of what is in issue for the purposes of the appeal should be raised as a preliminary issue with the tribunal.
59. When seeking to agree the matters in issue for the purposes of the appeal, consideration should be given to whether, despite the breadth of the original request, in the context of

- the appeal, the appellant is in fact only concerned with a narrower subset of information. If this is the case, then confirming this fact, either in pre-hearing correspondence or at the start of the hearing, will operate to narrow the scope of the appeal, potentially making it less expensive and time consuming for all concerned.
60. Sometimes appeals can operate on a misconceived basis because parties have adopted different constructions of the original request and, hence, have assumed that different types of information are in issue. If there is a concern that this is an issue in an appeal, it should ideally be raised in pre-hearing correspondence and, if necessary, with the tribunal. Otherwise, there is a risk that witness statements and relevant legal arguments will not be properly focussed.
61. Where a public authority is a party to an appeal, it should generally, in advance of the hearing, review the question of whether it has taken an unduly narrow approach to the request or has otherwise failed to identify information relevant to the request. If there is other information which plainly is relevant to the request which has thus far not been considered, it is prudent:
- (1) to notify the other parties and the tribunal of this fact;
 - (2) to make an assessment of whether the new information should be withheld or disclosed;
 - (3) in any event, to disclose the new information to the Commissioner at the earliest opportunity so that he can make his own assessment as to any information which the authority may wish to withhold.
62. Failure to take these steps can result in appeals becoming stymied as a result of the late disclosure of relevant information. It can also expose the authority to unnecessary adverse findings and even, in the worst cases, costs orders (see further *Bowbrick v IC & Nottingham City Council* (EA/2005/0006)).

Tailoring Evidence

63. It is essential that parties tailor their evidence very specifically to the particular facts of the case and the particular information in issue. This is an issue above all for public authorities, as typically they must satisfy the tribunal that their conclusion that the particular information was exempt from disclosure was a lawful conclusion.

64. A public authority will potentially be seriously imperilling its case if it does not give clear evidence (ideally in its witness statements) as to:

- (1) why, on the particular facts of the case and having regard to the particular information in issue, the particular exemption was engaged; and, further,
- (2) in the context of the application of any qualified exemption, why disclosure of the particular information in issue, in the particular circumstances of the case, would, at the particular time when the request was being responded to, have been contrary to the public interest.

65. Whilst it is of course often easier for witnesses to talk in generalities, the risk of doing so is that the tribunal will find that the public authority has not come up to proof.

Getting the Right Witnesses

66. Any party who intends to call evidence on its behalf party may jeopardize its position if it fails to adduce evidence from an appropriate witness. The question of who might be an appropriate witness in any particular appeal will of course turn on all the facts of the case. However, in every case, the party should be asking itself:

- (1) Do the witnesses we have selected have the necessary expertise to be able to address the kinds of factual questions which are likely to arise in this case? (This will entail consideration not merely of the case that party wishes to put forward but also the kinds of evidential points which are likely to crop up during the hearing, not least having regard to the arguments being advanced by the other parties).
- (2) Are the witnesses we have selected suitably senior and authoritative such that their evidence is likely to carry the necessary weight with the tribunal?
- (3) Are the witnesses we have selected going to be able to deal authoritatively with the particular circumstances of the case? (A mistake which is often made by public authorities is that they are inclined to call senior officials who can speak authoritatively on general issues but who lack an understanding of how things worked on the ground. A public authority which limits itself to such a witness may well find it is simply unable to answer key factual issues being raised by the other parties or the tribunal).

Closed Statements

67. In order to persuade the tribunal that its case genuinely takes into account particularities as well as generalities, the public authority will often need to put in a closed statement which engages in detail with the specific information in issue and also with any sensitive matters relevant to the appeal which cannot safely be referred to in any open statement.
68. However, a mistake which authorities often make is that they include evidence in the closed statement which could on any reasonable view have been given in an open statement. This typically results in objections being made by the tribunal and/or the Commissioner and time being wasted at the hearing working out which parts of the closed statement should now be revealed in open session. It follows that public authorities should always road test any draft closed witness statement in order to determine whether there is material in the closed statement which ought to be in the open statement. Note, this is an important consideration, not least because of the tribunal's duty to ensure that Article 6 (fair trial) rights are secured and that as much of the hearing is conducted in open session as possible.
69. Similar considerations apply in respect of any closed skeleton which the authority may submit for the purposes of the appeal.

Other Practical Measures

70. Often public authorities will have disclosed certain elements of the withheld information to a complainant by providing them with a redacted version of the information. It will generally assist the tribunal if, in any closed, unredacted version of the relevant document, any elements of the information which have been disclosed are highlighted. Thus, the tribunal will be able to see in one document what has and what has not been disclosed to the complainant. Similar principles apply where an authority has adduced a single witness statement with open and closed elements, the closed elements having been redacted in the version placed in the open bundle.
71. Finally, if you are a complainant's representative, it will often assist your client's case if you compile a series of questions which you would wish the tribunal to put to the public authority's witnesses in closed session. You may want to submit these in writing, although this will not always be practicable. Creating such a list avoids a situation in which the tribunal has to surmise for itself which questions the complainant would wish to ask if he/she were present in closed session.