

## Recent Developments in Freedom of Information and Data Protection

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1. This paper considers recent developments in Information Law issues affecting local government during the last 12 months or so. The focus is on the Freedom of Information Act 2000 (FOIA) and on the Data Protection Act 1998 (DPA).

### FOIA

#### *General structure*

2. FOIA section 1 confers a general right of access on request to information held by public authorities<sup>1</sup>. The right is however subject to limitations.
  - Public authorities may refuse to answer vexatious or repeated requests (section 14). The legislation does not give any specific definition of the term “vexatious”. A repeated request is one that is identical or substantially similar to a request that has previously been complied with by the public authority, and there is no duty to answer such a request unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.
  - There is no duty on public authorities to answer requests where the cost of doing so will exceed the “appropriate limit”: section 12. This is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004 No 3244). The limit is £600 for government departments, and £450 for other public authorities. In calculating a cost for time spent on dealing with a request, a figure of £25 per person per hour is to be used (regulation 4(5)); and only certain specified costs can be taken into account (regulation 4(3)).
  - Part II of the Act contains a number of exemptions. Some of these are absolute – in which case, information falling within the scope of the exemption is not subject to the duty of disclosure under the Act. Some are qualified – in which

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<sup>1</sup> The right of access to information under the Environmental Information Regulations 2004 shares many features with the right under FOIA, but is not separately discussed in this paper

case, whether the information is subject to the duty of disclosure will depend on whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

3. Where a person seeking information considers that the public authority has failed to deal with his request in accordance with the Act, he can complain to the Information Commissioner (see section 50 of the Act). The Commissioner's decision in relation to such complaints can then be appealed to the Information Tribunal, either by the public authority or by the person seeking information (see section 57 of the Act).

### ***The cost of the FOI regime, and proposals for amendment***

4. The cost imposed on the public sector by FOIA has been the subject of a recent report by Frontier Economics<sup>2</sup>, commissioned by the Department for Constitutional Affairs (DCA) and published on 16<sup>th</sup> October 2006. The report estimated the level of FOI requests annually at 34,000 for central government, 60,000 for local government and 27,000 for other public authorities. The total annual cost to the public sector as a whole in dealing with requests for information was estimated at £35.5 million, including £8 million for local government. The report acknowledged that these figures represented the full costs of dealing with requests for information, rather than the additional costs of implementing FOIA (even if FOIA were repealed tomorrow, no doubt requests for information would continue to be made to public authorities, and costs would be incurred in dealing with those requests). According to the report, there was a significant minority of requests that were disproportionately expensive to deal with: approximately 5% of central government requests accounted for 45% of the combined costs of officials and ministers in dealing with initial requests. Requests from "serial" (i.e. experienced) requestors tended to require more time to be spent on consideration and consultation than did requests from one-off users.
5. Following the Frontier Economics report, the DCA announced proposals to change the way in which the appropriate limit was calculated. A consultation paper was published on 14<sup>th</sup> December 2006<sup>3</sup> (with the period of consultation due to end on 8<sup>th</sup> March 2007), including draft revised FOI fees regulations to replace the 2004 regulations referred to above.

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<sup>2</sup> See <http://www.foi.gov.uk/reference/foi-independent-review.pdf>

<sup>3</sup> See <http://www.dca.gov.uk/consult/dpr2007/cp2806-condoc.pdf>

6. The main proposals in the paper were these.

- The costs of examining information in order to ascertain its nature or content, consulting with persons other than the applicant, and considering the applicability of exemptions, should be taken into account in determining whether the appropriate limit had been met.
- In calculating whether the appropriate limit had been met, public authorities would in certain circumstances be permitted to aggregate the costs of all requests received from a person, or from persons acting in concert or in pursuance of a campaign, within 60 working days. Aggregation would be permitted even if the requests did not relate to the same or similar information, provided that it was reasonable for the requests to be aggregated: see draft regulation 7(2)(b)(ii)<sup>4</sup>. Under the 2004 regulations, aggregation is permitted only as between requests relating to the same or similar information: see regulation 5(2)(a) of the 2004 regulations.

7. The proposals in the consultation paper were widely criticised in the media as an attempt to curtail the right of access conferred under FOIA – indeed, the apparent consensus among newspapers of very different political complexion was striking<sup>5</sup>. Concerns were expressed in some quarters that the effect of the proposed aggregation provisions would be that the BBC, or a newspaper, would only be able to make one FOIA request to any local authority, or government department, within a 3 month period<sup>6</sup>.

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<sup>4</sup> It is however interesting to contrast this with the statement by Lord Falconer, in the lecture referred to at note 5 below, that if requests are genuinely different then aggregation should not apply. It is possible that this indicates a shift of approach.

<sup>5</sup> See e.g. the *Daily Telegraph* leading article for 8<sup>th</sup> March 2007, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2007/03/08/dl0801.xml#comments>; the *Times* leading article for 5<sup>th</sup> March 2007, available at [http://www.timesonline.co.uk/tol/comment/leading\\_article/article1469969.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article1469969.ece); the *Daily Mail* leading article for 6<sup>th</sup> March 2007, available at [http://www.dailymail.co.uk/pages/live/articles/news/newscomment.html?in\\_article\\_id=440359&in\\_page\\_id=1787#StartComments](http://www.dailymail.co.uk/pages/live/articles/news/newscomment.html?in_article_id=440359&in_page_id=1787#StartComments); and the *Guardian* leading article for 5<sup>th</sup> March 2007, available at <http://www.guardian.co.uk/leaders/story/0,,2026485,00.html?gusrc=rss&feed=28>. For a defence of the Government's position, see the Lord Williams of Mostyn Memorial Lecture given by Lord Falconer on 21<sup>st</sup> March 2007: <http://www.dca.gov.uk/speeches/2007/sp070321.htm>

<sup>6</sup> See e.g. the response of the Campaign for Freedom of Information to these proposals: [http://www.cfoi.org.uk/pdf/CFOI\\_fees\\_response.pdf](http://www.cfoi.org.uk/pdf/CFOI_fees_response.pdf) (see page 8 of the document).

8. The Information Commissioner has also been critical of the proposed changes. Giving evidence to the Constitutional Affairs Committee of the House of Commons on 20<sup>th</sup> March 2007, he said this<sup>7</sup>.

In overall terms, I do not consider freedom of information is proving to be burdensome for public authorities, and I think the benefits, especially in terms of improved transparency, accountability and democracy are clear. I am mainly concerned about the practicalities of the proposals which are now under consideration ... A very important provision is section 14 of the Act, which sets out an exclusion for a request which is vexatious or for a repeated request. I have to say very frankly to this Committee that I am surprised that government departments and other public authorities are not using these provisions' exclusion for vexatious requests to any great extent. If there is a problem with this sort of request, then why is it that we are not being presented time after time with refused requests on the ground that they are vexatious? If there is a real problem in this area, then I make no secret, it is my view that a more robust use of the existing exclusion would to a very significant extent address the mischief at which the new cost proposals are directed.

9. On 29<sup>th</sup> March the DCA announced a supplementary period of consultation, to run until 21<sup>st</sup> June 2007<sup>8</sup>. Responses are now invited on the question of principle, as to whether there is any need for amendment to the existing fees regulations, as well as on the detail of the draft regulations.

***Recent developments: frivolous and vexatious requests***

10. Given the Information Commissioner's remarks, quoted above, it is interesting to see how the Commissioner has dealt with this issue in recent Decision Notices.
11. A good example is the decision notice issued on 19<sup>th</sup> March 2007 in case reference FS50086298, in which the public authority was the BBC. The applicant made 4 requests for information relating to the expenses statements of various individuals, and related matters. Prior to submitting these requests, the applicant had made about 90 FOI requests to the BBC since January 2005. The BBC refused to answer the 4 requests in question, on the grounds that they were vexatious.

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<sup>7</sup> For a full transcript of the hearing, see <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/uc415-i/uc41502.htm>

<sup>8</sup> See the supplementary consultation paper: <http://www.dca.gov.uk/consult/dpr2007/sp2806-condoc.pdf>

12. The Commissioner explained that he would in general be sympathetic to public authorities in cases where a request, which might be the latest in a series of requests, would impose a significant burden and: clearly did not have any serious purpose or value; was designed to cause disruption or annoyance; had the effect of harassing the public authority; or could otherwise fairly be characterised as obsessive or manifestly unreasonable. In the present case, the Commissioner considered that the volume of requests had the effect of harassing the authority; that certain of the requests had the effect of harassing individuals within the public authority with whom the individual had corresponded; and that the requests could fairly be characterised as obsessive. He upheld the public authority's decision to refuse to answer the requests.

***Recent developments: exemption under section 36***

13. The exemption under section 36 applies to information if in the reasonable opinion of a qualified person the disclosure of the information would or would be likely to prejudice various matters, including the free and frank provision of advice, the free and frank exchange of views for the purpose of deliberation, or the effective conduct of public affairs.

14. This is an important exemption for local authorities. It is often described as being intended to protect a "safe space" for deliberation and policy-making, enabling authorities to formulate options and to consider policy choices without being exposed to immediate public scrutiny. Section 35 of the Act plays a similar role - it applies to information relating to the formulation and development of government policy, and to certain other comparable classes of information – but section 35 applies only to information held by government departments or the National Assembly for Wales.

15. Both sections 35 and 36 create qualified exemptions, and this means that there needs to be consideration of the balance between the public interest in maintaining the exemption and in the disclosure of the information.

16. The Information Tribunal has considered these exemptions in three important recent decisions: *DWP v Information Commissioner* (5<sup>th</sup> March 2007); *DFES v Information Commissioner* (19<sup>th</sup> January 2007); and *Guardian Newspapers and Brooke v Information Commissioner* (8<sup>th</sup> January 2007). In each case, the Tribunal considered that the information in question ought to be disclosed.

17. One important message from these three cases is that in applying both of these exemptions there must be a careful consideration of the circumstances of the individual case, both in assessing the public interest in favour of disclosure and in assessing the public interest in favour of maintaining the exemption. Hence a public authority should not adopt a fixed rule that it will invoke section 35 or section 36 in relation to all information falling within a particular class (for instance, in relation to all the minutes of a particular committee). A public authority may adopt a general policy that it will invoke section 35 or section 36 in relation to particular classes of information; but any such policy will then need to be applied by reference to the specific content of the information in each individual case.
18. The *Guardian Newspapers* case considered whether the BBC should be required to disclose the minutes of the meeting of the BBC Governors at which the Hutton Report had been considered. This meeting had been followed by the public announcement of Greg Dyke's resignation as Director General. The BBC had withheld this information in reliance on section 36, and the Commissioner had upheld the refusal. The Tribunal ordered the information to be disclosed.
19. The Tribunal gave detailed consideration to the operation of section 36. It addressed the requirement for the qualified person's relevant opinion to be *reasonable*. The Tribunal considered that this meant both that the substance of the opinion must be objectively reasonable<sup>9</sup> and that the opinion must be reasonably arrived at: so the qualified person must give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters<sup>10</sup>.
20. In a case involving section 36, both the Commissioner and the Tribunal are required to consider whether the qualified person's opinion was reasonable, rather than whether it was correct. However, in assessing the balance of public interest, both the Commissioner and the Tribunal are entitled to form their own view on the severity, extent and frequency with which any of the adverse effects specified in section 36 would occur<sup>11</sup>.

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<sup>9</sup> See paragraph 60 of the *Guardian* decision

<sup>10</sup> See paragraph 64 of the *Guardian* decision

<sup>11</sup> See paragraph 92 of the *Guardian* decision

**Recent developments: exemption under section 40**

21. Some of the most difficult requests under FOIA are those seeking disclosure of information specifically about individual employees or office holders. Dealing with these requests requires a consideration of section 40 of FOIA. This creates an absolute exemption in relation to third party personal data (i.e. personal data about individuals other than the person making the request), in circumstances where disclosure of the information would breach any of the data protection principles in Schedule 1 to the DPA. Hence the operation of section 40 requires a consideration both of FOIA and of the DPA.
22. The most important Tribunal decision on section 40 is *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (16<sup>th</sup> January 2007). Under the publication scheme operated by the House of Commons, the total annual amount of travel expenses claimed by each MP was disclosed. There were requests under FOIA for disclosure of this information broken down by mode of transport (so as to give an annual figure for car, air, rail and bicycle transport in respect of each MP). The Commissioner required this information to be disclosed, and the Tribunal upheld his decision.
23. It was argued for the House of Commons that disclosure would infringe the first data protection principle: disclosure would be unfair, and there would be no basis for it under DPA Schedule 2. Both arguments were rejected.
24. As far as fairness was concerned, the Tribunal accepted that the Commissioner was right to have regard to whether the information related to public or private life. Here, the travel allowances in question were claimed by and paid to public office holder in respect of their duties; individuals could not have the same expectation as to privacy in relation to such information as they would have in relation to information about their private lives<sup>12</sup>.
25. As far as DPA Schedule 2 was concerned, the Tribunal accepted that Schedule 2 paragraph 6 provided a proper basis for processing notwithstanding that the MPs in question did not consent to the disclosure. The legitimate interests of members of the public in understanding how MPs' travel expenses were used, outweighed any prejudice to the legitimate interests of the MPs as data subjects<sup>13</sup>.

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<sup>12</sup> *House of Commons* decision, paragraph 77.

<sup>13</sup> See paragraphs 90-93 of the decision.

## DPA

26. The DPA gives rise to rather less litigation than does FOIA. For example, in the course of 2006 there were 94 appeals to the Information Tribunal; all but a handful of these related to FOIA or the Environmental Information Regulations.
27. Nevertheless, DPA issues are of real practical importance to local authorities. Many of the difficult issues arise in relation to the sharing of information, both between different departments within a local authority, and between an authority and its external partners. The principle difficulty here is that information sharing may involve the use of information for a purpose different from the purpose for which it was collected. Determining whether such use is lawful requires one to address: the DPA; general principles of administrative law; the law as to breach of confidence; and the Human Rights Act 1998 (in particular, by reference to article 8 of the Convention).
28. Although these issues are of very great practical importance, there is little direct guidance from decisions of the courts or the Information Tribunal. Local authorities will need to take account of the DCA's guidance on information sharing<sup>14</sup>.
29. A related issue that has troubled a number of local authorities is whether council tax information can be used for secondary purposes: for instance, where a local authority is setting up a customer relationship management (CRM) system, can it use its council tax name and address records in order to populate the CRM? The Information Commissioner's latest guidance (published in January 2007<sup>15</sup>) takes a much less restrictive approach than previously. It is clear from the guidance that secondary use of council tax data will still require very careful consideration; on the other hand, the Commissioner does not suggest that there is any absolute legal obstacle to the use for other purposes of name and address data that was originally collected for council tax purposes.

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<sup>14</sup> See the "toolkit" for data sharing, available at [www.dca.gov.uk/foi/sharing/toolkit/index.htm](http://www.dca.gov.uk/foi/sharing/toolkit/index.htm)

<sup>15</sup> See the Commissioner's website: [www.ico.gov.uk](http://www.ico.gov.uk)