



# The Information Rights Journal

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The Journal provides information rights practitioners with a round-up of the latest developments in the information rights field. The information contained in this Journal is Crown copyright but may be reproduced without formal permission or charge for personal or in-house use.

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## Foreword

I am delighted to present this first edition of the Information Rights Journal.

There has never been a more crucial time to encourage discussion and debate around information rights issues. The Freedom of Information Act 2000 has been in force for the best part of a year. The Data Protection Act 1998 and Environmental Information Regulations 2004 have been in force for longer. In Government, it is crucial that we provide a first-class service to those requesting information whilst continuing to strike the right balance between greater openness and the needs of effective Government - and an informed understanding of recent developments is central to this.

This journal will provide information on a wide range of issues across information rights as a whole, uniting Freedom of Information, Data Protection and the Environmental Information Regulations. It will provide reports of emerging case law from decisions of the Information Commissioner and, in time, from the Information Tribunal, and serve as a useful reference tool for practitioners in central Government and beyond.

Freedom of Information has raised the profile of Information Rights as a whole. I hope that this journal will prove to be a useful contribution in further raising awareness across the board.

**Clare Moriarty**  
Constitution Director  
Department for Constitutional Affairs



## Editorial

Welcome to the first edition of the Information Rights Journal.

This edition of the Journal opens with a look at information rights issues that have been making the news – including the use of the Freedom of Information Act by the private sector.

In recent developments, the Journal highlights the European Council proposals on data retention, which have figured prominently over the summer period, in the immediate aftermath of the London bombings.

The lead article explores the various uses of Neither Confirm nor Deny provisions in the FOIA and demonstrates the scope for their valid use beyond the traditional context of matters of national security.

As an important resource which will grow with time, the Journal provides summaries of recent decisions which have emerged from the Information Commissioner's Office. The cases in this edition report best practice recommendations; considerations to be taken into account when assessing the balance of the public interest; the calculation of the appropriate fees limit and the application of sections 32, 38, 40(2), 42(1), 43(2), 44 FOIA and regulations 12 (5)(b) and (f) EIRs.

**Dileeni Daniel-Selvaratnam**  
**Access to Information Central Clearing House**



## **In The News**

### **Go-ahead for league tables of hospital death rates**

St George's Hospital in Tooting has made available the death rates for different branches of medicine by surgeon.

The Times [Main] 25.08.05 Front Page

### **Companies hide their identities in Fol data searches**

Companies are disguising their identities when making information requests so they can obtain commercially valuable information without public bodies finding out. The private sector is increasingly using the Freedom of Information regime to extract information about bids and contracts from public bodies such as local authorities and NHS trusts.

Financial Times [Main] 30.08.05 Page 1

### **Banks to dig deeper into lending histories**

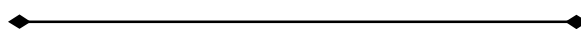
British Bankers' Association is pushing banks to share full data on customers' general level of indebtedness to promote responsible lending. HSBC has agreed to share full data and other high street banks say they hope to share full data by the beginning of next year

Financial Times [Money & Business] 03.09.05 Page 22

### **New pub law will fuel rape and murder, say police**

A Scotland Yard internal report, released under the Freedom of Information Act, analyses the potential impact of the new licensing laws.

Sunday Times [Main] 11.09.05 Page 3



## Recent Developments

### Data Protection in Europe

The current data protection focus in Europe is on the Council of Europe's proposals for Data Retention - the retention by service providers of all telecommunication traffic data (mobiles and landlines), e-mails and web sites visited. This does not, however, extend to the content of communications. Traffic data provides valuable information to law enforcement authorities in the investigation of serious crime and terrorism.

As the UK holds the Presidency, HMG will take the initiative forward with other Member States and the European Parliament. The European Parliament is particularly critical of the proposals, which it sees as disproportionate and an unjustified interference with Human Rights – in particular Article 8; the right to respect for private life.

The Department for Constitutional Affairs is working closely with the lead department - the Home Office - on this initiative, and officials have been engaging MEPs in Strasbourg over the past few weeks.

Other European work, in particular the proposal for a new Instrument to cover Data Processing in the Third Pillar is temporarily on hold. It is expected that the proposals from the Commission will appear in October.



## **Neither Confirm Nor Deny: Addressing the misconceptions**

The principle of Neither Confirm nor Deny (NCND) is long established, and is known to many in its use by those responding to difficult questions from the press, for example by neither confirming or denying the veracity of allegedly leaked information. NCND now has a use within the rights conferred under both the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIRs). However there exists general suspicion and scepticism amongst members of the public over the use of NCND by public authorities and the validity of its use.

This article examines the scope within the Act for providing an 'NCND' response to a request and demonstrates situations where this is necessary and in the public interest beyond its traditional use in the context of national security.

### **Provisions within the Act**

Under the FOIA, everyone has the right to be told firstly whether an authority holds the information that has been requested<sup>1</sup> and, secondly, to have that information communicated to them<sup>2</sup>. The principle of NCND is required in circumstances where to confirm or deny the existence of information would itself communicate sensitive and potentially damaging information to the detriment of the public good. It is, therefore, a logical adjunct to the exemptions and an entirely appropriate limit on general rights of access to information in certain circumstances<sup>3</sup>.

Further it is a tool, where consistency in application is extremely important. The failure of a public authority to give NCND due consideration can undermine the very principle of NCND, for example, when more than one public authority might hold the information in question.

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<sup>1</sup> s.1(1)(a) FOIA 2000

<sup>2</sup> s.1(1)(b) FOIA 2000

<sup>3</sup> The EIRs are slightly different, as there is no express duty to confirm or deny whether information is held in response to every request. In addition, there is still limited provision in the EIRs for public authorities to provide an 'NCND' response to a request.

This is subject to the important caveat that NCND (as is the case with the other exemptions or exceptions from the duty to provide information), should not and indeed, cannot, be used in a blanket fashion to cover types or categories of information. Under the FOIA or EIRs, each request must be considered on its own merits and this includes the appropriateness or otherwise of an NCND response. This is particularly important because, while the legislation acknowledges that in some situations it will be necessary to NCND, the ICO and ultimately the courts will review the use of NCND in individual cases, so as to ensure it is being applied lawfully in all the circumstances.

### **Law Enforcement and National Security**

The use of NCND is well known and particularly relevant in the areas of law enforcement, intelligence and national security. Because the work of the security and intelligence agencies is necessarily secret, it is a well-established matter of public policy that they do not normally disclose their operational capabilities or limits, what they are investigating, or what information they hold (or do not hold).

For example, it is self-evident that an NCND response is essential in answering questions about whether the agencies monitored, or are monitoring, a particular individual or group, regardless of whether any such monitoring is or was taking place. Even in cases where it might reasonably be assumed that a particular individual/group was being monitored, it would be important to NCND, as to give a positive answer (either that information was held or no information was held) may, in some instances, lead to inferences being drawn as to the likelihood of this being the case in relation to other individuals or groups.

### **Wider uses of NCND**

The above scenario is fairly familiar territory but it is not just in the areas of law enforcement and national security that NCND can be necessary and appropriate<sup>4</sup>. All the exemptions in the FOI Act, with the exception of section 21 (Information accessible to the applicant by other means), include a provision that enables a public authority, in certain circumstances, to NCND.

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<sup>4</sup> Under the Environmental Information Regulations the use of NCND is limited to circumstances where to confirm or deny would adversely affect international relations, defence, national security or public safety.

The use of NCND is very often contingent upon the terms of the request. For example, if a request asks for “the legal advice which said that decision X was contrary to the Human Rights Act” then to confirm that you hold such information would reveal something of the substance of the legal advice. On the other hand, if a request asks for “the legal advice which you received on decision X” then to confirm that you hold such information would not have the same result.

Indeed, the use of NCND is an important aspect of getting FOI right across the board. As considered in the examples below:

### *1. Inspections*

In general, often only limited notice is given to parties that an inspection<sup>5</sup> is to take place. The inspecting bodies, however, may know well in advance that they are undertaking a particular inspection. Prior to the notification period, information will fall into one of two categories:

- i. information not held - inspection has not been planned; or
- ii. information held – inspection planned but notice of it has not yet been issued.

If, in cases that fall in category (i.), it is stated that the date of the next inspection is unknown but, in cases that fall into category (ii.), the information is withheld under an exemption, it would indicate if that body is to be inspected in the near future. This would prejudice the inspection process by giving the body an unfair advantage, allowing them time in which to prepare for the inspection. In such a situation it is important that consideration is given to NCND.

### *2. Honours*

Similar considerations would apply to requests for information relating to the conferring of Honours. To confirm or deny whether a person has been considered for an honour would serve to pre-empt any announcement and might reveal the names of those considered but not selected for an award.

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<sup>5</sup> i.e. health and safety; school; planning; and tax compliance

### 3. *Policy development*

In the majority of cases that involve s.35 (1)(a) the strong public interest in maintaining the integrity of policy formulation may be sufficient to protect that information.

However, consider the position in the period prior to the Budget. Were the Treasury to confirm they had a paper discussing the merits of introducing a new form of tax, and even if the conclusions of the paper were that there was no validity in making the public pay that form of tax, it could lead people to infer that the Government was about to introduce it, with obvious negative effects<sup>6</sup>. After the announcement of the Budget however, the same considerations would not apply; underlining the importance of NCND being considered in all the circumstances of each case.

### 4. *Economic and commercial activities*

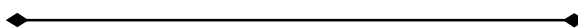
Similarly, if a request was received asking whether an authority held any information on a take-over bid from Company X of Company Y; to confirm or deny the existence of such information, could send the share price of Company Y rocketing, distorting the market and potentially prejudicing any other negotiations that Company Y may be in with other companies.

## **Conclusion**

The right to know whether a public authority holds the information that has been requested is a right most frequently met, but often overlooked. What is clear from the above discussion is the fact that whether information is, or is not, held is in itself information and that confirmation of this fact alone may be damaging to the public interest.

As this article highlights, for a public authority to confirm or deny if it holds information is a matter which always requires careful consideration.

**Dileeni Daniel-Selvaratnam**  
**Access to Information Central Clearing House**



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<sup>6</sup> This example was discussed during the passage of the Bill through Parliament [ Hansard 19.10.2000 Column 1249]

## Recent articles

**Title:**        **Do you want to know a secret?**

Summary:      Explains the operation of the Freedom of Information Act 2000 and the duties of public authorities to provide information to the public, as well as the individual's right to request information. Includes the ICO's top 10 tips for ensuring compliance with the Act.

Publication:   Estates Gazette E.G. (2005) No.0533 Pages 62,64

Author:         Peter J.G. Williams and Andrew Johnston (Eversheds LLP)

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**Title:**        **Open to scrutiny**

Summary:      Considers the impact of the Freedom of Information Act 2000 on the Land Registry's approach towards the disclosure of commercially sensitive information and the extent to which confidential information is protected.

Publication:   Estates Gazette E.G. (2005) No.0533 Page 65

Author:         Allyson Colby (Wragge & Co LLP)

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**Title:**        **When two worlds collide**

Summary:      Looks at the interplay between the Freedom of Information Act 2000 and the Data Protection Act 1998 and discusses the handling of freedom of information requests that involve personal information.

Publication:   New Law Journal (2005) Vol.155 No.7186 Pages 1130-1131

Author:         Claire Jervis



## Decisions of the Information Commissioner

1<sup>st</sup> January – 14<sup>th</sup> September 2005

- **Bridgnorth District Council**

**FAC0065282**

**17 May 05**

**Regime: FOI**

**Focus: s.32**

The request was for a copy of a county court case transcript. The Information Commissioner (the 'Commissioner') found that the Council had correctly applied section 32(1)(c) in not disclosing the information under the FOI Act. The transcript was taken from court tapes, which are covered by section 32: if an authority only holds information because it was obtained from a source to which section 32 applies then the information is exempt even if the authority subsequently converts the information into a different format. This decision is being appealed to the Information Tribunal.

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- **National Maritime Museum**

**FS 50063475**

**20 June 05**

**Regime: FOI**

**Focus: s.43(2)**

The request was for documents and correspondence relating to any payments made to an artist for work commissioned by the National Maritime Museum ("NMM").

The Commissioner agreed with the application of section 43(2) and that the public interest in withholding the information at the time outweighed the public interest in disclosing it. The information included details of the financial arrangements made between NMM and the artist for the work. At the time the request was made, the NMM was involved in active negotiations with another artist for other artwork.

The Commissioner's decision was that the premature release of financial arrangements would prejudice the NMM's bargaining position in these other negotiations. However, the Commissioner was of the opinion that this prejudice would diminish with time. The Commissioner expressed the view that those who engage with the public sector must expect that there may be a greater degree of openness about the details of these activities. The Commissioner gave particular weight to the fact that NMM were dealing with public funds and needed to ensure value for money. The Commissioner was not persuaded that the potential prejudice to the artist's commercial interests was, of itself, sufficient reason to maintain the exemption.

**IRJ Comment:**

**In this instance, timing was a critical issue; although this was not the case before the ICO, the Commissioner suggested that prejudice will diminish with time and that at some point after the conclusion of the active negotiations, the exemption would no longer apply. Note too, that the information in question was released by the Museum after the negotiations ended and before the ICO had made a decision. This decision is being appealed by the applicant to the Information Tribunal.**

- **Department of Finance and Personnel Northern Ireland (DFPNI)**

**FS50063659**

**Regime: FOI/DPA**

**12 July 05**

**Focus: s.40(2)**

The applicant requested details of the full qualifications, experience and duties of each member of the Department's Web Design Team by grade. The Commissioner was satisfied that disclosure would breach the provisions of the Data Protection Act 1998 in that the information could be linked to identifiable individuals. The Commissioner upheld the application of section 40 (2).

**IRJ Comment**

**This is a commonplace request received by authorities but unfortunately there is no further explanation in the publicly available decision notice of the basis on which the Commissioner considered that section 40(2) applied, nor which of the two conditions identified in section 40(3) were satisfied.**

- **Bridgnorth District Council**

**FS50062329**

**Regime: EIR's**

**12 July 05**

**Focus: regs.12 (5)(b)/(f)**

The applicant requested the right to inspect information contained in an enforcement file relating to a piece of land he owned. The Commissioner considered the information to be "environmental information" subject to the EIRs. Having previously considered the request under the FOI Act, the Council subsequently refused to supply the information, citing regulations 12(5)(f) (information supplied voluntarily and whose disclosure would adversely affect the interests of the supplier) and 12(5)(b) (investigations of a criminal nature).

The Commissioner found that regulation 12(5)(b) did not apply, as the investigation could not be construed as being an enquiry of a criminal nature. However, in so far as the information identified the original complainant, the Commissioner was satisfied that regulation 12(5)(f) had been correctly applied and considered the public interest to favour non-disclosure. In reaching this conclusion, the Commissioner had regard to both the public interest in protecting individuals from malicious complaints and the deterrent effect that identifying complainants may have on the free flow of information, which would hinder the activities of the planning authority.

The Council was ordered to allow the complainant to view the remainder of the information in the file which was held not be subject to this exception.

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- **Ferryhill Town Council**

**Ref: FS50075378**

**Regime: FOI**

**14 July 2005**

**Focus: s.16(1)**

The Commissioner upheld the application of the appropriate limit by the Council in refusing a request for information about Council allotments. However, as the Council had failed to give the applicant the opportunity to refine his request or to offer to supply that which could be provided within the appropriate limit, the Commissioner found that they had failed to provide appropriate advice and assistance in accordance with section 16(1).

**IRJ Comment:**

**The decision from the Commissioner underlines the importance of providing advice and assistance where appropriate, in order to assist applicants in obtaining information relevant to their request.**

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- **Independent Police Complaints Commission**

**Ref: FS50069386**  
**20 July 2005**

**Regime: FOI**  
**Focus: s.44(1)(a)**

Section 80(1) of the Police Act prohibits the disclosure of information received by the PCA in connection with its complaints handling functions, other than in specified circumstances, including where disclosure is necessary for the proper discharge of the functions of the authority. The Commissioner ruled that section 80(1) is a statutory bar to disclosure within the meaning of section 44(1)(a) of the FOI Act.

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- **The Standards Board for England**

**FS50064699**  
**01 August 05**

**Regime : FOI**  
**Focus : s.40/42/44**

The request was for information relating to the investigation of a complaint that had been lodged about the applicant.

The Commissioner considered the Board had applied the exemptions in sections 40(2), 42 and 44 FOIA appropriately to the requested information and upheld their decision not to disclose the information. In respect of section 42, the Commissioner recognised that there is always a strong public interest in maintaining this exemption. The Commissioner stated that in this particular case, it is clear the complainant disputes the powers of the public authority and in the event of litigation, the authority would wish to rely on the legal advice it has obtained. The applicant has lodged an appeal.

- **Chief Officer of Police of Essex Constabulary**

**FS50068601**

**Regime : FOI**

**3 August 05**

**Focus : s.31/S.38**

The applicant requested information relating to the identity and locations of speed cameras in a particular area. The Commissioner was satisfied with the application of the exemptions at sections 31 and 38. In applying the public interest test there was in the Commissioner's opinion, a stronger public interest in avoiding an increase in non-compliance with the road traffic laws and, likely increased risk to the health and safety of the public.

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- **Corby Borough Council**

**FS50062124**

**Regime : FOI/DP**

**25 August 05**

**Focus : s.40(2)**

The complainant requested details of the total amount of money paid to a former senior employee of CBC. CBC refused the request arguing that the exemption in section 40(2) FOIA applied because disclosure of the information would breach the first data protection principle. The ICO decided that disclosure would not breach any of the data protection principles. A key factor was the fact that the Audit Commission had made critical comments about how the employee's appointment and continued employment was handled: the ICO said that disclosure "should inform the ongoing debate on this issue and should help to ensure that the Council is held to account for the performance issues identified by the Audit Commission".

The ICO goes on to say that "in the Commissioner's opinion, it is reasonable for certain information about senior staff, such as the financial details requested, to be disclosed to the public".

**IRJ Comment:**

**The ICO's decision focuses closely on the circumstances of the case but does make general comments indicating that, in his view, information of this nature is generally disclosable. The applicant has appealed to the Information Tribunal.**

- **Luton Borough Council**

**FS50064062**

**Regime : FOI/EIR**

**05 September 05**

**Focus : s.1**

The request was for information relating to a piece of land that had a complicated management history. The Commissioner found that the Council should have been more open to taking a broader interpretation of the applicant's request. Given the Council knew the history of the case was complicated, it should not have interpreted the request literally, but should have understood the applicant to be seeking an understanding of the history of the site more generally.

The Commissioner had also noted that since the request relates to land it could have been regarded as a request for environmental information and been considered under the EIRs. However, as the outcome of this particular complaint would be the same whether considered under FOIA or EIRs and that neither party had raised it as an issue, there was not any merit in pursuing the matter.

