Freedom of Information Podcast

Episode 24 – January 2011

Ladies and gentlemen welcome to episode 24 of the UK's only Freedom of Information podcast. I'm Ibrahim Hasan.

In this episode we look at the changes to FOI announced by the Ministry of Justice as well as the latest FOI decisions (from September to November 2010). This includes decisions about:

- When information is held for the purposes of FOI
- The strike out of academic tribunal appeals
- Section 12 and the costs of compliance
- Pay negotiations information
- Applying the personal data exemption
- AND disclosure of commercially sensitive information

Before we go on to discuss these decisions, let's just pause to reflect on the latest developments in the world of freedom of information.

FOI Changes

On 7th January 2011, the Ministry of Justice announced plans to change the FOI regime in a number of ways.

The scope of FOI will be extended. The Association of Chief Police Officers, UCAS and the Financial Ombudsman Service will be brought under FOI as soon as possible, although no date has been given. This implements the previous Labour Governments proposals announced last year.

Going further secondary legislation will be introduced to extend the Act to a range of other bodies performing functions of a public nature. However this will not be done until these bodies are consulted. They include:

- Advertising Standards Authority
- Approved regulators under the Legal Services Act 2007, including the Law Society and Bar Council
- British Standards Institute
- Carbon Trust
- Energy Saving Trust
- Examination Boards (where not already covered)
- Harbour authorities (where not already covered)
- Independent Complaints Reviewer
- Independent Schools Inspectorate

- Local Government Association
- National Register of Public Service Interpreters
- NHS Confederation
- Quality Assurance Agency
- Schools Inspection Service
- The Bridge School Inspectorate
- The Panel on Takeovers and Mergers
- The Parking and Traffic Appeals Service
- The Trinity House Lighthouse Service
- Traffic Penalty Tribunal

Despite pledges in the coalition partners' election manifestos and speeches, it appears there are no plans for utility companies and Network Rail to be added to the list of FOI bodies.

The Coalition Government will also commence various provisions from the **Constitutional Reform and Governance (CRAG) Act 2010**, enacted by the Labour Government. These include:

- Amending the Public Records Act to reduce **the 30-year rule** so that historical records are generally made available at The National Archives and other places of deposit after 20 years; this will be transitioned over a 10 year period at a rate of two years' worth of records being transferred per year, with a view to commencing the process in 2013.There will be a parallel reduction in the lifespan of certain exemptions in the Act to 20 years.
- At present, communications with the Royal Family are exempt from disclosure under **section 37**, but subject to a public interest test. In future the public interest test will be removed for communications with the monarch and the next two in line to the throne (Prince Charles and Prince William at present). The lifespan of the exemption will change from 30 years to 20 years, or five years after the death of the relevant member of the Royal Family, whichever is later. The Constitutional Reform and Governance Act (2010) (Commencement No. 4 and Saving Provision) Order 2011 brought this into force on 19the January 2010.

Proactive Release: The Government has announced that the Act will be amended in the Freedom Bill (to published in February) to ensure public authorities proactively release data in a way that allows businesses, non-profit organisations and others to re-use the information for social and commercial purposes. This is a blow to those who think FOI is being used too much by companies for commercial purposes and shows that this Government, like the previous government, is firmly behind commercial exploitation of information released under FOI.

On the role of the Commissioner, the Government has stated that the Freedom Bill will seek to remove the requirement that the Commissioner seeks the Secretary of State's consent in relation to the appointment of staff, their pay and pensions etc; to limit the Commissioner to a single 5 year term and make the appointment process more transparent, including a greater role for

Parliament; and to introduce specific circumstances under which he may be removed from office. There will also be provisions for the Commissioner to set charges for certain services independently, and to issue statutory guidance without the sign off of the Secretary of State.

Finally, the Justice Select Committee is to be tasked with "post-legislative scrutiny" of how FOI is being implemented.

On the same day as the MoJ announcement a speech by Nick Clegg on civil liberties had much to say about FOI and access to information more broadly (available here). He hailed the Treasury's COINS database, which details public services expenditure, the work of The Open Knowledge Foundation in processing that data for ready public consumption, and the Cabinet Office's new transparency rules concerning the publication of spending figures by Whitehall departments (the Cabinet Office's website explains its work on transparency).

Mr Clegg also announced the government's plans for a **Public Data Corporation**, which will "bring existing government bodies together into one organization, responsible for disseminating a wealth of data". According to *The Guardian*'s article (read here), the Corporation will release data from the Ordnance Survey (OS), the Met Office, Land Registry and perhaps Companies House. The Cabinet Office indicated that it was setting up the Corporation in its business plan published in November in which it set April 2011 as the date for its creation. The work is being done by the Treasury and the Department for Business, Innovation and Skills.

Francis Maude, the Cabinet Office minister, said in November 2010 that the initial aim of the Corporation was to create a central repository. "The idea is that it would be a corporation that would hold a large number of public datasets," he said. "Its principal objective is to enable us to release data on a uniform basis. Its second priority is to get synergy from bringing together different organisations, reducing overheads and getting operational expertise in collecting and managing and distributing data."

Maude would not be drawn on whether the Corporation would make all its data available for free, or whether some would be charged for. He said that it was still "early days" for the project and that little had yet been decided – despite the short timetable.

Audit Commission Act 1998

It's worth remembering that FOI has not done away with other legal rights of access to official information.

One such right is contained in section 15 of the Audit Commission Act 1998. This gives a right to "any persons interested" (e.g. local council tax payers) to inspect the accounts of a local authority, as well as other named organisations e.g. the NHS, at the time of the annual audit for a limited period of 20 working days. This right extends to all books, deeds, contracts, bills, vouchers and receipts "relating to" the accounts as well as allowing the taking of copies of all or any part of the accounts and those other documents.

Section 15 came under judicial scrutiny in a High Court case last year (see episode 20).

Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and Shlomo Dowen and Audit Commission [2009] EWHC 2382 (Admin)

Veolia brought an action for judicial review asking the High Court to block Nottinghamshire County Council's decision to release details of its multi-million pound waste management contract, as well as invoices paid by the council. This followed a request by local waste campaigner under the Audit Commission Act.

Veolia argued that inspection should not be permitted as the contract and the invoices did not relate to the local authority's accounts. This argument was rejected by Mr Justice Cranston who ruled that the words 'relating to' (in section 15) were sufficiently flexible to accommodate the documents in question. In reaching this conclusion, he took account of the fact that that the function of section 15 is to enable interested persons to inspect documents which reveal precisely how the local authority is spending public money. Such a function would obviously be frustrated if various contracts and invoices under which the local authority made payments to third parties were excluded from the right to inspect.

Veolia also argued that a wide interpretation of section 15 would lead to confidential information in the contract and invoices being disclosed. The judge ruled that commercial confidentiality was not relevant under section 15 which only contained an exception for personal information. This decision caused concern amongst the private sector who saw it as opening the back door to allow competitors to get access to commercially sensitive information using the Audit Commission Act when such information could be the subject of an exemption under FOI and EIR (albeit subject to a public interest test). On appeal by Veolia to the Court of Appeal, this door was not fully closed but certainly the chain was put on.

In **Veolia ES Nottinghamshire Ltd. v Nottinghamshire County Council and Others, [2010] EWCA Civ 1214** the Court of Appeal agreed with the judge at first instance that the types of documents which could be accessed under the 1998 Act were very wide. However, it held that Section 15(1) had to be read so as to preserve the confidentiality of commercially sensitive information. In reaching its decision that the documents were protected from disclosure in this case, the Court relied on the provisions of the European Convention of Human Rights (ECHR).

The ECHR recognises that everyone (both individuals and companies) is entitled to peaceful enjoyment of their possessions (Article 1 of the first protocol). The Court of Appeal held that valuable commercially confidential information falls within the concept of "possessions". Therefore, the 1998 Act must be interpreted in the light of the right to peaceful enjoyment. The Council had to perform a public interest balancing exercise to justify maintaining confidentiality or disclosing the requested documents.

In the light of the above, the court held that Veolia's financial model and profit margins were protected from disclosure and also commented that the pricing mechanisms and key performance indicators (originally disclosed) were also the type of confidential information protected under the ECHR and disclosure could not be justified. It acknowledged that there is a public interest in transparency particularly in the use of public money but, on the other hand, "there is a strong public interest in the maintenance of valuable commercially confidential information".

The effect of this case is that members of the public cannot access commercial confidential information under the 1998 Act unless there is a public interest in granting access, which outweighs the private interest in keeping it confidential. This brings the 1998 Act more in line with the FOIA and the EIR, under which genuinely confidential information does not have to be disclosed but is subject to a public interest test.

Tardy FOI Authoroties

In October the Information Commissioner's Office (ICO) published a list of organisations that are being monitored because it appears they are not meeting the requirement to respond to freedom of information requests on time.

There are 33 authorities on the first monitoring list have either :

(i) been the subject of six or more complaints of delay in the last six months,

(ii) exceeded the time limit by a significant margin on at least one occasion, or

(iii) appear to respond in time to fewer than 85% of requests.

The ICO will monitor the authorities for three months, but may take action during this timeframe if an authority's standard of compliance is revealed to be particularly poor, or if it is unwilling to make the improvements necessary.

It is interetsting to note that out of 33 organisations on the list more than 55% are local authoroties. The ICO will publish the list on a quarterly basis. For the latest updates, go to the ICO Monitoring compliance page.

http://www.ico.gov.uk/what_we_cover/promoting_openness/monitoring_compliance.aspx

Academy Schools

Earlier this year the Freedom of Information Act was extended to cover Academy Schools by the Academies Act 2010. The Act now applies to academy trusts of maintained schools converting to academies from September 2010 and to academy trusts of existing academies from January 2011. Under the new Freedom of Information (Time for Compliance with Request) Regulations 2010 (SI 2010 No. 2768), academy schools have the same time limits as other schools for responding to requests. This means 20 working days, disregarding any working day that is not a school day, or 60 working days, whichever is the sooner.

Is Information Held?

FOI applies to information which is held by a public authroty (or on its behalf) at the time it

receives a request. When is information held? This issue was examine by the First Tier Tribunal in **British Union for the Abolition of Vivisection v IC and Newcastle University (EA/2010/0064 10th November 2010)**

On 9 June 2008 BUAV submitted a request to Newcastle University for the information set out in the project licenses, issued under the Animals (Scientific Procedures) Act 1986 ("ASPA") which governed the primate research at the University which had been written up in three scientific papers published in 2006-2007.

Amongst other things, the University argued that it did not hold the licenses. It said that they were held by the Named Veterinary Surgeon pursuant to his statutory role under ASPA. At the preliminary hearing the Tribunal had to decide whether the information was held by the university at the time it was requested. It noted that FOI contains no general definition of what it means to 'hold' information, but s3(2) states:

> *"For the purposes of this Act, information is held by a public authority if-*
> *(a) it is held by the authority, otherwise than on behalf of another person, or*
> *(b) it is held by another person on behalf of the authority."*

The effect of this subsection is to confirm the inclusion of information within the scope of FOI s1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s1 only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority 'holds' it within the meaning of the Act. The effect of paragraph (b) is that the authority 'holds' information in the relevant sense even when physically someone else holds it on the authority's behalf.

The Tribunal stated that 'Hold' is an ordinary English word; it is not used in some technical sense in the Act. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind.

Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, it considered that s1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk: that does not mean that the information is held by the authority. A Government Minister might bring some constituency papers into his departmental office: that does not mean that his department holds the information contained in his constituency papers.

The University submitted that the ASPA regime, which placed personal responsibility upon project license holders and certificate holders, had the consequence that the requested information was held solely by those individuals and not by the governing body of the University. The Commissioner supported this submission on the basis not of the statutory

regime alone but having regard to the evidence, which he submitted showed that the information was in fact ring-fenced so that only individuals with statutory roles could access it.

The Tribunal ruled that, while the ASPA regime is undoubtedly a material consideration, it did not have the consequences contended for by the University. The personal responsibilities laid on individuals by ASPA are an important feature of the system of control, since they avoid the danger of dilution that would result if the responsibilities were assigned merely to an institution. But this striking feature of the regulatory structure should not be allowed to crowd out the larger picture.

The Tribunal noted that animal research was a very substantial part of the University's activities, carried out for University purposes on University premises. The grants that were made to fund it were grants made to the University. The confidential information involved was generated within the University.

The licenses were physically held by Professor Flecknell as the NVS for the University's animal research, by arrangement with Dr Hogan, to whom Professor Flecknell was responsible. Dr Hogan was the certificate holder not in his personal capacity but precisely because as Registrar he represented the governing body of the University. In that capacity he held the information in the project licenses. In the Tribunal's judgment the governing body held the information through him.

Proof that Information Not Held?

Sometimes the applicant will insist that the information is held when the public authority says it does not. How far does the public authority have to go to prove its case?

In **Edwards v Information Commissioner (EA/2010/0104 21st October 2010),** the aplicant made a request for, amogst other things, data relating to a drug test carried out by Kings College London. The College stated that it did not hold the data in question and other reevant data had been routinely destoyed according to its usual practices. The applicant was disatisfied with this response and complained to the Commissioner insisting that the information was held. The Tribunal agreed with the Commisioner's decision that there was no evidence of dishonesty on the part of the College and no evidence that the information was held.

The Tribunal reminded itself of a previous decision **(Linda Bromley v Information Commissioner and the Environment Agency (EA/2006/0072))** that in order to be satisfied that particular information is not held, it is not necessary for the public authority to prove to a point of certainty that this is so, rather the matter is to be determined on the balance of probabilities. Thus, the Tribunal must ask itself if it more likely than not that the information is held.

Academic Appeals

The Tribunal recently stated that it has the power to strike out academic appeals. This will come as good news to public authorities who are often faced with persistent requestors who insist on taking matters to appeal even though they have already received the information. It is very rare

for the Tribunal to award costs against a party.

In **Edwards v IC and the Ministry of Defence (EA/2010/0056)**, the Tribunal has exercised its power to strike out a party's case under **Tribunal Procedure (First-Tier Tribunal) (GRC) Rules 2009.**

This was a case where the appeal was in effect academic, as the requested material had already been given to the appellant. The Tribunal used rule 2(2) of the 2009 Rules, which allows it to include considerations of proportionality, costs and resources to strike-out an appeal.

Section 12 – Cost of Compliance

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.

Section 16(1) of FOI imposes a duty on the public authority to whom the information request is made to offer advice and assistance to the person making the request, so far as it would be reasonable to do so. Section 16(2) provides that a public authority will be taken to have complied with its duty in this regard if it has complied with the Code of Practice, issued under section 45.

The Section 45 Code states at paragraph 14 that, when considering whether a request is over the appropriate limit, a public authority should consider providing an indication of what, if any, information could be provided within the cost ceiling and should also consider advising the applicant that by re-forming or re-focusing their request the information could be supplied at a lower fee or at no fee.

In Robert Brown v ICO and The National Archives (2nd October 2007) (see episode 9), the Tribunal ruled that section 12 and 16 must be viewed together. If a public authority claims it is not obliged to comply with a request for information on costs grounds, it would need to consider whether, with reasonable assistance and advice, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits. Without doing this, it may mean that the public authority's estimate that the cost of complying with the request would exceed the appropriate limit has not been made on a reasonable basis.

In **Dorothy Cooksey v Information Commissioner and Greater Manchester Police (EA/2010/0113)** the information request concerned documents relating to a murder investigation, undertaken between1992 and 1995. The public authority concerned, Greater Manchester Police refused to provide the requested information on the basis that, after aggregating the requests, the costs of doing so would exceed the appropriate limit (£450). The Information Commissioner

upheld this decision. The Tribunal agreed with this decision although it did criticize the authority for its poor records management. It also made some important points about application of the fees provisions and the duty to advise and assist in section 16.

The Tribunal was satisfied that the Respondent had properly considered whether there were alternative methods of complying with the information request, however the Tribunal agreed with the approach that "it is only if an alternative exists that is so obvious that disregarding it renders the estimate unreasonable". The Appellant had suggested some alternative sources but there was no evidence to support these suggestions and the Tribunal concluded that as they were speculative, it could not accept that they were sufficiently "obvious" to render the estimate (based on the understanding that the containers had to be searched) unreasonable.

With regard to the duty to advise and assist, the Tribunal accepted the argument of the Respondent (supported by the Additional Party) that this was not a case in which the Appellant could reasonably have been advised to re-frame her request, to limit its scope or to make it in a way that would allow de- aggregation as per section 16. This is because the Tribunal was satisfied on the basis of the evidence presented to it that the information is in so disorganised a state as to make it necessary for someone to search through all the containers in order to find any one part of it.

The Appellant also argued that there could reasonably have been a search up to the costs limit and that any information found in relation to her original request, even if only partial, would be useful. The Tribunal sympathised with this sentiment, however it does not seem to the Tribunal that this is a correct approach to section 12 FOIA. If the costs limit is engaged, the Tribunal finds that the effect of section 12 is to disapply the duty to comply with the information request. The Tribunal does not consider that the margin of difference between the compliance estimate and the costs limit is a relevant consideration in these circumstances.

Section 36 – Public interest

Section 36 (2) (b)(i) allows information to be withheld if disclosure would or would be likely to prejudice free and frank provision of advice. It is a qualified exemption and so the decision to withhold is subject to the public interest test.

In **Public and Commercial Services Union v Information Commissioner and the Ministry of Justice (9th December 2010 EA/2009/0123)** the PCS request for information about pay negotiations between the PCS and the National Offender Management Service (NOMS) was refused on the grounds that disclosure would prejudice free and frank advice and the public interest in disclosing the information was outweighed by the public interest in withholding it.

NOMS argued that the public interest for officials and Ministers to be able to consider fully all options on changing the pay and grading of staff would be stifled if the withheld information were to be released and that this outweighed the public interest in accountability and transparency.

The Information Commissioner considered that the exemption was engaged. He went on to consider the Public interest factors. The withheld information concerned the tactics and the

stance to be taken in negotiations over pay and conditions. Disclosure would cause an imbalance in those negotiations and was contrary to the public interest, even after the negotiations had been concluded, as the information had remained relevant and sensitive up to the time, approximately 4 years after the events in question, when NOMS had refused to release it. The Commissioner considered that those public interests were not equalled or outweighed by the public interest in disclosure put forward by PCS, which he considered to be of greater interest and benefit to PCS than to the public as a whole.

The Tribunal agreed with the decision of the ICO. This is an important decision for public authorities which will no doubt be the subject of many such similar requests as the effects of the public sector cuts begin to bite and there are difficult negotiations with the unions.

Section 40 (2) – The Correct Approach

Section 40 provides an exemption from disclosure of personal data about the requestor as well as that of third parties. With regards to the latter the public authority must show that disclosure would breach of one of the data protection principles (usually the First Principle).

The recent Tribunal decision in **Bousfield v Information Commissioner and Liverpools Women's NHS Trust (11th October 2010 EA/2009/0113)** concerned a refusal of a request for compromise agreements the Trust had entered with doctors that had "been paid off or 'taken voluntary early retirement". The Tribunal upheld the Trusts refusal (and the Commissioner's Decision Notice) on grounds of it being personal data - Section 40(2). In doing so it reiterated the questions that need to be asked when applying this exemption. This is well worth reading as a reminder of the approach to be taken in such cases.

Fraud Interview Notes

Requests for interview notes of disciplinary and internal investigations have been the subject of a number of Commissioner and Tribunal decisions.

Ince v Information Commissioner (EA/2010/0089)

Ms Alison Ince worked in a further education institute in Northern Ireland. She was dismissed from her employment in June 1999 and, from around 2002, had alleged on a number of occasions that her managers had been engaged in a fairly widespread fraud against the public purse in 1997. These allegations were investigated first by various bodies. No criminal or disciplinary charges were brought and the investigation was not taken any further.

Ms Ince was not satisfied with this finding. In October 2007 she made a request for information from the DEL with respect to her allegations of fraud at the institute. The information she sought included the transcripts of certain interviews held with other employees during the fraud investigation by the DEL. DEL provided some of the information, but withheld the transcripts pursuant to the personal data exemption in section 40(2) FOIA. The Information Commissioner agreed with DEL's reliance on the exemption.

The Tribunal agreed – for the most part – with the Commissioner's decision. Save in respect of one of the transcripts – that belonging to a friend of Ms Ince who gave evidence at a late stage in the hearing in which he consented to disclosure – the Tribunal found that it would not be fair for DEL to disclose the information and that disclosure would therefore breach the first data protection principle.

Following the reasoning in Corporate Officer of the House of Commons v IC and Baker it unanimously rejected the notion that anything said or done by a public sector employee was public information and could therefore be disclosed. It found by a majority that "the disputed information in the case related to the individual's employment but was not information so directly connected with their public role that its disclosure would automatically be fair".

The Tribunal found that harm or distress would be caused by disclosure generally, and would also be caused by Ms Ince's own 'disproportionate' method of pursuing her allegations – which included threatening to bring private prosecutions for fraud against certain individuals. The Tribunal further considered that the Commissioner had given appropriate weight to the interviewees' clearly expressed objections, and that they also had a reasonable expectation of privacy in respect of the transcripts. There was moreover no common law public interest in disclosure – fraud in the education sector generally was obviously of legitimate concern, but would not be helped by disclosure of the information sought by Ms Ince.

Personal Data – what it is and is not

In October the Tribunal (in Ferguson v IC and The Electoral Commission (EA/2010/0085)) handed down a decision which is notable both for its commentary on the interaction between personal data and the inherent publicity of political life, and for a number of distinctions it draws between types of information which, at first glance, may appear to be personal. Once again well worth a read especially for those dealing with requests for information about politicians.

Section 43 – Contract and Financial Models

In Department for Works and Pensions Respondent v Information Commissioner (EA/2010/0073 20 September 2010) the complainant requested, amongst other things, the full text of any and all contracts or agreements between the Cabinet Office and Atos Origin regarding the provision of the Government Gateway service.

Following Directions and a Pre-hearing Review the DWP disclosed much of the information apart from some clauses and schedules in the contract, in particular:

i. Liability caps

ii. Performance requirements – KPIs, service levels, service credits and hosting service levels

iii. Benchmarking model

iv. Charges

v. Atos' financial model ("Financial Model")

vi. Change control notifications

vii. Information relating to Atos' data centre

This was on the basis of Section 43 which provides for exemptions for trade secrets (section 43(1)) and where the commercial interests of the public authority or others would or would be likely to be prejudiced (Section 43(2)).

The Tribunal noted that there is no definition of what is a trade secret in FOI. It considered the case of Lansing Linde v Kerr [1991] 1 WLR 251 where the court referred to "information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret" provided it was used in a trade or business and the owner had either limited the dissemination of the information or at least not encouraged or permitted widespread publication.

The Tribunal found that the Financial Model is equivalent to a trade secret of Atos. Even if it were wrong it said that it "would prejudice" the commercial interests of Atos if it was disclosed because it contained the confidential financial information of Atos and its unique model for calculating prices, rates of return etc. This would put competitors at an unfair advantage if disclosed in relation to any future procurement exercise.

In relation to the rest of the disputed information it found that there "would be likely to be prejudice" to the commercial interests of the DWP. The Tribunal stated that there is a causal relationship between the disputed information and future government procuring of IT services and that there is a real risk to the competitive environment particularly in relation to the future of the Gateway.

Turning to the public interest the Tribunal found that the public interest balance favoured disclosure of the information apart from the Financial Model and data centre information. With regard to the former it noted that the OGC FOI (Civil Procurement) Policy and Guidance version 2.0 ("OGC Guidelines") recognises financial models and that up to the contract date its working assumption is that it should not be disclosed. It is not mentioned again in later stages of contract delivery but it seemed to the Tribunal that there is a strong public interest in such models being protected though the life of a contract particularly where the model continues to be used. The Financial Model in this case contained confidential information which if disclosed may very well reduce the competitiveness of Atos. Although the company would not walk away from public procurement if the model was disclosed it was clearly very concerned and indicated that Atos would be less inclined to offer such models as part of future contracts. In the light of this the Tribunal found that it would not be in the public interest that suppliers would in any way be reluctant to provide financial models in large IT outsourcing contracts.

With regard to the data centre the DWP argued that the location of the centre would make it easier for terrorists or other criminals to locate Gateway data. Also if the security specification and other information on the layout of the centre was disclosed it would make it easier for the premises/data to be penetrated or attacked. Therefore there was a public interest in keeping the information secret.

Having considered all the circumstances in this particular case, including the fact there was ultimately only one bidder for the 2006 Contract, the Tribunal found that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and that Liability caps, Performance requirements – KPIs, service levels, service credits and hosting service levels, Benchmarking model, Charges, Change control notifications should be disclosed.

The End

That concludes episode 24 of the FOI podcast. The next podcast will be in November 2010. Before then you can always catch up on the latest developments in information as well as surveillance law by attending one of my FOI update workshops and downloading my free web seminars. Both carry CPD credits. More details at www.actnow.org.uk

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

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