"Freedom of Information Act 2000 – One Year (and 5 months) On"

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1. Introduction

1.1 In October 2004, Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, gave a speech to the Society of Editor's Annual Conference, he stated that the '*law marked a real change, that it would create a new culture of openness, a change in the way we are governed which will have a widespread effect on the delivery of public services'*. For him and the government the test of the success of the Act would be measured by the extent to which it improves the quality of government. In his speech to The National Archives British Academy Seminar in February 2006, Lord Falconer was upbeat about the success of the Act's first year of implementation and how positively public authorities had responded announcing that: "*In the first nine months of FOI, almost 30,000 [29,575] applications were received by central government bodies – 60% released in full, 86% released within statutory deadlines*".

1.2 So, is Lord Falconer right? Has it been a success? As in most cases, this rather depends on who you speak to. The ICO issued a report in January 2006 (downloadable from its website). This was based on a survey conducted with 500 public authorities in England, Wales and N.Ireland. Its main Findings were:

- 66% of Respondents said they were very clear about the implications of the FOIA for their organisation; 32% said they were fairly clear, and only 2% said they were not very clear;
- Over 9 in 10 respondents said they had made some changes within their organisation over the past two years to comply with the Act, most commonly drawing up or revising their publication schemes;
- Over two fifths of respondents said they released some information automatically under their publication schemes only because of the FOIA.

The types of information most frequently released purely because of the Act related to internal information. 91% of the information related to annual reports /audited accounts; 85% related to future strategies/objectives and 84% related to information about decisions made by the organisation;

- After prompting, those receiving requests from the public most frequently related to statistics about the organisation (70%); then details of information about decisions made by the organisation (65%) and details of what public money was spent on (64%). Just over half (53%) were asked for personal information about members of staff (the report suggests this might due to a lack of public understanding of the scope of the Act);
- On 376 requests received from the public, 68% of requests were turned down. By far the highest amount of types of information turned down related to personal data about staff (53%); then commercially sensitive information (33%) and information already available by other means (14%). 9% were turned down because the information was confidential and only 8% turned down because an exemption applied or costs of providing it was above the threshold. 6% was turned down because it was exempted under the DPA (section 40). The lowest percentage of requests turned down (only 3%) were on the basis that disclosure would prejudice the conduct of public affairs (section 36).
- 39% of those interviewed in the survey stated that a little more information had been release to the public because of the FOI. 19% felt that a lot more had been released since the implementation of the Act.
- Although 45% felt that the implementation of the Act was a fairly good thing, 22% felt that the main disadvantage was that to comply with the Act was too time consuming (47% stated that up to 10% of their time was spent on tasks related to FOI in an average month, and 27% said it had added a lot to the workload of the organisation).
- Finally, 23% stated that clearer guidance would help their organisation implement the Act better.

1.3 The success of an Act in its fledgling stages might perhaps be more accurately assessed by analysing the number and types of requests appealed to the ICO and/or Information Tribunal.

ICO Decision Notices

1.4 It is reasonable to expect that as public authorities become better at dealing with requests, the fewer complaints there will be to the ICO, and of the complaints that are made, less will be upheld. The number of upheld

complaints (rather than the total number of complaints) is perhaps the best indicator at the moment of whether FOIA requests are being dealt with adequately and in accordance with the law. It is likely that at present many complaints are triggered as much by an applicant's inherent unwillingness to accept at face value a PA's decision, as by his/her misunderstanding of the scope and applicability of the Act. However, given the fact that one of the aims of the Act is to promote greater openness and public trust in PA's, the real indicator that the Act is working in years to come will be when the number of total complaints fall. I suspect that given previous experience, in particular with the DPA, there will be a rise in complaints/appeals before things level off.

1.5 Decision Notices provide a useful resource to PA's wishing to consider how to deal with requests in similar circumstances, and to find out how substantive issues under the Act have been interpreted by the ICO.

1.6 Only 135 notices of decisions had been issued up to January 2006. 78 notices have been issued since then (up to May 2006). Of these, 29 were complaints against Local Authorities, of which 19 were upheld or partially upheld by the ICO (most of the complaints were made up of alleged breaches of several sections of the Act).

1.7 Looking closer at these 29 upheld decision notices, just under half (14) relate to and/or include a breach of sections 1 (duty to disclose) and 10 (time for response to request). These breaches of section 1 seem to have been caused by a mixture of wrong judgment calls (issuing refusal notices when the information should have been disclosed) as well a failure to respond to requests at all. In cases where no response to a request was made at all, as well as in cases where a reply was sent outside the 20 day time limit (section 10 breaches) these were arguably entirely avoidable. A large proportion of these breaches may well be down to organisational "teething" problems within the LA concerned in dealing efficiently with requests, though the media and the CFOI have relied on these statistics to criticise LAs for 'dragging their feet' in complying with requests under the Act. It is reasonable to expect that as more decisions on substantive issues are published, and accordingly, the more the provisions of the Act, and how they should be implemented become familiar to Information Governance Officers or other officers in charge of dealing with FOI requests, the less of these 'procedural' breaches will occur.

The ICO's powers of enforcement

1.8 There is no cause of action for breaching the Act. Further, the Information Commissioner has no power to impose fines on public authorities for a breach of their duties under the rules, nor does he have power to compensate applicants or to make cost orders against the parties involved in a complaint. However, he can issue enforcement notices. These constitute a legal order requiring the PA to address its failure to comply with Part I of the Act. If the PA fails to comply with a decision, enforcement or information notice then the ICO can certify to the High Court that a PA has failed to comply and can ask the Court to investigate and punish the non-compliance as a contempt of Court if appropriate (section 54).

1.9 In practice, enforcement notices are only likely to be used where there is a systematic or repeated non-compliance. Only one enforcement notice by the ICO has been issued at the date of this paper, but one with important ramifications on the issue of how the public interest test will be applied in such cases: it was issued against the Legal Secretariat to the Law Officers to resolve the issues arising from a number of similar complaints relating to disclosure of advice given by the Attorney General on the legality of military intervention in Iraq in 2003. These requests were made by members of the Media for disclosure of the Attorney General's Legal advice as well as previous drafts of this advice, internal emails relating to this advice and ministerial correspondence. The Government sought to argue that most of the information was covered either by the exemptions which apply to legal professional privilege, formulation of government policy, ministerial communications, confidential information obtained from a foreign state and confidential information. The ICO found that certain of the information was absolutely exempt on the grounds that its disclosure would or would be likely to prejudice relations between the UK and any other State and/or was information disclosed in confidence by a foreign state or international organisation (presumably this may have included information contained in intelligence reports received from foreign intelligence services though this was not specified in the decision). There was a partial leak of the Attorney General's Advice (obtained and broadcast on Channel 4 News). This led to the Government publishing the advice in full in April 2005. The ICO when considering the complaint, came down strongly in favour of disclosure being in the public interest. It took into account the fact that the advice had been put in the public domain by the Government, and that the information requested needed to be disclosed to set the record straight and to correct some of the public statements made by the Attorney General in the form of a written

statement to the House of Commons on the 17th March (it turned out that his advice was in certain respects not consistent with, and in parts, a lot more equivocal than his later statement to the House) a statement relied on by the Government in its resolution to go to war.

Information Tribunal Decisions

1.10 Under section 57, where a decision notice has been served, the complainant or the public authority may appeal to the Information Tribunal against the Notice. The Information Tribunal may, in the same way the ICO can, report a failure to comply to the High Court. Further, any party to the appeal to the Tribunal may appeal from the Tribunal's decision to the High Court but only on a point of law (though this will include an appeal on all judicial review grounds). Appeals by JR would if successful entitle the applicant to damages, injunctions, declarations and costs in the normal way (there have been no appeals to the High Court at the date of this paper). Of the 11 decisions published on the Information Tribunal website 6 of these are appeals about decision notices issued in relation to FOI requests made to Local Authorities. 5 of the appeals were dismissed. (A few of these cases relevant to LA's are discussed in more detail below).

1.11 Some of the Information Tribunal's decisions were relied on by the CFIO to highlight shortcomings in the ICO's investigations into complaints. In the *Bowbrick case* (Decision Notice 63475, Nottingham County Council, 5/7/2005), the ICO accepted too readily the Council's assertion that, with minor exceptions, it did not hold the requested information. The Information Tribunal proceedings revealed this not to be the case and that a substantial volume of the information requested was in fact held by the LA. In the *Bustin* case (*Bustin v. The Information Commissioner*, Information Tribunal Decision No EA/2005/009), the ICO accepted that "an approved drawing" under the Highways Act was not held at the time of the request in as much as formal approval for the drawing had not been given. The Information Tribunal put this finding in doubt by stating that it appeared more likely than not that the Council did have the information requested at the time and failed to deal with the request in a satisfactory manner. Maurice Frankel expressed concern in his written submissions to the Constitutional Affairs Select Committee that these cases suggest that "*the Commissioner's office may sometimes have been ready to accept an authority's explanations of the facts of a case, a worrying prospect. More searching enquiries will clearly be needed in such circumstances*".

The Media's Use of the Act

1.12 *The Guardian* has a whole section of its website dedicated to the FOIA, and has published some important stories based upon information released under the Act. Most recently, in an article on May 8th 2006, it reported on how figures released under the FOIA revealed that "*Local Authorities invest £723m in 15 of the largest international arms companies*". The request was made by Caat (The Campaign Against the Arms Trade) to Councils for information relating to their pension funds. Of the 88 that responded, only 2 did not invest in the arms trade through their pension funds.

1.13 As Keith Mathieson, of Reynolds Porter Chamberlain, notes in his essay, *Freedom of Information and the Media*[1], regional newspapers have also taken advantage of the Act to obtain information from PA's:

- The *Birmingham Post* obtained a previously confidential consultant's report which warned that a £1 billion city redevelopment scheme was financially flawed.

- The *Evening Telegraph* in Derbyshire discovered a total of 17 sites, including a Korean war memorial, had been considered for a controversial arts centre.

- The *Northwich Chronicle* discovered that the local chief fire officer's salary had increased by £33,000 to more than £126,000.

- The *Burton Mail* used information obtained under FOIA to publish stories about local restaurants and food outlets which had flouted food hygiene standards.

- The *Kent Messenger* published details of previously undisclosed foreign trips by local councillors and officials including a trip to a conference in Seattle which cost £20,000.

2. The Right of Access to Information: principles and practice

2.1 Every public authority has a pro-active duty under the Act to disclose information to the public. This duty is fulfilled by adopting and maintaining a publication scheme setting out how it intends to publish various classes of

[1] See chapter 7, p. 178 of the *Freedom of Information Handbook* (published by the Law Society, 2006).

information it holds. Lord Falconer has called these schemes "the shop window of open government". It has been left up to the individual public authority and Information Commissioner to decide what should be made available to the public under these schemes (and they vary from body to body).

Section 1

2.2 Section 1 of the FOIA gives a statutory general right of access to any person of all types of recorded information held by public authorities.

2.3 This section is drafted in very wide-ranging terms. It applies amongst others to the following public bodies [2]:

- Governmental departments;
- Local authorities
- NHS bodies
- Schools, colleges and universities
- The police
- Houses of Parliament

2.4 There are 2 limbs to the right:

(1) the right to be informed in writing by the public authority whether it holds information of the description specified in the request; AND

(2) if that is the case, a right to have that information communicated to him/her (unless an exemption applies)

2.5 The public authority's duty to supply the information requested applies only to information held at the time when the request is received. It may take account of any amendment or deletion made between the receipt of the request and the communication of the information, but only if this is an amendment or deletion that would have been made regardless of the receipt of the request.

2.6 "Information" means information recorded in any form (i.e. written down; on a computer database; recorded by other electronic means). Information known to individuals within a public authority but not recorded is not covered.

[2] Schedule 1 to the Act contains a full and exhaustive list of the public authorities to which the Act applies.

Formal Requirements for a valid Request

2.7 Under Section 8, a request will only be treated as a request for information under the Act if it complies with some formal requirements:

- The request must be in writing (there is no need to mention the Act when making the request)
- It can be made by email
- The applicant must provide his name and correspondence address;
- A description of the information requested must be given in terms that enable the public authority to be able to identify and locate the information i.e. it has to be specific not generic or thematic (N.B. if the request is too vague, then the public authority can request further details before complying).

The Public Authorities Duties when a Request is received

2.8 When a request is made, the public authority has two duties:

(1) the duty to confirm or deny whether it holds any relevant information
(2) the duty to communicate

2.9 The DCA has published some recommended responses for freedom of information requests that can be accessed at http://www.foi.gov.uk/practitioner/recommendedresponses.htm. In two instances, the public body may have a duty to confirm in general terms that it holds certain types of information, but may not be under a duty to communicate the information. This applies to (1) information which is accessible by other means (section 21) and (2) information which relates to trade secrets (section 43). So, a public authority may be obliged to answer a request by saying that it holds information of the specified description but cannot communicate that information as it constitutes a trade secret. "Accessible by other means" would include information available under a PA's publication scheme (i.e. on its website).

2.10 The Act confers a right of access to information rather than a right to disclosure of documents. This means there is no duty to disclose the original document or copies of the original document containing the information.

2.11 In making a request an applicant may express a preference for communication by any one or more of the following means: (a) in permanent form, (b) inspection of a record or (c) a digest or summary of the information

held in permanent form. The PA must give effect to the preference if expressed in so far as is reasonably practicable (section 11(1)). The information can be requested for any reason or purpose and there is no limit stated in the Act as to the use to which the information can be used or disclosed to third parties.

2.12 The fact an applicant does not accept the substance of the information provided to him/her is not a matter for consideration under the Act. Section 1 of the Act does not give a right to a requester to get the information he or she thinks should be disclosed. The only obligation under the Act is for the PA to provide the information it holds of the description specified in the request (section 1(1)(a)). See the case of *Prior* (Information Tribunal decision, 27 4/2006, EA/2005/0017). Mr Prior had been seeking since early 2002 to ascertain the background and details of why and under what legal basis his mother was removed from hospital to a residential home where she subsequently died. By 2005 his requests for information had been distilled into two specific queries: (1) on what legal basis did the Council act when Mrs Prior was detained in hospital and then removed to a care home and (2) evidence that the Council had followed proper legal procedures. The Council had previously informed him by letter of the relevant statutory law applied to this case. Mr Prior also had the Investigator's Report into Mrs Prior's death which dealt extensively with the question of the legality of Mrs Prior's removal to the home and gave a full account of her treatment at the home. In the circumstances the Tribunal agreed with the IC's view that the Council had already provided the requested information to Mr Prior and was therefore exempted under section 21 of the Act.

2.13 In a recent decision of the Information Tribunal (*Harper v. The Information Commissioner and Royal Mail Group (Ltd),* EA/2005/0001, 15/11/2005), the Tribunal considered what constitutes "held" data under the Act when data is held electronically. The Tribunal recognized that data held electronically and then deleted may still in fact be retained in its original form on the computer systems' hard drive and may be restored and/or retrieved. In light of this, the Tribunal stated that it may be incumbent on a PA to make attempts to retrieve deleted information; '*accordingly the authority should establish whether information is completely eliminated, or merely deleted'*. This decision overturns guidance from both the ICO and DCA who regarded information on backups as not being "*held by a public authority for the purposes of the FOI*" and that "*information sent to the back-up server is no longer readily retrievable for business purposes*". It seems from this decision that where the

data is easily retrievable this should be done. However, where retrieval is not straightforward and would require special assistance (i.e. from a data recovery specialist), this might not be reasonable and will be subject to the cost exemptions under the Act (see para 2.15 below).

Time limit to comply

2.14 The request must be answered promptly and in any event no later than the 20th working day following receipt (section 10(1)). In cases where an exemption applies but is overridden by public interest, then the information must be released 'within a time that is reasonable in the circumstances'. This will be assessed on a case by case basis.

Costs and Fees

2.15 *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* provide that the appropriate limit to be spent in complying with a request by a local authority is £450. This is important in relation to the exemption to the general duty to comply with a request (as contained in Part I of the Act) in cases where the cost of compliance exceeds the "appropriate limit" (section 12). If the cost of compliance exceeds £450, there is no duty to communicate information (section 9(2)), but there may nevertheless be a power to do so: in such cases the authority can charge a fee for disclosure (section 13). The Fees regulations provide guidance to PAs in estimating the likely cost of compliance with any information request.

2.16 A PA may for the purpose of calculating the estimate take account of the costs it reasonably expects to incur in relation to the request in -

(a) determining whether it holds the information;
(b) locating the information or a document which may contain the information;
(c) retrieving the information, or a document which may contain the information, and
(d) extracting the information from a document containing it.

N.B. The PA cannot take into account any costs incurred in considering whether the exemptions apply to the information.

2.17 To the extent to which any of the costs which a PA takes into account are attributable to the time which persons undertaking any of the activities mentioned above on behalf of the authority are expected to spend on those

activities, those costs are to be estimated at a rate of £25 per person per hour.

2.18 Where more than one request is made by the same person, or where the same or similar requests are made by multiple persons (who appear to the PA to be acting in concert or in pursuance of a campaign), the estimated cost of compliance with any of the requests is to be taken to be the total costs which may be taken into account by the authority of complying with all of them (as long as information requested is of similar nature and is made within 60 working days of first request).

2.19 Only 2 decision notices have so far been issued by the ICO regarding complaints against a Local Authority under section 9. The full transcripts of the decisions can be found on the ICO website. The summaries are set out below :

Ferryhill Town Council (14/07/05)
Case Ref: FS50075378

"Summary: The complainant requested information in relation to Council allotments and alleged that he was dissatisfied with the Fees Notice issued in response to his request. The Council stated that the cost of complying with the request would exceed the appropriate limit as identified in the Fees Regulations but they agreed to supply the information on receipt of the full costs. After approaching the Council for clarification the ICO was satisfied that they had estimated the costs in accordance with the Regulations. However, they did not give the complainant the opportunity to refine their request or offer to supply the information that could be provided within the parameters of the appropriate limit. The Decision Notice therefore stipulated that the Council must offer appropriate advice and assistance to the complainant.
Section of Act/EIR & Finding: FOI s.9 - Complaint Not Upheld, FOI s.16 - Complaint Upheld".

London Borough of Camden (6/12/05)
Case Ref: FS50067399

"Summary: The complainant submitted a request to the Council for information relating to the Parking Enforcement Statistics. The Council advised that in order to provide all the information requested there would be a charge of £703.60, which the complainant felt excessive. However, having investigated this matter the Commissioner is satisfied that the charges have been calculated in accordance with the FOI Fees Regulations. Section of Act/EIR & Finding: FOI s.9 - Complainant Not Upheld".

Vexatious and repeated requests

2.20 Under section 14 of the Act, the PA does not have to comply with a vexatious request. The test is the effect of the request: intent should not be of relevance. What is considered "vexatious" is not defined in the Act. In the context of case law dealing with vexatious litigants, the test is whether a request is designed to subject a public authority to inconvenience, harassment or expense (see test laid down by Lord Bingham in *Attorney General v. Barker* (2000) 1 FLR 759). The ICO has also published guidance which it will expect LA to have considered in judging whether a request was reasonably refused under section 14[3]. This begins by stating that:

"*While giving maximum support to individuals genuinely seeking to exercise the right to know, the Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and:*

- *clearly does not have any serious purpose or value;*
- *is designed to cause disruption or annoyance;*
- *has the effect of harassing the public authority; or*
- *can otherwise fairly be characterized as obsessive or manifestly unreasonable.*"

2.21 The Guidance sets out the approach to identifying vexatious requests (this is a guide and not an exhaustive list). In summary indicators of a vexatious request may exist in one or more of the following circumstances:

- Applicant expresses intention to cause maximum inconvenience through request;
- The authority has independent knowledge of the intention of the applicant (i.e. if is a group/campaigning organization and/or has previously indicated intention to cause PA inconvenience) N.B. This can only be judged in the context of similar previous FOI requests. It cannot be judged solely on the fact that the applicant has been judged to be vexatious in some other respect unconnected to FOI (though similar DPA requests could probably be considered). The test suggested is whether the information would be supplied if it were to be requested by another person in the same circumstances but who was unknown to the authority. If this would be the case, the information must be provided as the PA cannot discriminate between different requesters.

[3] Freedom of Information Act Awareness Guidance No.22 V1 November 2004 (Updated January 2006), accessible on the ICO website.

However, it might be reasonable for the PA to conclude that a particular request represents a continuation of behaviour that it has judged to be vexatious in another context.

- The request clearly does not have any serious purpose or value. Such cases are more likely to arise where there has been a series of requests;
- The effect of the redaction would be such as to render the information worthless. If the redaction is such as to render the disclosable information meaningless or of no real use to the applicant;
- The request is for information that is clearly exempt. For instance, where the applicant clearly understands that the information is exempt even after the application of the public interest test;
- The request can be fairly characterized as obsessive or manifestly unreasonable. These cases will be exceptional – an apparently tedious request which in fact relates to a genuine concern must not be dismissed. It will be easier to identify such requests if there have been previous similar requests from the same applicant and a pattern is formed;
- A request that contains offensive and/or abusive language will not automatically be vexatious though it may be strongly indicative;
- Lengthy requests containing material other than FOI requests. The FOI request must be considered separately from non-FOI matters. In some rare cases the request/complaint may be so rambling and impenetrable as to make the request vexatious (though in such cases, the PA would also be able to request further information or clarification before it having to comply with a request – see section 8 above);
- Requests submitted under obvious pseudonyms are not automatically vexatious. Technically it would not be a proper request under section 8, but the PA has no power to enquire into the circumstances of the applicant or to ask for information in order to verify identities so unless the PA knows for sure that the applicant has used a pseudonym it will be difficult to refuse on this ground.

2.22 Repeated requests are defined as a request not made within a reasonable interval between compliance with a previous request and the making of the current request. “Reasonable interval” is not defined in the Act: it will depend on the type of information requested and how frequently this sort of information is updated by the PA. Whether a request is “repeated” must be judged in its proper context: in certain cases a request made at a later date (though identical or in very similar terms) will require disclosure of new

information not previously available to the PA (i.e. two requests from the same applicant a month apart, requesting a PA's most recent monthly performance statistics would not be considered to be a repeated request).

2.23 According to the Guidance, requests can be considered both vexatious and repeated. It may often be difficult to identify a single request as vexatious (and the ICO is of the view that only in very rare circumstances would it be advisable to do so) – however this may be easier where there are repeated requests made in quick succession (whether or not strictly "identical or substantially similar"), the effect of which is to harass the public authority (see the *Barker* case cited above).

2.24 Only 1 decision notice has so far been issued by the ICO regarding a complaint made against a Local Authority under section 14. The full transcript of the decision can be found on the ICO website. The summary is set out below :

Birmingham City Council (8/03/06)
(Case Ref: FS50078594)

"Summary: The complainant made 27 largely thematic requests for information and was advised by the Council that they were considering applying the section 14 exemption. The complainant then submitted a further 11 largely thematic requests. In line with Freedom of Information Act 2000 Awareness Guidance No. 22: Vexatious and Repeated Requests, the Commissioner considered whether the Public Authority had demonstrated that the requests would impose a significant burden, have the effect of harassing the public authority, or could otherwise be characterised as obsessive or manifestly unreasonable. In addition the Commissioner considered the number and nature of the requests, the previous history of the complainant and the manner in which the section 14 exemption had been applied by the Council. The Commissioner concluded that there was a demonstrable pattern in all but two of the requests for information, and so judged that the Council had applied the exemption correctly in all but the two identified requests.

Section of Act/EIR and Finding: FOI s.14 Complaint Not Upheld (excepting two requests)."

Summary of Exemptions under Part I of the Act

2.25 Under Part I there are therefore 4 cases in which there is no duty to comply with a request. In summary these are:

(1) the applicant has failed to provide all the information required under despite a request by the PA for this to be provided (section 8);
(2) a fees notice has been served and the fee has not been paid (section 9);

(3) the cost of compliance exceeds the appropriate limit (£450) (section 9(2));
(4) the request is vexatious and repeated (section 14).

Part II Exemptions

2.26 Part II of the Act contains a further 23 information exemptions. Each of these relate to a category of information. Exemptions relate to information rather than documents. Hence, a where a document contains both exempt and disclosable information under the Act, the LA will have to communicate the non-exempt information. Sometimes this will be able to be done by providing a redacted copy of a document (as is done in DPA requests).

2.27 The Part II exemptions can be divided into 2 categories:

(1) Those that apply to a whole category of information ('class exemptions') eg:

- Information relating to investigations and proceedings conducted by public
- Court records;
- Trade secrets

AND

(2) Those that are subject to a prejudice test, for example, where disclosure would prejudice, or would be likely to prejudice:

- the interests of the UK abroad;
- the prevention or detection of crime

N.B. Information becomes exempt only if disclosing it would prejudice or would be likely to prejudice the activity or interest described in the exemption.

2.28 The Exemptions can also be broken down into (i) absolute and (ii) qualified exemptions. For absolute exemptions the only decision the LA has to made is whether the information is of the type specified in the exemptions. If it is, then the exemption applies. For qualified exemptions, the LA must go one step further if the information is of the type specified: it must then consider whether the public interest in maintaining the exemption outweighs the public interest

in disclosure. The PA must inform the applicant of what exemption it is relying on and the reasons for its reliance on it, and where the exemption is not absolute but qualified, it must also state its reasons for concluding that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. N.B. If an exemption applies, the public authority is not barred from releasing information, it merely is not under a duty to do so. Therefore even when an exemption applies, it may still have the power to release the information.

2.29 Some exemptions which may be of particular interest to LA's are discussed in some detail below.

Section 36: effective conduct of public affairs

2.30 This section recognises the crucial role in effective government of free and frank discussion. It will tend to relate to areas which do not relate to government policy (which is covered by section 35). Unlike section 35, the information does not need to relate to government Ministers, it can include any advice and discussion taking place at official level. Section 36 will apply where the effect of disclosure would '*in the reasonable opinion of a qualified person… be likely to inhibit the free and frank provision of advice…or the free and frank exchange of views for the purposes of deliberation…or would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs*' (section 36(2)(b)(i) and (ii)).

2.31 The Type of information that might be caught under this provision include advice made by or made to any authority and any exchange of views for the purposes of deliberation: i.e. decision making processes, and opinion forming or evaluation. There are 7 section 36 decisions on the IC's website – none of these relate to requests made to LA's. However, a good illustration of how the section 36 exemption has been used are the requests made by the media to the BBC asking for copies of the minutes from the BBC's Board of Governors meeting held on 28 and 29 January 2004 which were held to consider their response to the Hutton report. The BBC refused to disclose the information requested, citing the exemption provided by section 36 (2) (b) (ii) (prejudice to effective conduct of public affairs). The IC agreed with the BBC that given the particular nature of the meetings, it was essential that those present had felt able to speak their minds in complete confidence and that they would not have been able to do that had they believed that the meeting was not taking place with that understanding. The BBC was held to be the "qualified person" in the form of its Governor and members of the Board. The IC was satisfied

that the qualified person had expressed a reasonable opinion. A reasonable opinion was defined as "*one that, given the circumstances of the case could be said to fall within a range of acceptable responses and be considered neither outrageous nor absurd*". The IC seems to have placed considerable significance on the fact that although the minutes of the meeting had not been made public, the outcome of the meetings had been reported extensively in the press[4].

s.40: Personal Data of which the applicant is the Data Subject.

2.32 The ICO survey revealed that 25% of the 376 requests received from the public were for personal data about staff. This exemption will apply where disclosure would contravene one of the data protection principles. This is an absolute exemption and the principle most likely to be a potential bar to disclosure will be the first principle, requiring that personal data should be processed fairly and lawfully, and that one of the conditions in Schedule 2 to the DPA must be satisfied (and in addition, in the case of sensitive personal data, one of the conditions in Schedule 3).

s.41(1) Breach of Confidence

2.33 This is an absolute exemption and applies to any information the disclosure of which by the PA would involve an actionable breach of confidence. PA's are not obliged to confirm or deny possession of any confidential information if to do so would itself be an actionable breach of confidence. N.B. Although the exemption is absolute, the law on breach of confidence should be applied, and therefore if under common law it is considered that confidential information should be disclosed in the public interest, then the PA would normally have to disclose the information.

2.34 Whether or not information is protected by confidentiality will depend on the circumstances in which it was obtained and, where obtained from a third party, whether at the time that authority expressly agreed to keep it confidential. The Lord Chancellor's Code of Practice issued under section 45 of the Act sets out guidance on when PA's should accept information in confidence and also when to consult third parties where an authority plans to disclose their confidential information. In summary:

[4] See *BBC* (Case Refs: FS50073129, FS50070769, FS50066295 15/02/06).

(1) a PA should only accept that information is confidential where it is necessary in connection with the authority's functions and would not be provided if not confidentially;
(2) a PA should not agree to hold information confidentially unless the information is genuinely of a confidential nature (it cannot seek to circumvent the FOIA by contracting that information is confidential when in fact it does not have the necessary quality of confidence);
(3) a PA should be prepared to justify the inclusion of any express confidentiality terms contained in a contract with a third party.

2.35 Where disclosure cannot be made without consultation with a third party the PA will usually do so unless the costs of consultation would be disproportionate. However, if the third party objects to disclosure, the PA should consider whether it has a duty to disclose in any case. The third party may have an actionable cause for breach of confidence, but not under the Act.

s.42: Legal Professional Privilege

2.36 This is a qualified exemption. The normal principles will apply. LPP can be divided into 2 categories: (1) legal advice privilege and (2) litigation privilege. The DCA guidance on this is that where LPP applies, the balance of the public interest will only in exceptional circumstances weigh in favour of disclosure.

s.43 Commercial Interests

2.37 This is a qualified exemption. Section 43(1) relates to trade secrets. There is no requirement to assess the prejudice which disclosure might cause because this is assumed by the very nature of the information. The duty to confirm or deny does not apply where to do so would defeat the purpose of the exemption. There is no definition of what a trade secret is but examples will include formulae for specific products (i.e. patents); technological secrets; strategic business information and databases.

2.38 Section 43(2) relates to more general commercially sensitive information if the disclosure of such would or would be likely to prejudice someone's commercial interests (i.e. the PA's own interests or those of a third party). Examples of such information would include: strategic business plans, information relating to the preparation of a competitive bid, and information about the financial viability of a business.

Recent Decisions

2.39 Examples of some recent decisions following refusals by Councils to disclose the information requested:

(i) A request to Skipton Town Council for information relating to a dispute with the Council regarding an allotment site and in particular, information relating to Council meetings at which the matter was discussed and which contained information which would have identified third parties. The Council complied as far as they could with the applicant's multiple enquiries though he stated he had not received any response. The IC did not uphold the complaint, relying on section 40. It was found that contrary to the applicant's claims, he had received a reply from the Council. Further the IC considered that although the applicant had a legitimate interest in receiving the information, the names and addresses of the petitioners was private information, as were the notes of a meeting with an allotment tenant when the matter was discussed and the person interviewed required that the information provided be kept confidential. The IC therefore held that the information could not be disclosed fairly or lawfully under section 1 of the Act, and relied on paragraph 6 of Schedule 2 to the DPA for saying that this information should not be disclosed, i.e. the processing was unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(ii) A request for the amount paid by Corby Borough Council to a temporary finance officer, Mr Moss (The Council refused to disclose the information, relying on section 40(2). The IC overturned this decision and required the Council to disclose. The IC considered that although the information was prima facie personal information, paragraph 6 of Schedule 2 to the DPA provided a basis for disclosure, i.e. 'The processing was 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, and the processing was not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'. The IC found that there was a legitimate interest in details of the amount of money spent on employing senior staff being made available to the public because this would increase accountability and transparency in local authorities. There were however particular circumstances of the case: there was public controversy about the appointment and continued employment of Mr. Moss, and the Audit Commission had made critical comments on the subject. The Council was order to comply with the IC's decision within 30 days and to disclose

information including Mr Moss's gross annual salary, as well as his travel, subsistence and accommodation costs.

(iv) A request to Mid Devon District Council of names and addresses of the tenants of council housing owned by the Council. The IC upheld the complaint deeming that although the information was personal information under the Act, the provision of the list of properties would be unlikely to cause unfairness to the tenants as it was not sorted by the characteristics of the tenants (such as 'asylum seeker' or 'ex-offendor'). This is an interesting case as the complainant was actually a member of the Council who requested the names and addresses of council tenants so he could send them information concerning a proposed transfer of Council housing stock to a Registered Social Landlord. It was argued by the Council that he wanted disclosure of the information so that he could inform tenants that they had been mislead by the Council as to the consequences of the proposed transfer. The complainant was not acting in his capacity as a Council member but as the leader of a political group on the Council (which one is not specified in the IC's decision notice). The complainant put in a revised request asking just for the addresses of council owned properties in order to try and meet the Council's objection that the information contained personal data. He argued that he had a legitimate interest in the information requested and that this appeared to outweigh any likely unfairness to data subjects. Further, if the Council had continued concerns it could mail the tenants on behalf of the Complainant or by placing restrictions upon uses to which the information disclosed could be put. The Council objected on DPA grounds and relied on the apparent motives for the request and uses to which the complainant wished to put the information. It stated that council tenants had not been mislead about the consequences of the proposed transfer of council housing stock as the complainant suggested and that "fear, worry and concern" might be caused to tenants receiving material from the complainant containing inaccurate information of this kind. The IC decided that the data requested was indeed personal data under the DPA and that even if only addresses were released, the complainant would be able to identify most tenants from the addresses by accessing the electoral roll and putting two and two together. The IC had to ignore the circumstances and motive of the applicant for wanting the information. The only issue was whether the data could be processed fairly and lawfully if disclosed. The Council decided that it could because there was no general unfairness to individuals in being identified as council tenants. In practice this would be generally known either because people were neighbours of the particular

tenants or because the properties were part of a council housing estate (although if the Council was housing any vulnerable individuals at a secret address and these could be identified by disclosure of a particular address, then this information would be withheld).

(v) A request for access to a letter sent to Powys Council by the headteacher of the applicant son's school. The Council released the bulk of the letter and provided summaries of other parts. It redacted the letter so as to withhold personal information relating to third parties and relied on section 40. The IC did not uphold the complaint.

(vi) A request of a copy of a report, provided to Boston City Council by a charitable company, relating to the charity's management of a sports arena, including financial and commercial information. The Council applied section 41 (information provided in confidence), and section 43 (commercial interests) and disclosed a redacted version; however, the Complainant wanted an unredacted copy of the report. The Commissioner found that a duty of confidence existed, and that the information was exempt from disclosure under section 41 of the Act as this would produce an actionable breach of that duty.

(vii) A request for details about Derry City Airport's agreement with Ryanair for the use of its airport, as well as how much Ryanair pay to Derry City Council for the use of its airport facilities. The Council refused to disclose the information requested, citing amongst others the exemptions under section 41, (information in confidence) and section 43(2) (Commercial interests). The IC upheld the complaint and required the Council to disclose the information (The Commissioner was not satisfied that the Council had demonstrated that prejudice in relation to the exemptions in section 43(2) would occur, and therefore the Commissioner did not consider the public interest test arguments put forward by the Council in relation to both of these exemptions. In regard to section 41 the Commissioner was satisfied that the exemption in this case was not engaged. Accordingly the Commissioner required the Council to provide the information requested to the complainant. The decision has potentially wide-ranging implications to PAs and is currently being appealed by the Council to the Information Tribunal.

(viii) The Information Tribunal's decision in *Bellamy* (4/4/2006, EA/2005/0023) considered the applicability of sections 42 and 43. Mr Bellamy owned or ran a franchise operation involving carpet cleaning. He requested details of legal

advice sought by the DTI's legal department from Treasury Counsel in relation to complaints made about a franchise company. He asked for the brief and evidence provided to Counsel, and the opinion of Counsel including details of all meetings, telephone calls, emails and letters. The advice centred on what, if any, action should be taken by the DTI as a result of the complaints. The DTI refused to disclose the information requested citing the exemptions provided by section 42(1) (legal professional privilege). The DTI also refused to confirm or deny that it held information about an investigation into the company's activities. In doing so, it relied on the section 43(2) and (3) exemption (no duty to confirm or deny if to do so would, or would be likely to, prejudice the commercial interests of any person). The Commissioner did not uphold Mr Bellamy's complaint and agreed with the DTI's reasons for withholding the information requested. The Commissioner decided that the submission and further material provided to Counsel, and Counsel's advice, were covered by legal professional privilege, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner further decided that the section 43 exemption had been appropriately applied and that the public interest in this instance was best served by maintaining the exemption. Mr Bellamy appealed to the Information Tribunal on the grounds that the IC had exercised his discretion wrongly. The Tribunal having examined the material which Mr Bellamy wished to be disclosed confirmed that all the relevant exchanges emanating from the DTI were in fact based on legal advice the DTI had received from Treasury Council. Under section 58(1) of the Act, the Tribunal had the power to conduct a merits review and can ask itself in general terms if the public interest in disclosure outweighs the public interest in non-disclosure. It disagreed with Mr Bellamy that the IC was exercising a discretion when deciding whether an exemption applied and if so, how the relative public interests should be balanced. The core question was the application of the Act to the facts as found by the Commissioner: if the Tribunal were to find that the commissioner had been wrong in his judgment of the public interest balance in accordance with section 2(2)(b) in the way he did, it could overrule him. However, in the circumstances it found that the applicant had failed to adduce sufficient considerations which would demonstrate that the public interesting maintaining the exemption was, in the present case, outweighed by any public interest in justifying disclosure.

2.40 As the number (and quality) of the decisions issued by the ICO, and judgments by the Information Tribunal increase, the easier it will become to make informed decisions in relation to specific requests under the Act.

According to the ICO (in an interview with OUT-LAW News on 13 January 2006), it had had 2,300 complaints up to that date about the public sector's handling of FOI and EIR requests. Over 1,000 of these were resolved by negotiation, information resolution, or by formal issue of a decision notice. However, at the end of 2005 there were 1300 unresolved complaints. Concerns were expressed about this backlog by Maurice Frankel of the CFOI in his written submissions to the Constitutional Affairs Select Committee at its inquiry earlier this year[5]. Concerns were also expressed by him about the quality of some of the earlier decisions: many of the decisions provide little information about the circumstances of the complaint or the reasons for the Commissioner's decisions. However, the Committee seems to be making moves to resolve these issues: Baroness Ashton of Upholland (Parliamentary Under-Secretary of State at the DCA) announced that the DCA was to make available an additional £550,000 to the Information Commissioner, to help clear the backlog of outstanding cases. The ICO also has a business plan for dealing with the backlog and this has been made public (see at http://foia.blogspot.com/ICObuscasejan2006.pdf). So, watch this space, or rather, look out for the ICO's next published report to see if things have improved in the next year or so.

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[5] This is accessible on the CFOI's website at http://www.cfoi.org.uk/

Appendix 1

Useful sources of Information on the Act

Although still very much in its infancy, the Act has already generated huge amounts of information about itself in the form of legal analysis, research and statistics on its implementation, Government reports, news items. There are a large number of dedicated websites on the Act. The main ones are set out below[6]:

Official sites:

(i) DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

http://www.foi.gov.uk

Government department responsible for freedom of information policy and also for the implementation of FOI within Government Departments.

The department also runs a central clearing house for more complex FOI queries received by government departments. Information can be found at: http://www.foi.gov.uk/clearinghouse.htm

(ii) DEPARTMENT FOR ENVIRONMENT FOOD AND RURAL AFFAIRS (DEFRA)

DEFRA is the responsible Government Department for the Environmental Information Regulations. The EIRs are separate to FOI but need to be considered alongside it. Many organisations are likely to receive requests for information that must be dealt with under EIR, other requests that are primarily FOI and yet other requests that will have aspects falling within the ambit of each provision. General information on the Environmental Information Regulations can be found at: http://www.defra.gov.uk/corporate/opengov/eir/index.htm

The following pages also provide information on Defra's own implementation of the FOI Act and other legislation: http://www.defra.gov.uk/corporate/opengov/accessinfo.htm

(iii) INFORMATION COMMISSIONER'S OFFICE

[6] This list of web resources has been reproduced from the CILIP (Chartered Institute of Library and Information Professionals) website: http://www.cilip.org.uk/professionalguidance/foi/webresources

http://www.informationcommissioner.gov.uk

The independent authority in charge of administering and enforcing the FOI Act, including approval of publication schemes. The Commissioner also deals with the Data Protection Act (1998) and the access rights people enjoy under that Act (Environmental Information Regulations 2004). The Commissioner acts for the whole UK, Scotland included, in regard to the Data Protection Act, but there is a Scottish Information Commissioner overseeing implementation of the Freedom of Information (Scotland) Act in Scotland.

This site also includes the Decision Notices of the Information Commissioner made under FOI and EIR:
http://www.ico.gov.uk/eventual.aspx?id=8618

(iv) NATIONAL ARCHIVES OF ENGLAND, WALES AND THE UNITED KINGDOM

http://www.nationalarchives.gov.uk/foi/

Produces policy and guidance on records management, and on public records held in archives offices to enable public authorities to meet their records obligations under the Act.

(v) OFFICE OF GOVERNMENT COMMERCE

http://www.ogc.gov.uk/index.asp?id=2817

Works with government to improve procurement and project/programme management, including how FOI impacts on procurement.

(vi) INFORMATION TRIBUNAL

http://www.informationtribunal.gov.uk

Details the work and procedures of the Information Tribunal that covers both the Data Protection Act (1998) and the Freedom of Information Act (2000).

The site also includes decisions on the cases heard by the Tribunal:

http://www.informationtribunal.gov.uk/our_decisions/our_decisions.htm

Special interest sites:

(i) CHARTERED INSTITUTE FOR LIBRARY AND INFORMATION PROFESSIONALS

http://www.cilip.org.uk

Professional body for library and information professionals with a key interest in FOI.

(ii) THE CONSTITUTION UNIT, UNIVERSITY COLLEGE LONDON

http://www.ucl.ac.uk/constitution-unit/foidp

Independent research body on constitutional change based within the School of Public policy at University College, London. It has a particular interest in FOI and data protection matters.

(iii) RECORDS MANAGEMENT SOCIETY

http://www.rms-gb.org.uk

Professional body with key interest in the implementation of FOI.

(iv) OUT-LAW News

A site providing IT and e-commerce legal news and help from International Law firm Pinsent Masons with a page dedicated to Freedom of Information.

http://www.out-law.com/default.aspx?page=355

(v) WALTER KEIM

http://home.online.no/~wkeim/foil.htm

Personal website that includes section on FOI laws of mainly European and English Speaking countries

Campaigning Sites:

(i) CAMPAIGN FOR FREEDOM OF INFORMATION

http://www.cfoi.org.uk

Campaigns against unnecessary official secrecy and for freedom of information.

(ii) CHARTER 88

http://www.charter88.org.uk

Movement for a modern and fair democracy.

(iii) GLOBAL INTERNET LIBERTY CAMPAIGN

http://www.gilc.org

Campaign for freedom of online information.

(iv) UK FREEDOM OF INFORMATION ACT (FOIA) BLOG

http://www.foia.blogspot.com/

Media:

GUARDIAN UNLIMITED

http://politics.guardian.co.uk/foi/

A site run by journalists Rob Evans and David Henke with the latest Guardian articles on freedom of information issues.