

## Freedom of Information Update Timothy Pitt-Payne QC

1. The Freedom of Information Act 2000 (FOIA) is likely to be one of the enduring legacies of the 1997-2010 Labour government. It was introduced during the 1997-2001 Parliament in the context of wide-ranging constitutional reforms, including the Human Rights Act 1998 and Scottish and Welsh devolution. It came fully into force on 1<sup>st</sup> January 2005, at a time when political life was dominated by the aftermath of the Iraq War, an issue that prompted many high-profile requests. During the 2005-2010 Parliament FOIA was central to the MPs' expenses scandal, as a result of which four MPs and two members of the House of Lords have subsequently been convicted of criminal offences. Repealing the Act, or seriously restricting its scope, seems now to be politically impossible: it has become part of the landscape. Nevertheless its Prime Ministerial progenitor has subsequently described himself as a "nincompoop" for having introduced it<sup>1</sup>.
2. During the present Parliament issues about access to information have continued to play an important role. The Coalition Government has promised to increase transparency, both by strengthening FOIA and by encouraging the routine disclosure of particular categories of information. At the same time, FOIA continues to generate a substantial volume of case-law. So far this year over 200 appeals have been lodged with the Information Rights Tribunal. Most of these cases relate to FOIA, though some are about the Environmental Information Regulations 2004 (EIR) or (in a very few cases) the Data Protection Act 1998 (DPA).
3. This paper considers the following recent developments, from a local government perspective:
  - the implementation of the commitments about transparency set out in the Coalition Agreement;
  - legislative reform: the Protection of Freedoms Bill, and the Localism Bill;
  - changes to the inspection regime under the Audit Commission Act 1998; and

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<sup>1</sup> In his memoirs, "A Journey". See [http://www.bbc.co.uk/blogs/opensecrets/2010/09/why\\_tony\\_blair\\_thinks\\_he\\_was\\_a.html](http://www.bbc.co.uk/blogs/opensecrets/2010/09/why_tony_blair_thinks_he_was_a.html)

- recent case-law about FOIA and EIR.

## COMMITMENTS TO INCREASED TRANSPARENCY

4. The foundational document of the present government, the Coalition's *Programme for Government*<sup>2</sup>, includes an entire section entitled "Government Transparency": see section 16. This draws an explicit link between increased transparency, and delivering better value for money in public spending and reducing the deficit. The commitments in this section include the following:
  - *We will require public bodies to publish online the job titles of every member of staff and the salaries and expenses of senior officials paid more than the lowest salary permissible in Pay Band 1 of the Senior Civil Service pay scale and organograms that include all positions in those bodies.*
  - *We will create a new "right to data" so that government-held datasets can be requested and used by the public, and then published on a regular basis.*
  - *We will require all councils to publish meeting minutes and local service and performance data.*
  - *We will require all councils to publish items of spending above £500, and to publish contracts and tender documents in full.*
5. The initial approach towards implementing these commitments relied on pressure and persuasion rather than formal legal mechanisms. On 4<sup>th</sup> June 2010 the Secretary of State for Communities and Local Government wrote to all local authorities in England, stating that he expected them to publish items of expenditure over £500, and invitations to tenders and final contracts on projects over £500, with effect from January 2011.
6. In February 2011 the Secretary of State published for consultation a draft of a statutory Code of Recommended Practice on data transparency for local authorities, to be issued under section 2 of the Local Government, Land and Planning Act 1980. The consultation document stated that the proposed Code was intended to complement the publication and disclosure requirements under FOIA and the EIR. Comments were sought by 14<sup>th</sup> March 2011.

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<sup>2</sup> Available online at <http://www.cabinetoffice.gov.uk/news/coalition-documents>

7. The draft Code would apply to local authorities in England. The main points are these.

- “Public data” is defined as the objective, factual, non-personal data on which policy decisions are based and on which public services are assessed, or which is collected or generated in course of public service delivery (§5). This is the data that the Code is keen to encourage local authorities to make public.
- As a minimum, the following datasets should be released (see §8).
  - Expenditure over £500.
  - Grants and payments under contract to the voluntary community and social enterprise sector: these should be clearly listed.
  - Senior salaries, with job descriptions, responsibilities, budgets and staff numbers. Senior salaries are those above £58,200 (the Senior Civil Service minimum pay band).
  - An organisational chart of the authority’s staff structure.
  - Councillor allowances and expenses.
  - Contracts and tenders to the business and to the voluntary community and social enterprise sector.
  - Policies, performance, audits and key indicators on the authorities’ fiscal and financial position.
  - Data regarding local democracy, including the constitution, election results, committee minutes, decision-making processes and records of decisions.
- Local authorities should develop and publish inventories of their data, and should register them on data.gov.uk (§§10-11).
- Data should be easily accessible, in a format and licence that allow re-use, published in open and machine-readable formats, but at the same time there should be controls in place to reduce the risk of any fraud resulting from publication (§§12-16). See also Annex A to the draft Code in relation to anti-fraud measures.
- Data should be published as quickly as possible after it is produced (§§17-19).
- Local authorities must not publish data in breach of the DPA or section 100A(2) of the Local Government Act 1972. Otherwise, where a FOIA exemption applies

or the data is within Schedule 12A of the 1972 Act, it is in the discretion of the local authority whether to rely on the exemption or publish the data.

## **LEGISLATIVE REFORM**

### **Protection of Freedoms Bill**

8. The Protection of Freedoms Bill was presented to Parliament on 11<sup>th</sup> February 2011. At the time of writing it is due to have its report stage in the House of Commons on 10<sup>th</sup> October 2011.
9. The Bill covers a wide range of different subjects in the general area of civil liberties and constitutional reform. Reputedly, it became known within the civil service as the “Christmas tree bill”: everyone wanted to hang something on it.
10. Part 6 of the Bill deals with Freedom of Information. The main provision relates to the release and publication of “datasets”, and is evidently intended to implement the “right to data” promised in the Coalition Agreement. Clause 98 provides that, where an applicant makes a request for information which is or forms part of a dataset held by the public authority, and where the applicant expresses a preference for communication in electronic form, then the public authority must so far as reasonably practicable provide the information in a reusable electronic form. Moreover, if the dataset or any part of it is a “relevant copyright work”, and the public authority is the only owner of the relevant copyright, then the public authority must make it available for re-use by the applicant in accordance with the “specified licence”. A “relevant copyright work” is a copyright work other than one in relation to which the Crown or either House of Parliament is the copyright owner. The “specified licence” is the licence specified by the Secretary of State in a code of practice issued under section 45.
11. A “dataset” is defined as follows:

*In this Act “dataset” means information comprising a collection of information held in electronic form where all or most of the information in the collection—*

- (a) has been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority,*
- (b) is factual information which*
  - (i) is not the product of analysis or interpretation other than calculation, and*
  - (ii) is not an official statistic (within the meaning given by section 6(1) of the*

*Statistics and Registration Service Act 2007), and*

*(c) remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded.*

12. The purpose of these elaborate provisions, in summary is to facilitate the re-use of raw factual data that is disclosed in electronic form.

### **Localism Bill**

13. The Localism Bill was presented to Parliament on 13<sup>th</sup> December 2010, and is currently part way through its report stage in the House of Lords (the next sitting is on 10<sup>th</sup> October 2011).

14. Part 1, Chapter 6 of the Bill makes provisions in relation to pay accountability. This part of the Bill has been significantly amended during its passage through Parliament: the summary below relates to the Bill as available on the UK Parliament website at the end of September 2011.

15. For each financial year from 2012-13 onwards, a “relevant authority” must prepare a pay policy statement relating to the remuneration of its chief officers and its lowest-paid employees, and the relationship between the remuneration of chief officers and other employees (see clause 22). “Relevant authorities” are defined in clause 27(1) and include council councils, county borough councils, district councils, London borough councils, and the Common Council of the City of London in its capacity as a local authority. “Chief officers” are defined in clause 27(2).

16. The policy statement must include the authority’s policies in respect of seven specified matters, including the level and elements of remuneration for each chief officer, the use of performance related pay and bonuses for chief officers, and the publication of and access to information regarding the remuneration of chief officers (clause 22(4)). The first such statement must be prepared and approved before the end of 31<sup>st</sup> March 2012 (clause 23(2)). In preparing such statements, relevant authorities must have regard to any guidance issued or approved by the Secretary of State (clause 24(1)).

17. By clause 25, in any financial year beginning on or after 1<sup>st</sup> April 2012, a relevant authority must comply with its senior pay policy statement when making a determination relating to the remuneration or other terms and conditions of a chief officer.

18. These provisions continue a prominent theme of the Coalition Government's approach – stemming from the Coalition Agreement itself – namely, an emphasis on the regular release of information by public authorities, without request, and particularly in relation to matters of expenditure. The aim of the provisions is evidently to restrain the levels of pay for senior local authority officers. It is not clear what will be the practical significance of the reference (in clause 22(2)) to the relationship between the remuneration of chief officers and others. For instance, will authorities be expected to set a maximum differential between chief officers' pay and the pay of other employees? Guidance under clause 24(1) may cast further light on this.

### **AUDIT COMMISSION ACT 1998**

19. The Audit Commission Act 1998 makes provision for a right of public inspection in connection with the annual audit of local authority accounts. Section 15(1) of the Act provides that at each audit under the Act any persons interested may inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them. The accounts and other documents must be made available for 20 working days before the date appointed by the auditor after which electors can exercise their statutory rights to question the audit and to make objections to him in relation to items of account.

20. This right of access is very well-established: its legislative history can be traced back to the Poor Law Act 1844. It does not fit easily into the framework of modern legislation about the right of access to information. The right can only be exercised for a short part of the year, but on its face it is very wide-ranging. There are limited exceptions: in particular, there is no specific exception for commercially confidential information. The scope of the right was extensively explored in *Veolia ES Nottinghamshire v Nottinghamshire County Council and others* [2010] EWCA Civ 1214, [2011] 1 Info LR 515, where the Court of Appeal held that disclosure of confidential commercial information under these provisions was capable of constituting an interference with the right to the peaceful enjoyment of possessions, falling within article 1 protocol 1 of the European Convention on Human Rights, and that the legislation would need to be read down (under section 3 of the Human Rights Act 1998) so as to avoid this.

21. Detailed provision for the exercise of this right is now made in the *Accounts and Audit (England) Regulations 2011* (SI 2011/817). The regulations include a requirement for "larger relevant bodies" to give notice on their website as to the arrangements for inspection: see reg 10. A larger relevant body has a gross income or expenditure

(whichever is higher) of more than £6.5 million. The DirectGov website now has to link to information about when local authorities in England make their accounts available for inspection:

[http://www.direct.gov.uk/en/HomeAndCommunity/YourlocalcouncilandCouncilTax/YourCommunity/DG\\_196382](http://www.direct.gov.uk/en/HomeAndCommunity/YourlocalcouncilandCouncilTax/YourCommunity/DG_196382)

## FOIA AND EIR CASE-LAW

### General issues

22. Recent case-law has addressed four issues of general importance relevant to all public authorities dealing with FOIA or EIR requests:
- the approach to aggregating the public interest in cases where more than one exemption is engaged;
  - late reliance on exemptions by public authorities;
  - change of circumstances after the time when the request for information was made; and
  - the relevance to FOIA of article 10 of the European Convention on Human Rights.
23. In relation to *aggregation*, the conflict is between two different approaches to the application of the public interest test to qualified exemptions. The first approach considers each qualified exemption separately. For each exemption, it asks whether the public interest in maintaining that exemption outweighs the public interest in disclosure. If the answer in every case is no, then the information must be disclosed. The second approach considers the exemptions collectively and in aggregate. It asks whether the total, overall public interest in withholding the information outweighs the public interest in disclosure. If so then the information is exempt.
24. An example may make the point clearer. A local authority is asked for disclosure of minutes of an internal meeting that discussed the performance of a contractor. The authority considers that two FOIA exemptions are applicable: section 36 (because disclosure would prejudice the frankness of internal discussions of this kind), and section 43 (because disclosure would prejudice the authority's commercial interests by revealing its likely approach to future negotiation with the contractor about performance improvements). If the exemptions are considered in isolation, then the desirability of avoiding each kind of prejudice needs to be weighed separately against the public interest in disclosure. But if the exemptions are considered in aggregate, then both kinds of prejudice can be weighed together against the public interest. In principle this is likely to make it easier to justify withholding the information.

25. The issue has been extensively litigated in relation to the EIR. In the *Ofcom* case a reference was made from the Supreme Court to the CJEU as to the proper interpretation of the Directive. The CJEU ruled in favour of aggregation as between the public interest considerations inherent in different EIR exceptions: see *Ofcom v Information Commissioner* Case C-71/10. It remains to be seen whether the same approach will be adopted in relation to FOIA.
26. In relation to *late reliance*, the issue arises because there are a number of different stages in dealing with FOIA (or EIR) requests. Public authorities need to make an initial decision how to respond; they may be asked to carry out an internal review; there may be a complaint to the ICO; and then there may be an appeal to the Tribunal. On occasion public authorities will rely at a later stage on an exemption that was not invoked in their initial response to the request. The issue is whether there is an unfettered right to do this.
27. In the Upper Tribunal case of *Home Office v Information Commissioner; DEFRA v Information Commissioner and Birkett* [2011] UKUT 17 (AAC), [2011] 1 Info LR 1533, the Tribunal held that public authorities could rely on exemptions before the ICO or in the Tribunal, even if those exemptions had not been previously raised. There was no discretion for the ICO or Tribunal to refuse to consider the late exemption. The same approach applied to the exceptions under the EIR. The Tribunal also suggested that in some circumstances the ICO should consider a potential exemption even if the public authority had not referred to it, particularly where this was necessary in order to ensure that third party interests were properly protected: see decision at §§43-53.
28. In relation to *change in circumstances*, the established approach is for the ICO and the Tribunal to consider the applicability of any exemptions, and the public interest test, by reference to the circumstances at or about the time when the request was made. But what if there is a subsequent change in circumstances? Can the ICO or Tribunal say that, even though the public authority breached FOIA in not disclosing the information at the time when it was requested, nevertheless because of the subsequent change disclosure will not now be ordered?
29. There is a passage in the judgment of Stanley Burnton J in the *OGC* case suggesting, *obiter*, that there is a discretion not to order disclosure: see *OGC v Information Commissioner* [2008] EWHC 737 (Admin), [2011] 1 Info LR 743, at §98.
30. The point arose for decision in the Upper Tribunal in *Information Commissioner v HMRC and Gaskell* GIA/3016/2010. The case concerned a request for information to the Rent Service (which at the time of the request was part of the DWP) for

information used in calculating Local Housing Allowance for a particular area. Subsequently the Rent Service became part of HMRC, and as a result the requested information became subject to a statutory prohibition on disclosure under section 18(1) of the Commissioners for Revenue and Customs Act 2005. The Information Commissioner declined to order disclosure. On appeal the First-tier Tribunal held that the Commissioner had erred in taking account of the 2005 Act, since it did not apply to the information at the time of the request. The Upper Tribunal restored the Commissioner's decision. It held that in determining a complaint under FOIA section 50 there were two matters for the Commissioner to consider: (i) whether the public authority had breached the Act in the way in which it had dealt with a request; and (ii) if so, what further steps (if any) the Commissioner should direct. At stage (i), the Commissioner had to make a determination by reference to the circumstances that existed at the time of the request. But even if the Commissioner that at the time of the request there was a duty to disclose the requested information, he had a discretion at stage (ii) as to whether he should refuse to order disclosure on account of a subsequent change in circumstances. In the present case, the Commissioner was entitled at stage (ii) to take into account that disclosure of the requested information was now subject to a statutory prohibition. Hence the Commissioner was entitled to refuse to order disclosure: so his decision was restored by the Upper Tribunal.

31. Finally, there is an issue whether *article 10 of the Convention* has any bearing on the interpretation of FOIA. This arose in the very interesting case of *Kennedy v Information Commissioner and Charity Commission* [2011] EWCA Civ 367. Although the factual context is remote from local authority matters, the potential implications of the case for all FOIA public authorities are wide-ranging.
32. The requester was a journalist, who sought disclosure from the Charity Commission of information relating to its inquiry into the Mariam Appeal (an appeal to raise funds for medical assistance to the people of Iraq). The Charity Commission refused disclosure relying on FOIA section 32(2), an absolute exemption relating to information held for the purposes of a statutory inquiry. A difficult question of construction arose: did the exemption still apply after the relevant statutory inquiry had come to an end? Applying ordinary principles of construction the Court concluded that the exemption would still apply. But the requester argued that the Human Right Act 1998 required a different construction, for the sake of consistency with article 10 of the Convention. Article 10 confers a right to freedom of expression, including the freedom to receive information. Hitherto it has not been understood as conferring a positive right to require a public authority to disclose information that it wishes to withhold. However, two decisions of the European Court of Human Rights

suggest that article 10 is capable of having such an effect, at any rate where the information is sought for journalistic purposes: see *Tarsasag a Szabadsagjogokert v Hungary* [2009] ECHR 618, *Kenedi v Hungary* [2009] ECHR 78. Having considered those authorities, the Court of Appeal remitted the case to the Tribunal for further evidence and argument in relation to the article 10 issue.

33. There is considerable scope for further argument in the *Kennedy* case, and the eventual outcome is uncertain. However, potentially its implications are far-reaching. If the article 10 argument succeeds, then will article 10 potentially be relevant in any case where there is a difficult point of construction under FOIA? And if so, will it be relevant regardless of the requester's identity, or only where the requester is a journalist? If the latter, what happens to the mantra that FOIA is applicant-blind and purpose-blind?

#### **Specific types of information**

34. Local authorities will be interested in recent cases applying FOIA or EIR to the following specific types of information:
- commercial contracts;
  - lists of void properties;
  - property search information; and
  - statistical information.
35. Local authorities are often faced with requests for disclosure of their *commercial contracts*. This is likely to require them to apply the exemption in FOIA section 43(2), relating to information the disclosure of which would be likely to prejudice commercial interests. In *Channel 4 v Information Commissioner and B Sky B* EA/2010/0134 the Tribunal rejected an argument that, where the substantive part of a long and detailed contract was not disclosable by reason of section 43(2), the contract could therefore be withheld in entirety. Although the core or "guts" of the contract were not disclosable, the public authority was obliged to disclose the parts of the contract that were not exempt under section 43(2). That was so, notwithstanding that this approach required the public authority to carry out a time consuming and expensive redaction exercise.

36. In relation to *void properties*, the recent decision in *Voyias v Information Commissioner and London Borough of Camden* EA/2011/0007 received considerable media attention. The case was about a request for disclosure of lists of certain categories of empty property. The Tribunal held that FOIA section 31(1)(a) was engaged: disclosure would be prejudicial to the prevention of crime, since it would be likely to increase the number of properties that were squatted, and hence to increase certain kinds of low-level criminality (e.g. criminal damage on entry) associated with squatting. However, the public interest in maintaining the exemption was outweighed by the public interest in bringing empty properties back into use, which would be promoted by disclosure.
37. Much of the media attention given to this judgment interpreted it as asserting that *squatting* was in the public benefit. This is not actually what the judgment says. Rather what it seems to be arguing is that disclosure would increase awareness of which properties were empty, and thus increasing public pressure for them to be brought into use: the tribunal was not saying that disclosure was in the public interest because it would facilitate squatting.
38. In relation to *property search information*, there has been a considerable amount of case law about rights of access under EIR, in particular arising out of requests made by property search companies. In *Kirklees Council v Information Commissioner and PALI Ltd* [2011] UKUT 104 (AAC) a property search company asked to be allowed to inspect those records held by the Council which would allow the company to answer particular questions in the Law Society's CON29R form. The issue was whether the Council was obliged to answer the request, and if so whether it was allowed to charge. Before the Upper Tribunal, the Council argued that the request was invalid because it was "purposive" not "descriptive": that is, it did not simply describe the target information, but was framed by reference to the purpose of answering the CON29R form. The Tribunal rejected this as an illegitimate attempt to narrow the right of access under the EIR. The Tribunal also held that the Council was obliged to allow inspection without charge: a charge was only permissible if copy documents were provided to the applicant or information was accessed other than by means of an inspection on site. The Council could not charge for locating and retrieving documents prior to allowing inspection.
39. Finally, the disclosure of *statistical information* has given rise to difficult legal issues. A recurring question is this: in what circumstances should such information be treated as being personal data? On the face of it, statistical information involves numbers rather than names. But it is easy to construct examples where the disclosure of statistical information is tantamount to the disclosure of information about specific

individuals. For instance, if Fred Smith is the only white male between the ages of 18 and 30 living in Acacia Avenue, then the question “How many white males aged between 18 and 30 and living in Acacia Avenue are HIV positive?” is equivalent to asking, “Is Fred Smith HIV positive?”

40. However, when it comes to identifiability there are two different scenarios that need to be disentangled. One is that the *public authority* that holds statistical information may also hold other information that would inform it as to the identity of the individuals to whom the statistics relate. The second is that there is other information *in the public domain* that would enable those individuals to be identified if the statistics were published.
41. Two recent decisions – by different legal routes, and based on different analyses of the decision of the House of Lords in *Common Services Agency* [2008] UKHL 47, [2011] 1 Info LR 184 – have reached the following conclusion. The disclosure of statistical information will not constitute the processing of personal data – and hence will not engage the exemption in FOIA section 40(2) - merely because the public authority that discloses the statistics holds other information that would enable it to identify the relevant individuals. Disclosure of statistical information involves the processing of personal data only where there is other information in the public domain that would allow the identification to be made. See the decision of the Upper Tribunal in *APPGER v Information Commissioner* [2011] UKUT 153 AAC, and the judgment of Cranston J in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin).
42. These cases leave a number of difficult questions for further exploration. In particular, there is a question as to what level of risk of identification is required, and what assumptions should be made as to the steps that might be taken to identify individuals.

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