

## FOI Update - September 2009

**By Ibrahim Hasan (IBA Solicitors and Act Now Training)**

The new Information Commissioner, Christopher Graham, took up his post in June. Mr Graham previously ran the Advertising Standards Authority. One of his main challenges will be to tackle the lengthy backlog of cases that his office (ICO) has been struggling with. In a report published in July, the Campaign for Freedom of Information (CFOI) strongly attacked the ICO over extensive delays before it issues formal decisions ([www.cfoi.org.uk](http://www.cfoi.org.uk)). In the worst case, the Commissioner's decision notice was issued three years and ten and a half months after the complaint was made. The ICO has said that it is trying to speed up its processes and that most cases are resolved informally and more quickly.

The government has now published its response to the recent consultation on extending the Freedom of Information Act. It proposes to add only four new organisations to the list of public authorities namely Academy schools, the Association of Chief Police Officers (ACPO), the Financial Ombudsman Service and the Universities and Colleges Admissions Service (UCAS). The Government has stated that this is an initial step and further consultations with Network Rail and utility companies will examine how the Act could apply to them. It will be interesting to see what the Conservatives propose in their next general election manifesto about extending FOI. David Cameron has, in the wake of the MPs' expenses scandal, tried to claim the moral high ground when it comes to openness and transparency.

On 10<sup>th</sup> June 2009, the Prime Minister announced that the 30 year period before old official papers are made public would be reduced to 20 years. More controversially he also announced that two new FOI exemptions would be created. Information relating to the Royal Family would be made exempt from the Act altogether despite their already being an exemption for correspondence with the Royal Household (section 37). Even more controversial is the proposed new exemption to cover Cabinet documents. This is a direct response to the Information Tribunal decision published on 27<sup>th</sup> January 2009 ([Cabinet Office and Dr Christopher Lamb v IC \(EA/2008/0024 & 0029\)](#)) which upheld the ruling by the Information Commissioner that minutes of cabinet meetings from 2003 should be released. These refer to meetings that discussed the Attorney-General's legal advice about the Iraq war. This decision led to the Lord Chancellor (Jack Straw) issuing the first ever ministerial veto under section 53 of the Act in February 2009. In his Statement of Reasons he argued that disclosure would be contrary to the public interest, damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government. The new exemption will avoid the need to use the veto and the consequential media outcry.

There is still much confusion about the distinction between information falling within the Environmental Information Regulations 2004 (EIR) regime as opposed to the FOI regime. In a decision involving [Nottingham City Council \(11<sup>th</sup> June 2009 Case Ref: FS50194691\)](#), the complainant requested the legal advice which the council obtained in respect of a piece of land called the Arboretum in Nottingham. The council initially claimed that the exemptions in sections 42 and 43 of the Freedom of Information Act applied. The Commissioner informed the

council that the information should have been considered under the EIR regime as it came under the definition of environmental information in Regulation 2(1) (c) which states –

“(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements”

The elements and factors referred to in paragraph (a) include -

‘ ... air and atmosphere, water, soil, land, landscape and natural sites...’

The Commissioner found that the legal advice being requested related to legal restrictions placed on the land to prevent its sale, lease or development other than for specified purposes. These are measures as defined in Regulations 2(1)(c) and the legal advice was on those measures and fell to be treated under the EIR regime.

The Information Tribunal has recently handed down a decision in which it reached a number of important conclusions on the application of the section 32 exemption for court records. In **Dominic Kennedy v IC & Charity Commissioners (EA/2008/0083)**, the complainant wanted information concerning the Commission’s 2007 inquiry into the Mariam Appeal, a controversial fund set up by the MP George Galloway. The first issue which the Tribunal was called upon to determine was whether the word ‘document’ as it appears in section 32 included electronic documents or merely hard copy documents. The Tribunal decided that the word should be given an expansive interpretation so as to include both electronic documents and hard copy documents. It also held that section 32 can apply, not merely to records relating to on-going inquiries, but also to inquiries that are closed. In the course of its decision, the Tribunal accepted that it was giving s. 32 ‘a very wide scope’, which contrasted with the approach taken by the Tribunal to other exemptions in FOIA. However, it concluded that this was the required result given the need to respect the autonomy of the courts and those bodies which conduct statutory inquiries and arbitrations.

The Information Commissioner takes a restrictive view of commercial interests when it comes to applying the section 43 exemption. In his FOI Awareness Guidance No. 5 (V3.0, 6 March 2008) he draws a distinction between commercial interests and financial interests, stating that the latter cannot be protected by the application of the section 43 exemption.

This approach has been called into question in recent a Tribunal decision. In **Student Loans Company Limited v Information Commissioner (EA/2008/0092)** the Student Loans Company Limited (“SLC”) challenged a decision of the Information Commissioner that it must disclose a training manual used for staff who deal with defaulting borrowers. Amongst other things, the SLC argued that disclosure would harm its commercial interests (s43(2)), in that the manual would help borrowers to delay or avoid complying with their obligations. The Commissioner contended that SLC was not participating competitively in the purchase and sale of goods or services, and that a detrimental financial effect of the kind feared by SLC would not constitute prejudice to the “commercial interests” of SLC.

The Tribunal ruled that the Commissioner's approach to section 43 was too restrictive. "Commercial" is an ordinary English word. The Tribunal did not consider it appropriate to tie its meaning directly or indirectly to competitive participation in buying and selling goods or services and to exclude all other possibilities. Debt collection is a commercial activity, even when carried on by a company supported by public funds. The Tribunal ruled that a better approach was to ask itself whether a detriment to SLC, from the delay and reduction of debt collections and increasing the costs of collections, could fairly be described as prejudicing SLC's commercial interests. Though it thought this case was borderline it decided the answer was in the affirmative and it ordered some parts of the manual to be redacted before disclosure. It will be interesting to see if the Commissioner revises his section 43 guidance in the light of this decision.

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