



The Information Rights Journal

Vol. 1 Issue 2 [2005/2006]

February 2006

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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Editorial

Since the last issue of the Journal, we have seen the first anniversary of full implementation of the Freedom of Information Act (DP and EIRs legislation having been with us for much longer). A vast array of information has been made available over the year, as highlighted in the news review this issue.

The introduction of the Information Rights qualification (detailed at page 8) demonstrates the extent to which Information Rights legislation has established itself as its own area of law, requiring specific expertise.

Since the summer, Data Protection has moved centre stage on the Information Rights agenda. The ICO Annual Track research into awareness of DP and FOI legislation, published in November, showed that, compared to the 2004 figures, concerns about personal information handling have risen. Our lead article looks at our work to simplify Data Protection, in order to increase understanding by members of the public of the rights and protections afforded by the legislation.

The issues raised by information rights legislation remain topical not only here but also abroad. Andrew McDonald, formerly Constitution Director at DCA, is currently a visiting scholar at the University of California, Berkley. His article at page 14 takes a look at FOI from an American perspective.

Until recently, those with an interest in FOI have looked to decision making in other jurisdictions as a useful reference point. The publication over the last few months of the first FOI decisions by the Information Tribunal in the UK, however, marks the beginning of firm interpretation of our own legislation. Over time these decisions will become an invaluable resource in understanding the boundaries of information rights legislation.

From next issue, the Journal will undergo some changes in order better to meet practitioners' needs. Beginning in March, a round up of ICO and IT case summaries will be published on a monthly basis, to help practitioners stay abreast of the latest developments. The Journal will move to publication on a quarterly basis, providing the usual analysis and commentary coupled with collation of all case summaries for the preceding months.

Dileeni Daniel-Selvaratnam
Access to Information Central Clearing House



In The News

Revealed: from nuclear tip plans to Blair's 'barmy' Simpsons star turn

Since coming into force one year ago, the Freedom of Information Act has resulted in the release of a great deal of information that was previously unavailable to the public – from restaurant health inspection reports, to information on Tony Blair's appearance on The Simpsons in 2003; from details on the railway stations with the worst passenger facilities, to a list of sites considered suitable for storing nuclear waste, and the amount of money raised through speed camera fines.

The Guardian (Main) 02/01/06 page 7

Falconer signals curbs on 'irresponsible' information requests

Lord Falconer said that although most Freedom of Information requests have been to find out information about matters that impact on people's lives, a small number have been irresponsible, and the Government is planning to review the Act to "ensure its central purpose is being honoured".

The Guardian (Main) 31/12/05 page 5 & 26

Businesses wary of new regime's risks

Research carried out by a City law firm suggests companies are still worried about the risks of commercially sensitive information being released by Public Authorities and have been fairly slow to use the Freedom of Information Act themselves to access information that could benefit them, for example information about their competitors or rival contracts.

Financial Times (Main) 29/12/05 page 4

Clarke wins EU pact on storing phone and internet records

Home Secretary Charles Clarke secured agreement in the European Parliament on his proposal that telephone and internet records be retained by telecommunications companies across Europe for a period of up to two years. The new EU directive will be subject to strict data protection controls.

The Guardian (Main) 15/12/05 page 6

More 'health tourists' fly in to have NHS births

Figures obtained under the Freedom of Information Act show that a rising number of women are travelling to Britain to have babies in NHS maternity wards, with the cost of treating the overseas maternity care patients being over £100,000 per year in some hospitals.

Daily Mail (Main) 15/12/05 page 38

Four banks set to share details on cardholders

For the first time Co-operative Bank, Abbey, Barclaycard and Egg have agreed to share their credit card customers' information to try and help identify people who are having difficulty repaying their loans. A representative from Barclaycard UK said: "Data-sharing will encourage responsible lending and ensure customers have the ability to repay debt."

Financial Times (Main) 02/12/05 page 9

Chief Medic considered quitting

The full results of the public consultation on smoking in England released under the Freedom of Information Act show that 90% of the 57,000 responses were against allowing pubs not serving food to be exempt from any smoking ban.

The article also focused on chief medical officer Sir Liam Donaldson and his consideration of whether to resign over the Government rejecting his advice to introduce a full ban on smoking in all enclosed public places.

BBC news online 24/11/05

Data protection action to focus on serious breaches

The Information Commissioner is implementing a new approach to enforcing data protection legislation. A reduced amount of time will be spent dealing with minor or technical breaches of the law and more time will be spent on cases where failure to comply with the Act has 'serious consequences'.

Financial Times (main) 22/11/05 page 7

No late-night cheer at No10 local

The Freedom of Information Act has been used to learn the reasons why The Red Lion in Whitehall has been refused permission to open until 2am from Thursday to Saturday and until 1am during the rest of the week.

Daily Telegraph (Main) 16/11/05 page 4

Local groups to scrutinise public bodies

Research by the National Council for Voluntary Organisations has found that over 20,000 campaign groups and voluntary organisations are planning to use the Freedom of Information Act to find out information on how private companies interact and work with the public sector.

Financial Times (Main) 09/11/05 page 4

MSPs expense claims to be posted online

Major changes to MSP's expense claims mean every receipt and invoice will now be available on the Scottish Parliament's website at regular intervals, possibly as often as each month. The changes also mean that MSPs will have to generate invoices, vouchers and receipts for every claim they make.

The Scotsman 02/11/05

Focus on basics shakes up schools

The Freedom of Information Act has been used to obtain the English and maths results for every English secondary school over the past four years. The figures show that one in six of the schools that had improved GCSE-level results since 2001 actually had poorer results in the two core subjects of English and maths.

BBC news online 20/10/05

How Harold Wilson stepped in over Slater Walker debacle

Documents released under the Freedom of Information Act by Treasury show that the Prime Minister at the time, Harold Wilson, took a personal interest in the near-collapse of Slater Walker Securities in 1975. The near collapse resulted in intense discussions within government and a serious argument between the Treasury and the Bank of England.

Sunday Times (Business) 02/10/05 page 3

Tesco stocks up on inside knowledge of shoppers' lives

Tesco is putting together a profile or 'personality map' of every person in the country, which contains information ranging from peoples' travel habits and shopping preferences right through to how eco-friendly people are.

The Guardian (Main) 20/09/05 page 23



Future events

- **Thursday 25 May 2006 – FOI Live – Fourth Annual Information Rights Conference for the Public Sector**

On Thursday 25 May the Constitution Unit, in partnership with the Department for Constitutional Affairs and the Information Commissioner's Office, will hold the Fourth Annual Information Rights Conference: FOI Live 2006 at the Millennium Conference Centre in central London.

The scope of this year's event is wider than in years past - speakers and panels will discuss not only the most relevant issues related specifically to FOI, but also the interface between the FOIA and data protection, EIR and re-use of public sector information. Sector-specific parallel plenary sessions will also give those in central government, local government and health the chance to explore topics that uniquely affect them. The conference will follow directly after the international information commissioners' conference hosted by the ICO in Manchester, and several commissioners from other countries, including Canada, Germany and the Republic of Slovenia, will attend and speak at FOI Live 2006. Plenty of opportunities for networking are interspersed throughout the programme. For more information, and to register, please visit www.foilive.com.



Recent Developments

- **Information Rights Qualification to be launched**

A postgraduate information rights qualification, the first of its kind in the country, will be on offer from September 2006. The qualification, which is being jointly developed by the University of Northumbria and the Department for Constitutional Affairs, is designed to meet the specific needs of information rights practitioners and improve the skills base of staff engaged in such work.

Baroness Ashton, Parliamentary Under Secretary of State for Constitutional Affairs, said recently that the qualification “will take information rights training to a new level, equipping practitioners with the skills and knowledge to deliver across the information rights arena.”

The qualification programme has been designed to deliver a comprehensive and consistent understanding of information rights within the context of government and the public sector. In addition, the programme will provide an understanding of how information rights legislation impacts on the private sector. The qualification also covers the relationship with other pieces of legislation, such as the European Directive on the Reuse of Public Sector Information (PSI Directive), the Copyright Designs and Patents Act and the Official Secrets Act.

This flexible course will be delivered through distance learning and will offer 3 levels of accreditation – certificate, diploma or a Master of Laws degree.

For more information and an application form, please contact:

The Programme Administrator
LLM Information Rights Law and Practice
School of Law
Northumbria University
Sutherland Building
Newcastle upon Tyne, NE1 8ST.
Tel 0191 227 4494
Email: la.information@northumbria.ac.uk

- **Information Commissioner's Office – Annual Track Research**

The results of the ICO's annual research into awareness of DP and FOI legislation and rights were published on 16 November.

Compared to the 2004 figures, the results showed a rise in concerns about personal information handling generally. Concerns about the protection afforded to personal information now rank third, above the NHS, equal rights and national security.

The results also showed an increase in awareness of both DP and FOI rights, although knowledge of the legislation itself remains relatively low. However, it appears that individuals who are aware of the Acts are no more likely to be aware of their rights than those with no awareness of the Acts. People are also confused about which Act gives rise to which rights.

Amongst organisations, the public sector appears to feel a higher sense of responsibility towards the handling of personal information (including in relation to such matters as notification) than the private sector. However, both sectors agree on the organisational benefits of good data handling and records management.

Local government was seen to be the most likely target of FOI requests, followed by banks and other financial agencies. Central government ranked below health, education and the police as a potential target. Most requests (nearly half) were likely to be made for personal reasons.

The surveys of both individuals and organisations were carried out by telephone. Over 1000 individuals were interviewed, from all age ranges and social groups. Over 800 organisations were interviewed, around 400 each from the public and private sectors.

Further details of the research and results can be found at <http://www.ico.gov.uk/eventual.aspx?id=8443>



Clarifying Data Protection Simplification

2006 marks several important anniversaries for Information Rights specialists - not only will January mark the first anniversary of the Freedom of Information Act coming into force, but it will have been 25 years since Data Protection was recognised as an element of fundamental human rights, and 21 years since the first Data Protection Act came into force in the United Kingdom.

Freedom of Information has been widely welcomed, signalling a new era in the way in which government information is regulated, but recent research shows that there is also increased concern amongst the populace about the way in which their personal information is handled. This research underlines the very important role played by the rights and protections afforded under the Data Protection Act in the modern world. More than ever before there is the opportunity for personal data to be used, shared, stored and disseminated by various organisations.

Whilst the vast majority of the population has heard of the Data Protection Act (DPA), few are knowledgeable about the way in which the framework operates, or how the common-sense principles at its core regulate the use of their personal information. Although many intuitively expect that some protection be provided for, few understand the ways in which the Data Protection Act provides such safeguards. Indeed, some practitioners contribute to the confusion by exploiting it, using data protection as an excuse for not operating in an efficient way. Blaming data protection is easy to do – dispelling the myths that are created as a result will be a little harder. Clearly, this is a situation that can not be ignored. A lack of trust and understanding of the current framework is not only unsettling for the public. As well as undermining sensible measures to protect our privacy, it also has the potential to frustrate the proper regulation of personal information in a way that could inhibit legitimate and valuable information flows.

Because of the multitude of discrete occasions where personal data issues arise, addressing the problem of misunderstanding and misconceptions about the Act is not a straightforward task. It is, however, one which the Information Commissioner (ICO) and the Department for Constitutional Affairs (DCA) are together seeking to tackle. This article outlines the actions which will be taken in the short-to-medium term, and is intended to provoke debate among practitioners about what more could be done to

improve perceptions of the Data Protection Act and drive up standards of decision-making and public service.

Our first priority must be to reduce the general level of anxiety about the Data Protection Act. We must demonstrate that a common-sense decision making framework exists which is properly regulated by the Information Commissioner, independently of Government. To do this my department will restate the policy rationale for the DPA, emphasising the common-sense principles that underpin our system. We will seek opportunities to promote general understanding around these issues by providing information in plain English rather than talking about the technicalities of the legislation in legal jargon. We have already begun the connected process of revising and simplifying existing guidance available on the Act, such as on the DCA and DirectGov websites, and we will continue to work in this vein with the Information Commissioner in the coming weeks and months.

Whilst addressing the realities of what the legislation means, we must also tackle head-on the myths that have grown up around the legislation. Just as the myth that the EU regulates to control the curvature of bananas obscured debate about real issues of European concerns, so myths about the DPA help perpetuate confusion about the Act and increase anxiety amongst the general public. The ICO has published a paper addressing myths and realities about the DPA, such as that it bars parents from taking photographs of their children at school. Myths are dismissed where they are erroneous, and where there is a grain of truth, the common-sense reasons why there may be restrictions in dealing with personal data in certain circumstances will be properly explained.

DCA also continues its work to address the myths and misunderstandings which have grown up around the sharing of personal data. Work is already in hand to build on the existing Data Sharing Toolkit and DCA officials have been advising policy makers, and especially Whitehall bill teams who have data sharing issues early in the process, to help reduce confusion and ensure provisions are lawful.

The DCA and ICO intend to bolster the general education and myth-busting programme outlined above, by ensuring that information about the Act and information rights is targeted at the public at those times in their lives where such issues gain most importance to them. The ICO will therefore be using research which reveals which life events prompt people to come into contact with the Data

Protection framework. The ICO is looking at what the public need to know at certain points in their lives: for example, when they get married or divorced; when applying for credit; or when receiving medical attention. We are all too aware that, when going through such stressful life events, members of the public need to be reassured and provided with information about their rights in a simple and straightforward manner.

We also need to encourage data controllers to make better decisions and to inform the public of why a certain decision has been made. The ICO has produced new best practice notes in areas of common difficulty for Data Controllers. These notes, which will dovetail with the life events described above, will also prompt data controllers to provide better customer service.

This article sets out the main pillars of the approach DCA and the ICO are taking to clarifying data protection in the short term. Both organisations would be interested in the views of practitioners on this programme and their suggestions as to where greater in-roads could be made into this difficult problem - be they short-term measures or suggestions for longer-term reforms. Ideas should be sent to the following mailbox - informationrights@dca.gsi.gov.uk - headed Clarifying Data Protection.

Baroness Ashton of Upholland
Parliamentary Under-Secretary of State, Department for Constitutional Affairs



Freedom of Information in the United States

I'll begin with a quiz question. Which leading member of the Bush administration was one of the Congressional sponsors of the USA's 1966 Freedom of Information Act? The answer follows later.

Why I am I troubling you with this? Because I want to get you in the mood for a quick tour of the current state of FOI in the United States.

Almost ten years ago I had worked on FOI in the States and the last couple of months have provided me with an opportunity to test whether my findings remain valid.

The first thing to say is that the boundary between openness and secrecy is still a salient political issue. Indeed it runs through most of the current controversies preoccupying the country (or at least Washington DC). Let's take three examples.

The indictment of Scooter Libby – formerly chief of staff to the Vice President – has its origins in the claims made by former ambassador Joseph Wilson about an investigation he had undertaken into Iraq's alleged weapons programme. Not only is it striking that Wilson choose to take his story to the press – there is now prolonged controversy about what the investigation and associated records might show about the origins of the war in Iraq.

The second example concerns the Supreme Court nominations made by the President. The Senate's Judiciary Committee was vexed that the President blocked access to some of the records written by John Roberts when he worked for the administration. Roberts was confirmed all the same, but the Committee made it clear that it was going to press harder for records of the current White House which showed the legal advice of Harriet Miers – currently the White House counsel and (then) the President's second nominee for the Court. Miers subsequently withdrew, but the issue has not gone away. Samuel Alito – the President's new pick for the Supreme Court – served in the Reagan administration, and so the Judiciary Committee will be sure to press for full disclosure of records which show his thinking on constitutional issues. The White House will now have to consider whether the same questions of executive privilege are raised by these records from the 1980s.

The third concerns a bill currently before Congress to create a new government agency to undertake research on drugs and vaccines to combat bioterrorism. The proposal is that the new agency is wholly excluded from the FOI Act because it might be damaging to national security if the agency's data fell into the wrong hands. Opponents of this provision argue that it is excessive: the FOI Act has an exemption dealing with national security and so there is no need to put all the records of the new agency beyond the reach of the public.

And charges of secrecy have not only been levelled at the administration's handling of matters of state. Even the release of the menu for the White House banquet for Prince Charles and the Duchess of Cornwall proved to be a struggle. The *New York Times* trumpeted its success in securing a copy – and then revealed each course in loving detail. (I can report that the new White House pastry chef is said to be a stern advocate of simplicity in all things to do with puddings. Not for him the chocolate Big Bens served to Tony Blair at a recent White House dinner. But his idea of simplicity and mine don't quite square and I certainly wouldn't recommend attempting his alarming confection at home).

So one theme is certainly consistent with the story ten years ago: secrecy is topical and the administration is charged with undermining its own public commitments to openness.

Indeed, critics argue that matters have got much worse over the intervening period. In its 2005 report card on the administration, OpenTheGovernment.org points to an increasing willingness of officials to classify information and they note that declassification has dropped 72% in volume since 9/11.

And some issues continue to rumble on, more than thirty years after an effective regime was introduced (the 1966 Act was a very modest measure which was strengthened in the wake of Watergate). For example, there is still periodic litigation over access to diaries of administration officials – a theme that will be familiar to readers in the UK.

I make no claims for scientific precision in this whistlestop tour of FOI. But some points are clear. It remains true that FOI is contested territory. It remains true that a complicated request to many federal agencies will be met by a long – a very long –

delay before a substantive reply is given. And it remains true that FOI is heavily litigated.

The e-FOI Act may have modernised aspects of the bureaucratic and legal process, but the fundamentals of the system have not changed substantially. New legal restrictions on the release of security and intelligence records have been introduced in the wake of 9/11 but the basic contours of the FOI Act remain. And even after ten years, some of those contours continue to surprise: not the least remarkable feature is the exclusion from the Act of the offices of the President and Vice President.

The US is one of the many FOI jurisdictions that we would do well to study more closely. Not in the breathless manner of this survey, but in greater, and more exacting, detail. We can and should do more to learn from our counterparts in other FOI systems – but through research which is grounded in a careful understanding of the legal and administrative characteristics of other systems. Superficial comparisons often mislead; informed comparative work can only leave us better placed to administer FOI in the UK.

And lest you think I have given too downbeat an impression of openness in North America, let me balance up the account. The premier of British Columbia – an advocate of democratic transparency – has introduced a bold step in that direction: televised Cabinet meetings. Now there is an idea to conjure with ...

And while you chew on that, I'll leave you with the answer to your quiz question: Donald Rumsfeld, Secretary for Defense.

Andrew McDonald
Visiting Scholar – University of California, Berkeley



Recent Publications

Title: [Freedom of Information – Nosey Parker’s Charter?](#)

Summary: Explores the interaction between the Freedom of Information Act 2000 and the Commissioners for Revenue and Customs Act 2005. The article considers the extent to which information disclosed by taxpayers to Revenue and Customs is kept confidential.

Publication: Tax Journal (2005) No.805 p19

Author: Phil Lee

Title: [Open Environment](#)

Summary: Looks at the Environmental Regulations 2004, explaining their distinction in scope from the Freedom of Information Act 2000 and the Data Protection Act 1998.

Publication: Solicitors Journal (2005) Vol. 149 no. 41 p.1262

Author: Martha Grekos

Title: [The Official Information Act: A Window on Government or Curtains Drawn?](#)

Summary: Examines the operation of the Official Information Act in New Zealand.

Publication: New Zealand Centre for Public Law Occasional Paper 17

Author: Steven Price

Title: [Government & Information: The Law relating to Access, Disclosure & their Regulation.](#)

Summary: Covers the requirements under UK, EU and ECHR for access, disclosure and retention of government records.

Publication: Third edition, ISBN: 184592088

Author: Patrick Birkinshaw

Title: [Get Ready to Share](#)

Summary: Examines the definition of 'environmental information' for the purposes of the Environmental Information Regulations 1992, and the scope of the exceptions.

Publication: Building (2006) No.4 p64

Author: Michael Woods

Title: [Well Informed](#)

Summary: Advises charitable organisations on how to use the Freedom of Information Act to get information from public authorities.

Publication: Solicitors' Journal (2005) Vol.149 No.48 (Charity and appeals update) p22

Author: Lawrence Simanowitz



Decisions of the Information Commissioner

23 September – 25 January 2006

Please note: the information set out below is a summary of some of the published decisions of the Information Commissioner. The summaries should **not** be taken as representative of the views of the Journal, or the Department for Constitutional Affairs: any comments from the editors are clearly marked.

- **Department for Trade and Industry**

FS50068235

Regime: FOI

5 January 2006

Focus: s. 30

The Commissioner ordered DTI to disclose the outline reasons for its investigation under section 447 of the Companies Act 1985 into Atlantic Property Limited.

The Commissioner was not convinced that disclosure in such general terms would “significantly damage” DTI’s ability to conduct investigations in the context of section 30. Regard was had to the desirability of companies understanding the reasons for an investigation taking place.

The Commissioner noted that it was open to question whether the request, which sought “to determine the reasons behind the decision to investigate”, was a valid FOI request, as it was not a request for specific information.

The decision is being appealed to the Information Tribunal.

- **Foreign and Commonwealth Office**

FAC0069504

Regime: FOI

5 January 2006

Focus: s.27

The Information Commissioner upheld the FCO's decision that information relating to the nationalities of foreign diplomats alleged to have committed serious offences over the previous five years was exempt under section 27(1).

The Commissioner was satisfied that release of the information requested may well have a detrimental effect on relations between the relevant countries and the UK and that the public interest required the information to be withheld. The Commissioner took account of existing FCO policy and the expectation of foreign missions that such information would not be disclosed, but noted that FCO might review its policy, which could alter the missions' expectations of confidentiality.

- **Department for Education and Skills**

FS50074589

Regime: FOI

4 January 2006

Focus: s.35/40

The Commissioner ordered disclosure of the minutes of senior management meetings at DfES where the setting of school budgets was discussed. The Commissioner accepted that the section 35 exemption applied to the information in question, but held that the public interest lay in disclosure.

The Commissioner rejected arguments that disclosure could lead to a decline in the standards of record keeping and have an inhibiting effect on the provision of the advice. He considered these to be "management" issues. Any chilling effects were, according to the Commissioner, attributable to the Act itself and not to decisions made under it. He disagreed that identifying individual civil servants with particular policies might jeopardise their working relationship with future administrations, concluding that Ministers would be fully aware of the role of civil servants.

The Commissioner disagreed that disclosure of passages in the minutes that referred to a topic of discussion at a Cabinet Committee would have a prejudicial effect on collective responsibility, noting that the public appreciates that the Cabinet will debate a range of options and that members may disagree. If taken to their logical conclusion, he felt the arguments deployed by DfES could ultimately lead to s.35 being treated as an absolute exemption.

The Commissioner rejected the application of section 40 to lists of attendees at meetings and references attributing contributions to particular individuals. He did not accept that disclosure of the officials' names would breach the data protection principles, because they were senior staff acting in their professional capacities.

The decision is being appealed to the Information Tribunal.

- **Richmondshire District Council**

FS50070183

15 December 2005

Regime: FOI/EIR

Focus: s.42

A request sought access to legal advice and directly related correspondence concerning the possibility of the council taking action regarding noise control for a local motor racing circuit. The Commissioner upheld the Council's decision to withhold the information on the basis of section 42 and, in the event that the information was environmental information, regulation 12(5)(b) of the EIRs. The Commissioner had particular regard to the fact that the merits of taking legal action had been under consideration and review for a number of years.

- **Bridgend County Borough Council**

FS50073296

Regime: FOI

9 December 2005

Focus: s. 31

The Council refused disclosure of a hygiene inspection report for a local hotel on the grounds that disclosure would prejudice the exercise of its regulatory functions in relation to food hygiene (sections 31(1)(g) and 31(2)(c)). It argued that to release the information would prejudice the informal approach they promoted in carrying out food hygiene inspections and would force them to adopt a more formal regime, which would be less effective in protecting the public.

The Commissioner disagreed, concluding that section 31 did not apply. He considered that disclosure would increase clarity of and public confidence in the inspection system.

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- **The Post Office Limited**

FS50066054

Regime: FOI

30 November 2005

Focus: s.43

The Commissioner upheld the Post Office argument that s.43 (commercial confidentiality) applied to 'mystery shopper' information about service standards in a specific branch, particularly since the Post Office operated in an increasingly competitive market and its competitors were not obliged to disclose similar information.

The Commissioner noted that there is a public interest in holding the Post Office to account for its use of public funding, although the release of this information would not substantially contribute towards that interest. To release this information would prejudice the competitive position of the branch, at a time when many smaller Post Office branches were being shut down. The Commissioner therefore held that the public interest lay in maintaining the exemption.

IRJ Comment:

This decision is recognition that a public authority operating at least in part in a competitive market can have a legitimate claim to confidentiality for material that would advantage its competitors.

- **British Nuclear Fuels Plc**

FS50072719

Regime: FOI

29 November 2005

Focus: s.10 and s.16

BNFL refused a request, in part, on the basis that the costs of compliance would exceed the appropriate limit (section 12). The Commissioner held that, by failing to provide the applicant with details of how the costs had been estimated or any opportunity to refine the request, BNFL had also failed to offer advice and assistance in accordance with s.16(1).

- **Chief Officer of Northamptonshire Police**

FS50066050

Regime: FOI

24 November 2005

Focus: s.31 and s.38

The request sought information about offences that had been recorded by a particular speed camera. Northamptonshire Police confirmed that the information was held, but refused the request on the basis of sections 31 and 38 (law enforcement and health and safety). The Commissioner agreed that the release of the data could enable drivers to identify or estimate when that particular camera was likely to be switched off, which would increase the likelihood of speeding and thereby prejudice law enforcement (section 31(1)(a) and (b)) and put others' lives at risk (section 38).

- **Calderdale Council**

FS50068973

Regime: FOI

24 November 2005

Focus: s.40/42

This request related to a Council recruitment exercise in New Zealand and Australia. The Council refused to disclose the names of the officials concerned (citing section 40) and related legal advice (citing section 42). The Commissioner upheld the application of section 42 but ordered disclosure of the names of officials.

He found that disclosure would not breach the 'fairness' requirement of the first data protection principle: the nature of the officials' roles, their level of responsibility and the extent of public funding that was involved outweighed the employee's expectations of non-disclosure and any media intrusion that would result. The Commissioner also found that responding to an FOI request would itself be a 'legitimate interest' for the purposes of determining whether disclosure met paragraph 6 of Schedule 2 to the Data Protection Act 1998.

- **Carmarthenshire County Council**

FS50066308

Regime: FOI

24 November 2005

Focus: s.17; s.31

The Commissioner upheld the Council's decision to withhold the vehicle identification numbers of its fleet of vehicles on the basis of section 31(1)(a) (prejudice to prevention or detection of crime). Having taken advice from Thames Valley Police and the DVLA, he agreed that disclosure would be likely to increase the risk of vehicle cloning and that the balance of the public interest favoured non-disclosure.

The Commissioner did not agree that the vehicle registration marks were similarly exempt and concluded that the Council had misapplied section 31(1)(a) in this respect. NB. the applicant had excluded vehicles used for covert surveillance from the scope of his request.

- **Department for Trade and Industry**

FS50066313

Regime: FOI

24 October 2005

Focus: s.42/43

The Commissioner upheld DTI's refusal of a request which sought access to a brief to, and the opinion of, Treasury Counsel relating to a carpet cleaning franchise company. The Commissioner agreed that section 42 applied to the information and that the balance of the public interest favoured non-disclosure.

The Commissioner also agreed with DTI's decision to cite section 43 in refusing to confirm or deny whether it held any information about an investigation into the company's activities, in light of the potential for prejudice to that company's commercial interests.

The decision is being appealed to the Information Tribunal.

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- **Civil Aviation Authority**

FS50065361

Regime: FOI/DPA

18October 2005

Focus: s.40

The complainant sought information relating to a third party who had expressed concern at the complainant's fitness to fly. The Commissioner upheld the application of s.40: most of the information was also the applicant's own personal data so was exempt under section 40(1) and should have been dealt with under the Data Protection Act 1998. Information which identified the informant was exempt under section 40(2) and (3) as the person was acting in a private capacity and disclosure would be unfair.

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- **The Financial Services Authority**

Ref: FS50069723

Regime: FOI

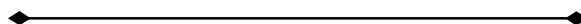
26 September 2005

Focus: s44/ meaning of “proof”

The Information Commissioner agreed that section 348 acted as a statutory bar to disclosure of information relating to building society mortgages and relevant calculations. Section 348 of the Financial Services and Markets Act 2000 prohibited the FSA from disclosing the requested information without appropriate consent.

During correspondence, the applicant indicated that he wanted the FSA to “prove” that banks were excluded from the requested calculations. The IC noted that it was not for him to determine whether the information concerned amounted to “proof”, which is a subjective term.

This decision is being appealed to the Information Tribunal.



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23 September – 25 January 2006

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- **John Connor Press Associates Limited v. Information Commissioner**

EA/2005/0005

Regime : FOI

25 January 05

Focus : s.43

The Information Tribunal concluded that the National Maritime Museum (NMM) should have disclosed financial details relating to contractual negotiations which it conducted with an artist, Conrad Shawcross for his contribution to NMM's New Visions programme.

The Information Commissioner had upheld NMM's decision to withhold the financial information, concluding that disclosure would prejudice the commercial interests of NMM for the purposes of section 43(2) and that the balance of the public interest favoured non-disclosure. The Commissioner's decision was based on the fact that, when the request was made, NMM was involved in active negotiations with another artist (Beth Derbyshire) concerning the same programme and disclosure would have been likely to prejudice NMM's bargaining position at that time.

The Tribunal considered the meaning of "likely to prejudice" in section 43(2), interpreting it as meaning that there must be a real and significant risk of harm being caused and citing case law under the Data Protection Act 1998. It concluded that the threshold for the application of section 43(2) was not met in this case because: firstly, NMM had already disclosed a lot of information that would be of use to those with whom they were engaged in negotiations; secondly, some details of the contract with Conrad Shawcross had already been disclosed; and thirdly the works of art by

Conrad Shawcross and Beth Derbyshire were so different that they could not be treated as true comparables for the purposes of a negotiation.

The Tribunal rejected the Commissioner's submissions that its jurisdiction was confined to reviewing the Commissioner's decision on a judicial review basis, although it did conclude that the Commissioner did not have sufficient evidence before it to reach the conclusion that it did. The Tribunal heard evidence from the official in the Information Commissioner's office who had dealt with the complaint.

IRJ Comment:

It is worth noting that, although the Tribunal concluded that section 43(2) was not applicable in this case, it did accept that the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on subsequent transactions.

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- **Bustin v. Information Commissioner**

EA/2005/009

Regime: FOI

16 December 2005

Focus: Information "held"

In January 2005 the appellant, Mr Bustin, requested a copy of an "approved drawing" from Cornwall County Council relating to an agreement under the Highways Act. The Council eventually sent Mr Bustin a copy of the approved drawing in late February. In the meantime, the Council refused the request, maintaining that they did not hold the requested information, because the drawing in question had yet to be "approved".

The Commissioner agreed that the Council did not hold the information at the time of the request and concluded that no remedial steps were required.

On appeal, Mr Bustin presented evidence suggesting that the Council did hold the approved drawing at the relevant time. The Tribunal noted that, in light of the dispute of fact, it would not be able to resolve the question of whether the information was 'held' without evidence from the Council, which was not a party to the appeal. However, as Mr Bustin was now in possession of the relevant information, the Tribunal found that it did not need to determine this point.

The Tribunal dismissed the appeal on the grounds that, 'irrespective of the Commissioner's factual finding [that the information was not held], the only possible conclusion for his decision notice was a conclusion that no remedial action was required.'

- **Simmons v. Information Commissioner**

EA/2005/0003

Regime: FOI

16 December 2005

Focus: Information "held" / remit of Tribunal

The appellant considered that the calculations and reasoning provided by the Valuation Office Agency (VOA) in response to his request for information about how the Council Tax banding was determined for his property were inadequate to justify the banding. He argued that the VOA had therefore not provided the information requested by him.

The Tribunal noted that Mr Simmons' quarrel was with the quality of the information provided and whether it was sufficient to justify the banding. It was not for the Tribunal to adjudicate on those matters: their jurisdiction under the Freedom of Information Act was concerned only with whether the information actually held had been communicated to him. After considering the written evidence provided to them, they concluded that all relevant information held by the Inland Revenue had been communicated, and the appeal was dismissed.

- **Harper v. Information Commissioner and Royal Mail Group PLC**

EX/2005/0001

Regime : FOI

15 November 05

Focus : Meaning of "held"

The Tribunal decided in this case that the Commissioner was correct in concluding that the Royal Mail did not hold the information in question (information on whether, within a defined period, any requests had been made for access to Mr Harper's personnel file). Although the Royal Mail was likely to have held the information at

some time, their practice of deleting information periodically meant that they did not hold the information when the request was received.:

The Tribunal also noted that, where a public authority had not complied with the statutory time limit when responding to a request, the Commissioner could take action in a number of ways : by issuing a good practice recommendation under section 48 of the FOI Act ; an adverse report to Parliament under section 49 ; or an Enforcement Notice issued under section 52 requiring the public authority to comply in future, on pain of proceedings for contempt of court.

Finally, although it was not relevant to the conclusion of this case, The Tribunal went on to give lengthy guidance on its approach to deleted electronic records under the FOI Act. The Tribunal thought that the Information Commissioner should look further at this question, and issue guidance. The Tribunal concluded that public authorities may be required to attempt to retrieve deleted data. Whether or not deleted data are still 'held' is a question of fact and degree, but restoration from a recycle bin folder or back-up tape should normally be attempted, and any use of specialist staff time or software to retrieve data may result in the appropriate limit being engaged for the purposes of section 12.

- **Barber v. Information Commissioner**

EA/2005/0004

14 October 05

Regime: FOI

Focus : s1 (3)

The Inland Revenue received a request for information on the prioritisation of refunds of overpaid tax, which was framed by reference to an allegation of failed standards, with which the Inland Revenue disagreed: they responded indicating that they did not have any such information. The Commissioner upheld the Inland Revenue's response, but the Information Tribunal overturned his decision. The Tribunal noted that, if the language used by a requester causes difficulty in identifying requested information, the public authority should seek clarification under s.1 (3) FOI. The Inland Revenue should have disregarded the subjective terms in which the request was phrased, and should have sought to satisfy Mr Barber's underlying requirement to receive information concerning the prioritisation of refunds.

In the meantime, Mr Barber had made a number of further requests for information, which had been complied with. Consequently, the Tribunal adjourned the hearing and asked the parties to consider what, if any, further information could be provided to Mr Barber.

- **Mitchell v. Information Commissioner**

EA/2005/0002

10 October 05

Regime : FOI

Focus : s.32

The Information Tribunal considered the application of the Act. to court transcripts that are held by public authorities as litigants, third parties subject to a court order, or interested parties, and determined that s.32 (1)(c) (documents created by a court or member of staff at a court) did not apply.

The Tribunal concluded that section 31(2)(c) could not extend to public orders of the court, but must refer to internal documents such as notes to a judge relating to the conduct of a case. The Tribunal also noted that no issues of legitimate privacy or confidentiality arose in relation to court transcripts, as they are records of proceedings to which any adult could freely have listened.

IRJ Comment:

The Information Tribunal concluded in this case that the transcript was not in fact 'held' by the public authority. However, taking a narrow interpretation of its jurisdiction, the Tribunal determined that, as the Information Commissioner's decision notice referred only to section 32, the Tribunal could not look at whether any other exemptions applied, and had to ignore the fact that the Council did not hold the information in question.



Other Jurisdictions

23 September – 25 January 2006

Please note: the information set out below is a summary of some of the published decisions of the Scottish Information Commissioner. The summaries should **not** be taken as representative of the views of the Journal, or the Department for Constitutional Affairs: any comments from the editors are clearly marked.

- **Scottish Executive**

089/2005

Regime: FOI(S)A

22 December 2005

Focus: s.29

The Commissioner upheld the Scottish Executive's decision to withhold information on the use of the powers in ss.4 and 5 to extend the scope of the FOISA on the basis of section 29 (formulation of Scottish Administration policy).

The Commissioner considered that, as only 5 months had elapsed since implementation of the FOISA, the failure to use the powers in sections 4 and 5 was not a matter for significant public concern. The Commissioner agreed that the balance of the public interest favoured non-disclosure in this case, but noted that the arguments made by the Executive (on the need for "free space" in which to consider policy) were made in a very generic way.

- **Mr David Emslie and the Scottish Executive**

080/2005

Regime: FOI(S)A

16 December 2005

Focus: s. 14(1)

The applicant made eight information requests to Cathy Jamieson, Justice Minister, concerning alleged fraud and criminal activities. The request included a number of unsubstantiated allegations against an individual. The Commissioner upheld the

Executive's decision to classify the request as 'vexatious' under section 14 on the basis that the language used was wholly inappropriate and made it almost impossible to work out what was being requested. However, the Executive had breached sections 9(b) and 21(9), firstly by failing to inform the applicant of the right to internal review, and secondly by failing to carry out a review on request.

- **Mr David Laing and the Chief Constable of Fife Constabulary**

076/2005

Regime: FOI(S)A

15 December 2005

Focus: ss25, 26(a), 34(1)(a), 38(1)(b)

Solicitors acting for one of the parties involved in an road traffic accident requested the names and addresses of the owner and driver of the other vehicle, and the names, addresses and statements of witnesses. The request was refused. As legal agents for a party to in the accident, they could have obtained the information by paying £51 for a copy of the Police Accident Investigation Report.

The Commissioner upheld the application of section 26(a) (prohibitions on disclosure) on the grounds that disclosure to the public would breach the DPA, although it would have been preferable to cite section 38(1)(b) (personal information). In doing so, the Commissioner ignored the fact that the requestor was acting as agent for a person with particular interest in the information, saying that information provided under the FOISA must be "provided to any applicant, no matter who they are: effectively, the information enters the public domain".

The Commissioner upheld the exemption of witness statements under section 34, despite there being no prospect of a prosecution. He held there were "strong reasons" to uphold the exemption, notably the public interest in maintaining public willingness to co-operate with the criminal justice system, which could be compromised if witness statements were routinely released under FOI(S)A.

- **Common Services Agency for the Scottish Health Service**

066/2005
8 December 2005

Regime: FOI(S)A
Focus: ss. 30/38

The Commissioner ordered the Common Services Agency for the Scottish Health Service (CSA) to disclose the clinical outcomes (mortality rates) for surgeons.

The Commissioner disagreed with the CSA's argument that, because the information that they held was unreliable and incomplete, it was not 'held' for the purposes of the Act. He also concluded that section 38 (personal information) did not apply to the statistics. Referring to guidance issued by the Information Commissioner, the Scottish Commissioner considered that the information related to the individual surgeons in their professional, rather than personal capacities. It was far from demonstrated that disclosure would cause any damage or distress and, in any event, any adverse comment would be confined to their professional lives.

The Commissioner also found that the information was collected from hospitals on a routine basis so it was not likely that disclosure would prejudice surgeons' willingness to provide information in future. In addition, there was no evidence that press coverage of earlier releases of mortality data had caused substantial harm to the effective conduct of public affairs. Consequently, section 30(b) did not apply.

IRJ Comment:

This release has attracted widespread media interest. Scotland's Chief Medical Officer is reported to have queried the meaningfulness of such figures.

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- **Mr Alexander and the Scottish Executive**

057/2005
24 November 2005

Regime: FOI(S)A
Focus: 28(1)

The applicant requested a large amount of information relating to why sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 had not been commenced. The Scottish Executive released 32 documents (with redactions) after

internal review, relying on a large number of exemptions (including section 28(1) – relations with the UK administration), in withholding the remainder.

The Commissioner ordered disclosure of a substantial amount of information, concluding, inter alia, that disclosure of information which is, in his view, of an uncontroversial, administrative nature, is unlikely to harm relations with the UK Government.

The decision concluded with a comprehensive table identifying that information whose disclosure was ordered.

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- **Rob Edwards and the Scottish Executive - (Scottish Information Commissioner case)**

042/2005
25 October 2005

Regime: FOI(S)A
Focus: s 3(2)

The Commissioner upheld the Scottish Executive's decision to refuse a request for information relating to EU infraction proceedings, on the basis that it had been supplied in confidence from a department of the Government of the United Kingdom, and as such was 'not held' for the purposes of the FOI(S)A (section 3(2)).

Regard was had to the Scotland Act 1998 which defines the Scottish Parliament's competence to legislate on Freedom of Information in terms similar to section 3(2), and the Memorandum of Understanding between the UK Government and the Scottish Ministers.

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- **Mr Paul Hutcheon and the Scottish Parliamentary Corporate Body**

033/2005
6 October 2005

Regime: FOI(S)A
Focus: ss38(1)(b), 39(1)

The Commissioner ordered disclosure of the destination points of taxi journeys for which David McLetchie MSP had submitted travel claims since 1999. He ordered disclosure on the grounds that release would not contravene any of the data protection principles, and so s38(1)(b) was not engaged. He also found that section 39(1) (information endangering health and safety) was not engaged.

The Commissioner stated that, as the journeys were undertaken on Parliamentary duty, it was reasonable to expect that such information would be made publicly available (there was no evidence of Mr McLetchie's personal expectations). He concluded that it was not possible to identify a pattern of travel behaviour from the information, and there was no evidence that disclosure would endanger Mr McLetchie.

The Commissioner stressed that each such case would be treated on its own merits and that he would not order release of such information in future cases should the release of the information put a person at risk.

- **Mr Michael Collie and the Scottish Health Service - (Scottish Information Commissioner case)**

**021/2005
15 August 2005**

**Regime : FOISA/DPA
Focus : s 38 FOI(S)A, ss.1(1)/8(7) DPA**

The requester asked the Common Services Agency for information on the incidence of childhood leukaemia, by year, for all of the Dumfries and Galloway (DG) postal area by census ward.

The CSA had a longstanding rule of scrutinising any data containing small numbers before release, and suppressing cells in tables containing less than 5 cases where it was considered that there was a significant risk of indirect identification of living individuals.

The Commissioner upheld the CSA's argument that the information it held fell within the definition of "personal data", as set out in section 1 (1) of the DPA, taking account of information which might be in the possession of a data recipient. The

Commissioner had regard to section 8 (7), which is concerned with whether it is reasonable to disclose personal data in response to a subject access request, where to do so also discloses information about another identifiable individual. He stated that: "In the past, this section has been applied not only where a subject access request involves the release of third party data, but also where any request for third party data is received". He also stated: "The advice from the Office of the Information Commissioner was that section 8(7) of the DPA 1998 should be taken into account when considering whether an individual can be identified from data".

The Commissioner held that it would be unfair to release the information in its present format. However, he decided that the public authority must not only consider whether it could have modified the data to make it publishable, but also should have provided "Barnardised" (adapted) statistics, or offered the applicant "the closest fit" to the information he had requested.

IRJ Comment:

It is novel for information in the possession of a *data recipient* to be considered when determining whether or not information is "personal data" on the grounds that individuals are identifiable. The definition in section 1(1) refers only to information in the possession of the *data controller*, and not the *data recipient*. It is not clear on what basis section 8(7) of the DPA was used as a tool for interpreting section 1(1).

