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Recent development under the Freedom of Information Act 2000

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Introduction

1. Unlike some former senior governmental figures, our current Deputy Prime Minister does not regard the Freedom of Information Act 2000 as a regrettable blunder. In his speech on 7th January of this year, Nick Clegg described FOIA as *"a good start, but it was only a start. Exceptions remain far too common. And the available information is too often placed behind tedious bureaucratic hurdles"*.[1] In this paper, I will outline in brief some recent developments in the area of freedom of information and environmental information law, and consider in some of the most commonly-cited type of exemption.

2. The structure of this paper is as follows:

   a) Developments under FOIA and EIR exemptions. Here I will consider the exemptions for personal data and for confidentiality/commercial information in some detail, and others in brief.

   b) Other developments under the Environmental Information Regulations 2004. I will look at the evolving definition of a "public authority" (of interest to those who advise "borderline" organisations) and the questions of charges and requesters' rights to inspect information.

   c) Recent and forthcoming developments on "late reliance" and the impact of events post-dating the handling of the request.

   d) I will then touch briefly on a number of practical issues to keep in mind when litigating FOIA disputes.

   e) Finally, I will look briefly at the government's legislative proposals affecting FOIA.

[1] The text of Mr Clegg's speech is available at http://www.newstatesman.com/2011/01/government-british-information

A. EXEMPTIONS UNDER FOIA AND THE EIR

Personal data

3. The exemption at section 40 of FOIA represents the interface between FOIA and the DPA. As you know, the exemption is complex in structure. In most cases, however, two pivotal questions arise: (i) does any of the information requested constitute (anyone's) personal data?, and (ii) if so, would disclosure to a member of the public (as opposed to simply the requester) contravene any of the data protection principles? The first data protection principle imposes a requirement of "fairness", and the most commonly-raised condition from Schedule 2 (namely the sixth) requires a balance of one party's legitimate interests against those of another. The upshot is that while this is in theory an absolute exemption, its application usually entails a balancing of interests very similar to that involved in the standard "public interest balancing test" under FOIA.

The interpretation of personal data

4. On the first of the two pivotal questions, the starting point is the DPA definition of personal data as *"data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"* (my emphasis).

5. Notwithstanding this definition, "identification" alone will not suffice, according to the long-standing threshold set down in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. Not only must it be possible to identify a living individual, but that individual must also be among the focuses of that information; it must be "biographical in a significant sense". In a recent application of the *Durant* standard, the Information Tribunal emphasised the following test:

> *"To constitute personal data the information should have the data subject as its focus and affect the subject's personal privacy. Identification that a person was involved in some matter which has no personal connotations will not amount to personal data."*
> (*Ferguson v IC and The Electoral Commission* (EA/2010/0085)), §48)

6. This approach is regarded as unduly narrow by many at a European level: see for example the published opinions of the European Data Protection Supervisor, in which a very wide interpretation of personal data is evident.[2] For present purposes, however, the rather more restrictive threshold retains its place in UK jurisprudence.

[2] See for example the "Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)", Official Journal of the European Union, 5.6.2010.

7. A further interesting example of a more restrictive definition that appears to be allowed under UK law is that, in some cases, data which is not personal data in one pair of hands is personal data in another. In other words, personal data is (sometimes) a perspective-dependent test. On this, see *Department of Health v Information Commissioner (Additional Party: the Pro Life Alliance)* (EA/2008/0074), the Tribunal case involving abortion statistics, on which a delayed appeal hearing in the High Court will take place in the next few months. The phrase "in the hands of" comes from the speech of Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 at §18.

8. I am not aware of other Tribunal decisions dealing directly with this "in the hands of" approach to personal data – but this approach warrants consideration when dealing with requests for disclosure of statistical data.

Recent case law

9. The Information Tribunal has promulgated a number of decisions on section 40 in recent months: *Pycroft v IC and Stroud District Council* (EA/2010/0165); *Dun v IC and National Audit Office* (EA/2010/0060); *Davis v IC and Olympic Delivery Authority* (EA/2010/0024); *Ince v IC* (EA/2010/0089); *Ferguson v IC and The Electoral Commission* (EA/2010/0085) and *Bryce v IC & Cambridgeshire Constabulary* (EA/2009/0083). I draw out a number of helpful points from some of these cases below.

10. Requests for information are often complex and multi-part. Sometimes, some of the requested data will be personal, but the rest will not be. In other cases, the personal data of a number of data subjects will be involved.

11. If faced with the first of these scenarios, the decision in *Ferguson* serves as a useful guide. Here the Tribunal drew distinctions between types of data all of which, at first glance, look like personal data. The requester asked a number of questions about an Electoral Commission investigation into potential electoral fraud by the Labour MSP Wendy Alexander. One type of question was this: "who gave you [the Electoral Commission] the answers to certain questions you posed?" This, said the Tribunal, was *not* personal data: identification was the essence of the requested information, but there were no privacy implications for the data subjects, about whom this information was anodyne. A second type of question concerned who had misrecorded the relevant donations and why they had done so. This, said the Tribunal, was personal data, for the (converse of) the same reasons.

12. *Bryce* is a very useful decision on the second scenario, namely where the request encompasses the personal data of a number of data subjects. A request had been made by Ms Bryce for disclosure of a police investigation report. The report addressed concerns which had been raised by Ms Bryce and others about the way in which the Cambridgeshire Constabulary had investigated

the death of Ms Bryce's sister, who had been killed by her husband. The Tribunal held that the report contained a multiplicity of different types of personal data including: (i) Ms Bryce's personal data; (ii) the husband's personal data; (iii) personal data relating to the husband's family; (iv) the personal data of witnesses; (v) personal data relating to the deceased's family; and (vi) personal data relating to officers who had conducted the investigation.

13. Apart from Ms Bryce's own personal data, which was exempt from disclosure under section 40(1) FOIA, the Tribunal approached the question of how the section 40(2) exemption applied to the remaining data by conducting a discrete analytical exercise in respect of each type of data. Very different considerations applied, for example, in respect of officers' data as compared with the data relating to the husband's family: consider, among other things, their respective roles in creating this data, their expectations and the likely effects of disclosure on each of these categories of person.

14. *Dun* concerned concerned the NAO's enquiry into the Foreign & Commonwealth Office's handling of grievances raised by employee "whistleblowers". The Tribunal considered whether fairness could be achieved by disclosure in redacted form. In these circumstances, the Tribunal's answer was yes, given that (i) only those involved would be able to identify the persons being referred to, and (ii) those involved would not learn anything from the disclosed material which they did not know already.

15. Another point of interest from *Dun* concerns the established position that disclosure of the names of senior civil servants (Grade 5 or above) will generally be fair, whereas those of their more junior colleagues would not. The Tribunal agreed with this position on these facts, but stressed that no blanket policy should apply: fairness depends on the particular responsibilities of the civil servants and the particular information with which the case is concerned.

16. One interesting aside on the question of civil servants: what of a civil servant who was junior at the time the information was created, but has since been promoted? Generally, subsequent events should not make a difference, but not necessarily: the Tribunal observed that it could *"envisage a scenario where it is fair to disclose an earlier document in order to refute protestations of ignorance from the same individual who later becomes more senior and accountable"*. In other words, the assessment of fairness can – in certain cases – be influenced by events postdating the public authority's handling of the request. Query whether the same applies to the assessment of the public interest, on which see below.

17. Also on the topic of public sector employees, note that the Tribunal in *Ince* unanimously rejected the proposition that anything said or done by a public sector employee was effectively public information and that this sufficed to ensure that disclosure was fair. The majority found that *"the disputed information in the case related to the individual's employment but was not information so directly connected with their public role that its disclosure would automatically be fair"*, whilst the third panel member described it as *"'hybrid' information in that it was impossible to fully separate*

the public information from the private information" (§40). Compare this with the views of the Tribunal in *Bryce* as to whether information about police officers concerned their public or private capacities.

Timing of the section 36 certificate

18. This prejudice-based qualified exemption protects free and frank advice and discussions, as well as the effective conduct of public affairs. As you know, it can only be used once this prejudice is certified by the "the reasonable opinion of a qualified person". Difficulties have arisen where the public authority has sought to rely on section 36 in circumstances where the reasonable opinion was not in fact generated until sometime *after* the request was refused by the public authority.

19. In the case of *Roberts v IC* (EA/2009/0035), the Tribunal held that section 36(2) will not be engaged in these circumstances. This is because, if the information was not in fact exempt at the time the refusal notice was sent out (i.e. because the relevant reasonable opinion was not in existence at that time), it cannot be rendered exempt ex post facto. This represented a considerably more restrictive approach to that which had prevailed up until *Roberts*. This has now been confirmed as the correct approach: *Chief Constable of Surrey Police v IC* (EA/2009/0081).

20. Note that Roberts concerned a public authority's attempt – some years after its initial refusal to disclose information – to rely on section 36 in respect of the same information which was the subject of its initial refusal. Where further information is subsequently found – for example during the course of the Information Commissioner's investigation – then the Roberts logic need not apply: see *Dedalus v IC and Arts Council England* (EA/2010/0001) at §§65-67.

21. The Tribunal in the *Surrey Police* case went on to highlight the significant dangers for a public authority if it fails to keep a record of the opinion as and when it is reached. Following an earlier decision in *University of Central Lancashire v IC* (EA/2009/0034), the Tribunal in the *Surrey Police* case effectively held that a public authority will struggle to rely on the exemptions afforded under section 36(2): (a) if it does not keep a record of the opinion which has been reached and, further, (b) if, in the context of any record which it has made, it fails to identify the particular sub-sections of section 36(2) which the qualified person has concluded are engaged. In reaching this conclusion, the Tribunal confirmed that it was not the function of the Information Commissioner to speculate about or forage around for opinions which might have been reached by the qualified person where there was no good evidence that such opinions had in fact been formed at the time the request was being responded to (see in particular §§54-59).

Confidentiality and commercial sensitivity

22. Confidentiality arises in a number of guises, and is often closely linked to sensitive commercial information. Under FOIA, section 41 FOIA applies to information provided in confidence, whereas

section 43 applies to trade secrets and information the disclosure of which would prejudice commercial interests. Under the EIR, these concerns are expressly fused in the qualified and prejudice-based exemption at regulation 12(5)(e), which concerns *“the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”*, whereas regulation 12(5)(f) applies, in effect, to information obtained in confidence.

23. I will consider this complex topic by application in two very different but equally commonplace contexts, namely life after *Veolia*, and planning applications.

Veolia and ECHR rights in the Information Tribunal

24. As those involved in local authority work will know, the issue in *Veolia* arose from section 15(1) of the Audit Commission Act 1998. When read together with regulation 14 of the Accounts and Audit Regulations 2003, this provides that, for a period of 20 working days prior to the date appointed by the auditor, “any person interested” may inspect and copy *“the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them”* (emphasis added).

25. Unlike FOIA, the Audit Commission Act 1998 does not provide for information to be withheld on the basis of commercial confidentiality. This was confirmed by Cranston J in the High Court at first instance ([2009] 2382 (Admin)), which saw Nottinghamshire CC being ordered to provide the “person interested” with access to the commercially sensitive information from contracts between the local authority and a private-sector waste management company.

26. The Court of Appeal in *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2010] EWCA Civ 1214 took a different view. The first issue concerned the construction of the term “relating to”: the Court of Appeal upheld the wide interpretation applied by the first-instance judge, but noted that “relating to” (a question of substance, i.e. the nature and function of the document) was not equivalent to “referring to” (a question of the form of words). Even on a narrow reading of “relating to”, however, the disputed information was caught.

27. The second issue was whether section 15(1) should be “read down” so as to preserve confidentiality at common law and/or the Articles 8 and Article 1 of Protocol 1 of the ECHR, and/or European Directive 2004/18. The Court of Appeal decided that “reading down” was required. It commented that *“it would be irrational if persons interested were, by reason of their right to access to a narrower class of documents, entitled to breach the confidence which resided in documents or information”* (§112, per Rix LJ). This means that (subject to the question of justification), confidential information now constitutes an exception to the right of access under section 15(1).

28. *Veolia* has begun to make itself felt in Information Tribunal jurisprudence. In *Staffordshire CC v IC & Sibelco* (EA/2010/0015), the quarry operator had voluntarily – and on an express understanding

of strict confidentiality – provided the local authority (a mineral planning authority subject to attendant statutory duties) with sales and reserve data on the minerals it quarried. It was accepted that regulations 12(5)(e) and (f) EIR applied. The Tribunal found – primarily on the basis of the decision and reasoning of the Court of Appeal *Veolia* – that the public interest favoured the maintenance of these exemptions.

29. Going by this decision, the impact of *Veolia* on duties under FOIA and EIR is very great indeed: requests under FOIA for commercially confidential information can engage the ECHR rights (specifically, Article 1 of Protocol 1, but also Article 8) of the party to whom confidentiality is owed; if so, disclosure will almost always constitute an interference with that right; such disclosure will therefore be lawful only if it is *justified* according to ECHR principles of being reasonably necessary for and proportionate to the pursuit of a legitimate aim. The upshot is that the presumption in favour of disclosure of environmental information contained in regulation 12(2) EIR must now be read subject to an exception in the case of any information which is held subject to a legal duty of confidentiality.

30. Shortly thereafter, a differently constituted Tribunal took the view, in *Nottinghamshire CC v IC & Veolia & UK Coal Mining Ltd* (EA/2010/0142), that the *Veolia*-inspired ECHR analysis mattered little. The disputed information, contained in a schedule to the relevant contract, concerned the leasing details for land upon which a waste incinerator was to be built. The first notable point here is that, contrary to the Information Commissioner's stance – and despite the waste management context – the Tribunal found that this did not constitute environmental information. Instead, it was a purely commercial matter, which fell to be dealt with under section 43 of FOIA rather than the EIR. The Tribunal accepted that ECHR rights – here the focus was Article 8 – could be engaged, and that Convention-compliant justification would be required before disclosure could lawfully take place. Its view, however, was that this kind of ECHR analysis adds little to the usual analysis under FOIA: the Article 8(2) justification test is already effectively reflected in the public interest balancing exercise under section 2 (§74).

31. In summary, it is not yet clear whether Tribunals will, as a rule, scrutinise the potential disclosure of confidential information according to ECHR principles. In most cases, the types of factors being considered under the public interest test may well be the same as those considered from the perspective of ECHR justification. Nonetheless, it is safer for public authorities to carry out both types of analysis, and to ensure that this is reflected in their responses to requesters and in submissions to the Commissioner and the Tribunal.

32. A final point under this heading concerns a potential development to look out for on the question of the severability of contracts. This week, the Tribunal is considering (or has considered) an appeal about commercial contracts to which Channel 4 is a party. The Appellant in this case has asserted that, from a FOIA perspective, an all-or-nothing approach to contracts is required. In other words, the challenge runs, the Information Commissioner cannot order disclosure of some parts of the

contract and not others. Contracts must be read as a whole, and if some clauses, parts or schedules are exempt, then the *entire* contract is exempt. If this is accepted, the implications would be enormous. A judgment is expected shortly.

Planning applications

33. Planning authorities frequently receive requests for information about planning applications, such as "viability reports", financial models, valuation estimates or consultants' reports provided to the public authority by or on behalf of the prospective developer. The public authority often seeks to rely on regulation 12(5)(e) EIR. Two decisions in recent months – one ordering disclosure, the other not – illustrate how this exemption is currently applied at Tribunal level.

34. *Bristol City Council v ICO and Portland and Brunswick Squares Association* (EA/2010/0012) saw the Tribunal order disclosure of a viability report about a historic building. The context was the (no longer in force) planning policy guidance document known as "PPG 15". This required that, where a building is listed or makes a positive contribution to a conservation area, it should only be demolished if there is *"clear and convincing evidence that all reasonable efforts have been made to sustain existing uses or find viable new uses and these efforts have failed"*. Bristol CC granted permission to demolish a listed building in its ownership, relying for PPG 15 purposes on the developer's viability reports which apparently showed alternative uses of the building to be commercially unviable. The Tribunal found that regulation 12(5)(e) was engaged, rejecting the requesters' argument that a reasonable person would not regard these reports as confidential because the planning process is one that assumes and requires public involvement.

35. The Tribunal went on, however, to find that the public interest favoured disclosure, given the decisiveness of these reports in a matter which had aroused substantial local controversy. It emphasised the "particular scrupulousness" demanded of a council when dealing with one of its own sites. The Tribunal also considered it proper to take into account the *"general mismatch between the resources of developers and residents' groups"* and noted that *"so far as PPG 15 viability reports are concerned, it seems to us that developers will not be able to refuse to supply them if they want to obtain the relevant consent but that, given their hypothetical nature, it may be possible for them to construct such reports in a way that does not reveal sensitive commercial information specific to themselves"* (§§18-19). PPG15 has since been supplanted by PPS5, which retains a reconfigured version of the aforementioned principles, albeit with a hint of uncertainty about unlisted buildings in conservation areas.

36. Some months later, the Tribunal in *Bath & North East Somerset Council v IC* (EA/2010/0045) found that the council was entitled to withhold the developer's financial model under regulation 12(5)(e) EIR. The context was the development of brownfield land within a UNESCO World Heritage Site. Only a small proportion of this land was owned by the council, the rest being owned by the developer, who would also bear 100% of the risk of the project. The proposed £500m project would

deliver 50% of the council's new homes target for the next 10 years – the council was (as is often the case) therefore acting as both beneficiary and planning authority. With a view to a section 106 agreement, the developer voluntarily provided the council with "open book" access to its financial model for the proposed project.

37. In finding that the public interest favoured the maintenance of the exemption, the Tribunal distinguished *Bristol City*: that case concerned a viability assessment designed to show that a hypothetical scheme was not viable, and involved generic, industry-level pricing. In contrast, this case concerned detailed and developer-specific financial information about an actual proposal. The commercial sensitivities differed materially. Disclosure of such information, held the Tribunal, would lead to the developer refusing to provide any further "open book" information, which would stymie this particular development and dissuade developers from future co-operation.

38. The Tribunal was also impressed by the availability of alternative scrutiny mechanisms in this case. It was less impressed with the council's argument that disclosure of the disputed information would damage its reputation with developers. The Tribunal ordered the disclosure of consultants' reports and emails, with commercially sensitive information redacted.

39. The most recent case in the planning context is *Elmbridge Borough Council v IC (Additional Party: Gladedale Group Limited)* (EA/2010/0106), where disclosure of a viability report was ordered. The Tribunal confirmed that the confidentiality of the information must be *objectively* required *at the time of the request* (rather than, for example, when the information was created or passed to the Council) in order to protect a relevant interest. The Tribunal also confirmed that it is not enough that some harm *might* be caused by disclosure, but that it is necessary to establish (on the balance of probabilities) that some harm to the economic interest *would* be caused by disclosure. The Tribunal's decision was plainly influenced by the "notable absence of independent or objective evidence" – on the questions of confidentiality and prejudice to a commercial interest, speculation and assertion will not suffice.

Manifest unreasonableness under the EIR

40. *Little v ICO and Welsh Assembly Government* (EA/2010/0072) contains a number of notable points on the application of the principles in *DBERR v IC and Platform* (EA/2008/0096) concerning "manifestly unreasonable" requests under regulation 12(4)(b) EIR. In particular, it deals with a public authority's reliance on that exemption based on the excessive time which would be required to comply with the request.

41. The Tribunal confirmed that manifest unreasonableness – whilst not a condemnatory term - did imply a higher threshold than mere unreasonableness. A certain obviousness was required. Beyond that, no more precise definition could be given, and terms such as "self-evidently" were not applicable.

42. The cost of compliance is relevant, but only as one factor among many. A request may be manifestly unreasonable if the cost of compliance is disproportionate the importance of the issue, or if compliance would divert resources so as significantly to disrupt the public authority's normal activities. These, however, are only examples, and each case must be decided on its own facts. On the facts of this case (which concerned information on the disposal of land owned by Forestry Commission Wales for the purposes of wind farm development) the requests were manifestly unreasonable.

43. The Tribunal went on to find that the "cost of compliance" provision under section 12 FOIA may not be used as a yardstick for determining manifest unreasonableness under regulation 12(4) EIR. The provisions are entirely separate, and one offers no guidance on the other. It also found that compliance with the duty to advise and assist under regulation 9 EIR is a precondition for reliance on regulation 12(4)(c) (the exemption applicable where a request is too general) – but not for reliance on manifest unreasonableness under regulation 12(4)(b).

B. OTHER DEVELOPMENTS UNDER THE EIR

Definition of "public authority" under regulation 2 EIR

44. In *Smartsource v IC & 19 Water Companies* (GI/2458/2010), the Upper Tribunal held that water utility companies are not public authorities as defined under regulation 2(2) EIR. This is now the definitive decision on two limbs of that definition, namely regulation 2(2)(c) (functions of public administration) and 2(2)(d) (the meaning of "under the control" of a public authority). Note the following features of the Tribunal's decision:

(i) No single factor is decisive. Rather, the factors to be considered include those set down by the House of Lords in *Parochial Church Council for the parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and Another* [2003] UKHL 37, [2004] 1 AC 546, and by the Information Tribunal in *Network Rail Limited v IC* (EA/2006/0061 and EA/2006/0062) and *Port of London Authority v IC* (EA/2006/0083).

(ii) A body will not be a public authority under regulation 2(2)(c) simply because it carries out public functions; they must be "functions of public administration" (§35).

(iii) An activity does not become a function of public administration simply because there is a significant public interest in what it does (§76).

(iv) The focus of both the Aarhus Convention and the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC) which it informs is on *"capturing*

governmental and executive functions in their various guises", rather than on functions at *"arm's length from the machinery of the state"* (§94).

(v) Neither references to the body in statute nor regulation by the state brings the body within the definition of a public authority (§§70 and 73).

(vi) The concept of a "hybrid authority" was rejected: a body is either within regulation 2(2) or it is not, i.e. it cannot be within regulation 2(2) for some purposes but outside it for others (§104). Accordingly, it no longer matters whether the requested information concerns the particular functions in respect of which a body is a public authority for EIR purposes.

45. The Information Tribunal has recently decided that the Duchy of Lancaster is not a public authority for EIR purposes: see *Cross v IC* (EA/2010/0101). It did so just prior to the promulgation of the decision in *Smartsource*. The Tribunal will shortly be asked the same question – this time with *Smartsource* in mind – concerning the Duchy of Cornwall.

Charging for information requested under the EIR

46. Regulation 8 EIR allows a public authority to impose a "reasonable" for making environmental information available, subject to (among other things), regulation 8(2), which provides that:

(2) A public authority shall not make any charge for allowing an applicant—
(a) to access any public registers or lists of environmental information held by the public authority; or
(b) to examine the information requested at the place which the public authority makes available for that examination.

47. Those working in a local authority context will be familiar with the issue of "property search information" and what can legitimately be charged for access to such information. They will also be familiar with three related decisions, namely: the Tribunal decision in *East Riding Council v IC & York Place* (EA/2009/0069) (where the council unsuccessfully argued that that it was entitled to charge for permitting access to the information under regulation 8 EIR); the High Court's decision in *OneSearch Direct v City of York Council* [2010] EWHC 590 (Admin) (which did not concern the EIR, but instead an unsuccessful application for judicial review of the council's decision to charge for property search information under the Local Authorities (England) (Charges for Property Searches) Regulations 2008), and the Tribunal's (older) decision in *Markinson v IC* (EA/2005/0014) in which the Tribunal set out the factors relevant when assessing the reasonableness of a charge (see in particular §§33-34).

48. An authoritative decision on the question of charges under the EIR is expected imminently. The Upper Tribunal has heard an appeal by Kirklees Metropolitan Council against a decision notice[3] ordering the council to make the requested information available for the complainant to inspect free of charge.

49. This case also saw a novel argument being advanced by the appellant to the effect that a *purposive request* (i.e. one that asks for "information to enable me to answer the following questions" rather than for information of a specified description) is not a valid request under the EIR (or, it must follow, FOIA). If this argument succeeds, a substantial proportion of requests will be rendered invalid.

50. Another interesting decision under the EIR expected imminently involves a request by the anti-GM pressure group GM Freeze for information from Defra for the precise location (in the form of a six-figure map reference) of a field of oilseed rape accidentally contaminated with an unapproved GM trait in Somerset in 2008. Defra refused to disclose this information, relying on the "personal data" exemption at regulation 13(1) EIR.[4]

C. LATE RELIANCE AND OTHER "DISCRETIONS"

Late reliance

51. The question of whether a public authority can seek to rely on exemptions at a late stage in proceedings is one which arises in many tribunal appeals. Historically, the Tribunal has taken the view that it has a discretion to refuse late reliance on exemptions: see for example *DBERR v IC and Friends of the Earth* (EA/2007/0072) and *Crown Prosecution Service v IC* (EA/2009/0077). This line of authority held that the Tribunal may allow late reliance on exemptions where the public authority puts forward *reasonable justification* as to why the exemption has not been raised before then.

52. More recently, the Tribunal has departed from this "orthodoxy". The Tribunal in *Home Office v IC* (EA/2010/0011) held that no such discretion exists as a matter of construction: the application of an exemption under FOIA is an *objective* question, the answer to which does not depend on whether or not the exemption was in fact (ever) raised by the public authority. Taken to its logical extreme, this would require the Information Commissioner to consider the potential application of all exemptions in every case, regardless of the position adopted by the public authority.

[3] Reference number FER0311744.

[4] Reference number FER0260420.

53. In its joint decision on appeals from <u>*Home Office*</u> and from <u>*Defra v IC and Birkett*</u> (EA/2009/0106), the Upper Tribunal (a decision of UT Judge Jacobs) has mandated exactly this logical extreme (GIA/1694/2010 and GIA/2098/2010; see in particular §§49-52):

> *"In order to make section 50 effective and consistent with the full range of the Commissioner's powers and duties, it is necessary for the Commissioner to take the initiative in appropriate circumstances and to do so as a matter of duty, not of discretion."* (§49)

54. Similarly, the Upper Tribunal found that, as a matter of the construction of section 58 FOIA, the Information Tribunal has no discretion to refuse late reliance:

> *"...the section imposes the 'in accordance with the law' test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority."* (§58)

55. It is not yet known whether this decision will be appealed to the Court of Appeal. Even if it is not, there is some chance that this will not be the last word for much longer. An appeal against two decision notices[5] concerning the All Parliamentary Group on Extraordinary Rendition and the Ministry of Defence has been heard by the Upper Tribunal. At the conclusion of that hearing, the Upper Tribunal requested submissions on the question of late reliance. These could lead to a different view on late reliance being taken in this case.

<u>**The Commissioner's discretion not to order disclosure**</u>

56. The Upper Tribunal will also shortly hear an appeal concerning the question of whether or not, having found that the public interest at the time of the request favoured disclosure, the Information Commissioner nonetheless has a discretion to decline to order disclosure because of events in the intervening period. The requester sought information from what is now the Valuation Office Agency on the methods by which rental information was gathered in the local area. The public authority sought to rely on section 44(1)(a) FOIA (a statutory prohibition on disclosure) *retrospectively*, on the basis of a statutory bar to disclosure (section 18 of The Commissioner's for Revenue and Customs Act 2005) which had come into force *subsequent* to its handling of the request.

57. The Commissioner found that the exemption could not be relied upon retrospectively. He decided, however, that because of the statutory bar now in force, he would not order disclosure.[6] He relied on the decision of Burton J in <u>*Office of Government Commerce and the Information Commissioner*</u>

[5] FS50200146 and FS50246244.

[6] See decision notice FS50211872.

and Her Majesty's Attorney General [2008] EWHC 737 (Admin) (at §98) as supporting the following principle:

> *"If considerations under the original exemptions favoured disclosure the Commissioner has the ability to take into account these new circumstances when considering the steps to make the public authority comply with section 1(1) of the Act. In very limited circumstance such as these the Commissioner will use his discretion not to enforce compliance with the Act."* (§15 of the Decision Notice)

58. The appeal to the Upper Tribunal contends that this approach was unlawful.

D. PRACTICAL POINTS

59. Tribunal decisions often raise practical points with substantive applications. Two notable points have emerged recently concerning the information which is actually made available to the requester.

Unlawfully unhelpful redaction

60. The Tribunal's dicta in _Gradwick v IC and the Cabinet Office_ (EA/2010/0030) offers clear guidance on how to go about disclosing information from a substantively redacted document. In response to a FOIA request, the Cabinet Office had decided to disclose some extracts from its Manual of Protective Security but to withhold others. Due in part to administrative complications, it did so by compiling a document consisting solely of the former rather than blanking out parts of the original manual. Relying on FOIA's reference point being information rather than documents, the Cabinet Office sought to justify this approach in the face of criticism from the Tribunal. The Tribunal however, remarked that *"it is at least arguable that a document which sets out the passages that contain the information to be disclosed, but which has the effect of obscuring the nature and extent of the information which has been withheld, does not inform the party making the request whether or not it holds information of the description specified in the request, for which exemption is claimed"*.

61. This approach to the presentation of information could, it observed (without deciding the issue), constitute a breach of section 1 (duty to provide information) and/or section 16 (duty to assist) of FOIA. The Tribunal indicated that it prefers the following approach:

> *"Within the practice established by the Tribunal and its users to date, a document characterised as having been redacted has come to mean one in which the extent of the omitted material is indicated by blank spaces and in which, to the extent possible, headings or other indications are retained or inserted to give a fair indication, to both panel members*

and those presenting submissions, of the broad nature of the information that has been withheld. Annotating the resulting document to indicate the exemption relied on to justify each omission is also a valuable assistance in cases where different exemptions apply to different sections of the document or information."

Spreadsheets

62. We looked earlier at the substantive decision in *Bath & North East Somerset Council v IC* (EA/2010/0045). That decision also concluded with what could become an important practical issue. Both the council and the Commissioner had interpreted the request as being for a static version of the developer's financial model. A 'live' model – i.e. a spreadsheet containing visible formulae – is another matter. The Tribunal did not order the disclosure of that model, but warned that in future cases, clarification should be sought from the requester. One assumes that, invariably, requesters will ask for 'live' versions.

Changing the information

63. *Cooksey v ICO and Chief Officer of Greater Manchester Police* (EA/20100113) concerned the cost of compliance "exemption" at section 12 of FOIA. The case concerned a request in six severable parts for information concerning documents from a murder investigation undertaken between 1992 and 1995. The material from that investigation was stored in entirely disorganised boxes. This disorganisation gave rise to the engagement of section 12. The Commissioner had examined a sample of the material and produced his own cost estimate which was lower than that advanced by the public authority. The Tribunal was satisfied that section 12 was engaged on the basis of the Commissioner's estimate – but not that of the public authority. It went on to confirm that there is no duty to search up to the cost limit: if the costs limit is engaged, the effect of section 12 is to disapply altogether the duty to comply with the information request.

64. The interesting practical point is this: the Tribunal noted that the boxes had been numbered *after* receipt of the request for information, for purposes of transportation. This, the Tribunal suggested, constituted a *change in the way that information was organised* which might allow for differently constituted information requests to be made, relying on the box numbers as a way of targeting those requests.

E. LEGISLATIVE PROPOSALS

65. The *Protection of Freedoms Bill* had its first reading in the House of Commons on 11th February 2011. It contains a number of provisions which will affect freedom of information law. These include:

(i) An amendment to section 11 FOIA (means by which communication to be made): where information concerns a "dataset" (a term with a complex definition), the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use. This aims to improve transparency and accountability by making public sector data readily accessible for number-crunching and analysis.

(ii) This must be done proactively and not merely on request. "Datasets" must appear in up-to-date form in a public authority's publication scheme "unless the authority is satisfied that it is not appropriate for the dataset to be published".

(iii) To ensure that the provision of electronic databases, models and the like is lawful, the Bill provides that where the "dataset" being released for re-use involves a "copyright work" owned by the public authority, the public authority must make the relevant copyright work available for re-use by the applicant in accordance with the terms of the specified licence.

(iv) The definition of a "publicly-owned company" under section 6 FOIA is being amended. Section 6(1) will no longer apply only to bodies wholly owned by a FOIA-listed authority, but also to those wholly owned by "the wider public sector". Section 6(2) is adjusted so that it also pivots around the concept of "the wider public sector". This ties in with Mr Clegg's announcement in his speech in January that additional bodies such as the Association of Chief Police Officers and UCAS will become subject to FOIA duties.

(v) There is a new procedure for the removal by Parliament of the Information Commissioner.

66. The Information Commissioner has welcomed the proposals contained in the Bill, with the caveat that *"we* [the ICO] *will be examining all of the Bill's provisions closely to be satisfied that they will deliver in practice"*.[7]

February 2011

[7] ICO statement, 11th February 2010, available at:
http://www.ico.gov.uk/~/media/documents/pressreleases/2011/freedombill_statement_20110211.ashx