

Information Law Issues: Personal Data and Policy Information

Timothy Pitt-Payne

Note: in this paper the Freedom of Information Act 2000 is referred to as “FOIA 2000”; the Environmental Information Regulations 2004 as “EIR 2004”; and the Data Protection Act 1998 as “DPA 1998”.

ACCESS TO PERSONAL INFORMATION UNDER FOIA 2000 AND DPA 1998 - THE LEGAL FRAMEWORK

1. The main relevant provision in FOIA 2000 is section 40: this creates a number of related exemptions from the general right of access under section 1 of the Act. The provision is a complex one, but the most important point to grasp at the outset is the difference between two kinds of requests to public authorities involving access to personal information. The first kind is a request by the applicant for the applicant’s own personal data; the second, is a request by the applicant for third party personal data.
2. In both cases it is necessary to determine whether the information in question is “personal data” in relation to the applicant or a third party. The leading case is *Durant v Financial Services Authority* [2003] EWCA Civ 1746. The Information Commissioner has recently issued detailed technical guidance about the practical application of the principles set out in the *Durant* case: see guidance of 21st August 2007, available at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

First kind of request: personal data about the applicant

3. The first situation identified above is a request for personal information *about the applicant* (i.e. the person making the request). Information will be absolutely exempt from disclosure under FOIA 2000 if it constitutes personal data of which the applicant is the

data subject¹. At first sight this is very surprising indeed: individuals have a strong and obvious interest in access to personal information about themselves. However, the purpose of the exemption is to ensure that requests by individuals for access to personal information about themselves are dealt with as subject access requests under DPA 1998² rather than as information requests under FOIA 2000. The exemption is not intended to exclude individuals altogether from having a right of access to any personal information about themselves that is held by public authorities.

4. There is however an important practical difference between information requests under FOIA 2000 section 1, and subject access requests under DPA 1998 section 7. The difference is in the remedies that are available for failure to comply with the request.
5. Under FOIA 2000, an applicant for information who considers that his request has not been dealt with in accordance with the Act can complain to the Information Commissioner (see section 50 of the Act). There is no fee for making such a complaint, and the applicant is not at risk as to costs if the complaint is unsuccessful. Then if the Commissioner does not uphold the complaint it is open for the applicant to appeal to the Information Tribunal against the Commissioner's decision: see FOIA 2000 section 57. There is no fee for making an appeal; all that is required procedurally is the completion of a simple form, available on the Tribunal's website³; and the circumstances in which costs will be awarded against an unsuccessful appellant are limited⁴. There is a further right of appeal to the High Court against a decision of the Information Tribunal, on a point of law only (FOIA 2000 section 59). Only at this point would the appellant be faced both with the procedural complexities of High Court litigation and with the usual cost risks (i.e. an expectation that an unsuccessful litigant would be required to pay the successful party's costs). In general, then, an unsuccessful applicant for information under FOIA 2000 has extensive procedural rights when it comes to complaining about the public authority's treatment of his request.
6. Contrast the position of an individual who makes a subject access request under DPA 1998 section 7, and who is not provided with the information that he is seeking. The individual has two choices. One is to seek an order from the Court for the data controller

¹ See FOIA 2000 section 40(1), read in conjunction with section 2(3)(f)(i). The terms "personal data" and "data subject" are defined in DPA 1998.

² See DPA 1998 section 7 for the right to make requests for access to personal information about oneself.

³ See http://www.informationtribunal.gov.uk/Files/NoticeofAppealform_Jan07.doc

⁴ See Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14) rule 29. Costs can be awarded if the appeal was manifestly unreasonable (rule 29(1)(a)) or if a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided (rule 29(1)(c)).

- to provide the information sought: see DPA 1998 section 7(9). Alternatively the individual may complain to the Commissioner under section 42, seeking an assessment of the way in which his personal data has been processed. A request for an assessment under section 42 might lead the Commissioner to issue an enforcement notice under section 40 requiring the information to be disclosed: there have certainly been cases where the Commissioner has issued an enforcement notice requiring the disclosure of specific information to a particular individual.
7. However, if the Commissioner does not take this step then the complainant has no right of appeal to the Information Tribunal. His only option is to go to Court: either he could bring a claim under section 7(9) of DPA 1998, or he could seek judicial review of the way in which the Commissioner has carried out the assessment. The Information Tribunal has no jurisdiction to consider appeals by individual data subjects arising out of the way in which subject access requests have been handled, or arising out of the way in which the Commissioner has dealt with complaints about subject access requests.
 8. That said, in some important respects an individual seeking access to his own personal data is in a stronger position where the data controller is a public authority⁵ than in relation to data controllers generally. For the purposes of the right of subject access, the definition of “data” is wider in respect of public authorities than in respect of data controllers generally, and extends to all recorded information held by the public authority⁶. The extended definition of data in respect of public authorities is contained in DPA 1998 section 1(1)(e). It is convenient to refer to data falling within section 1(1)(e) as “manual data”⁷.
 9. Special rules apply where a public sector employee is seeking access to their own personnel records. Such a request will be dealt with as a subject access request under DPA 1998, not as an information request under FOIA 2000⁸. If the information is manual data then the right of subject access will be excluded by DPA 1998 section 33A(2). On the other hand, if the information falls within limbs (a)-(d) of the definition of data in DPA 1998 section 1(1) then the right of subject access will operate.

⁵ The term “public authority” in DPA 1998 has the same meaning as in FOIA 2000: see DPA 1998 section 1(1) as amended by FOIA 2000 section 68(2)(b).

⁶ Some information falling within section 1(1)(e) is categorised as “unstructured personal data” under section 9A(1) of DPA 1998: in which case, the right of subject access is limited in the respects set out in section 9A(2)-(6).

⁷ This label is used, for instance, in the heading to section 33A of DPA 1998.

⁸ This is the effect of FOIA 2000 section 40(1) read in conjunction with DPA 1998 section 7.

10. The way in which section 33A(2) fits into the overall structure of FOIA 2000 and DPA 1998 is at first sight difficult to understand. Its practical effect appears to be that public sector employees do not have any wider right of access to their own personnel records than private sector employees would have. Both categories of employees can rely on the right of subject access to their own personnel records under DPA 1998 section 7, but only in respect of information falling within limbs (a) – (d) of the definition of “data” in DPA 1998 section 1(1).
11. What would happen if a third party (such as a trade union official) made an application to see the personnel records of an individual public sector employee? The request would not be treated as a subject access request, but would be an information request falling under FOIA 2000. It would be subject to the general provisions discussed in the next section of this paper relating to information requests for third party personal data⁹. If disclosure of the information would contravene any of the data protection provisions then there would be an absolute exemption from disclosure. What if the individual gave his express consent to disclosure? In that case it is unlikely that there would be any contravention of the data protection principles. It would however still be necessary to consider section 40(4) of FOIA 2000. Under that provision, third party personal data is exempt from disclosure under FOIA 2000 in cases where the information is exempt from the data subject’s own right of subject access by virtue of any provision of DPA 1998 Part IV. Hence in the situation under discussion any manual data that was excluded by DPA 1998 section 33A(2) from the individual employee’s own right of subject access would also be exempt from disclosure to the trade union official. However, the exemption under FOIA 2000 section 40(4) is qualified not absolute¹⁰; it would therefore be necessary to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure.

Second kind of request: personal information about third parties

12. It was stated above that there are two different kinds of information request to public authorities that involve access to personal information. The first kind is requests for access to the applicant’s own personal information: these were discussed in the previous section of this paper. The second kind involves requests for access to *third party* personal information (that is to say, information that is personal data about someone other than the individual who is making the request).

⁹ The next paragraph of this paper explains the meaning of this term.

¹⁰ See FOIA 2000 section 2(3)(f).

13. As was explained above, if A makes a request to a public authority for access to personal information about A himself, then the information will be subject to an absolute exemption from disclosure under FOIA 2000, but the individual will still potentially have a right of access to the information under DPA 1998 section 7. On the other hand, if A makes a request to a public authority for access to personal information about B, then A's only potential right of access to this information is under FOIA 2000. It will then be necessary to consider whether the information is caught by any of the exemptions in FOIA 2000: and the most obvious exemptions are those in FOIA 2000 section 40.

14. Section 40 creates the following exemptions applicable to requests for access to third party personal data¹¹.

- An **absolute** exemption, where disclosure of the information to a member of the public otherwise than under FOIA 2000 would contravene any of the data protection principles: see FOIA 2000 section 40(3)(a)(i) and 40(3)(b).
- A **qualified** exemption, where disclosure of the information to a member of the public otherwise than under FOIA 2000 would contravene section 10 of DPA 1998 (the right to prevent processing likely to cause damage or distress): see FOIA 2000 section 40(3)(a)(ii).
- A **qualified** exemption, where the information is exempt from the data subject's own right of subject access by virtue of any of the provisions of DPA 1998 Part IV: see FOIA 2000 section 40(4).

15. The exemption that has given rise to most discussion so far both in the Information Commissioner's decisions and in appeals to the Information Tribunal is the absolute exemption relating to information the disclosure of which would contravene any of the data protection principles. At first sight the absolute nature of this exemption might suggest that the values inherent in the data protection principles will "trump" those inherent in FOIA 2000: in other words, where there is a conflict then protecting personal information takes precedence over promoting access to official information. However, an examination of decisions under section 40 by the Commissioner and the Tribunal demonstrates that this would be a superficial and misleading approach to section 40. The data protection principles are themselves open-textured, and intended to

¹¹ FOIA 2000 section 2(3)(f) determines which of these exemptions are absolute and which are qualified.

accommodate conflicting interests. What both the Commissioner and the Tribunal have done is to consider the competing interests of individual privacy *versus* transparency and open government, accommodating that consideration within the framework of the data protection principles themselves. The result is that there have been a number of occasions on which public authorities have been required to disclose personal data, in particular in relation to their own employees or office holders.

16. In theory all eight data protection principles in Schedule 1 to DPA 1998 are potentially relevant to the operation of the exemption in section 40(3) of FOIA 2000. In practice discussion usually focuses on the first and second principle, and in particular on the first.
17. The first principle requires that personal data must be processed¹² fairly and lawfully; that personal data must not be processed unless one of the conditions in Schedule 2 to DPA 1998 is met; and that sensitive personal data¹³ must not be processed unless one of the conditions in Schedule 3 is also met.
18. In order to meet the fairness requirement in the first data protection principle, it is necessary to comply with the specific provisions of Schedule 1 Part II paragraph 2. The data subject must be provided with or have made readily available to him certain information in relation to the processing of his data, specified in paragraph 2(3). A notice containing this information is often referred to as a “fair processing notice” (although this term does not appear in DPA 1998 itself). However, the provisions in paragraph 2 are not intended to be an exhaustive definition of what amounts to “fairness” for this purpose. Even where there is compliance with paragraph 2 then the processing may still be unfair on general grounds¹⁴.
19. The first principle also requires that processing of personal data should be in accordance with one of the conditions in Schedule 2 (or in the case of sensitive personal data Schedule 3) to DPA 1998. Of these conditions, the one most often discussed in the relevant Commissioner and Tribunal decisions is in paragraph 6 of Schedule 2. This reads as follows:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where

¹² “Processing” personal data would include disclosing it: see the definition of “processing” in section 1(1) of DPA 1998.

¹³ Defined in DPA 1998 section 2.

¹⁴ See *Johnson v Medical Defence Union* [2006] EWHC 321(Ch), at paragraph 114 onwards.

the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

20. The second principle requires that personal data must be obtained only for one or more specified and lawful purposes, and must not be further processed in any manner incompatible with such purpose(s).

FOIA ACCESS TO THIRD PARTY PERSONAL INFORMATION: THE COMMISSIONER'S APPROACH

21. The Commissioner's website includes general guidance about a number of aspects of FOIA 2000. The Commissioner's Freedom of Information Act Awareness Guidance No 1 deals with section 40 of the Act¹⁵.

22. The guidance focuses on the first data protection principle, and in particular on the way in which fairness should be assessed for the purposes of that principle. It gives the following examples of questions that may need to be considered in assessing fairness (see page 4 of the guidance).

- Would the disclosure cause unnecessary or unjustified distress or damage to the person to whom the information relates?
- Would that person expect that his or her information might be disclosed to others?
- Had that person been led to believe that his or her information would be kept secret?
- Has that person expressly refused consent to the disclosure of the information?

23. In an important passage, the guidance suggests that in assessing fairness it is likely to be helpful to ask whether the information relates to the private or public life of the person to whom it relates. Information which is about the home or family life of an individual, or his or her personal finances, or which consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work

¹⁵ There is also detailed guidance prepared by the Department for Constitutional Affairs (DCA) and available on the DCA website: see <http://www.dca.gov.uk/foi/guidance/exguide/sec40/index.htm>

capacity should normally be provided on request unless there is some risk to the individual concerned.

24. There are by now a number of examples of cases where the Commissioner has considered the application of the exemption in section 40.
25. An early example was the decision in the *Corby Borough Council* case¹⁶. The complainant asked for information about payments to M, a former Temporary Finance Officer employed by the Council. The Council refused to disclose the information, and there was a complaint to the Commissioner. The Commissioner took into account the fact that the Council has been publicly criticised for the way in which M's appointment was handled. He considered that disclosure would not be unfair, and that the Council could satisfy the sixth condition for processing listed in Schedule 2 of the DPA. There was a legitimate interest in making the public aware of the amount of money spent employing senior staff, and in this case disclosure would not be unwarranted by reason of prejudice to the rights, freedoms or legitimate interests of M. In addition it had been recognised for some time that individuals occupying senior posts within public authorities were likely to be subject to greater levels of scrutiny than those in more junior roles. M cannot reasonably have expected this information to remain confidential.
26. There are a number of points to note in this decision. As far as the question of fairness is concerned, the approach taken is consistent with the Commissioner's guidance, and with the idea that there are different reasonable expectations of confidentiality in relation to different types of personal data. The decision also indicates that the level of seniority of an individual is relevant in assessing that individual's reasonable expectations about confidentiality, and hence in assessing fairness.
27. The decision of interest in relation to the question whether any of the conditions in Schedule 2 to the DPA 1998¹⁷ were satisfied in relation to the disclosure of the information. M did not consent to the disclosure, so the condition in paragraph 1 of Schedule 2 was not satisfied. However, the Commissioner considered the application of Schedule 2 paragraph 6. This condition is satisfied where:

the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed,

¹⁶ Case reference FS50062124; 25th August 2005.

¹⁷ The information was not sensitive personal data, so there was no need to consider the application of Schedule 3.

except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

28. The Commissioner's approach to Schedule 2 paragraph 6 involves a balancing exercise between: (i) the interests of a member of the public, in obtaining access to the information sought; and (ii) the interests of M (the data subject). There is an obvious parallel with the test that is applied when considering the balance of public interest in respect of a qualified exemption under FOIA 2000. There is however an important difference. In considering the operation of a qualified exemption, what is relevant as a consideration against disclosure is the *public interest* in maintaining an exemption. Under Schedule 2 paragraph 6, what is relevant is the interest of a *data subject* in preventing disclosure of particular information.
29. Another example of a similar approach is the Commissioner's decision in the *Calderdale Council* case¹⁸. The complainant requested information about recruitment by the Council of social workers from Australia and New Zealand. Some of the information requested by the complainant was released but the Council declined to disclose the names of the officers who traveled abroad in connection with the recruitment, relying on the exemption in section 40. The Commissioner decided that the names of the officers did constitute personal data but disclosing those names would not breach any of the data protection principles.
30. One question to which the Commissioner's approach gives rise is this: in order to consider the question of fairness, and also in order to consider Schedule 2 paragraph 6, does the public authority need to know how the applicant proposes to use the information that he is seeking? Can the public authority refuse to disclose the information if the applicant will not explain what use he proposes to make of it?
31. It is suggested that the answer to these questions is no. The question for the public authority under section 40 is whether disclosure to a member of the public would contravene the data protection principles; the question is not whether disclosure to this particular applicant would contravene those principles. There is no provision in FOIA 2000 entitling a public authority to require an applicant for information to disclose the purpose for which the information is being sought.

¹⁸ Case reference FS50068973: 24th November 2005.

32. On the other hand, if the public authority is made aware of how the applicant proposes to use the information, then it is suggested that the public authority can properly take this knowledge into account in considering whether disclosure would breach the data protection principles.

FOIA ACCESS TO THIRD PARTY PERSONAL INFORMATION: THE TRIBUNAL'S APPROACH

33. The Tribunal has now had the opportunity to consider the approach taken by the Commissioner to the application of section 40; and, broadly speaking, it has endorsed that approach. The leading case in the Tribunal is *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2005/0015 and 0016; decision promulgated 16th January 2007). The case involved the disclosure of information about the expenses claimed by MPs.
34. The background is that MPs are permitted to claim allowances for various classes of travel, including travel by air, road, rail, and bicycle. The House of Commons has a publication scheme under FOIA 2000¹⁹, under which the total annual amount claimed by each individual MP by way of travel expenses is disclosed.
35. Two individuals made requests under FOIA for disclosure of these annual figures, broken down by mode of transport. For the most part this was information that was held by the House of Commons; indeed each MP was, for verification purposes, provided with an annual breakdown of his travel expenses by mode of transport. However, the House of Commons refused to disclose the breakdown under FOIA 2000. It was contended that this information was exempt from disclosure under section 40 of the Act. In particular, the House of Commons argued that it would be unfair to MPs to disclose information that went beyond the scope of the publication scheme.
36. The information sought related to travel by MPs, not by their spouses or other family members. MPs were required to satisfy themselves that any expenditure claimed from their allowances had been wholly, exclusively and necessarily incurred for the performance of their Parliamentary duties.
37. The Tribunal accepted that the disputed information – that is, the information requested by the applicants but withheld by the House of Commons – constituted personal data within the meaning of DPA 1998. In order to consider how section 40 should be applied,

¹⁹ See section 19 and 20 of the Act for the provisions in relation to publication schemes.

the Tribunal considered a number of points about the relationship between FOIA 2000 and DPA 1998.

38. One point was that section 40 requires consideration of the question whether disclosure *otherwise than under this Act* (that is, FOIA 2000 itself) would contravene the data protection principle. What is the significance of the italicised words? The Tribunal accepted that they were to avoid the “logical loop” that would occur if the possibility of disclosure under FOIA 2000 were itself a relevant circumstance to take into account in considering whether disclosure would contravene the data protection principles. Hence in the Tribunal’s view once section 40(2) of FOIA 2000 was engaged the Tribunal was required to consider the request under the data protection principles in DPA 1998, without any further consideration of FOIA 2000.
39. The “logical loop” point is best understood by way of a specific example. Schedule 2 paragraph 3 provides a lawful basis for processing if the processing is necessary for compliance with a legal obligation (other than an obligation imposed by contract) to which the data controller is subject. In a case where section 40(2) was relevant, could one argue that this condition was satisfied because of the legal obligation to give disclosure under FOIA 2000? If this sort of argument is permissible then there is a logical circularity: you need to know whether disclosure under FOIA 2000 is required, in order to know whether this condition is satisfied; yet you need to know whether the condition is satisfied, in order to know whether FOIA 2000 requires disclosure. The drafting of section 40(2) is intended to avoid any conundrum of this kind.
40. The Tribunal went on to consider its own previous decisions in *CNN Systems v Data Protection Registrar* and *Infolink Ltd v the Data Protection Registrar*²⁰. These were relied upon by the House of Commons for the proposition that the first and paramount consideration in a case under DPA 1998 must be the interests of the data subject himself. It was argued that this necessary focus was missing from the Commissioner’s decision. The Tribunal considered that these cases could be distinguished where public officials were concerned and where the data in question arose out of the performance of a public function²¹. In such cases individuals must have an expectation of greater scrutiny than they would in respect of their private lives. Hence the Tribunal accepted the legitimacy of the distinction drawn by the Commissioner, between information about private life and information about working or public life.

²⁰ These were both decisions under the Data Protection Act 1984, arising out of the enforcement action taken by the Data Protection Registrar (as the Information Commissioner was then known).

²¹ See paragraph 78 of the Tribunal’s decision.

41. Against this background the Tribunal considered four issues:

- whether the disclosure of the information would fall outside the scope of the fair processing notice that had previously been given to MPs in relation to the use of their personal data;
- whether disclosure would be unfair on general grounds;
- whether the condition in Schedule 2 paragraph 6 was met; and
- whether disclosure would contravene the second data protection principle.

42. As far as the fair processing notice was concerned, the Tribunal accepted that disclosure of the information in the circumstances of this case would not fall outside the scope of any relevant fair processing notice. Moreover, the Tribunal was clearly reluctant to accept any argument that would allow a public authority to avoid having to make FOI disclosures by deliberately limiting the scope of the fair processing notice that it gave to its employees or to office holders²².

43. As to fairness generally, the Tribunal considered that disclosure would not be unfair to MPs. This conclusion was informed by the Tribunal's approach to the *CNN Systems* and *Infolink* cases, and by its acceptance that the distinction between information about public and private life was relevant in this context.

44. The condition in Schedule 2 paragraph 6 was satisfied in the Tribunal's view. The Tribunal set out the competing factors on both sides. It recognised that there was a legitimate interest in disclosure to the public of the information in question. For instance, there was an interest in understanding how MPs travel expenses were used and in ensuring that any use of this money was properly accountable. These considerations outweighed any prejudice to the rights, freedoms and legitimate interests of MPs. Disclosure would involve a very limited invasion of MPs privacy, considered in the context of their public role and of the spending of public money.

45. The Tribunal considered that the second data protection principle was also satisfied. One of the purposes for which the data in question was collected was the purpose of

²² See in particular paragraph 76 of the Tribunal's decision/.

making disclosures to the public under the House's publication scheme. The making of disclosures in response to a specific request was not a new purpose and was not incompatible with the purpose for which the data were collected.

46. The Tribunal's overall conclusion therefore was that the Commissioner had been right to order disclosure of the information sought. The decision was not appealed, and the information was subsequently disclosed²³.
47. The Tribunal has taken a similar approach in a further case about the disclosure of MPs' expenses: see *Corporate Officer of the House of Commons v Information Commissioner EA/2006/0074/0075/0076* (decision promulgated 9th August 2007).

CONCLUSION ON PERSONAL DATA

48. The Commissioner's approach to fairness, and to Schedule 2 paragraph 6, opens the way for the disclosure of significant amounts of personal data about public sector employees and office holders. The Tribunal has now endorsed that general approach. However, there are still important issues to be explored.
49. One of the central points in the Tribunal's decision is its acceptance that information may constitute personal data (falling within DPA 1998 section 1(1)) but may nevertheless relate to public life rather than private life; and that this affects the extent to which there can be a reasonable expectation that the information will be protected against disclosure. There are at least three strands to the Tribunal's characterisation of the information about MPs expenses as being "public" in nature. One is that it was information about work life rather than, say, family life. A second is that it was information arising out of the exercise of a public function. A third is that it involved the expenditure of public money. Clearly, not all of these three considerations will be present in every case.
50. It is suggested that it would be unhelpful to think in terms of a clear cut division between information about private and public life. Rather, there is a spectrum: the closer to the "private life" end of that spectrum, the more likely it is that any disclosure would involve a breach of the data protection principles. A number of issues remain for further exploration. For instance, whereabouts on that spectrum would one place information about travel expenses claimed by a public sector employee or a public official but in

²³ The decision received a significant amount of attention in the media: see for instance http://news.bbc.co.uk/1/hi/uk_politics/6268543.stm

respect of travel by a spouse or other family member? Or whereabouts would one place information about allegations of work-related misconduct?

51. These questions will no doubt be explored further both in the Tribunal's own decisions and in any cases under FOIA 2000 section 40 that are appealed to the High Court. The decisions in the two *House of Commons* cases are significant and important, but inevitably it is not the last word on this subject.

POLICY-RELATED INFORMATION

52. Public authorities are often concerned to protect a "safe space" for the formulation and discussion of policy. There is concern that the policy formation process would be inhibited if "real time" information about that process was required to be made public under FOIA 2000. There are two important exemptions in FOIA 2000 that are relevant here, under section 36 and section 35.
53. 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. This is an important exemption in particular for non-central Government public authorities.
54. 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.
55. 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. The question of how the public interest is properly to be approached has proved very controversial.
56. The Information Tribunal has considered these exemptions in three important decisions promulgated earlier this year: *DWP v Information Commissioner* (5th March 2007); *DFES v Information Commissioner* (19th January 2007); and *Guardian Newspapers and Brooke*

v Information Commissioner (8th January 2007). In each case, the Tribunal considered that the information in question ought to be disclosed.

57. 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.
58. Another relevant factor is that the Tribunal considers the passage of time may be very important. The Tribunal will be much more reluctant to require the release of information when the relevant decision-making process is still under way, than in cases where the process has been completed and the decision taken. That said, this is not an absolute approach: compare *Friends of the Earth v Information Commissioner and ECGD* (EA/2006/0073, decision promulgated 20th August 2007) which considered the analogous exemption in EIR 2004 relating to internal communications.
59. 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.
60. 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 reasonable²⁴ 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 matters²⁵.

²⁴ See paragraph 60 of the *Guardian* decision

²⁵ See paragraph 64 of the *Guardian* decision

61. 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 occur²⁶.

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²⁶ See paragraph 92 of the *Guardian* decision