**Freedom of Information Podcast**

(*Episode 22 – February to April 2010)*

*Presented by Ibrahim Hasan*

Ladies and gentlemen welcome to episode 22 of the UK's only Freedom of Information podcast. I'm Ibrahim Hasan. In the three months upto the end of April 2010 the Information Commissioner published 150 decisions whilst the Information Tribunal published 19.

In this episode we will be concentrating on the decisions of the Information Tribunal or as it is now called, for most appeals, the First Tier Tribunal (Information Rights). Sometimes the more complex FOI appeals are heard in the Upper Tribunal. Of course these terms don't quite roll off the tongue so I am going to refer to both as the Tribunal. All the decisions we discuss today are from the First Tier Tribunal.

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

- Late reliance on exemptions
- Vexatious requests
- Information about animal testing
- Disclosure of historic personal data
- Anonymised data
- The Church of Scientology
- AND disclosure of legal advice

I start off though by discussing recent cases involving access to local authority land charges information which will have a big impact on council's ability to charge for such information.

**EIR and Property Search Information**

Anyone who has sold a house will know about the need for providing a CON29R search to the buyer as part of the compulsory Home Information Pack (HIP). This involves

requesting the local authority to conduct a search of the Land Charges Register and other register which it maintains and to answer certain standard questions designed to establish whether the property in question was, or might become, affected by certain activities e.g. footpaths, planning permissions etc. Traditionally this has been a lucrative source of local authority income thanks to the Local Authorities (England) (Charges for Property Searches) Regulations 2008.

It is possible to obtain the answers to most, but not all, of the questions set out in Form CON29R by inspecting various public registers maintained by local authorities, as well as from other sources. A number of private organisations have developed services for obtaining the necessary information in this way and providing it to property sellers and those advising them. The fees charged by local authorities for these personal searches are much lower but vary widely. Over the past few years a number of local authorities have faced challenges from property search companies who see the CON29R regime as a costly system which unjustly allows local authorities to exploit their monopolistic position as controllers of property search records.

In March 2010 the High Court judgment was handed down in *OneSearch Direct v City of York Council* [2010] EWHC 590 (Admin). The case involved an attempt by a property search company (OneSearch) to gain direct access to unrefined property records held by a local authority. The advantage to OneSearch of gaining such direct access is that it would not have to pay to receive the relevant property search information through the CON29R system. When OneSearch's request for direct access to the records was refused by the council, the company brought a claim for judicial review. In that claim, which was treated as a test case, OneSearch argued that denying access to the unrefined records was unlawful having regard to the statutory purpose and intention underlying the relevant local authority legislative scheme. The judge rejected OneSearch's claim. He ruled that it was entirely lawful and in accordance with the statutory scheme for the council to opt to provide the relevant property search information through the CON29R system.

It is interesting to note that the rights of access available under the Environmental Information Regulations 2004 were not relied upon by OneSearch in this case. This is

surprising since the Information Commissioner issued guidance in July 2009 on the relationship between the Property Search Regulations and EIR. The Commissioner insists that most of the information requested by personal search companies is environmental, and that councils are obliged to allow inspection for free. The guidance was issued at the same time as a number of Decision Notices against local authorities to this effect.

Recently, in *East Riding of Yorkshire v IC & York Place*, EA/2009/0069 (15th March 2010) the Tribunal was called upon to determine the question of whether, on an application of the EIR, particular property search information should have been made available to a property search company free of charge. More particularly, the Tribunal had to determine whether the local authority: (a) was required to allow the company to inspect the information free of charge at the local authorities premises under regulation 6; or (b) was entitled to refuse inspection and make the information available by way of hard copy documents, for which a charge could be levied under regulation 8 EIR.

The Council claimed that the information was not in a form which enabled it to be inspected without further collation by the Council. Accordingly, it said, the information should be made available as a document in that collated form and the Council was entitled to impose a reasonable charge for providing it. The Council relied on the wording EIR regulation 6 (1) and regulation 8 (1) and (2) in support of its position.

Regulation 6 and 8 states:

> "6. **Form and format of information**
> (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless-
> (a) it is reasonable for it to make the information available in another form or format..."
>
> "8. **Charging**
> (1)...where a public authority makes environmental information available ...the authority may charge the applicant for making the information available.

(2) A public authority shall not make any charge for allowing an applicant-

(a) To access any public registers or lists of environmental information held by the public authority; or

(b) to examine the information requested at the place which the public authority makes available for that examination"

The council's argument that it would not be reasonable to allow access to the information directly was based on other factors too including the possibility of unauthorized access to personal data, the risk of the data being manipulated. After having made a number of findings as to the weakness of certain aspects of the council's evidence, the Tribunal went on to hold that the council ought in fact to have permitted the company to inspect the relevant records free of charge.

The key points of this decision are:

- Inspection of information under the EIRs is free
- Authorities seeking to resist a request to inspect must provide good evidence that an alternative method of providing information is "reasonable"
- Collation of information is no barrier to inspection

This judgment is important both because of its careful examination of the principles relating to charging under the EIR and because of its implications for local authority charging regimes in respect of property search information. Demand for this information may reduce as the Conservatives and Liberal Democrats said in their manifestoes that they would scrap HIPs. However is this one of the legislative priorities of the new Con Lib alliance?

**Late Reliance on Exemptions**

Can a public authority rely on exemptions for the first time before the Commissioner or the Tribunal?

In **Crown Prosecution Service v IC EA/2009/0077 (25th March 2010),** the CPS initially relied on section 35(1)(a) (formulation and development of government policy) to refuse disclosure of information. When appealing to the Tribunal, it invoked section 35(1)(b) (ministerial communications) and section 42 (legal professional privilege). Finally, during the Tribunal proceedings, it also raised section 40 (2) (personal data) for the first time.

The Tribunal did not accept the CPS's contention that it was obliged to accept the claiming of late exemptions. It said that it could only do so in exceptional circumstances on a case-by-case basis. The Tribunal decided to allow late reliance on sections 40(2) and 42, but not section 35(1)(b). In so doing, it endorsed the principles set out in **Home Office & Ministry of Justice v IC EA/2008/0062 (20th November 2008)** and approved the quotation cited in that case from yet another Tribunal decision in **Department of Business and Regulatory Reform v IC & CBI EA/2007/0072** (paragraph 72):

> ".... The Tribunal may decide on a case-by-case basis whether an exemption can be claimed outside the time limits set by ss. 10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA."

The Tribunal in the CPS case also considered whether the Information Commissioner is under a duty to consider exemptions himself that are not raised by a public authority during an appeal. Here, following the approach in **Bowbrick v. Nottingham City Council EA/2005/0006 (28th September 2006)**, it said in exceptional cases the Commissioner is "entitled" to look for an appropriate exemption but there was no positive duty for it to do so. At paragraph 46 of the judgment the Tribunal stated:

> " ...the IC does not have a positive duty to look for exemptions that might have been claimed by the public authority, but have not been claimed by the authority. If a public authority fails to invoke a particular exemption before the IC, and the Commissioner orders disclosure of the information, the public authority cannot then come to this Tribunal and say it was an error of law for the Commissioner to fail to put forward on our behalf a particular exemption which we did not put forward on our own behalf. If the public authority raises an exemption, the Commissioner needs to consider whether that exemption is applicable, but if the public authority does not raise an exemption, the Commissioner does not have a positive duty to look for exemptions on which the public authority might rely."

Public authorities should think very carefully and take legal advice before citing exemptions in their Refusal Notice. If any exemptions are missed, it is by no means certain that they can still be invoked for the first time before the Commissioner or Tribunal or that the Commissioner will look for appropriate exemptions of his own accord.

**Section 14 – Vexatious Requests**

There is now a fair amount of jurisprudence from the Tribunal on what constitutes a vexatious request under section 14(1) . The Information Commissioner's Guidance, which has been approved by the Tribunal, sets out the questions to be considered. These are:

- Can the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden in terms of expense and distraction?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

In **Tony Wise v IC EA/2009/0080 (15th April 2010),** Lancashire County Council was asked for its written policies and procedures on information sharing with other public authorities.

This followed two allegations about the appellant made to the council's social services department in May and June 2006. These were investigated by the council and found to be untrue. The appellant was aggrieved about information being passed on by the Council to the police. He made complaints about this to the IPCC, the Council and the Local Government Ombudsmen, all of whom thoroughly investigated them.

Applying the Information Commissioner's guidance, the Tribunal upheld the decision that the request was vexatious. Amongst other things it took into account:

- the appellant's aggressive, accusatory and harassing tone in correspondence with the council
- the volume of the appellant's correspondence which contained lists of questions
- the fact that the appellant did not wait for the response to one information request before making the next one
- the fact that the requests were part of a campaign against the Council.

**Section 38 – Animal Experiments**

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. The term 'endanger' is the same as "prejudice" used in other exemptions. Section 38 is a qualified exemption and so requires consideration of the pubic interests test. It was recently relied upon successfully in **People for the Ethical Treatment of Animals Europe (PETA) v IC & Oxford University, EA/2009/0076 (13th April 2010)**. This case concerned experiments performed on a macaque by an Oxford University Professor. This was the subject of a BBC documentary in November 2006 entitled "Monkey Rats and Me."

The appellant, an animal rights pressure group, sought extracts from the relevant Home Office project licence concerning, amongst other things, the work plan and purposes behind those experiments. The Tribunal applied **Hogan and Oxford City Council v IC (EA2005/0026 and EA2005/0030)** where it ruled that the application of the prejudice test involved a number of steps; namely:

i The Tribunal needs to identify the applicable interest(s) within the relevant exemption

ii The nature of the endangerment being claimed must be considered

iii Some causal relationship must exist between the potential disclosure and the endangerment

iv The endangerment must be "real, actual or of substance" There is therefore effectively a de minimis threshold which must be met.

v Where a public authority is relying upon the "would be likely to endanger" limb of section 38, the Tribunal must be satisfied that there is a real and significant risk of endangerment even if it cannot be said that the occurrence of endangerment is more probable than not.

The Tribunal in the present case found that section 38 was engaged, given the indiscriminate nature of the violence tending to accompany the publication of information about animal experiments at Oxford. It gave weight to the evidence submitted by the university of a long list of attacks and incidents which took place following the showing of the BBC documentary. This allowed it to be satisfied that disclosure of the information would increase the risk of endangerment to its staff as well as anyone visiting or associated with the University.

In terms of the public interest test, the Tribunal ruled that the public interest in withholding the information outweighed the public interest in disclosure. It gave weight to the need for transparency in the way experiments were conducted on animals to allow public debate and scrutiny. However the risk to those working in this field was judged to be so great (the increased risk of indiscriminate bombings and arson) that it outweighed the former.

The Tribunal also identified the fact that private sector organisations applying for the same Home Office license were not subject to the FOI regime. In the light of the risk of endangerment the Tribunal was satisfied that it was in the public interest that there should be a "level playing field" so that those working for public bodies engaged in this type of work were not exposed to a greater risk than their counterparts in the private sector.

**Section 40 – Anonymised Staff Data**

There have now been many decisions of the Commissioner, the Tribunal and the courts on disclosure of anonymised personal data. The Commissioner previously argued that such data (where the individual cannot be identified by the recipient) is not personal data. This was until the Tribunal looked at this issue in various cases including

**Department of Health v ICO and the Pro Life Alliance (EA/2008/0074) 15th October 2009.**

Here the Tribunal ruled that anonymised data could still be personal data in the hands of the data controller if there is further information in the hands of the data controller which would allow the subjects to be indentified.

This reasoning was applied recently in **Magherafelt District Council v IC EA/2009/0047 (3rd February 2010) .** Following an FOI request, the council disclosed the numbers of staff disciplined and dismissed over a four year period. However it would not disclose the penalty issued or the reason for the action against those disciplined. It also refused to disclose the reasons for dismissal. The Tribunal ruled that this was personal data and went on to consider whether disclosure would be fair and lawful in accordance with the first Data Protection Principle.

It accepted that the employees had a reasonable expectation of privacy. Integral to the question whether disclosure (despite this expectation) was fair, was the related question whether there was a real risk of identification by the public if the information were to be disclosed.

It was argued by the Council that it would be easy for a journalist, speaking to other members of the Council's staff, to identify the individuals referred to in the information. The Tribunal, whilst clear that, read on its own, the information would not identify particular individuals, did accept (given the small size of the authority and the local population) that it would not be hard for a journalist to take steps to identify the individuals in question. This

could then lead to wide spread publication of the names of the individuals, the disciplinary offences they had committed and the sanctions received. This was not the same as concluding that the information on its own enabled identification (which would bring the information within limb (a) of the definition of "personal data"). Further investigative steps would need to be taken, but given that these did not appear to be onerous or unlikely, it would be artificial for the Tribunal to ignore what appeared to be a very real risk.

The Tribunal concluded therefore that public disclosure of the information would be unfair to the data subjects (the employees in question) such that disclosure would be a breach of the First Data Protection Principle.

For the sake of completeness the Tribunal also went onto consider whether disclosure could be justified on one of the grounds in Schedule 2 of the DPA. The Tribunal concluded that it was not "necessary" within the terms of paragraph 6 of Schedule 2 for there to be disclosure of the information. The legitimate interests in disclosure of information about disciplinary offences, such as they were, had already been met by a means that interfered less with the data subjects' interests, that is, by the previous release of information about numbers and types of offences and sanctions.

In light of the above, the Tribunal concluded that disclosure of the remaining information would be a breach of the First Data Protection Principle and that the absolute exemption under section 40(2) FOI applied.

Contrast this decision with **William Thackeray v IC and The General Medical Council EA/2009/0063 (23rd February 2010),** where the Tribunal ruled that the GMC should have disclosed internal correspondence about a Fitness to Practice Panel member's links with the Church of Scientology. The GMC had argued that this was personal data disclosure of which would breach the First Data Protection principle.

It was the appellant's case, much of which the Tribunal agreed with, that the Scientology leadership is opposed, as a matter of religious belief, to the practice of psychiatry and therefore it cannot be right that a person having links to such an organisation should sit on

a GMC panel which may be required to make judgments on psychiatrists. He submitted that by not declaring his connection to Scientology, in the light of the published opposition to psychiatry and psychiatrists, the panel member may have breached the ethical conditions of his new role and committed misconduct. The appellant submitted that the panel member can have no reasonable expectation that such misconduct would be kept private.

The Tribunal concluded that disclosure would not be unfair and was necessary in the legitimate interests of the requestor and these interests outweighed any impact on the panel member. In coming to this conclusion it took account of, amongst other things, the role of the member (sitting in judgment on others), the seniority of the member and the fact that he had not declared his connection with the Church of Scientology. It also took account of the public interest in the disputed information as it relates to the possibility that if the panel member's one time connection with the CCHR had been declared, it may be that his fitness to sit on other cases involving psychiatrists would have been questioned, or that the GMC would not have considered him a suitable panel member for such cases, or that he would not have been appointed to a responsible position in the GMC at all.

**Old Personal Data**

Just because personal data was collected many years ago does not necessarily mean that disclosure of it will be fair to the data subjects. The section 40 exemption may still apply to it.

In **Guy Etchells v IC EA/2009/0109 (30th March 2010)** the Tribunal ruled that disclosure of information which had been gathered back in 1939 as part of National Registration was exempt under section 40 (2) being third party personal data. The 1939 Register listed individuals who lived at particular addresses at a particular time. The Tribunal agreed with the Commissioner that when the information was obtained and at the date that the information request was considered the public expectation was that in the ordinary course of events personal information obtained in this way would not be disclosed whilst the individual was alive. Whilst any information about deceased subjects would not be subject

to section 40 the Tribunal noted that the average life expectancy had gone up considerably over the past 150 years so that it cannot be assumed that the subjects would no longer be around.

**Section 42 - Legal Advice**

The section 42 exemption for legal privileged information has been the subject of much scrutiny by the Tribunal. The High Court (in **Department for Business, Enterprise and Regulatory Reform (BERR) v O'Brien and Information Commissioner [2009] EWHC 164 (QB)**) has considered and to a great extent approved the Tribunal's case law on this exemption.

The caselaw was recently was followed in **Christopher Bellamy v IC and The Department for Business, Innovation and Skills EA/2009/0070 (23rd February 2010)**. The Tribunal upheld the decision of the Commissioner that legal advice about the legality of a trading scheme should not be disclosed. Two factors were given specific weight in deciding where the public interest lay; namely the age of the advice and whether it was still live.

The Tribunal ruled that where legal advice is recent and informs ongoing policy-making (such that, for example, it may turn out to be relevant to a possible legal challenge) the importance of protecting the confidentiality of the advice is heightened.

Finally the outcome of the election will have a big impact on freedom of information law and practice. The Conservative plan to cut the financial deficit quickly will mean massive cuts in public sector spending. This will no doubt lead to many more FOI requests to local authorities from interested parties including the media, unions and disgruntled employees.

It is also worth noting that the "ConLib" alliance agreement includes a commitment to extend the scope of the Freedom of Information Act. This is no surprise as both parties had pledged this in their manifesto.

The Lib Dems made mention of bringing private companies under the Act if they are delivering monopoly services to the public. They specifically made mention of Network Rail, but I presume it would also then extend to utility organisations like water and power companies. The era of openness and transparency is here to stay. Watch this space!

**The End**

That concludes episode 22 of the FOI podcast. The next podcast will be in September. Before then you can always catch up on the latest developments by attending one of my FOI update workshops and downloading my free web seminars. More details at www.actnow.org.uk

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

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