Freedom of Information Act 2000: enhanced access to information

By *Jonathan Barnes*

The Freedom of Information Act 2000 ("FOIA"), which comes into force on 1st January 2005, marks a major enhancement to the accessibility of information held by public authorities. Introduced to give effect to a 1997 government pledge towards more open government, which itself was the culmination of years of lobbying, FOIA is likely to become a workhorse of journalists, professional researchers and others who use information as their raw material. The new regime is discussed in Part A below. One category of new users is likely to be that of litigation lawyers, and there is no reason apparent from the legislation why FOIA should not become a useful litigation disclosure tool, as has in recent years the subject access request under section 7 of the Data Protection Act 1998 ("DPA"). This is explored under Part B below.

PART A: REGIME

By FOIA section 1 an applicant is entitled to be told by a public authority whether that authority holds information fitting any particular description put forward by the applicant. This is "the duty to confirm or deny". If the authority does hold such information then it is required to disclose it. Within reason, the public authority is bound to give effect to an applicant's preference as to the mode by which the information sought is to be communicated to him or her. The subject matter of an application – "*…information of the description specified in the request…*" – is theoretically unlimited. The information to be disclosed is that held at the time of application, subject to any changes that would have been made to it regardless of the application.

"Public authority"

The target of an application can only be a public authority – there are both generic definitions and a lengthy list of specific bodies in FOIA Schedule 1. Further bodies may be designated by the Secretary of State, but some estimates suggest that 100,000 bodies are already caught. Publicly-owned (i.e. governmental) companies are also included. A public authority must respond not only in respect of information actually held by it, but also in respect of information held by any other person or organisation on its behalf.

Request

A "request for information" will be effective if it is in writing (including in electronic form provided it is legible and capable of being used for subsequent reference), states the name of the applicant and an address for correspondence and describes the information requested. The public authority may reasonably require further information of the applicant in order to identify and locate the information requested. A public authority may within 20 working days send the applicant a "fees notice" stating its charge for compliance with the request. Unless the fee is paid within 3 months of the notice then the public authority need not comply. Maximum fees and mechanisms for calculation are to be determined by regulations made by the Secretary of State or as appropriate with reference to statutory maxima.

Compliance

The time for compliance by the public authority is 20 working days from the date of receipt of the request. This is subject to any applicable fees notice that has been served, and any variation by the Secretary of State of the 20 working days time limit up to a maximum of 60 working days.

A public authority will be excused from compliance upon non-payment of notified fees within 3 months, and where the cost of compliance would exceed an appropriate limit (to be prescribed). If the cost of communicating the information sought would exceed such limit, the public authority will still not be exempt from the duty to confirm or deny unless the estimated cost of performing that duty alone would exceed the limit. Vexatious requests will not have to be complied with. These include repeat requests from the same applicant within an unreasonably short interval, but the Act does not otherwise define "vexatious".

Exemptions - absolute

In addition to the above conditions for compliance, FOIA further sets out a regime of exemptions that may benefit a particular public authority where certain types or classes of information are sought. Where an exemption is claimed – there is no statutory "duty" in the legislation requiring a public authority to claim an exemption every time one arises – the public authority must notify the applicant within 20 working days of receipt of the application. Absolute exemptions from compliance will apply in respect of:

- Information reasonably accessible to the applicant by other means
- Security matters
- Court records
- Information that is protected by Parliamentary privilege
- Personal data of which the applicant is the data subject (in which case the application will proceed as though made as a subject access request under DPA section 7)
- Personal data of which an individual other than the applicant is the data subject and disclosure would contravene the DPA data protection principles
- Information in relation to which a duty of confidence is owed by the public authority to a third party

and where disclosure is otherwise prohibited by enactment, European Community obligation or the contempt laws.

Qualified exemptions

Certain class exemptions are qualified, in that they can only be relied upon by the public authority in refusing disclosure if the public interest in maintaining the exemption outweighs the public interest in the public authority making disclosure. These are:

- Information intended for future publication (by the public authority)
- Where national security requires safeguarding
- Investigations and proceedings conducted by public authorities
- Information concerning the formulation of governmental policy
- Communications with the Royal Family and concerning honours
- Information which is protected by legal professional privilege

Another set of qualified exemptions is set out, these intended to avoid prejudice to specific interests and where the public interest

in maintaining the exemption outweighs the public interest in the public authority making disclosure:

- Defence, international relations, relations within the UK, UK economic and financial interests
- Law enforcement, audit function, the conduct of public affairs
- The health and safety of any individual
- Commercial interests, including trade secrets, of any person (including the public authority concerned)

Exemptions in practice

The absolute exemptions may well not be problematic in practice. Once the exemption is established (for example, by Ministerial certificate in the case of security matters), then if it is maintained by the public authority that will excuse compliance with the request without more.

However, the qualified exemptions, addressed to discrete sectors and classes of information, do look likely to raise some difficult "balancing" arguments. This will be with reference to the general qualification that such an exemption may be maintained if maintaining it outweighs the public interest in the public authority making the disclosure requested. Here, the "need" for a public authority not to comply with a particular request will be balanced against the "public interest" in disclosure being made.

Individual health and safety

Where, for example, a disclosure would be likely to endanger the physical or mental health or safety of any individual then it is not difficult to see the exemption being upheld notwithstanding the qualifying test, with disclosure denied. The public interest in disclosure would be defeated by the personal interest of the individual concerned in not being imperilled. At its extreme, this balance may be analogous to that struck by the courts in granting anonymity upon release from prison to notorious child killers.

Commercial interests

But, on the other hand, where a public authority claims that compliance with a request for information would be likely to prejudice its commercial interests, that may well not be the last word on whether or not, and regardless of such claim, there is in a particular case a greater public interest in disclosure than in information being withheld. Here, the public interest in knowing what commercial interests a public authority has or has been engaging in may be relatively powerful as against the countervailing concern that those interests may be prejudiced by disclosure. Indeed, this area, of calling public authorities to account for their commercial dealings, is likely to be one that generates significant interest for investigative journalists, documentary makers, professional lobbyists and others.

PART B: LITIGATION DISCLOSURE

Parties to civil litigation crave information, especially in the form of documents. When tied into litigation, each party is obliged by the Civil Procedure Rules ("CPR") to disclose to the other all documents (which include computer records) it holds or once held that are or may be material (either supportive of a particular party's case or adverse to it) to the matter in dispute. In certain types of case (for example, personal injury, clinical disputes, judicial review) a defendant may be required to provide limited disclosure documentation in the early stages of a dispute, but typically the "standard" disclosure obligation does not kick in until after the parties have exchanged their written statements of case.

Pre-action and third party disclosure

Exceptionally, where a party can establish by evidence that pre-action disclosure against its opponent is "desirable" then a court may make such an order. A court may also make orders for disclosure of documents and other information under the *Norwich Pharmacal*[1] jurisdiction, where such order is "necessary" as against an innocent third party in order to identify a wrongdoer, and as part of relief granted by interim freezing (formerly *Mareva*) and search (*Anton Piller*) orders. Further, disclosure against a person not a party to litigation can be ordered under CPR, again subject to the applicant satisfying a court on evidence that such disclosure is "necessary". Any attempt to obtain supplementary, or "specific", disclosure of documents, falling at first blush outside an opponent's standard disclosure obligation, will be treated by the court cautiously, and subjected firmly to tests of necessity and proportionality.

Restrictions on use

All documents obtained under CPR disclosure are subject to a rule that ordinarily they may only be used for the purpose of the proceedings in which they were disclosed. A similar CPR rule applies also in respect of witness statements served in proceedings. Both these rules cease to apply once a document or witness statement has been referred to or deployed at a hearing in open court.

Data Protection Act 1998 ("DPA") section 7

DPA provides a mechanism by which an individual may obtain personal information held about him or her by data controllers. It and CPR do not cross-refer and there has been considerable uncertainty in the context of litigation as to what permissible role DPA has to play. Should a DPA subject access request made by a claimant against a defendant who is also a data controller be allowed to proceed, or in those circumstances should the parties be made to play by the "rules" of CPR disclosure and the DPA route be blocked? Although the Court of Appeal case of *Durant v FSA*[2] and a number of other cases have dwelt to a degree on this question, it remains a fact that litigants are using DPA rights as a novel litigation tool to obtain documents, and therefore information, concerning their case, but outside the CPR disclosure rules.

Further, and very recently, in *Johnson v The Medical Defence Union Limited*[3], the court had to grapple with a situation where a claimant, seeking to establish that a data controller had not previously complied properly the DPA data protection principles, sought specific disclosure of all documents about him held by the data controller. That was apparently in order to support his case in part that the principles had been breached by prior failure on the part of the data controller to disclose such documentation (when responding to the section 7 subject access request). This approach was <u>not</u> ruled out in an interlocutory judgment as a matter of principle, and it would appear that, perhaps ironically, it provides a claimant in the right set of circumstances a CPR route to obtain information previously denied him or her under DPA.

FOIA and CPR disclosure

The DPA experience may well have provided a foretaste of how litigants and their lawyers will seek to use the new statutory FOIA access rights as an adjunct to CPR disclosure.

Differences

There is no need for an FOIA applicant to be in dispute, or even anticipated dispute, with the public authority in question, or any other party. The applicant's "litigation status" is irrelevant to the FOIA regime. There is theoretically no limit to the scope of the information that may be sought – there is no "materiality" or "relevance" test under FOIA. There is also no apparent geographical limit – a request could be made from anywhere in the world (for example, in writing by email). The applicant's purpose or motive in making his/her FOIA request is irrelevant as to whether or not it must be complied with. Perhaps, however, situations approaching an abuse of process, akin to that in *Durant*, will develop in the context of FOIA. But the applicant need not disclose (if it be the case) that he/she later intends to use information obtained through FOIA in current or contemplated litigation. There is also no restriction upon the use of information once it has been disclosed pursuant to FOIA.

Third party privacy; confidentiality

Third party privacy, in respect of an FOIA request for personal data concerning a third party, will block an FOIA request. In other words, an FOIA request is likely only to elicit non-personal information. CPR disclosure knows no such restriction. Confidentiality, ongoing investigations and commercial sensitivity may all frustrate an FOIA request, although they do not usually justify material relevant to a particular dispute being withheld in CPR disclosure. Similarly, although perhaps of less significance to general litigation, considerations such as international relations, the economy, public affairs, communications involving the Royal Family etc may block an FOIA line of enquiry.

Mechanics

The deadline for compliance (20 working days) with an FOIA request is relatively short. Save for the fees notice, there is no risk of adverse costs consequences of making an FOIA request, as opposed to the risky, expensive and often cumbersome CPR approach.

Non-compliance

The court can impose sanctions on a party to litigation for failure to comply with his/her CPR disclosure obligations, to the point of striking out his/her claim or defence. A public authority's refusal to comply with an application can be referred in the first instance to the Information Commissioner, then on appeal to the Information Tribunal and then on appeal on a point of law to the High Court. If during or as a result of this process the Information Commissioner issues an enforcement notice on a public authority that is not complied with, the public authority's failure to comply with such notice may be referred to the High Court and treated by it as a contempt of court. However, the public authority's failure to comply will not give the applicant any right of action against it. FOIA does not create any direct rights action or sanction as between applicant and public authority.

Similarities

FOIA offers no obvious inroad to any public interest immunity to production of a document in litigation pursuant to either CPR or the extensive body of case law that has built up in this area. The "fees notice" and cost of compliance provisions bear some relation to "proportionality" under CPR disclosure, but it is unclear at this stage to what extent cost/benefit will restrict FOIA access in practical terms. Both regimes protect legal professional privilege i.e. advice and documents produced for the purposes of litigation, and so exempt from disclosure subject to overriding public interest considerations.

New litigation tool

FOIA plainly represents a further means of obtaining pre-litigation access to documents and information from a public authority which an applicant may later wish to sue. FOIA will perhaps operate in conjunction with DPA here.

The Act also provides a means of obtaining access to documents and information from a public authority during the course of litigation which may not (quite properly) have been disclosed as being central to the dispute, but serve nevertheless to inform the applicant in some way as to his/her claim and its prospects.

Further, the Act is a relatively straightforward and direct route to obtain from a public authority documents and information it holds as a non-party to litigation that may assist either the parties and/or the court in resolving a dispute, either before or during litigation. It is conceivable that the use of FOIA in suitable cases may render CPR third party disclosure and the (difficult and complicated) *Norwich Pharmacal* route redundant in practice, where previously they might have been a litigant's only hope of obtaining vital information.

In summary FOIA is a new litigation tool. Given that private citizens will be able to use it to find out information about anything they like from thousands of organisations, public authorities must expect that litigants and their lawyers will inevitably also take full advantage of these novel access rights.

This paper is based in part on Jonathan Barnes' presentation to a Central Law Training Practitioner Conference on 26th November 2004: *Freedom of Information – Management Challenges for Local Authorities & Other Public Bodies*

[1] *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, HL.
[2] (2004) FSR 28.
[3] [2004] EWHC 2509 (Ch), Laddie J, 9th November 2004.