Freedom of Information Podcast

Episode 21 – November and December 2009 and January 2010

Ladies and gentlemen welcome to episode 21 of the UK's only Freedom of Information podcast. I'm Ibrahim Hasan. In the three months upto the end of Janaury 2010 the Information Commissioner published 154 decisions whilst the Information Tribunal published 17. I'm here to guide you through some of these.

In this episode, amongst others, we will be discussing decisions involving:

- Redaction costs when dealing with FOI requests
- Another use of the ministerial veto
- Section 36 and the opinion of the qualified person
- The tax status of a conservative peer
- Disclosure of information about the deceased
- When the Breach of Confidence exemption can be invoked
- AND disclosure of commercially sensitive information

Before we go on to discuss these decisions, let's just examine some interesting recent developments.

New Tribunal

On Monday 18th January 2010, the Information Tribunal ceased to exist. All its work has been transferred to the new General Regulatory Chamber.

The transfer is to be effected in accordance with the Transfer of Functions Order 2010 (SI 2010/22) . From 18 January, all Freedom of Information Act (FOI) appeals will be heard either in the First-tier Tribunal (Information Rights) or in the Upper Tribunal. The question as to where each particular appeal will be heard will be determined by two new sets of tribunal rules as well as practice directions. These will apply to all new appeals, which are commenced on or after 18 January. In respect of appeals commenced prior to this date, the Tribunal will have discretion as to whether to apply the old rules or the new rules; or a combination of the two.

Internal Reviews

The Information Commissioner has produced specific guidance for authorities on how to conduct internal reviews of FOI decisions. The recommended period of time for completing a review is 20 working days or 40 working days in exceptional cases. In no instance should the 40 day limit be exceeded.

The Commissioner has emphasised this recently by issuing Practice Recommendations to the UK Border Agency and Cardiff County Council . Both organisations were found to have repeatedly failed to comply with the timescales for responding to requests for internal reviews. The Commissioner was also concerned by the manner in which the Council's requests for review were logged and tracked, particularly after it admitted that statistics held were inaccurate.

Failure to comply with the Practice Recommendations may lead to an Enforcement Notice being served or an adverse comment being recorded in a report to Parliament by the Commissioner.

Calculating Fees

Section 12 of the Act and Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004 No 3244) (the "Regulations") mean that when a public authority wishes to refuse a request on grounds that to comply with it would be over the appropriate limit, it can only take account of the costs in doing four things calculated at a rate of £25 per hour:

(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.

In Mr John Jenkins v Information Commissioner and Dept for Environment, Food and Rural Affairs (discussed in episode 10) (EA/2006/0067 2nd November 2007)), the question before the Tribunal was whether "extracting the information" includes the time it takes for the public authority to redact exempt information from a document before disclosure of the rest. The Tribunal agreed with the Commissioner that such an act of deletion was not extraction within the meaning of the Regulations and so not an allowable cost for the purpose of calculating whether the appropriate limit has been reached. However the Tribunal did observe that the point was not free from doubt.

A recent decision by a differently constituted Tribunal has dispelled this doubt. In Chief Constable of South Yorkshire Police v Information Commissioner (EA/2009/0029 14th December 2009), the Tribunal came to the same conclusion having considered points of both statutory construction and matters of principle.

Section 35 and Ministerial Veto (again)

Section 35 allows information to be withheld if relates to, amongst other things, the formulation or development of government policy. It is a class based exemption which means that the public authority (usually a government department) does not have to show that there would be any prejudice to the formulation or development of government policy if the information is disclosed. However, prejudice is relevant when applying the public interest test. Section 35 has been the subject of two decisions which have gone onto be vetoed by the Government using its powers under section 53 of the Act.

In Cabinet Office and Dr Christopher Lamb v IC (EA/2008/0024 & 0029 27th January 2009) (the Tribunal decided to uphold 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. On 24th February 2009 the Lord Chancellor (Jack Straw) issued the first ever ministerial veto under section 53 of the Act.

The Information Commissioner said at the time:

"Anything other than exceptional use of the veto would threaten to undermine much of the progress towards greater openness and transparency in government since the FOI Act came into force."

Unfortunately these words seem to have fallen on deaf ears as on 10th December 2009, Mr Straw announced that he was exercising his powers of veto for a second time. The new veto has been issued in respect of a decision of the Commissioner (Cabinet Office FS50100665 23 June 2009) requiring disclosure of minutes of the Cabinet Ministerial Committee on devolution to Scotland and Wales and the English Regions in 1997. Explaining his action, Mr Straw stated that disclosure of the information would have put the convention of collective cabinet responsibility at 'serious risk of harm'. He also stated that he considered the circumstances of the case to be exceptional. Interestlingly these are the same reasons given by him when excercising the veto for the first time.

The effect of the veto is that the decision notice ceases to have effect. Therefore the appeal against the Commissioner's decision, which was due to be heard by the Information Tribunal at the end of January 2010, will now be aborted.

The Commissioner has expressed regret and concern that the veto was issued in circumstances where the Tribunal had yet to adjudicate on the Cabinet Office's appeal (unlike the Iraq minutes case where the veto was issued subsequent to the Tribunal's decision). The Commissioner will in due course issue a report to Parliament on the matter.

Section 36 and the Qualified Person

Many decisions of the Tribunal have considered the controversial question of whether public authorities can rely on exemptions which have been claimed for the first time before the Commissioner or the Tribunal.

Lately it has had to decide on the issue of late reliance in respect of the section 36 exemption (where disclosure would be likely to prejudice the effective conduct of public affairs). Unlike other exemptions, section 36 is only engaged where an opinion has been given by the 'qualified person'. This is usually a minister for a government department or in respect of other bodies, the head of the organisation. The question arises as to whether the qualified person must have given his/her opinion prior to the Refusal Notice being served, in order for section 36 to be engaged.

In the case of Roberts v IC & DBIS (EA/2009/0035, 20th November 2009), the Tribunal held that because information could only be withheld if it was exempt at the time of the request (or more precisely at the time the request was being responded to), it followed that an opinion which was reached after the Refusal Notice was sent out could not constitute a valid opinion for the purposes of section 36.

In the light of this decision, public authorities should aim to ensure that, wherever possible, any section 36 opinion is obtained prior to the release of the Refusal Notice.

In University of Lancashire v IC (EA/2009/0034 18th December 2009), the Tribunal highlighted the degree of rigour which must be applied when the relevant qualified person is seeking to formulate an opinion which engages section 36. It also stated (at paragraph 53) that the public authority must itself provide evidence that the person who reached the relevant opinion was a 'qualified person' for the purposes of section 36;

> "We observe, however, that the qualification of the person, upon whose opinion reliance is placed, requires proof and should be readily ascertainable by the requester. Save for authorities identified specifically in s.36(5) (a) to (n), it must be clearly shown to the requester, the Commissioner and in evidence to the Tribunal, either that the opinion is that of a minister of the crown ((o)(i) or that the minister has designated the authority or official giving the opinion as the qualified person ((o)(ii) and (iii))."

Section 38 - Physical Restraint of Children

Section 38 provides that information is exempt if its disclosure would, or would be likely to, endanger the physical or mental health of any individual and/or the safety of any individual. It is a qualified exemption and so requires consideration of the pubic interests test.

FS50173181 10 December 2009
Youth Justice Board for England and Wales
www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50173181.pdf

concerned an FOI request for details from the Physical Control in Care Prison Service manual. The Board refused to release some details maintaining that disclosing the material would be likely to prejudice security of prisons (section 31(1)(f)) and put the health and safety of young people and staff within Secure Training Centres (STCs) at risk (section 38).

It believed that this risk would arise through young people within STCs learning the restraint techniques detailed within the withheld information and applying this knowledge to counteract these techniques. This could also lead to other young people and staff being injured.

The Commissioner agreed that both exemptions were engaged. However, given the level of debate and controversy surrounding the use of physical restraint, on both legal and ethical grounds, and the evidence that these techniques can result in physical harm, he decided there is a significant public interest in releasing the manual in full. Disclosure may also lead to these techniques being subjected to public scrutiny and may result in changes to these techniques with the aim of better protecting young people's health and safety.

Section 40 - Names of staff

As a director of a training company, I have often wondered whether a public authority should disclose the names of staff attending a training course? The answer to this question was considered by the Information Commissioner in a decision involving:

Case Ref: FS50259598
17/12/2009 Bolton Council

The complainant requested the names of individuals from the Council who attended Common Purpose courses. The Council explained that in its view they were exempt by virtue of section 40(2) as disclosure would contravene the data protection principles. It explained that its policy was to release Chief Officers' information, but not to release that of less senior individuals unless their name is already in the public domain and if it would be fair in all the circumstances to do so.

The Commissioner found that section 40(2) had been applied incorrectly to four of the seven names requested. One of the main reasons for coming to this conclusion was that these four did not, when consulted by the council, strongly object to their names being disclosed. He also took account of the seniority of those individuals, the legitimate interests of the public and the fact that the data protection policy of the organisation (running the course) would enable the same information to be released to the public.

Lord Ashcroft

The tax status of the conservative party' major donor and deputy chairman, Lord Ashcroft, has been the subject of much controversy and media headlines over the past few years. Lord Ashcroft gave an undertaking to the Government in March 2000 to end his status as a tax exile (or 'non-dom') when he was awarded a life peerage. This has now been the subject of an FOI request to the Cabinet Office by a labour MP

Case Ref: FS50197952
Date: 28/01/2010
Cabinet Office
View PDF of Decision Notice FS50197952

Gordon Prentice MP requested disclosure of the form in which the undertaking by Lord Ashcroft was given and identity of the person to whom it was given. The Cabinet Office confirmed that it held the information but determined that it should be withheld in reliance of the exemptions contained in sections 37(1)(b) (the conferring of honours), 40(2) (personal data) and 41 (Breach of Confidence). All these exemptions require consideration of the public interest in disclosure.

The Commissioner decided that the Cabinet Office was wrong to rely on the exemptions.
He ruled that there was a 'legitimate' public interest in knowing whether Lord Ashcroft has actually fulfilled the undertaking. Mr Graham said the public interest in transparency in the honours system outweighed the Cabinet Office's claim that disclosure would be 'unwarranted and prejudicial to the rights and legitimate interests' of Lord Ashcroft.

This is an interesting case, not just because of its political angle in the year of an election but, because the Commissioner has ruled that personal data is disclosable under FOI to a third party, even though it could not be requested by Lord Ashcroft himself by making a subject access request (under section 7 of the Data Protection Act 1998 (DPA). This is due to the exemption under the DPA for personal data processed for the purpose of "the conferring by the Crown of any honour"(schedule 7).

Section 41

Section 41, which exempts information from disclosure where it would lead to an actionable breach of confidence, has been the subject of many decisions by the Information Tribunal. The latest one involves the Higher Education Funding Council (Higher Education Funding Council for England v Information Commissioner (EA/2009/0036 13th January 2010)). It will need to be taken into account by public authorities considering the application of the exemption.

The Council, a statutory body for the administration of higher education funding, relied on this exemption in refusing to disclose information relating to the state of the buildings at higher education institutions that contributed to the Council's database. The Commissioner decided that section 41 was not engaged. The Tribunal agreed, addressing a number of issues, the most important of which is on the meaning of the word "actionable".

Section 41 can only be claimed where disclosure would lead to an "actionable" breach of confidence. Does "actionable" in this context denote a claim that is likely to succeed on the balance of probabilities or merely a claim that is properly arguable? The Tribunal considered the wording in section 41 to be ambiguous and so turned to Hansard. In the words of the Freedom of Information Bill's sponsor, Lord Falconer, "actionable" for section 41 purposes means "being able to go to court and win". Therefore public authorities wishing to rely on the section 41 exemption should note that a merely arguable potential action for Breach of Confidence will not be enough.

Section 41 and Dead People

When it comes to considering requests for information about the deceased, two recent decisions of the Information Commissioner have emphasised the importance of checking whether the requestor is the deceased's appointed personal representative. If they are not then the disclosure could be an actionable Breach of Confidence and so the section 41 exemption will apply. This is the case even if the applicant is the next of kin.

Case Ref: FS50213780
Date: 21/12/2009
Coventry City Council
View PDF of Decision Notice FS50213780

Coventry Law Centre ("CLC"), acting on behalf of the complainant, made an information request for copies of social services files relating to the complainant and her husband, who was deceased. The Council considered that the request for the complainant's file was a subject access request under the Data Protection Act 1998 and it provided this information. However, it refused to provide any of the information held on the complainant's husband's file because it considered that this information was exempt under section 41.

The Commissioner found that both exemptions had been correctly applied. With regard to section 41, the Commissioner held that the council owed a duty of confidence to the deceased which would be capable of surviving the complainant's husband's death even though it appeared that there may not have been any personal representative appointed to manage his affairs. This is

because there is always the possibility that a personal representative could be appointed following the disclosure and could take action against the Council for a Breach of Confidence. The fact that the complainant was the wife of the deceased was immaterial, as she had never applied to become the personal representative upon his death.

In order to decide that a Breach of Confidence is actionable, the Commissioner had to consider the applicability of the inherent public interest defence. The Commissioner recognised that it is in the public interest to bring to light any wrong-doing on the part of public authorities and for individuals to have access to information to help them to conduct a case. However, it was not apparent to the Commissioner that there has been any proven wrongdoing on the part of the authority and he also noted that if the complainant did pursue a negligence claim, information may be accessible through court disclosure rules. He also noted that it is likely that the complaint could be reviewed by other independent bodies with the jurisdiction to consider such issues. He therefore took the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there would therefore be no public interest defence available if the Council had disclosed the information.

A similar decision was reached by the Information Commissioner when a request was made for the social services records of a deceased service user to Leicestershire County Council: (Case Ref: FS50213781 22/12/2009) View PDF of Decision Notice FS50213781

Here the Commissioner relied on the fact that the complainant had stated that both her and her brother were appointed as personal representatives of the deceased in May 2009 and were given letters of administration. The complainant's brother had objected to the disclosure of information to her. The Commissioner therefore ruled that section 41 applied because the complainant's brother or any other personal representative that may be appointed in the future could bring a claim against the Council for Breach of Confidence.

These cases emphasise the importance of public authorities checking the status of the applicant and asking whether he or she is really the personal representative of the deceased whose information is being requested. If he/she is not the personal representative then, even though they may be close family, any disclosure could lead to the public authority being sued by the personal representatives for Breach of Confidence.

Section 43 and University Course Materials

In a recent decision, the Information Tribunal considered the question of whether FOI can be used to gain access to university course materials. In University of Lancashire v IC (EA/2009/0034 18th December 2009) it had to balance the commercial interests of the university with important matters of public interest in knowing what is being taught at a publically funded institution.

The university had earlier refused a request for disclosure of course materials relating to a BSc degree course in homeopathy. As well as section 36 (which we have discussed above), the university had claimed the section 43 exemption; that disclosure of the course materials would damage its commercial interests,

At first instance, the Information Commissioner held that the university should have disclosed the course materials, except certain elements, and particularly empirical case studies, which could be withheld under the section 41 exemption (where disclosure would lead to an actionable breach of confidence).

The Tribunal agreed with the Commissioner and dismissed the university's appeal. It had argued before the Tribunal that the course materials were exempt from disclosure because they contained a significant amount of third party copyrighted information and disclosure of that material would discourage third parties from contributing to course materials in the future. The Tribunal rejected these arguments stating that disclosure of information under FOI would not in any way have diluted any copyright enjoyed by the third parties and there was, in any event, no sufficient evidence before the Tribunal to substantiate the university's case that disclosure of the copyrighted material would have had an alienating effect on third party contributors.

The Tribunal also found that there were strong public interests in members of the public being able to test the educational value of publicly funded degree courses and in accessing information relating to a homeopathy degree course which was a controversial subject.

This is an important case which will have a big impact on universities seeking to restrict access to educational resources for various reasons. It also emphasises that copyright in itself cannot be used to withhold information under FOI. An earlier decision by the Information Commissioner involving the Student Loans Company Ltd (Case Ref: FS50217416 04/02/2009 – see episode 17) came to the same conclusion.

The End

That concludes episode 21 of the FOI podcast. The next podcast will be in May. Before then you can always catch up on the latest developments by attending one of my FOI update workshops. More details at www.actnow.org.uk

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Thank you for listening. Until the next time – Goodbye.

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