

Freedom of Information – Recent Developments

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INTRODUCTION

1. With the dust now finally beginning to settle in the wake of the MPs' expenses scandal, it is perhaps an apt moment to review those somewhat less politically seismic but nonetheless legally significant developments which have occurred in the field of freedom of information over the past year. To that end, consideration will be given in this paper to a number of important developments in the case-law on the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR), including case-law on:

- the application of the public interest test under the EIR and FOIA (*Office of Communications v IC* [2009] EWCA Civ 90 and *Office of Government Commerce v IC* [2008] EWHC 737 (Admin));
- the application of FOIA to public authority contracts (*Department of Health v IC* (EA/2008/0018));
- the operation of the legal privilege exemption under s. 42 FOIA (*DBERR v IC & O'Brien* [2009] EWHC 164 (QB)); and
- the application of FOIA to internal FOIA decision-making processes (*Home Office & Ministry of Justice v IC* [2009] EWHC 1611 (Admin)).

THE PUBLIC INTEREST TEST

Aggregating Public Interests

2. The public interest test under s. 2(2)(b) FOIA applies wherever information falls within the ambit of a qualified exemption under Part II FOIA. The test operates so as to require disclosure, save where:

'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure'

3. Applying this test in practice can often be challenging public authorities. This is not least because deciding what weight should be attributed to particular public interests will generally be an inherently speculative exercise.

4. One question which public authorities often pose is whether, in cases where there are multiple exemptions in play:
 - (1) they can aggregate all the public interest considerations together in single compendious balancing exercise; or
 - (2) they have to conduct discrete balancing exercises under each exemption and must, in each case, apply public interest considerations which are specifically tailored to the individual exemption in issue.
5. The line which has repeatedly been taken in the Tribunal and the High Court in respect of this question is that there can be no aggregation: the public interests in favour of maintaining the exemption must be specifically tailored to and rooted in the exemption itself (see *Office of Communications v IC* (EA/2006/00280) and, in the High Court [2008] EWHC 1448 (Admin), §48; see also *DBERR v IC & O'Brien* [2009] EWHC 164 QB, per Wyn Williams at §§57-58 and *Home Office & Ministry of Justice v IC* (EA/2008/0068), §63). However, the strength of this orthodoxy has now been placed in question as a result of the Court of Appeal's judgment in *Office of Communications v IC* [2009] EWCA Civ 90 ("*Ofcom*").
6. *Ofcom* is a case which was decided not under FOIA but under the EIR. In *Ofcom*, the Office of Communications sought to claim that particular information relating to the location of certain mobile telephone base stations was exempt from disclosure under the public safety exception (r. 12(5)(a) EIR) and the intellectual property rights exception (r. 12(5)(c) EIR). Application of each of those exception called for an application of the public interest test provided for under r. 12(1)(b) EIR. That test provides that the authority may refuse disclosure of environmental information if: "*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*" (the wording is of course virtually identical to that found in s. 2(2)(b) FOIA).
7. In the course of defending its decision that the requested information was exempt from disclosure under regs. 12(5)(a) and (b), *Ofcom* argued that it was possible to aggregate all of the public interest considerations together and consider them in a single public interest balancing exercise. The Commissioner argued that this was the wrong approach and that the legislation required instead: (a) that the public authority conduct discrete public interest balancing exercises under each exception; and (b) that only those public interest considerations which arose naturally from the particular exception in question could be considered (i.e. the authority could not bundle together in a single public interest balancing exercise public interests in maintaining public safety with public interests in protecting intellectual property rights).

8. The Commissioner succeeded in these arguments before the Tribunal (EA/2006/00280). The Tribunal held that public interests applicable to other exceptions could not be aggregated in this way and *'for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception'* (§§56-58). That decision was upheld in the High Court where Laws LJ held that the: *'the focus of the legislation is on the particular interests which the particular exceptions serve. It requires such interests, in effect, to be specifically justified in a context where the presumption is in favour of disclosure'* ([2008] EWHC 1448 (Admin), §48).
9. However, the Court of Appeal allowed Ofcom's appeal against Laws LJ's judgment. It concluded that public interests relating to different exemptions could be aggregated together in a single public interest balancing exercise. In reaching this conclusion, the Court of Appeal relied in particular on the analysis set out below (see per Richards LJ, §§37-43).
 - (1) Regulation 12(1) provides that, subject to the application of the public interest test, a public authority may refuse to disclose requested environmental information if 'an exception applies under paragraphs (4) or (5)'. - (2) Ordinary principles of statutory construction require the court to construe the words 'an exception' as meaning 'one or more exceptions'. That in itself suggests that exceptions may be considered together and not in isolation. - (3) That conclusion was reinforced:
 - (a) by the fact that the public interest test required consideration of 'all the circumstances of the case'; and
 - (b) by the number and nature of possible exceptions in regulation 12(5). - (4) It would be wholly artificial to look at each exception separately for the purpose of the public interest balancing exercise. - (5) There was nothing in the Directive, from which the EIR was derived, which required a different result.¹ Whilst the Directive requires exceptions to be construed narrowly, it does not require each exception to be looked at separately for the purposes of the public interest balancing exercise.
10. This Court of Appeal's judgment is now being appealed by the Commissioner to the Supreme Court. The appeal is due to be heard on 17 September 2009.

¹ Directive 2003/4/EC.

11. The fact that *Oftcom* was decided under the EIR rather than FOIA obviously poses questions as to whether a similar approach should be adopted under s. 2(2)(b) FOIA. However, given the similarity in language and structure of the two enactments, it is strongly arguable that the same approach must be adopted under FOIA.

Generalised Public Interests

12. It has for some time been thought that, when applying the public interest test under FOIA:
 - (1) public interests in favour of disclosure of information may be generalised (e.g. disclosure would generally serve the public interests in improving accountability and transparency in our public institutions); but
 - (2) public interests in favour of maintaining a Part II exemption may not be so generalised and must instead be more directly anchored in the facts of the individual case (see e.g. *DFES v IC* (EA/2006/0010), §75(i), *Secretary of State for Work and Pensions* (EA/2006/0040), §§23-24 and *Home Office & Ministry of Justice v IC* EA/2008/0062, §63).
13. This orthodoxy has also been approved in the High Court (see *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), §§26-27 and *Department for Business Enterprise & Regulatory Reform v O'Brien & IC* [2009] EWHC] 164 (QB), §§57-58).
14. However, a question mark was arguably placed over this orthodoxy as a result of an obiter comment made by Stanley Burnton J in *Office of Government Commerce v IC* [2008] EWHC 737 (Admin). In that case, Stanley Burnton J commented, in the context of an analysis of the public interests in favour of maintaining a particular exemption, that: '*generalisations, admitting of exceptions, may be possible*' (§87).
15. It is not clear precisely what Stanley Burnton J meant by these words. If he meant that a public authority does not need to tie any public interest considerations in favour of maintaining the exemption to the particular facts in issue in the particular case, his comment would be at odds with all the leading Tribunal and High Court jurisprudence on section 2(2)(b). However, he may instead have merely been seeking to suggest that there may be cases which, on their particular facts, indicate that disclosure would have generalised deleterious effects (e.g. on effective administration), such that the public interest balance weighs in favour of maintaining the exemption. This latter approach to the public interest test is one which seemed to favour with the High Court in the more recent case of *Home Office & Ministry of Justice v IC* (of which more below). Notably, the

following principles seem to emerge from Keith J's judgment in the *Home Office* case (see in particular paras. 34-35):

- (1) the more generalised a factor is, the more difficult it may be to identify either the particular harm or the particular benefit which might accrue from disclosure or non-disclosure of a particular piece of information;
- (2) a public authority is likely to struggle in asserting that the public interest test weighs in favour of maintaining the exemption where the authority's case operates at a high level of generality which is not anchored to the particular facts of the case;
- (3) however, an applicant who is seeking disclosure will equally struggle if he or she does not focus on the particular benefits to be derived from disclosure of the particular information;
- (4) that being said, provided that it is supported by the facts of the particular case, there is *'no reason why in principle a "generalised" factor should be of less significance than a more specific one'*, although factors which are said to favour disclosure will more often than not be more generalised than those factors which are said to favour non-disclosure.

PUBLIC AUTHORITY CONTRACTS

Disclosure under FOIA

16. The issue of whether and to what extent public authority contracts are susceptible to disclosure under FOIA is a particularly controversial one. This is because it is frequently assumed that such contracts will be immune from disclosure because of their confidential nature and/or because they contain commercially sensitive information which, if disclosed, may damage the commercial interests of the authority or the contractor.
17. The question of how public authorities should approach requests for disclosure of such contracts under FOIA was considered some time ago in the case of *Derry City Council v IC* (EA/2006/0014) ("*Derry*"). In that case, the Tribunal was called upon to consider whether particular financial information contained in a contract between Derry City Council and Ryanair for use of an airport run by the Council was exempt from disclosure under s. 41 (confidential information exemption) and/or s. 43 (commercial interests exemption) FOIA.
18. With respect to the application of s. 41, the Tribunal held that that section was not engaged in respect of the information in the contract because:

- (1) in order for section 41 to be engaged the information must have been 'obtained by the public authority from another person'; and
 - (2) information in the contract had not been provided to the Council by Ryanair, but instead merely reflected the terms which had been mutually agreed between the parties.
19. However, the Tribunal went on to comment obiter with respect to s. 41 that:

'We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party to the contract...' (§32(e))
20. This comment left open the possibility that there may be cases where information in a contract could fall within the ambit of s. 41. However, the Tribunal omitted to clarify the type of 'technical information' which might be characterised as information 'obtained by the public authority from another person'.
21. With respect to the application of section 43, the Tribunal held that: there was no sufficient evidence before it that Ryanair's commercial interests would risk being prejudiced by the disclosure (Ryanair had not itself had an opportunity to put such evidence before the Tribunal as it was not a party to the appeal); s. 43 was nonetheless engaged in respect of the information because disclosure would have risked prejudicing the council's commercial interests; however, the public interests weighed in favour of the disclosure of the information in all the circumstances, which included not least that the information was rather old.
22. More recently, the issue of whether public authority contracts are exempt from disclosure under sections 41 and 43 was revisited in the case of *Department of Health v IC* (EA/2008/0018) ("*DOH*"). In *DOH*, the Information Tribunal considered whether a substantial and high value public procurement contract between the Department of Health (DH) and a private sector contractor had been lawfully withheld under FOIA. Under the contract, the contractor was required to set up and support a national electronic recruitment service for the NHS. The contract was likely to require some £6m of investment by the DH.
23. The DH argued before the Tribunal that the entirety of the contract was exempt from disclosure on an application of the following provisions of FOIA: s. 41 (exemption in

respect of confidential information); section 43 (commercial interests exemption) and s. 44 (statutory prohibition exemption). With respect to s. 44, DH argued that the information in the contract was absolutely exempt from disclosure under FOIA because: (a) the information in the contract was information 'supplied to' the DH by the contractor; and (b) accordingly, disclosure was prohibited under regulation 30 of the Public Service Contracts Regulations 1993 ("the 1993 Regulations").

24. Having heard detailed evidence from the relevant contractor, along with evidence from a DH witness, the Tribunal decided that the contract was not generally exempt from disclosure under FOIA, although a limited amount of commercially sensitive information contained in certain schedules to the contract could lawfully be withheld under s. 43 FOIA.
25. A number of important principles emerge from the Tribunal's judgment in *DOH*.
 - (1) Information in contracts which have been agreed between a public authority and a contractor will not generally be susceptible to the application of section 41 FOIA. This is because such information cannot properly be characterised as information 'obtained from' the contractor. Instead, it is information which reveals the terms which have been mutually agreed by the parties.
 - (2) Even where particular terms or entire contracts have originally been drafted exclusively by the contractor, they become mutually agreed terms as and when the parties enter into the contract. Such mutually agreed terms cannot be said to amount to confidential information 'obtained from' the contractor for the purposes of section 41.
 - (3) Similar principles apply in respect of section 44 FOIA read together with regulation 30 of the 1993 Regulations (or what is now regulation 43 of the Public Contracts Regulations 2006).
 - (4) The only exception to these general principles is that, where the contract contains highly technical information relating, for example, to chemical processes or blueprints for a machine – i.e. information which is not susceptible to negotiation, it may be possible to treat that information as having been 'obtained from' the contractor for the purposes of section 41. (This represents an important clarification of the obiter comments made in *Derry*).
 - (5) Public authorities should routinely consider the principles set out in the OGC (Civil Procurement) Policy and Guidance prior to deciding whether to disclose under FOIA a contract which has been entered into following a public procurement process.

- (6) If an authority wishes to depart from these principles in a particular case, they must be prepared to explain their reasons for that departure to the Commissioner.
- (7) If an authority refuses disclosure of a contract which has been requested under FOIA and a complaint is made to the Commissioner, it will not be sufficient for the authority simply to make a blanket assert that the information in the contract is exempt under a particular section in Part II FOIA.
- (8) Instead, the authority will have to show with reference to the individual provisions in the contract why the particular exemption is engaged and, if the public interest test is in issue, why the public interest weighs in favour of the exemption being maintained in respect of those provisions.

Disclosure under the Audit Commission Act 1998

- 26. Of course, FOIA is not the only enactment which potentially allows access to contractor information held by a public authority. Section 15 of the Audit Commission Act 1998 permits 'any person interested' to inspect the accounts of local authorities at each audit. A 'person interested' may include, for example, the local government elector for the area, a council tax payer and a non-domestic rate-payer (*R(HTV Ltd) v Bristol City Council* [2004] 1 WLR 2717). The information which may be inspected under s. 15 includes: *'the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them'* (s. 15(1)(a)). Moreover, under s. 15(1)(b), copies of these documents may also be taken by the interested person. The aim of s. 15 is evidently to allow interested persons to hold the local authority to account for the way in which it spends public monies. Importantly, there is no restriction on the use to which information obtained under s. 15 can be put (see *HTV* supra, paras. 51-67).
- 27. The seemingly broad nature of these provisions invites a question as to whether, in effect, they allow members of the public to inspect and take copies of documents even where they contain highly commercially sensitive contractor information. It is precisely this question which was posed in the case of *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC & Ors* (heard in August 2009; judgment awaited).
- 28. In June 2006, Veolia entered into a contract with Nottinghamshire CC for the provision of waste management services. Thereafter, Veolia submitted monthly invoices to the Council for work done under the contract. Each payment made to the Council during any financial year constituted an item within the Council's accounts for that year. The total charge to the Council during the financial year ending 31 March 2008 was £21.2 million. In June 2009, the local government elector sought to inspect documents relating to the Veolia contract. The documents included: (a) certain schedules to the contract which contained pricing information and formulae for calculating the amount due; and (b) the detailed monthly

invoices submitted by Veolia. The Council decided that the documents could be inspected and copied under s. 15 as they 'relate to' the Council's accounts for that year.

29. Veolia sought a judicial review of that decision. It claimed that s. 15 required disclosure only of the total amounts for which Veolia had invoiced the Council and not the documentation which would show how the payments had been determined. It argued that the more detailed information did not itself 'relate to' the Council's accounts. Moreover, it asserted that disclosure of the disputed information would be in breach of confidence and/or commercially damaging. The Council, supported by the Audit Commission, argued that the concept of 'relates to' was a broad one which included not merely the global sums paid but also the more detailed information which would enable the interested persons to assess, for example, whether the sums paid were properly due and whether the Council was more generally making proper arrangements for securing best value in the use of its resources.
30. Judgment in *Veolia* is currently awaited. However, if Veolia's challenge fails, the results will be that:
 - (1) information which may otherwise have been withheld under s. 43 FOIA is nonetheless disclosable under the ACA; and
 - (2) Veolia will presumably not be able to sue for breach of confidence on the basis that the disclosure by the Council was required by law.

LEGAL PROFESSIONAL PRIVILEGE

31. It is well established that the principle of legal privilege is not merely a rule of evidence but is rather a 'fundamental condition on which the administration of justice as a whole rests' (*Reg v Derby Magistrates' Court ex parte P* [1996] 1 AC 487, per Lord Taylor). In *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax & another* [2003] 1 AC 563 Lord Hoffmann described it as a 'fundamental human right'.
32. Against the background of these principles, one might have expected any exemption in FOIA relating to legally privileged information to be an absolute exemption. However, it is quite clear that the exemption in FOIA relating to legally privileged information is a qualified, rather than an absolute exemption. Hence, where it is engaged, it calls for an application of the public interest test – see s. 42 (read together with s. 2).
33. That being said, applying the public interest test under s. 42 does require something of a unique approach which is not generally found in the context of other exemptions. This is because the starting point for applying the public interest test under s. 42 entails recognizing that there is already a strong public interest in preserving the confidentiality of legally privileged information which is effectively 'built in' to the exemption. In other words,

in contrast with other exemptions, where the public interest scales are considered to be empty at the start, an application of the s. 42 exemption requires, at the outset, that considerable weight to be placed in the scale favouring maintaining the exemption.

34. This is an approach which was originally adopted by the Tribunal in *Bellamy v IC* (EA/2005/0023). It has now been authoritatively approved by the High Court in *DBERR v IC & O'Brien* [2009] EWHC 164 (QB), per Wyn Williams J, §§35-40.
35. In *DBERR*, the applicant (Mr O'Brien) was seeking disclosure of information which included legally privileged information relating to the proposed inclusion in the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 of a provision which stated that daily fee paid judicial office holders were excluded from the ambit of the Regulations. The Tribunal decided that this information should be disclosed. *DBERR* appealed that decision on the basis that, in applying the public interest test under s. 42, the Tribunal had failed to give sufficient weight to the strong inbuilt interest in protecting the confidentiality of legally privileged information.
36. The High Court accepted *DBERR*'s arguments on that issue. It held that the Tribunal had recognized the strong inbuilt public interest in maintaining the exemption in its analysis of the relevant legal principles but had then failed to apply this principle to the facts of the case. The High Court remitted the public interest question under s. 42 to a newly constituted Tribunal. That Tribunal decided that the legally privileged information was exempt from disclosure under s. 42 (EA/2008/001; decision of 20/7/09).
37. However, whilst the High Court in *DBERR* was keen to emphasize the importance of the in-built public interest in maintaining the s. 42 exemption in respect of legally privileged information, care must still be taken not to treat legally privileged information as effectively automatically exempt from disclosure under FOIA. As has been made clear in a number of cases, including *DBERR* and the earlier case of *Mersey Tunnel Users Association v IC* (EA/2000/00052), there may yet be cases where, notwithstanding the strong in-built interests in maintaining the confidentiality of legally privileged information, there are equally strong public interests in favour of disclosure of legally privileged information. In such cases, the information, despite being privileged, will not be exempt from disclosure under s. 42.

FOIA PROCESSES IN THE SPOTLIGHT

38. Taking decisions as to how FOIA applies to particular requested information is now a routine activity within most public authorities. In *Home Office & Ministry of Justice v IC* (EA/2008/0062), the Tribunal was called upon to decide the rather novel question of whether information relating to such decision making processes was itself susceptible to disclosure under FOIA.

39. The case involved a request for disclosure of information relating to how the Home Office had applied FOIA to some 48 requests made by or on behalf of a particular media organisation. The request was made in circumstances where the applicant had expressed concern that the Home Office was discriminating against the media organisation when dealing with its FOIA requests. The Home Office refused the request on the basis that the information was exempt under s. 36(b) (disclosure inhibitive of free and frank provision of advice/exchange of views) and s. 36(c) (disclosure prejudicial to effective conduct of public affairs) FOIA. Notably, the Home Office did not refuse disclosure on the basis that the request was vexatious under s. 14 FOIA or on the basis that responding to it would exceed the cost limit under s. 12.
40. The Commissioner decided that s. 36 was engaged in respect of the disputed information (as the necessary reasonable opinion had been obtained from the qualified person so as to engage s. 36). However, he held that the public interest balance weighed in favour of disclosure of the information.
41. The Tribunal upheld that decision on appeal by the Home Office. In reaching the conclusion that the Commissioner's decision should be upheld, the Tribunal rejected generalised arguments advanced by the Home Office to the effect that requests for disclosure of information about internal FOIA processes (described by the Home Office as 'meta-requests'):
- (1) were 'irresponsible';
 - (2) were a waste of resources;
 - (3) were designed to allow 'backdoor access; to information which had previously been held to be exempt;
 - (4) were prone to having a chilling effect on civil servants in terms of making them less free and frank in their advice;
 - (5) served only private interests; and
 - (6) improperly circumvented the internal review procedure and the statutory complaints and appeal procedures provided for under Parts IV and V FOIA.
42. On the facts of the case before it, the Tribunal held that there were a number of important public interests which favoured disclosure of the requested information and those interests were not outweighed by the rather weak public interests in maintaining the section 36 exemption.

43. The Tribunal also refused to permit the Home Office to rely on a number of new exemptions which had been identified only in the context of the appeal before the Tribunal.
44. The Home Office and Ministry of Justice appealed the Tribunal's decision to the High Court. The High Court rejected the Home Office's argument that the Tribunal erred when it held that the public interest weighed in favour of disclosing the requested information. Notably, Keith J rejected out of hand Home Office arguments to the effect that: (a) absent evidence of impropriety, the public should simply assume that FOIA processes were being properly applied internally and (b) that the public interest in understanding how the Home Office applied FOIA internally was sufficiently served simply by the publication of its internal procedures. Keith J also rejected arguments that, when considering cases under s. 36, the Tribunal should automatically defer to the views expressed by ministers and civil servants as to the likely effects of disclosure. Whilst the judge criticised the way the Tribunal had expressed some of its findings, he was in no doubt that the Tribunal had been entitled to find that the Home Office's evidence had not established that there were overwhelming factors which favoured maintaining the exemption.
45. Importantly, on the late exemptions question, the court declined to decide the question of whether, as a matter of construction, FOIA permitted public authorities to rely on new exemptions whenever they were claimed (cf. the approach adopted in *Department of Business and Regulatory Reform v IC and Friends of the Earth EA/2007/0072* where the Tribunal held that: (a) it had a discretion as to whether to allow late reliance on exemptions and (b) at the very least, the authority had to show that it had a reasonable justification for the delay in relying on the exemption). Keith J reached the conclusion that he should not decide the late exemptions question on the basis that the Commissioner had conceded that the Tribunal had erred in refusing to allow the Home Office to rely on the late exemptions and, accordingly, the issue had become academic in the context of the appeal. It follows from that the approach adopted in *Friends of the Earth* will continue to be applied by the Tribunal, at least for the time being.

AND IN OTHER NEWS...

Disclosure of Consultants' Reports under the EIR

46. The use of specialist consultants is wide-spread within the local authority sector. However, there remains uncertainty as to whether and, if so, to what extent information generated by those consultants can be said to form part of a local authority's 'internal communications' for the purposes of the exception afforded under regulation 12(4)(e) of the EIR.
47. Outside of the local authority context, the issue of whether information generated by a consultant constitutes an 'internal communication' was considered in the case of *Secretary of State for Transport v IC (EA/2008/0052)*. In that case, Sir Rod Eddington was jointly

commissioned by the Secretary of State and the Chancellor to produce a report on the links between transport and the UK economic development. The information in issue was a draft version of the report. Whilst compiling the report, Sir Rod had been based at the Department of Transport and used business cards stamped with Department of Transport and Treasury logos. He worked within a team of civil servants and was supported by a civil service steering team. The costs in respect of the report were borne by the departments, although Sir Rod was not paid for the services he provided. Sir Rod had been brought in both because of his experience and expertise and also because of his independence. He saw the draft report as something for consideration by Ministers as part of a reciprocal communications process and considered that it was not for circulation to the wider public. The Tribunal held that the report was an 'internal communication' particularly given the 'embedded' nature of Sir Rod's activities and the fact that he was, in essence, invited into the thinking space within which Ministers and their advisers operate when policies are still under discussion.

48. In *South Gloucestershire v IC & Bovis* (hearing due to take place in October 2009), a request was made by a developer, Bovis, for disclosure of an appraisal report which the Council had asked specialist consultants (Chestertons) to prepare. The report had been commissioned by the Council in order to assist it in negotiating a major section 106 planning agreement with Bovis. One of the issues which the Tribunal will need to determine is whether the report is an 'internal communication' for the purposes of regulation 12(4)(e).

Confidential Information

49. A further issue which will be considered by the Tribunal in the *South Gloucestershire* case relates to the application of the confidential information exception in r. 12(5)(e) EIR. The issue has arisen because the Commissioner concluded in his decision notice that this exception could only be engaged in respect of confidential information where the duty of confidence was owed by the authority to a third party. The Council is challenging that conclusion on the basis that r. 12(5)(e) can also equally be prayed in aid by the public authority to protect its own confidential information.
50. By way of contrast, in the case of the *Higher Education Funding Council for England v IC & The Guardian* (hearing due to take place in November 2009), the Tribunal will be considering the application of the confidential information exemption contained in s. 41 FOIA. In that case, an application was made for disclosure of data with respect to the state of building stocks within universities. The HEFC refused disclosure on an application of s. 41 FOIA. Under s. 41, information will be absolutely exempt from disclosure if it was obtained by the authority from a third party and its disclosure would give rise to a 'breach of confidence' which is 'actionable' by that third party or any other person. Issues which fall to be considered in the appeal include:

- (1) whether the public authority can rely on s. 41 where it is unable to establish that the breach of confidence would give rise to some form of detriment (i.e. is detriment a necessary element for an actionable breach of confidence?); and
- (2) whether in order to establish that a breach of confidence is 'actionable' for the purposes of s. 41, the authority must show that it is more likely than not to succeed or merely that it has reasonable prospects of success.

Commercial Information

51. In *University of Lancaster v IC* (forthcoming in November 2009), the Tribunal will be called upon to decide a number of issues relating to a request made to a university for disclosure of copies of the course materials for its Homeopathy BSc. The University refused to disclose the course materials on the basis that they were exempt from disclosure under sections 36 (prejudice to public affairs) and 43 (commercial interests).
52. With respect to the s. 43 exemption, the University asserted that, despite being a not-for-profit organisation, it had commercial interests in the information and that those commercial interests would be prejudiced by disclosure, not least because, if disclosed, competitor institutions could use the content of the course materials to obtain an unfair competitive advantage. These arguments did not find favour with the Commissioner. He held that the University had no 'commercial interests' in the disputed information for the purposes of s. 43 because it was not a body which 'participated competitively in a commercial activity, i.e. the purchase and sale of goods or services'. He also held that, because the University already disclosed the course materials to its own students, it could not realistically claim any real risk of additional damage resulting from a disclosure under FOIA. During the course of the appeal, the Tribunal will need to decide: (a) whether the Commissioner adopted an unduly narrow approach to 'commercial interests' under s. 43; and, further, (b) whether, notwithstanding that the disputed information has been disclosed to one section of the public (in this case to a student cohort), it nonetheless retains an element of commercial sensitivity such that s. 43 is engaged.

Vexatious Requests

53. The vexatious requests provision contained in s. 14 is typically invoked when there has been a long history of difficult dealings directly between the applicant and the public authority. But what is the position if the difficult dealings have been not with that public authority but with other public authorities? Can the public authority rely on how the applicant has behaved when making requests of other authorities when asserting that a particular request which it has received is vexatious under s. 14? These questions were posed in a case involving Brent LBC which was decided by the Commissioner in June 2009 (FS50238979).

54. In the *Brent* case, the applicant submitted a very extensive information request. The request embraced at least 15 different requests, many of which contained a number of different elements. The requests themselves implied failings by the local authority in a number of areas. This was the first time Brent had itself had received a FOIA request from the applicant. In refusing the request under s. 14, Brent sought to rely in particular on the fact that the applicant had made hundreds of very similar requests of other local authorities (the applicant himself claimed to have made requests of some 250 authorities). The issue for the Commissioner was whether Brent could take into account the prior history of requests which had been made across the local authority sector when deciding whether the request was vexatious under s. 14. The Commissioner held that, whilst in many cases, there will be nothing per se vexatious about an applicant submitting similar requests to a number of different authorities, on the facts of this case it was appropriate for the prior history to be taken into account. This was particularly given the voluminous nature of the requests themselves, the fact that they constituted an implicit (harassing) attack on the authority and, further, the fact that they were likely to impose significant resource burdens on the authority.

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