

## Recent Developments in Information Law

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### SCOPE OF THIS PAPER

1. This paper covers two areas where there have been important recent developments in Information Law. The first is a shift in the understanding of what is meant by “personal data” under the Data Protection Act 1998 (“DPA”). The second is the High Court’s view of the Freedom of Information Act 2000 (“FOIA”), as illustrated by its recent decisions in some of the first appeals to reach the High Court against decisions of the Information Tribunal.
2. In relation to the meaning of “personal data”, there is recent guidance from the Information Commissioner’s Office (ICO). The House of Lords (HL) has been invited to consider that guidance in the case of *Common Services Agency v Scottish Information Commissioner*.
3. As far as FOIA is concerned, the High Court has recently considered two of the most important FOIA exemptions. The exemption under section 35 in relation to policy information was considered in *OGC v Information Commissioner*. The exemption under section 40 in relation to personal data was considered in *House of Commons v Information Commissioner*. Both of these were cases where the High Court was considering an appeal against a decision of the Information Tribunal (which was in turn considering an appeal against a decision of the Information Commissioner).

### PERSONAL DATA

4. This is a key concept under the DPA. The duty of data controllers to comply with the eight data protection principles (set out in DPA Schedule 1) only applies in relation to their processing of “personal data”. Likewise the various rights conferred on individuals (e.g. the right of subject access under DPA section 7) only arise in cases where personal

data is being processed. The concept of personal data is also important in relation to FOIA, since it lies at the heart of one of the main exemptions in FOIA (see section 40).

5. The statutory definition is set out in DPA section 1. The first step is to identify what is meant by *data*. Broadly speaking, any information processed by automatic means (e.g. by computer, or on a CCTV system) will constitute data, as will information held in certain highly structured paper-based systems.
6. *Personal data*, according to the statute, is:

*data which relate to a living individual who can be identified –*

*(a) from those data; or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller*

7. In recent years, discussion of what is meant by *personal data* has been dominated by the *Durant* case in the Court of Appeal (*Durant v Financial Services Agency* [2003] EWCA Civ 1746; [2004] FSR 28). The key passage is at paragraph 27 of the decision (in the judgment of Auld LJ). This puts forward two notions “that may be of assistance”: whether the information is biographical in a significant sense; and whether it has the putative data subject as its focus.

*In short, [personal data] is information that affects his privacy, whether in his personal or family life, ,business or professional capacity*

8. There are a number of potential difficulties with *Durant*, at any rate in the way in which it has generally been understood and applied so far. One difficulty is that it involves an apparent gloss on the statutory language: the concepts of “biographical significance” and “focus” are often deployed as a replacement for the statutory test itself. Another difficulty is in the way in which the concept of privacy is used to delimit the scope of personal data.
9. Contrast here the decision of the European Court in the *Bavarian Lager* case (*Bavarian Lager Company v EU Commission* T-194/04, judgment of 8<sup>th</sup> November 2007). The Court of First Instance (CFI) considered whether there was a right of access (under the EU's own freedom of information legislation: Regulation 1049/2001) to information about

- the names of industry representatives who had attended a particular meeting. The CFI held that the information in question was personal data about the individuals in question; but that disclosure of that information would not infringe privacy.
10. The Information Commissioner's Office (ICO) has been seeking to bring the UK approach to the meaning of personal data more closely in line with the European understanding, as reflected in an opinion on the concept of personal data issued in June 2007 by the Article 29 Working Party. The Commissioner's preferred approach is set out at length in a paper giving technical guidance on the meaning of personal data published on 21<sup>st</sup> August 2007: *Data Protection Technical Guidance – determining what is personal data*.
  11. The House of Lords has had a recent opportunity to consider these issues in *CSA v Scottish Information Commissioner* (on appeal from the Court of Session [2006] CSIH 58). The appeal was heard on 1<sup>st</sup> and 2<sup>nd</sup> April 2008 (and is as yet undecided).
  12. The Scottish Commissioner required disclosure of "barnardised" (i.e. anonymised) information about leukaemia statistics, under the Freedom of Information (Scotland) Act 2002 (FOISA). The information related to small geographical areas (census wards) – so there was a risk that disclosure of the statistics would enable specific individuals to be identified. The case raised three main issues: whether the anonymisation was effective; whether the information in question was personal data; and if so, whether it was exempt from disclosure under FOISA.
  13. The Court of Session seems to have accepted that the anonymisation was effective; and it went on to hold, applying *Durant*, that the information was not personal data. On the CSA's appeal, the House of Lords was invited (especially by the ICO and the Ministry of Justice, intervening) to approve the ICO's guidance as the correct approach to the question of what is personal data. The House of Lords was also addressed on a narrower issue: even if the anonymisation was effective, arguably the information was still personal data, because the data controller itself would be able relate the barnardised information to specific individuals. The data controller would be able to turn the barnardised information back into information about identifiable living individuals.
  14. An interesting and novel point raised in argument was this: even if the barnardised information is personal data, is it necessarily *sensitive* personal data? Apparently yes: it is about health, and so would fall within section 2(e) of DPA 1998. However, at least two of their Lordships were receptive in argument to the suggestion that this information

might fall outside DPA section 2, even if it fell within section 1. The basis for the suggestion was that section 2 (unlike section 1) does not include a provision about an individual who can be identified from those data *and other information* in the possession of the data controller. So barnardisation might take the information outside section 2, even if it did not take the information outside section 1. The significance of this would be that there would be no need to consider whether disclosure of the information satisfied any of the conditions in DPA Schedule 3.

## **RECENT HIGH COURT DECISIONS UNDER FOIA**

### **FOIA section 35**

15. Section 35 of FOIA sets out a qualified exemption in relation to policy-related information. It has been considered by the Information Tribunal in a number of decisions. There are three important cases from 2007 where the Tribunal upheld the Commissioner's decision that information should be disclosed.
16. *DFES v Information Commissioner* (EA/2006/0006) is the leading case. The Tribunal upheld the Commissioner's decision that certain internal minutes relating to education funding and to a supposed "funding crisis" that developed in 2003 ought to be disclosed. At paragraph 75 of the decision the Tribunal set out general guidance as to how the public interest should be assessed in relation to the section 35 exemption. A similar approach was followed in *DWP v Information Commissioner* (EA/2006/0040), relating to the disclosure of information about how the ID cards project would affect the Department for Work and Pensions; and in *OGC v Information Commissioner* (EA/2006/0068), relating to the disclosure of "Gateway Reviews" in respect of the ID cards project.
17. The *OGC* case has now been considered by the High Court, on appeal. The grounds of appeal set out some wide-ranging criticisms of the way in which the Tribunal had approached the public interest test under section 35 of the Act (and also under section 33 of the Act). It was contended for the OGC that the very fact that information fell within section 35 was in itself an indication that there was a strong public interest in withholding it from disclosure. The information ought therefore to be withheld unless some specific and substantial public interest could be identified in the disclosure of the information; and the Tribunal had failed to identify any such interest. Moreover, it was said that the Tribunal had failed properly to consider or appreciate the significance of the evidence it

had received as to the harm that would follow to the Gateway Review process if the review reports were to be disclosed.

18. On appeal the case took a somewhat unexpected tack. There was an intervention on behalf of the Speaker of the House of Commons, arguing that the use made by the Tribunal of a report by a Parliamentary Select Committee involved a breach of Parliamentary Privilege. This argument succeeded, and the case was remitted for reconsideration by a fresh Tribunal. As a result the High Court did not need to deal with the other issues in the appeal. Nevertheless, it did address those issues to some degree, and the main points include the following.

- (1) Although there is no express presumption in favour of disclosure in the Act, the High Court approved a statement by the Tribunal that the Act embodied an “assumption” as to the inherent value of the disclosure of information on request by public authorities.
- (2) The debate as to whether or not there was any intrinsic public interest in withholding information that fell within section 35 was likely in most cases to be “sterile”; but given the breadth of coverage of section 35, it was difficult to see how there could be such an intrinsic interest in every case.
- (3) The Tribunal was not bound to accept the evidence given on behalf of the OGC about the harmful consequences of disclosure, but was entitled to make its own assessment of the cogency of that evidence.

19. The Tribunal has considered the disclosure of information as to MPs’ expenses, in three decisions. Two of these relate to travel expenses (*Corporate Officer of the House of Commons v Information Commissioner* EA/2006/0015; *Corporate Officer of the House of Commons v Information Commissioner* EA/2006/0074); a third relates to the Additional Costs Allowance (ACA), which subsidises the cost of MPs’ second homes (*Corporate Officer of the House of Commons v Information Commissioner* EA/2007/0060). In each case the question was whether the information requested was exempt under FOIA section 40.

20. The Tribunal's decision in relation to the ACA (which actually went further than the Commissioner had done in requiring disclosure) has recently been upheld by the High Court: [2008] EWHC 1084 (Admin).

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