Freedom of Information Podcast

Episode 26 – September 2011

Ladies and gentlemen welcome to episode 26 of the UK's only Freedom of Information podcast. I'm Ibrahim Hasan.

In this episode I discuss FOI developments and decisions during the six months ending in August 2011. This includes Commissioner and Tribunal decisions on:

- Schools and information law
- When information is held under FOI
- Information held by PFI Contractors
- Vexatious Requests
- Personal Data and Statistics
- Disclosure of Salaries
- Deceased Persons' Information
- And Section 43 and disclosure of contracts

Latest ICO Monitoring List

On 12th April, the Information Commissioner's Office (ICO) published its latest list of public authorities being monitored over the time they take to respond to freedom of information requests. Eighteen public authorities, ten of which are councils, have hit one or more of the following performance markers:

- The ICO has received six or more complaints concerning delay within a six month period
- it appears that they have exceeded the time for compliance by a significant margin on one occasion or more;
- For authorities that publish data on timeliness, it appears that less than 85% of

requests are responded to within the appropriate timescales.

The performance of the public authorities was monitored for a three- month period, from 1 April to 30 June 2011. The ICO will now collate the findings and make a further announcement on the results in the Autumn. It will also publish the next monitoring list at the same time.

The ICO also monitored the performance of 33 public authorities for a period of three months ending in 31st December 2010. It expressed particular concerns about delays at the Cabinet Office, the Ministry of Defence and Birmingham City Council. Discussions on appropriate regulatory action are now taking place. Four other authorities, the London Borough of Hammersmith and Fulham, the London Borough of Islington, Wolverhampton City Council and Westminster City Council, have been asked to sign undertakings to improve their performance in this area.

Schools and Information Law

There is still a lack of awareness of the Data Protection Act and the Freedom of Information Act amongst school staff and governors. This is despite the fact that every school is covered in its own right by each peace of legislation. In April, Freehold Community School in Oldham was found to have breached the Data Protection Act after the overnight theft of an unencrypted laptop from a teacher's car. An undertaking to comply with the seventh data protection principle has also been signed recently by Bay House School after the personal details of nearly 20,000 individuals, including some 7,600 pupils, were put at risk during a hacking attack on its website.

In May, Aberdare Girls' School signed a commitment to improve its freedom of information practices following the ICO's concerns over its refusal to disclose information under FOI. This related to the legal costs and advice sought over the exclusion of a former pupil who refused to remove a religious bangle. During the ICO's enquiries the school repeatedly failed to provide timely responses to questions. This led

to Information Notice being issued requiring the school to disclose information necessary to the investigation. The ICO issued a decision notice ordering the school to provide the information to the requester on the 20 December 2010. It has also now served the school with an undertaking to ensure that it continues to demonstrate a commitment to openness and compliance with the Freedom of Information Act.

Not only should schools comply themselves with information legislation, the ICO says that the importance of data privacy and access to official information should be embedded into the formal education process. In August the ICO launched a research project to explore ways of getting information rights issues covered in primary and secondary education systems in the UK. The project aims to ensure that young people are aware of the threats to their privacy and how to protect themselves, understanding the practical and legal safeguards that can help them. It will also explore how young people can be encouraged to exploit the increasing availability of public information to their advantage.

Now is the time to raise awareness of information law issues amongst school staff and governors. Act Now offers a full range of services to schools including training on data protection and freedom of information as well as compliance audits and online seminars. See our website for full details (www.actnow.org.uk) and to make an enquiry.

When is Information Held?

Section3(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"

What is the test to be applied when deciding whether information is held under FOI? In episode 20 we discussed the First Tier Tribunal decision in **British Union for the Abolition of Vivisection(BUAV) v IC and Newcastle University (EA/2010/0064 10th**

November 2010). The University's appeal against the decision has now been heard by the Upper Tribunal.

In 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.

The Upper Tribunal has now upheld the decision of the FTT that the information was held by the University for FOI purposes (**University of Newcastle v Information Commissioner and British Union for the Abolition of Vivisection (2011) UKUT (AAC)).** It approved the FTTs reasoning in respect of section 3(2) that *the* effect of this subsection is to confirm the inclusion of information within the scope of FOI, 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 section 1 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. In general, said the Upper Tribunal, authorities should base their cases on the exemptions rather than technical arguments as to whether the information was held.

PFI Contractors

Over the years, many public authorities, especially councils, have entered into outsourcing, partnering and PFI arrangements with the private sector to deliver capital

projects and run services. These are often the subject of complex FOI requests. Sometimes the contractor will hold the requested information and the public authority will have access to it but on restricted terms. The question arises as to who holds the information for the purposes of FOI.

In **Alan Dransfield v IC and Devon County Council (EA/2010/0152 30th March 2011)** the appellant made a request for an Operations Maintenance Manual for a school which was built and maintained by a private company under a PFI arrangement with the council. The contract between the parties required the company to maintain and update the manual and give access, upon request, to the Council to demonstrate that it had complied with this obligation. The contract also contained a strict confidentially clause preventing the parties and their employees from disclosing anything within the contract and the project documents.

The Council submitted that the Operating Manual was held by the contractor and so was not subject to FOI. It was entitled to access the document for the sole purpose of determining whether the contractor had complied with its obligations with respect to the compilation and maintenance of the document. It was not entitled to a copy and the confidentiality clause meant that it could not disseminate the information within it. Furthermore the Council had had no input into generating the information, no control over it and no right to deal with it in any way.

The Tribunal agreed with these submissions. It ruled that the Council did not hold the requested information and has not held it at any relevant date and therefore it was not obliged to make it available to the Appellant. It noted though that after 2033 the position will change when the Council will have direct responsibility for the school and will then have a full right of access to the information. It will then hold the information for FOI purposes.

This decision clarifies the question of applicability of FOI to information held by contractors under PFI arrangements. In any particular case though, care will have to be

taken to examine the precise nature of the requested information, the basis upon which it is held and also what rights of access the public authority has to it (and to disclose it further). Here the information was more about the record of operations and maintenance which is part of the company's internal procedures at this stage. The only access the Council needed to it was to ensure that it was being maintained and even then it was subject to a strict confidentiality clause. After 2033, as the Tribunal explained, when the contract ended it would need (and have) full access to the manual and would therefore be holding it for the purpose of FOI.

Compare this case to two others decided by the Commissioner where it held that information held by a contractor was held on behalf of the authority for FOI purposes:

Case Ref: FS50118044 Date: 10/04/2007
Leeds City Council View PDF of Decision Notice FS50118044

The complainant requested copies of the responses given to a market research exercise undertaken by Swift Research Ltd ("Swift") on behalf of Leeds City Council. The Council concluded that it did not hold the requested information, as it only asked Swift to provide it with a final report and not the completed questionnaires. After examining the contractual relationship between the company and the council, ICO concluded that the questionnaire responses, but not the names and addresses of those taking part, were held by Swift on behalf of the Council. Consequently they had to be disclosed by the Council. In particular the Commissioner noted that the contract gave the council a right to inspect all data produced by the company during the contract and to receive hard copies at the end of the contract. Therefore there was nothing stopping the council from requesting the information and disclosing it subject to considering the FOI exemptions.

Case Ref: FS50141015 Date: 17/11/2008
Department for Work and Pensions

The complainant requested information from the Department for Work and Pensions ("DWP") as to whether there were any complaints recorded about a doctor employed by Atos, a company which provides medical examination services to the DWP in relation to individuals claiming certain types of benefits. The DWP initially stated that it held no such information and later added that even if it were held by Atos on their behalf it would be exempt from disclosure by section 40(5) of the Act, being the personal data of the doctors concerned.

The Commissioner found that due to the contractual relationship between the parties, complaints information held by Atos, if it existed, would be held by them on behalf of the DWP, by operation of section 3(2) of the Act. However he ruled that the DWP was correct to rely on section 40 to neither confirm nor deny the existence of the requested information as to do so would contravene data protection principles.

On the issue of whether the information was held on behalf of the DWP, the Commissioner noted that the agreement between the parties stipulated that Atos employees can only undertake medical examinations, for the purposes of determining state benefits, if they remain approved for such by the DWP. In order to determine this approval the DWP would, amongst other things, have recourse to the type and frequency of complaints collated by Atos. The DWP could, at its complete discretion by virtue of the agreement, direct Atos to furnish it with any complaints against Atos doctors. The ICO ruled that the information collected and organised by Atos was in effect for the benefit (i.e. on behalf) of the DWP to enable them to make a determination regarding approval. The fact that Atos also held the information for their own purposes did not prevent them also holding it on behalf of the DWP .

Section 14 - Vexatious Requests (Considering the Context)

There is now a fair amount of jurisprudence on what constitutes a vexatious request under section 14(1). The Tribunal has previously (in Rigby v the Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103)

approved the Information Commissioner's Guidance (last updated in December 2008) which states that if a public authority wants to deem a request as vexatious, it must make a reasonably strong case that it can answer yes to more that one of the following questions:

- whether compliance would create a significant burden in terms of expense and distraction
- whether the request was designed to cause disruption or annoyance
- whether the request had the effect of harassing the public authority or its staff
- whether the request could otherwise fairly be characterised as obsessive or manifestly unreasonable
- whether the request had any serious purpose or value?

Duke v IC and University of Salford **(EA/2011/0060 26th July 2011)** is the first appeal against a public authority that decided to refuse requests for information in the wider context of a substantial number of FOI requests being received during a specific period from different people. The public authority believed the requests were, to a significant degree, associated with each other. It is the FOI equivalent of concluding that these multiple, associated requests amount, in effect, to a Denial of Service attack (DOS) in Internet terms.

The Appellant, a dismissed former employee, was believed to be behind a concerted campaign of FOI requests to Salford University. Between October 2009 and February 2010, the University received over 100 requests for information, submitted by 13 individuals, mostly via the WhatDoTheyKnow.com website. Some of the requests had been made under pseudonyms. Compare these figures to those for the whole of 2008 when the University had received 117 requests submitted by 78 different requestors. The Appellant and other requestors also distributed satirical literature and maintained websites critical of the University.

In the light of the context of the Appellant's requests and his concerted campaign

together with others, the Tribunal upheld the ICO's findings, It is interesting to note that the Tribunal and the Commissioner gave weight to the fact that the first request which "kicked things off" (and many of the subsequent requests) were made via the WhatDoTheyKnow.com website. Whilst this in itself cannot be evidence of someone being vexatious, the Tribunal seems to have concluded that the purpose of using the site was to encourage associates of the Appellant to make requests.

At Paragraph 82 of the Decision Notice the ICO stated:

> "It cannot therefore be coincidental that [the Appellant] has used this facility and has immediately been followed by a number of others, some of whom are known associates. The use of FOIA requests in this fashion, noting also the use of pseudonyms, may fairly be characterised as an abuse of the right of access to information provided at section 1 of the Act."

So whilst WTDK is still a legitimate way of making FOI requests, public authorities who are inundated with requests from different people via the same site, may wish to (when deciding whether a request is vexatious) check the site to see if there is any explicit or implicit encouragement to others by the requestor to make requests and if there is an upsurge in requests as a result. These issues may, in the light of the above case, be legitimately be taken into account in deciding whether any request is vexatious.

The above case and the Commissioner's guidance states that in considering whether a request is vexatious a public authority can take account of the context in which the request was made. However care must be taken to not place too much weight on the context of the request and thus giving insufficient consideration to the particular request. Sometimes even a previously vexatious requestor can make a legitimate request!

In ***Gardner v IC and Nottingham City Homes Limited*** **(EA/2011/0054)** the Appellant, a tenant of Nottingham City Council, requested information about public expenditure on neighbouring council flats. He suspected that more money had been spent on the

upkeep of other properties than on his. The Commissioner found that, given the context and history of the requests, the Appellant was vexatious. The Appellant had a made a number of complaints and was the subject of litigation and a court injunction.

The Tribunal disagreed that this particular request was vexatious. It found that there had been too much focus on the history of relations with the Appellant and a resultant failure to consider the particular request on its merits, which did on this occasion have a serious purpose.

Section 40

Definition of Personal Data

Section 40 often comes into play where public authorities receive requests for disclosure of statistics. There have been a number of decisions on this issue. The Commissioner has always maintained that truly anonymised statistics are not personal data and so section 40 cannot be used to exempt disclosure. The test of whether statistics are truly anonymised is whether members of the public could reasonably identify the subjects by cross-referencing them with information or knowledge already available to them or which they could obtain .

On 20th April 2011, the long awaited judgment in the 'abortion statistics' appeal (***Department of Health v IC* [2011] EWHC 1430 (Admin)**) was handed down. The Department refused a request for detailed statistics on the number of late-term abortions carried out on prescribed grounds. It relied on s. 40 FOIA, basing its case on the risk that, given the 'low cell counts' in these categories, the relevant patients and/or doctors might be identified by those sufficiently motivated to do so. The Commissioner found that these statistics were not personal data. The Information Tribunal agreed with the Department that they did constitute personal data, but was not satisfied that s. 40 was effective, as there was insufficient risk of identification.

On the Department's appeal to the High Court, Cranston J agreed with the Commissioner that these statistics are not personal data. The judgment is interesting to those interested in the concept and extent of 'personal data' under s. 40 FOIA and the DPA – especially when looking at the grey area of statistics or other anonymous data which is rooted in or derived from other data which is more overtly personal. The judgment is also essential reading for anyone grappling with the application of the leading House of Lords decision on this subject, Common Services Agency v Scottish Information Commissioner [2008] UKHL47, [2008] 1 WLR 1550 (*'CSA'*) discussed in episode 20.

Cranston J adopted the majority reasoning in that case of Lord Hope which an be paraphrased as follows. The definition of personal data under s. 1 DPA provides for two means of identification: either from the data itself (inapplicable in the case of anonymous statistics) or from *"from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"*. Lord Hope's approach to situations such as this is to ask: does the 'other information' (if provided to the hypothetical member of the public) add anything to the statistics which would enable them to identify the underlying individuals? If the answer is no, the statistics are not personal data. The underlined words are important: if identification can be achieved from the 'other information' in isolation (rather than when added to the statistics) then the statistics themselves are truly anonymous, and are not personal data. The statistics in this case failed Lord Hope's test, and were thus not personal data.

Cranston J's conclusion was that the Tribunal had been correct to conclude that the data was 'truly anonymised' – but it had erred in treating this as *personal data* which had been truly anonymised. The Department contended that, because it held the underlying identification data, the abortion statistics remained personal data in all circumstances. Cranston J rejected this submission, stating that:

> "If that were the case, any publication would amount to the processing of sensitive personal data… Thus, the statistic that 100,000 women had an abortion in a particular year would constitute personal data about each of those

women, provided that the body that publishes this statistic has access to information which would enable it to identify each of them. That is not a sensible result and would seriously inhibit the ability of healthcare organisations and other bodies to publish medical statistics".

Disclosure of Salaries

In June, the ICO ordered the **Cabinet Office (Reference: FS50347053 20 June 2011)** to disclose the names of 24 public sector workers who earn more than £150,000. This followed a request for information to the Cabinet Office who had previously withheld the information on the basis that the individuals did not consent to their details being released and so the disclosure would breach one of the data protection principles and so was exempt under section 40(2).

Where the data subject has not expressed consent to the disclosure of their personal data the Commissioner considers the following principles when considering fairness:

· Non- expression of consent is not absolutely determinative as to whether the data subject's personal data will be disclosed.
· It also remains important to still consider whether it would be reasonable for the data subject to object to the disclosure

The Commissioner noted the information disclosed would not reveal an exact salary paid. He went on to state that those who receive some of the highest salaries in the public sector should expect certain information on their public or work life to be made public, including details of their remuneration. Public policy has been clearly articulated in terms of greater transparency for public expenditure (including salary information) for many years. He found that there is a widespread expectation that those earning over £150,000 in the public sector will be named as earning over that amount. The Commissioner ruled that disclosure was fair and lawful and any expectation of privacy on the part of the subjects was not reasonable.

Section 41 - Deceased Persons' Information

Access to information about the deceased requires application of the section 41 exemption (breach of confidence). The leading Information Tribunal decision on this issue (Bluck v Information Commissioner and Epson and St. Helier University Hospitals NHS Trust Appeal Number: EA/2006/0090 17 September 2007) concerned the disclosure of medical records to the deceased mother without the consent of the deceased's' husband.

The Trust's decision to deny access was based on section 41 FOI i.e. that a duty of confidence was owed to the deceased was upheld by the Commissioner and the Tribunal. Both ruled that the duty of confidentiality extends beyond death. If the information was disclosed there was, in theory at least, an actionable Breach of Confidence which would allow the personal representatives of the deceased to sue the Trust.

In **O'Hara v Information Commissioner (EA/2010/0186 30th March 2011)** the question was whether the Ministry of Defence ("MOD") was entitled to refuse the Appellant's request for certain information about a particular member of the Armed Services ("the Subject"), who died in 1943, on the grounds that it was exempt by virtue of section 41.

The information which the MOD withheld ("the Withheld Information") was:

(a) The Subject's occupation prior to joining the Armed Services in 1942.

(b) His home address.

(c) The name, address and relationship of his next of kin.

(d) Any information relating to medical boards attended by the Subject.

(e) The Subject's religion.

The Commissioner, following the Bluck decision, was satisfied that any information about the Subject's medical boards constituted confidential information that had been obtained from him in circumstances giving rise to an obligation of confidence and that the legal right of action to prevent its unauthorised disclosure would have survived the

Subject's death.

He also concluded that the MOD would not have been able to show that the public interest in disclosure exceeded the public interest in maintaining the Subject's confidentiality, so as to give rise to a public interest defence. On these bases the Information Commissioner concluded that the section 41 exemption applied to any information the MOD held regarding the Subject's medical boards and that it had therefore been entitled to refuse disclosure.

The Commissioner applied the same considerations when assessing the rest of the Withheld Information. He acknowledged that it was not as sensitive as medical information and that in some respects it might be regarded as innocuous, particularly as 60 years had passed since the Subject's death by the time the request for information was made. However he concluded that it would have been of sufficient personal significance to the Subject still to be treated as confidential and had been acquired by the MOD in circumstances giving rise to an obligation of confidence. To the extent that it was necessary to prove detriment in the case of personal information the Information Commissioner considered that the loss of privacy itself satisfied the requirement. The Tribunal agreed with the Commissioner's approach and upheld the decision.

Each case has to be considered on its merits and context. See the ICO decision involving **The National Archives (FS50101391 11/12/06).**

The complainant requested information from The National Archives relating to the 1911 census schedule. The National Archives withheld the requested information, relying on the exemption under section 41 (Breach of Confidence). The Commissioner decided that this was wrong since the information requested did not have the "necessary quality of confidence" about it. It comprised the names of the individuals, their relationship to the head of the family, age, occupation, marital status, birthplace and nationality. This was not the type of sensitive information which was also captured in the 1911 census

such as health or infirmity. Had it been the latter then it would have warranted protection even though the subjects may well be dead at the time the request was made.

The Commissioner was mindful of the fact that some of the requested information such as the name, address, age, and marital status of the individuals concerned is publicly available through researching the registers of births, deaths and marriages.

Other information on the face of the relevant census schedule such as the occupation and nationality of the individuals is not available to the public at large. However, the Commissioner did not consider that an individual's occupation or nationality would normally be of such sensitivity as to give rise to an expectation of privacy. Although such information is not published or otherwise in the public domain, the Commissioner did not consider that the release of this less sensitive information would normally constitute an infringement of the privacy of the individuals concerned. It cannot therefore attract the protection of the law of confidence.

Perhaps the difference between the two cases is that the former involved information which had been gathered by the MOD about a soldier in its employ where there was reasonable expectation of privacy whilst the latter involved information gathered as part of a census where the subjects knew that at some stage some of the information would be available to researchers and historians.

Section 43 – Divisibility of Contracts

The Section 43(2) exemption (commercial interests) is usually considered when a request is made for contracts or agreements. The public authority often argues that disclosure of some or all of the information would harm its or its contractor's commercial interests. This usually involves a line by line analysis of long and complex contracts and spending time and resources on considering the prejudicial effect of disclosure.

In March, Channel 4 argued before the Tribunal (***Channel 4 v IC and BSkyB***

(EA/2010/0134)) that where the substantial parts of a long and detailed contract are exempt under s.43(2), then the whole contract is exempt. The Tribunal rejected all of Channel 4's arguments in support of this position and said that the established approach, which requires clause-by-clause consideration of the application of exemptions, is the correct one.

The End

That concludes episode 26 of the FOI podcast. The next podcast will be in January 2012. Before then you can always catch up on the latest developments in information law by attending one of my FOI update workshops or my 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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