



# 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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## Editorial

The significant number of case summaries included in this edition of the Journal points to a key development in the area of information rights since our last edition. As the body of decisions issued by the Information Commissioner and Tribunal has grown, so the boundaries of our Information Rights legislation have begun, tentatively, to emerge.

Nobody is suggesting that these boundaries are immutable. The Tribunal has yet to rule on some of the key issues affecting public authorities, including the application of section 14(1) on vexatious requests and the full extent of the duty to provide advice and assistance under section 16. However, the Commissioner has given a clear indication of his thinking on these matters. In particular, his decisions on the extent of public authorities' duties under s.16 have begun to make clear his views on what constitutes reasonable advice and assistance. The implications of these decisions for public authorities are explored in our lead article at **page 6**.

As the unknowns surrounding the application of the Act begin, very gradually, to diminish, public authorities are entering a period of consolidation, building on lessons learned from early experience. In his article at **page 19**, Alan Stead of Nottingham City Council looks at the challenges facing local government in this respect, and highlights the need for increased knowledge sharing among local government practitioners.

Underpinning future developments in the Information Rights world will be records management systems. The future challenges in this respect are considerable – how must such systems change to cater for modern ways of working? Natalie Ceeney, Chief Executive of The National Archives, gives an overview of some of the key issues in this area in her article at **page 15**.

You will note that this edition of the Journal constitutes two issues in one. From early September we will publish a monthly round-up of ICO and IT case summaries. These monthly updates will be available via e-mail to anyone subscribing to the Information Rights Journal circulation list. Please see <http://www.foi.gov.uk/maillinglists.htm> for further details.

We are keen to make the Journal as useful to practitioners as possible. We therefore welcome suggestions as to possible future articles. If there are any aspects of the

articles in this edition that you would like to see explored in more depth in future, please do let us know by writing to us at [informationrights@dca.qsi.gov.uk](mailto:informationrights@dca.qsi.gov.uk).

**Editor, Information Rights Journal**  
**Access to Information Central Clearing House**



## Recent Developments

### [Consultation paper on increasing penalties for deliberate and wilful misuse of personal data](#)

In the context of moves towards an era of greater data sharing, the Government is concerned to demonstrate that personal data will not be wilfully or recklessly abused. The Department for Constitutional Affairs published a consultation paper on proposed custodial penalties for the deliberate and wilful misuse of personal data, on 24th July.

These proposals are part of the Government's wider strategy on data sharing, the aim of which is to increase public confidence in the sharing of personal data while preventing and effectively punishing those who try to profit from illegal trading in personal information. There have been increasing concerns over the rise in the trade of personal data and identity fraud. Investigations by the police and Information Commissioner's Office have uncovered evidence of a widespread and organised undercover market in confidential personal information.

The current penalties (i.e. fines) in section 60 of the DPA do not provide a sufficiently strong deterrent to those who try to profit from this illegal trade. Section 55 of the Act makes it an offence to obtain, disclose or procure the disclosure of personal information knowingly or recklessly without the consent of the organisation holding the information. To deter people from trading in personal data the Government proposes to increase the penalties available to the courts for offences under s.55 of the DPA. Those found guilty of offences under s.55 could be imprisoned for up to two years, in addition to the fines already available to the court.

The Government's proposal for custodial penalties for data misuse does not mean penalising front-line public sector staff who, while sharing data for legitimate reasons, make errors of judgement in what are often complex cases. It does mean penalising those who sell the personal information from databases, abusing their positions of trust, and those who attempt to gain personal information through deception.

Greater data sharing within the public sector has the potential to be hugely beneficial to the public as individuals and to society as a whole. The Government is keen to make the most effective use of the information that it holds and to promote the sharing of personal data across the public sector to increase efficiency, combat serious and organised crime,

protect the vulnerable and encourage the development of more effective, targeted and personalised services.

At the same time, it is extremely important to protect and secure people's personal information. Those who abuse the trust placed in them by their employers, or those who cajole information from organisations - both public and private sector - should face the appropriate penalties.

The consultation paper invites comments from both members of the public and organisations. It is available on the Department for Constitutional Affairs' website at [http://www.dca.gov.uk/consult/misuse\\_data/cp0906.htm](http://www.dca.gov.uk/consult/misuse_data/cp0906.htm). The consultation ends on 30 October.



## **Article: The section 16 duty to provide advice and assistance – decisions of the Commissioner**

**Author:** Andy Drought, Access to Information Central Clearing House, Department for Constitutional Affairs

The section 16 duty to provide advice and assistance, and the section 45 Code of Practice <sup>1</sup> to which it refers, can be viewed as the cornerstone of public authorities' interaction with members of the public seeking information under the Freedom of Information Act 2000.

The duty to advise and assist was designed, among other things, to prevent the Act becoming the preserve of a select group of information rights "experts" who understood how the Act functioned and how public authorities used and stored information. The duty to provide advice and assistance would, it was hoped, support ordinary members of the public, inexperienced in dealing with public authorities, for whom the Act was fundamentally intended.

Initial reservations about a duty to advise and assist being too open-ended and impracticable to enforce because of its lack of clarity were, to a large extent, addressed by a stipulation that the duty extended so far as it could be considered "reasonable" for a public authority to provide such advice and assistance. Crucially, where the authority had provided advice and assistance in conformity with the Secretary of State's s.45 Code of Practice, an authority would be deemed to have complied with its statutory duty under s.16. The hope was that the Code would provide a clear message to public authorities about what they must do as a minimum to ensure that they had met the duty imposed by the Act. The incorporation of the duty into the Act also ensured that it would be enforceable by the Information Commissioner.

Early experience has suggested that, too often, public authorities are unaware of the central importance of the Code in defining their relationships with members of the public. Given its importance, every information rights practitioner should have an intimate understanding of its provisions. They should also, at every opportunity, endeavour to impart the central messages contained in it to officials in wider government who may be involved in dealing with requests for information.

Of course, the s.16 duty and the Code of Practice (along with guidance issued by the Information Commissioner<sup>2</sup> and the Department for Constitutional Affairs<sup>3</sup>) should only be regarded as the starting point, the baseline, for public authorities engaging with members of the public. As authorities' practical experience of the Act increases, their understanding of the exact extent of the duty, and how the s.45 Code applies to the myriad complications of real-life requests, will increase. The answers to vexed questions such as what can be considered "reasonable" in specific circumstances, or whether a public authority's actions have in fact conformed to the s.45 Code in relation to a certain request, will gradually become clear. It was always intended that they would be aided in this by the decisions of the Information Commissioner and the Information Tribunal. More than a year and a half into the Act's operation, the Tribunal has only begun to give consideration to the extent of the duty<sup>4</sup>. However, the Commissioner has ruled on the s.16 duty in more detail. This article considers those decisions to date, and attempts to provide pointers as to their practical implications for public authorities seeking to comply with the Act.

### *1. Interrelationship with section 12 - suggestions as to refinement of requests*

Many of the Commissioner's key decision notices in this area have addressed the interrelationship between the s.12 "appropriate limit" exemption and the s.16 duty. The Commissioner has taken pains to emphasise the need to help applicants refine and re-word their requests to bring them within the appropriate limit, and has examined closely whether public authorities' actions in this regard have represented compliance with the s.16 duty. In some cases, he has applied a stringent test. In one such case, the *Department for International Development*<sup>5</sup> (DfID) rejected a request under s.12, but suggested that the applicant refine his request to a specific subject area. When a refined request was received in line with their suggestion, the department found that compliance with this request, too, would exceed the appropriate limit. The Commissioner therefore held that DfID's suggested refinement "cannot be seen to be an offer of advice and assistance", and that it had not complied with its obligations under s.16 of the Act.

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<sup>1</sup> See: <http://www.foi.gov.uk/reference/impref/codepafunc.htm>

<sup>2</sup> See: [http://www.ico.gov.uk/tools\\_and\\_resources/document\\_library/freedom\\_of\\_information.aspx](http://www.ico.gov.uk/tools_and_resources/document_library/freedom_of_information.aspx)

<sup>3</sup> See: <http://www.foi.gov.uk/index.htm>

<sup>4</sup> It has suggested that the duty to advise and assist could not create a duty to consult in *Slann v the Information Commissioner* (EA 2005/0019 – summarised in this issue at page 26) and in *Kircaldie v the Information Commissioner* (EA/2006/0001 – summarised in this issue at page 28) under the equivalent reg. 9 of the EIRs, they praised the public authority for not taking a timing point against an applicant.

<sup>5</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50082257.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50082257.pdf)

It follows that the Commissioner will expect officials dealing with requests that are formulated in too general a manner to take steps, when suggesting ways in which the applicant might refine his request, to satisfy themselves that their suggestions will, if followed, result in a request that can be processed under the appropriate limit. This represents a robust interpretation of the relevant provisions of the s.45 Code, which state that: “the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling.”

### *Practical implications*

Public authorities dealing with sometimes significant numbers of requests for information will recognise the practical problems that the Commissioner’s approach in this case might present. Experience thus far has demonstrated that public authorities will often put forward suggestions as to how to refine a request on the basis of what might be described as a “reasonable estimate”. Such suggestions are put forward in good faith, but the investigations necessary to ascertain whether such a refinement would definitely result in a request being processed may be seen by authorities as unduly burdensome in certain circumstances.

This being the case, the practical effect of the Commissioner’s reasoning in this case, if followed faithfully by public authorities, might be expected to vary. On a pessimistic view, officials may formulate their refinement suggestions in a less specific way - for example, a bland suggestion that the applicant “may wish to refine his/her request” - which is likely to be to the detriment of requesters. Perhaps more optimistically, they may spend more time investigating the precise way in which a request might be refined. The latter approach might be difficult if they do not have a clear picture of the requester’s area of interest - it may be that authorities will therefore need to spend more time in engaging with requesters on an ongoing basis. They should, in any case, ensure that they are satisfied that the approach they have taken in advising an applicant as to how a request could be refined is reasonable.

### *2. Interrelationship with section 12 - Provision of detailed reasoning with regard to rejected requests*

The Act is silent about the extent to which public authorities should provide details of the reasons underlying an estimate that the cost of compliance with an applicant's request would exceed the appropriate limit under s.12. The Commissioner, however, has interpreted the s.16 duty in such a way as to place public authorities under a duty to provide reasonable information in respect of this section of the Act.

In a decision involving *British Nuclear Fuels Plc*<sup>6</sup> (BNFL), the Commissioner found that BNFL had not complied with its duties under s.16, and stated: "BNFL did not provide to the applicant any information as to how they had made their estimate...." He indicated that, by reference to s.16, he expected to see more than a simple assertion that compliance would exceed the cost limit. The Scottish Information Commissioner, in the case of *Mr F and the City of Edinburgh Council*<sup>7</sup>, has made such reasoning more explicit, stating that: "I accept that there is no explicit requirement... to provide a breakdown of costs of providing information when this exceeds £600. Nevertheless, I would judge that the provision of [this information] would be entirely within the spirit of flexibility set out in the section 60 Code of practice, and would have provided greater assistance to the applicant in understanding the legal basis for refusing his application under FOISA".<sup>8</sup>

### *Practical implications*

It is not yet known how the Tribunal would view such an interpretation of the s.16 duty in relation to the provision of detailed reasoning under s.12, particularly as the s.45 Code is silent as to the need to provide such reasoning. However, in the absence of any decision by the Tribunal on this matter, public authorities should, when rejecting requests under s.12, pay careful attention not just to the need to suggest refinement of the request, but also to the extent that it would be reasonable to explain why the request exceeds the appropriate limit in the first place. The latter question is one that will need to be addressed on a case by case basis, having regard to all the relevant circumstances.

As a practical example, if it would be obvious on any reasonable reading of a request that it would exceed the appropriate limit, it is suggested that it would not seem

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<sup>6</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2005/decision\\_notice\\_72719.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2005/decision_notice_72719.pdf)

<sup>7</sup> See: <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision073-2005.pdf>

<sup>8</sup> See also a case involving the Ministry of Defence, where the Commissioner held that the MOD had met its obligations under s.16 by providing a detailed description of the technological limitations of the computer system from which the information requested might theoretically be extracted, and had also engaged in a number of phone conversations to ascertain precisely which information the requester was interested in:

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50084565.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50084565.pdf)

reasonable within the wording of s.16 to expect the authority to provide a detailed breakdown of likely costs - a high level explanation would suffice. But in cases where, on the face of it, it may be difficult for an applicant to understand why the fees limit applies, public authorities may need to look particularly carefully at the information provided in any response, and take a view as to what is reasonable in all the circumstances.

### *3. Provision of information about exemptions that may apply to refined or resubmitted requests*

Many public authorities will, when suggesting that a requester refine his request, indicate that information falling within any refined request may also be exempt under certain provisions in the Act. There has been some understandable nervousness about this approach, with some practitioners feeling that, regardless of the fact that such information is provided with the best of intentions, it might be seen as an attempt to dissuade the applicant from resubmitting a request.

The Commissioner has considered this issue in a case involving *Her Majesty's Revenue and Customs*<sup>9</sup> (HMRC). In his analysis under s.16, he found that it was reasonable for a public authority to state which exemptions might apply to a certain type of information, recognising that such an approach was an attempt to manage the requester's expectations. He qualified this, however, by stating that such an explanation would only be appropriate if it were given in conjunction with "further explanatory information of sufficient detail to assist the requester." Without such additional explanatory information, he said the impression might be given that any information relating to the subject at hand would be exempt information.

#### *Practical implications*

Many public authorities will take comfort from the Commissioner's recognition that the approach they have taken in providing an indication of possible applicable exemptions is a reasonable one. However, the Commissioner indicates that response letters making such a point must be carefully phrased. Where public authorities choose to manage expectations by indicating that certain exemptions may apply to refined or resubmitted

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<sup>9</sup> See: [http://www.ico.gov.uk/tools\\_and\\_resources/decision\\_notices.aspx?id={52A7CAAF-B67D-464E-821C-67783E7761C7}&ref=&authority=84&section=35&month=0&year=0&status=0#dn](http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx?id={52A7CAAF-B67D-464E-821C-67783E7761C7}&ref=&authority=84&section=35&month=0&year=0&status=0#dn)

requests, they should qualify such information with a statement that indicates that all subsequent requests will be assessed in line with the Act.

#### 4. *The limits of “reasonable” advice and assistance*

The Commissioner has, in a number of Decision Notices, given an indication of the circumstances in which he will consider the advice and assistance given by public authorities to be “reasonable”. He has, of course, referred to the s.45 Code, which discusses advice and assistance in the context of clarifying a request for information, and in his Awareness Guidance No.23 he states that: “In simple terms, the provision of advice and assistance can be seen as the means by which a public authority engages with an applicant in order to establish what it is that the applicant wants, and where possible assist him in obtaining this, maintaining a dialogue with the applicant throughout the process.”

The Commissioner has stated in a case involving the *Department for Regional Development, Northern Ireland*<sup>10</sup> that where a request is clear as to what information is required, and that information has in fact been supplied, additional advice and assistance is not required. Similarly, in a case involving the *London Borough of Richmond upon Thames*<sup>11</sup>, he found that the authority had met its obligations by engaging with the applicant sufficiently to establish what he wanted, assist him in obtaining it, and maintain a dialogue with him. As the request was already clear, the public authority did not require any further information to establish what information the applicant wanted, or to assist him further in framing his request in a way that would help him in obtaining the information. The Commissioner also noted a number of further limitations to the s.16 duty to provide advice and assistance. He took the view that entering into an ongoing debate with an applicant about differing interpretations of the Act would not be reasonable, or indeed even fall within the definition of advice and assistance under the Act. Moreover, he found that the extent of an authority’s s.16 duty is not determined by an applicant quoting s.16 when asking a question, but by the requirements of the Act and by reference to the s.45 Code. The Commissioner did not consider that the obligation to provide advice and assistance required a public authority to reply to phone calls and correspondence immediately or by return as was requested by the applicant.

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<sup>10</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Noteice\\_FS50093054.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Noteice_FS50093054.pdf)

<sup>11</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50073576.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50073576.pdf)

Both these cases represented circumstances in which a public authority had sufficient information to be clear as to the information being requested, and had supplied the information in question. However, the Commissioner has been more ready to find public authorities in breach of the s.16 duty in cases where there may remain some doubt as to the precise nature of the information requested and, in particular, in cases where information has not been provided to a requester for whatever reason.

In a case involving the *Department of the Environment (Northern Ireland)*<sup>12</sup>, in which the public authority interpreted a request narrowly and withheld certain information, the Commissioner held that the authority, rather than placing a narrow interpretation on the request, should have engaged with the applicant to clarify its scope. He noted that paragraph 10 of the s.45 Code states that advice and assistance to enable an applicant to describe more clearly the information requested may include providing an outline of the different kinds of information which might meet the terms of the request, or providing a general response to the request, setting out the options for further information which could be provided on request.

A similar view was taken in a case involving *Mid Devon District Council*<sup>13</sup>, in which the Commissioner found that, where the council did not hold certain information requested, it would have been appropriate to clarify what sort of information was recorded on the council's business rate system.

### *Practical implications*

These decisions appear to indicate that the Commissioner, in line with the assumption that it is generally in the public interest to make available information held by public authorities, will look particularly closely at whether the s.16 duty to advise and assist has been breached in cases where information has not been provided to a requester. Where information held by public authorities may be relevant to an applicant's area of interest and is not exempt, the Commissioner evidently attaches importance to its being made available wherever possible. Public authorities should, where they are providing a response that is likely to be disappointing to an applicant, pay particular attention to the need to help the applicant understand the view that they have taken of a request, and the possible alternative avenues by which they might get related information. There will

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<sup>12</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50066752.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50066752.pdf)

<sup>13</sup> See: [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50072180.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50072180.pdf)

obviously, however, be difficult balances to be struck when providing information about other types of information held, particularly where such other information is considered exempt by the public authority. In such circumstances, authorities may consider engaging in further dialogue with the requester to ascertain precisely where his/her interest lies.

### *Conclusion*

The cases outlined above represent the first intimations of the boundaries of s.16 becoming apparent through the decisions of the Information Commissioner. They are tentative boundaries, and should in all probability not be considered final until the Tribunal has been invited to rule on the related issues. However, public authorities should pay them careful attention when dealing with requesters under analogous circumstances - they not only provide useful guidance as to how the Commissioner believes interaction with members of the public should take place, but they also flag up the arguments that public authorities will need to consider when seeking to demonstrate that they have complied with their duty to provide advice and assistance under s.16.

### *Further note on practice with regard to s.16 advice and assistance*

It appears that some officials continue to show reluctance to use the telephone as a medium for providing advice and assistance to requesters, despite the Commissioner having made it clear that it will often be appropriate to do so. It is possible that at least some of the problems encountered by the public authorities involved in the cases outlined in this article might have been avoided had a conversation taken place between the official dealing with the request and the applicant. An iterative approach to refinement might be accepted more readily by a requester if the relevant considerations are conveyed orally rather than in formal letters - two telephone calls are usually less time consuming and bothersome than two rounds of correspondence. Public authorities may be able to gain a clearer picture of the instances when applicants do not understand the reasons for rejection of their request in conversation, and provide advice accordingly. And experience has shown that conversation often yields greater clarity as to the precise subject area the requester is interested in, making it easier for public authorities to assist the requester in refining his request.

In some cases, of course, reluctance to use the telephone is understandable - a desire to ensure that the requester does not believe he or she is being pressured into framing his request in a certain way, or to ensure that decision-making is fully audited. While it is correct to say that the telephone will not always be the appropriate avenue for advice and assistance, however, there are simple measures that can be taken to address such concerns. For example, preparing a form of words before telephoning that reassures the requester of the motives for a call is a simple way of avoiding misunderstandings. And writing a letter or e-mail confirming the content of a conversation, and setting out clearly the public authority's understanding of the outcome of that conversation, is an effective way of avoiding misunderstandings and maintaining the integrity of audit trails.

The advice and assistance given to members of the public by information rights practitioners plays a vital role in ensuring the development of a healthy, functioning information rights culture. Practitioners should do all they can to enhance their capabilities in this area, and to ensure a good understanding of what may be judged "reasonable" in terms of the s.16 duty.

**Andy Drought**  
**Access to Information Central Clearing House**



## Article: Records management – FOI and beyond

**Author:** Natalie Ceeney, Chief Executive, The National Archives

Information rights practitioners do not need to be told about the importance of records and information management. They realise this on a daily basis as they search for information requested by a member of the public, or try to explain why information that might be expected to be among their records cannot be found.

Records management underpins access rights, which is why the FOI Act (section 46) provided for a Code of Practice on Records Management to be issued<sup>14</sup>. Some of the recent guidance published by The National Archives has had the Code very much in mind, particularly our new series of short guides<sup>15</sup>, each linked to a section of the Code. These guides are aimed in particular at those who become responsible for records management but do not come from a records management background, or who need to know what records management, and the Code, are about.

But access legislation is not the only reason that records and information management matters. In this article I want to remind you of some of the other reasons and to give an overview of some of the changes technology is bringing. The records of the past will always be with us, but the records of the present and future are very different and require radical new approaches.

Organisations do not keep records just because a member of the public might ask to see them. They keep records because they need them for business purposes: to prove legal rights, to refer to in daily work, to share knowledge and create new evidence-based policy, to use as evidence, to meet legal, accountability and governance requirements and to serve as corporate memory. When deciding what records to create and for how long to keep them, organisations consider what business benefit they bring and what risks – legal, financial and reputational - they would face without them. Increasingly, records and information managers must quantify the cost of keeping records against the cost of not having them when needed, and must justify the cost of investment in new systems against the benefits those systems will bring in terms of more useful and

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<sup>14</sup> The records management Code was issued in November 2002. It can be found at <http://www.foi.gov.uk/reference/imp/imp/codemanrec.htm>

accessible records. Information management must support core business functions and be seen as a key enabling tool, not an overhead, for the organisation. One of the challenges facing records and information managers is to secure recognition of information as an asset rather than a liability or overhead. Just how this can be done is currently being explored by The National Archives. Its forthcoming merger with the Office of Public Sector Information, which has the lead on the re-use of public sector information, will bring together policy on two complementary aspects of information management: from The National Archives the 'underpinning infrastructure' of records management, and from the Office of Public Sector Information the re-use and 'knowledge management' focus which realises the benefit of creating this information asset. One of the ways we hope to tackle this is to create a 'Knowledge Management Council', under the Chief Information Officers' Council, composed of key staff across government, to bring together different approaches in this area. The Department for Constitutional Affairs, and particularly the Information Rights Division, will be a critical part of this.

Technology has already changed how people keep and use information of all kinds, both at home and at work. At home people use the Internet for shopping, they store data digitally, whether it is music, photographs or correspondence, and they write business letters on their personal computers instead of by hand. At work they communicate and conduct much of their business by internal and external email. Instead of circulating a paper file for individuals to annotate with comments or a note of action taken, there is a string of emails or, for some casework, a workflow system. To remain accessible, those emails must be saved and filed and the workflow system must have a capacity to keep information for as long as it is needed. Most organisations use their websites as a primary source of guidance and other resources, and many contacts from members of the public are initiated that way. To remain accessible, those contacts must be saved and stored in some way. But terms like 'saving' and 'filing' imply action not by records management staff but by end users as part of their daily work. End users are the record keepers now, which makes it all the more necessary that records systems are easy for them to use. New records systems must be developed in such a way as to encourage rather than deter users from keeping the records the organisation will need in the future. This is a further challenge facing records and information managers.

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<sup>15</sup>See [http://www.nationalarchives.gov.uk/electronicrecords/guides\\_code.htm](http://www.nationalarchives.gov.uk/electronicrecords/guides_code.htm). Suggestions for other topics our guidance should cover should be sent to [nas@nationalarchives.gov.uk](mailto:nas@nationalarchives.gov.uk).

What we are likely to see in the future is integration of these various sources of information – our records, our workflow systems, our website and web contacts, and other information - into both a way of thinking about information management and into technology approaches. The ‘way of thinking’ dimension is crucial – unless information and records are valued as assets, and managed as such, we will not realise the benefits. On the technology side, approaches are in place (and developing fast) to create, store, manage, distribute and publish digital content with a common user interface for users to access all forms of information across the organisation. Most organisations would call these approaches ‘EDRM’ (Electronic Document and Record Management) or, more recently, ‘ECM’ (Enterprise Content Management). Approaches of this nature will significantly benefit FOI, both for finding information in response to requests and for maintaining Publication Schemes and publishing the information promised in them, but will not do away with the need to manage the information. One of the challenges for information managers here will be the need to resolve the tension arising from the need for collaborative working with transparency of content and action while simultaneously supporting a security structure that necessitates limitations on transparency and access.

Although technology brings enormous benefits, it also brings preservation problems. Paper files are stable enough to survive long periods of benign neglect as long as the storage conditions are adequate. Digital records are much less stable. For one thing, the media on which they are stored is vulnerable to damage and decay. For another, even if the information survives intact, it may not be possible to retrieve it because computers no longer accept the medium (floppy discs, for example), or the software used to create and store the information is no longer recognised. Infrastructure must be designed so as to ensure that corporate information remains accessible and reliable for as long as it is required and preservation must be designed into systems from the point of record creation. This will require collaborative working by information management and IT specialists, such as the current work led by The National Archives on developing a shared services model to address the requirements for medium and long term access to and preservation of digital information. The National Archives is also making progress with its Seamless Flow programme<sup>16</sup> which is designed to accommodate the expected increase in digital records being transferred by government departments by automating the process from creation through to public access.

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<sup>16</sup> For more information on the Seamless Flow programme see [http://www.nationalarchives.gov.uk/electronicrecords/seamless\\_flow/](http://www.nationalarchives.gov.uk/electronicrecords/seamless_flow/)

I started this article by referring to the Records Management Code of Practice under s.46 of the FOI Act. I believe that emerging technology will have an enormous impact on how business is conducted and how the resulting records are created, stored and made accessible. But the principles set out in the Code will apply whatever the technology used to create and manage records; it is how they are interpreted and applied that will change over time. Furthermore, as I hope I've illustrated, the issue is no longer just 'records', it's the whole range of information that is created, and the purposes for which this information is used and reused which needs to concern government. And just as The National Archives has issued guidance and other tools in the past to support records management involving traditional formats, so it will work with others in the public and private sectors to develop the tools and guidance required for this very different information world.

**Natalie Ceeney**  
Chief Executive,  
The National Archives



## **Article: Information rights in local government – future challenges**

**Author:** Alan Stead, Nottingham City Council

Local government has dealt with many difficult issues arising from the Environmental Information Regulations 2004 (EIRs) and Freedom of Information Act 2000 (FOI) over the past year and a half. The complexities of the new legislation, coupled with the high volume of requests received during early 2005 and the significant increase in interaction with the general public, have all represented real challenges for local government officials.

Now that the FOI Act and the EIRs have started to bed down, and the number and type of requests are becoming more routine, councils are better able to plan for the future and should be taking active steps to do so. Two key issues which underpin the success of the next phase of implementation for local government are:

1. The need for better co-ordination and knowledge sharing among practitioners; and
2. The need to maintain and improve awareness of the limits of the legislation among members of the public

### *Awareness-raising and knowledge-sharing at local authority level*

In the run-up to January 1<sup>st</sup> 2005, some local authorities adopted a “wait and see” approach to the introduction of the new legislation, opting to allow officials to learn the practical skills needed “on-the-job”. However, the complexities of the legislation have now led to most local authorities hiring dedicated information rights staff. This has meant that many councils are now conducting higher quality analyses and issuing more accurate and helpful response letters (compared with the responses given to applicants in the first few months of 2005). This development is being supported by initiatives aimed at consolidating experience, such as the new University of Northumbria LLM in Information Rights (supported by the DCA), which local government practitioners appear to be genuinely enthusiastic about.

However, in addition to these encouraging developments, there remains a real and increasing need for local government practitioners and officials to meet regularly in order to share the knowledge garnered from their experiences, and to highlight best practice. It is only by pooling experience that local government can hope to develop a consistent

understanding of the access to information regimes, which is in the interests of both requesters and public authorities. Although the differences in circumstances that exist between local government areas must always be taken into account, and there is certainly no imperative to ensure unanimity on all information rights issues, it can cause problems when, in response to an identical request, council A decides to release data that council B withholds. Local government, perhaps learning from the experiences of central government, should therefore look further at improving mechanisms that enable increased co-ordination and consistency in their understanding of information rights legislation.

### *Disclosure logs*

As a practical example of this, the Department for Constitutional Affairs recommends that public authorities make use of disclosure logs as a routine part of their information access practice<sup>17</sup>. These logs will benefit local authorities and councils by proactively making information available and reducing the amount of time spent gathering and assessing information when processing future requests. Furthermore, in the areas where councils get multiple requests, well-maintained disclosure logs will allow practitioners to assess and learn from the approaches of other practitioners and help ensure consistency in the application and understanding of legislation. Unfortunately, many local authorities are not yet taking adequate steps to harness the benefits that a well-maintained disclosure log brings.

### *Regional groups*

Disclosure logs alone will not be sufficient to ensure the correct application of legislation at local government level. Practitioners must also have a mechanism through which they can discuss and debate the approaches taken by other public authorities. In this respect, regional groups operated by public sector organisations across the country have proved invaluable to local government. Their quarterly meetings attract high quality speakers from central and local government, as well as the Information Commissioner's Office, and provide a good "sounding board" for local information rights practitioners to test their individual theories on the operation of FOI / EIRs / DPA. Regional groups are also represented at national level in DCA and Department for Communities and Local Government working groups.

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<sup>17</sup> <http://www.foi.gov.uk/practitioner/resources/disclosurelogs.htm>

These regional groups are, by helping to establish and improve knowledge sharing among practitioners, proving useful in encouraging a common understanding of information rights issues across regions. Development of the regional groups' role in this area, while requiring careful management to ensure the independence of local authorities is not compromised in any way, is something that merits further consideration.

Other national bodies, such as the National Association for Information Management (NAIM), have also played a useful role in allowing staff to share best practice across the country.

*Use of telephone and other informal media*

If local government can work to enhance the role of the groups outlined above, and improve and sustain use of disclosure logs, there should be sufficient local knowledge-sharing to answer most queries. In addition, for trickier issues, council officials should be encouraged to make use of other avenues. They should not shy away from simply picking up the phone and talking matters through with colleagues in other councils. Council officials should also make use of the various websites and forums that give information on the latest developments in information rights.

*Maintaining and improving understanding of the information access regimes among members of the public*

A further area of operational delivery in which local government practitioners should be striving to improve their skills is the continuing need to educate and inform members of the public about the precise nature of the information rights legislation. It should be acknowledged that the actions of the Government and the ICO in attempting to raise awareness and share knowledge with local government and the public has improved the situation in this regard considerably over the last six months. Specifically, the recent steps taken by the Department for the Environment, Food and Rural Affairs to promote awareness of the EIRs have been particularly welcome. However, councils still report that some requesters can become angry and confused when they discover that they may not receive every single piece of information held on their topic of interest, or when they receive information rather than copies of the original documents containing that information. As one way of addressing this issue, practitioners should be encouraged to seek to share examples of best practice in relation to section 16 – the duty to provide advice and assistance.

The challenges faced by local government in implementing the new information rights legislation have been considerable. However, they are being met, and the legislation is now functioning significantly better at a local level than it was in the early months of FOI. The challenge for the future is to build on the successes we have already achieved, and ensure that knowledge-sharing and awareness-raising among information rights practitioners becomes second nature.

**Alan Stead**  
**Nottingham City Council**



## Recent Publications and Articles

**Title:** [Freedom of Information Annual Report 2005: Operation of the FOI Act in central government](#)

**Summary:** Provides comprehensive information on central government's handling of FOI requests received in 2005. It also provides details of the Department for Constitutional Affairs' work in 2005 to implement the FOI Act across both central government and the wider public sector.

**Publication:** Available on the DCA website at <http://www.dca.gov.uk/foi/imp/annrep05.pdf>

**Author:** DCA

**Title:** [Information Commissioner's Office Annual Report 2005-2006](#)

**Summary:** The 2005-2006 Annual report looks back on the first full year of FOI implementation, and the 21<sup>st</sup> year of the operation of the Data Protection Act. It includes 'at a glance' statistics on the performance of the ICO in respect of FOI and DP cases as well as more detailed information on the operation of the Office and its accounts.

**Publication:** ISBN 0 90 293848 2 (The Stationery Office). Also available at <http://www.ico.gov.uk/>

**Author:** Information Commissioner

**Title:** [Your right to know: A citizen's guide to the Freedom of Information Act](#)

**Summary:** The third edition of this guide for users of the Act will be published in October 2006. Specific chapters deal with how best to access information from different parts of the public sector.

**Publication:** ISBN 0 745 325 823 (Pluto Press)

**Author:** Heather Brooke

**Title:** [Public Sector Information: Renaissance, Reformation and the Age of Reason](#)

**Summary:** Considers recent legislation on access to public sector information and what factors should determine whether information should be transferred to the public domain.

**Publication:** Business Information Review, Vol. 23, No. 2 (2006) Pages 125-134

**Author:** Mike Clark

**Title:** [Targeted website advertising: a web of issues?](#)

**Summary:** This article considers targeted website advertising in the context of individuals' right to opt out of receiving direct marketing under the Data Protection Act.

**Publication:** Entertainment Law Review, Vol.17, No.3 (2006) Pages 94-95

**Author:** Phil Lee

**Title:** [Using personal health information in medical research](#)

**Summary:** This article considers the European and UK rules which govern access to personal health information, and how a risk-averse attitude to privacy laws can make it difficult for researchers to obtain access to the data they need.

**Publication:** British Medical Journal, Jan 2006; 332: Pages 130 - 131

**Author:** Tom Walley

**Title:** [FOIA confidential](#)

**Summary:** Explores the question of whether individual's names should be disclosed under the Act, or whether they are exempt as 'personal information' under section 40.

**Publication:** Solicitors Journal, Vol.150 No.20 (2006) Pages 654-655

**Author:** Ibrahim Hasan

**Title:**            [Subject access requests – an update](#)

Summary:        This article explores the recent decision of the Information Tribunal in *Harper v Information Commissioner* on the subject of whether deleted information is “held” for the purposes of subject access and FOI requests.

Publication:    Corporate Briefing, May 2006, Pages 8-10

Author:         Russell Houghton

**Title:**            [Vexatious requests – the Commissioner’s first decision](#)

Summary:        Looks at the Information Commissioner’s decision notice regarding Birmingham City Council’s handling of a request deemed vexatious by the authority under section 14 of the Act.

Publication:    The Freedom of Information Journal Vol 2 (5) 2006, Pages 3-5

Author:         Julia Apostle

**Title:**            [Client confidentiality and freedom of information](#)

Summary:        Explores the exemption at section 36(1) of the Freedom of Information (Scotland) Act 2002 (lawyer-client communications), and surveys the decisions of the Scottish Information Commissioner in this area.

Publication:    The Journal of the Law Society of Scotland 51 (4) 2006, Pages 21-23

Author:         Rosalind McInnes



## Decisions of the Information Tribunal

20 February – 11 July 2006

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**Please note:** the information set out below is a summary of some of the published decisions of the Information Tribunal. 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.

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### Slann v the Information Commissioner & Financial Services Authority

**EA/2005/0019**  
**11 July 2006**

**Regime: FOI**  
**Focus: s.44**

Mr Slann requested information from the Financial Services Authority (FSA) relating to monthly mortgage rates that the FSA provides to the Office for National Statistics. The FSA explained that this information was provided to calculate a “weighted average” which is published monthly. They provided Mr Slann with a worked example of how the average is calculated but exempted the 23 individual rates that go into the calculation on the basis of section 44 of the Freedom of Information Act.

The FSA relied on the prohibition on disclosure at section 348 of the Financial Services and Markets Act 2000 (FSMA). This provides that confidential information must not be disclosed without the consent of the person from whom it was received or to whom it relates (in this case, the 23 building societies). This decision was upheld at internal review and by the Commissioner.

The Tribunal found that the information did fall within the description at s.348 of FSMA, since the information received from the 23 building societies was confidential and no consent had been obtained to release it. The information was therefore exempt under s.44 of the FOI Act. In coming to this conclusion, the Tribunal discussed (at para. 40) whether the FSA should have produced an anonymised dataset. It concluded that either this was not possible (as people would be able to guess which figures related to individual mortgage providers based on their size) or the data would have to be altered, which would amount to creating new information and that the FOI Act does not require

that. It also heard representations on whether the duty to provide assistance in section 16 of the FOI Act required the FSA to seek consent (para. 44). The Tribunal did not rule definitively on this point but held that no duty to consult based on s.16 existed in this case. It did conclude (para. 42) that no duty to consult could derive from the Code of Practice in relation to the application of an absolute exemption which clearly applied as a matter of law.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/Slann\\_v\\_Information%20Commissioner.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/Slann_v_Information%20Commissioner.pdf)

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### **A v the Information Commissioner**

**EA/2006/0012**

**Regime: FOI/DPA**

**11 July 2006**

**Focus: s.40**

The appellant was the father of a child (referred to as X) who attended school in Powys, Wales. The appellant had requested a copy of a letter written by the head teacher of that school to Powys County Council, requesting additional funding to provide X with additional teaching support. The Commissioner had upheld certain aspects of the council's decision to release the letter with information redacted under section 40(2), and had helped effect the informal resolution of other aspects of the complaint, including the provision of a summary of one redacted passage. The redactions that were the subject of the appeal contained personal information about two unnamed teachers who had expressed concerns at having X back in class with no support, and personal information about a third party in the context of a current legal claim against the school following an injury to a teacher caused by another child.

The Tribunal upheld the Commissioner's decision. It noted that, as the individuals referred to in the redacted passages were identifiable by the school, the information constituted the personal data of those individuals. It also decided that disclosure would be unfair, and as such would breach the 1<sup>st</sup> Data Protection Principle. The appellant had argued that any unfairness to the individuals in question should be balanced against the unfairness that his child would suffer if the information in question were withheld. The Tribunal noted that s.40 was an absolute exemption and that, once it had been decided that disclosure would breach the Data Protection Principles, there was no obligation to consider the public interest in maintaining the exemption. There was already a balancing exercise incorporated into condition 6 of Schedule 2 to the Data Protection Act (DPA), which refers to the legitimate interests of both the data controller and the data subject.

They did not think that any unfairness would result to X as a result of the information being withheld, and that even if there were a degree of unfairness, it would not outweigh the interests of those whose personal data were at issue.

The Tribunal recognised and supported the Commissioner's attempts to operate an informal resolution process between the appellant and the council. The result had been a narrowing of the issues and the release of certain additional information to the appellant. This demonstrated the effective operation of the complaint procedure under section 50 of the FOI Act, and the Tribunal did not consider it to give rise to a legitimate ground of appeal.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/A\\_v\\_Information\\_Commissioner.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/A_v_Information_Commissioner.pdf)

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### **Kirkaldie v the Information Commissioner and Thanet District Council**

**EA/2006/0001**

**Regime: FOI/EIR**

**4 July 2006**

**Focus: s.42, Reg.12(5)(b)**

The appellant had requested the legal advice sought by Thanet District Council (TDC) regarding the night flying policy at Kent International Airport. The Commissioner upheld TDC's decision to withhold the information, relying on section 42 of the FOI Act.

The public authority had dealt with the request under the FOI Act, but the Tribunal held that the information should have been considered under the Environmental Information Regulations as the legal advice "related to a measure likely to affect the elements and factors referred to in Reg. 2(a) and (b)," as well as to noise and emissions caused by night flying, which could affect the state of human health and safety.

The Tribunal also commented on timing issues. It found that the request was valid and praised the pragmatic approach the council had taken, of treating the information as held for the purposes of the request even though the request had been received 7 days before TDC had actually received the legal advice. The Tribunal noted that, in any case, the duty to advise and assist at Reg. 9 would have placed the authority under a duty to inform the requester that the information was expected soon and to re-submit his request.

TDC withheld the legal advice by reference to s.42 of the FOI Act. The Tribunal identified the exception at Reg.12(5)(b) as being similar to the s.42 FOI Act exemption as an exemption that protects legal professional privilege. But in this case, the IT found that the public authority had waived its privilege in this legal advice such that it could no longer claim LPP. The Tribunal held that waiver of privilege was an objective, not a subjective test - what mattered was not what a party intended, but an objective analysis of what the party had done with privileged information. By providing a summary of the legal advice at a full council meeting, followed by the recording of the disclosure in the minutes of that meeting, TDC had waived privilege, and the exception therefore did not apply. No other exemption/exception applied and the information should therefore be disclosed.

The Tribunal also considered whether it was legitimate, once a request had been considered under the wrong regime (in this case, the FOI Act), to then attempt to rely on an analysis under the alternative regime (in this case, the EIRs). The Tribunal said that, given the complexities involved in identifying which regime applied, it would be reluctant to find that a public authority could not do so, although it would not necessarily extend this finding to other exemptions or exceptions which had no relationship to the original exemption or exception claimed.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/Kirkaldie\\_v\\_Information\\_Commissioner.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/Kirkaldie_v_Information_Commissioner.pdf)

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### **Toms v the Information Commissioner**

**EA/2005/0027**

**19 June 2006**

**Regime: FOI**

**Focus: s.30**

The appellant had requested information about the number and location of street storage post boxes that were broken into in the Glasgow area in 2004. The Commissioner had upheld the Royal Mail's decision to withhold information on the location (but not the number) of relevant boxes under section 30(1), as revealing the location of the boxes could "facilitate further attacks".

The Royal Mail said that information about the locations of the boxes had been gathered in order to identify crime patterns, to try to predict the areas in which suspects might next operate. There had been previous attacks on the boxes, and one suspect had already

been charged with relevant offences at the time the request was received. It also provided evidence that criminals targeted boxes that had been broken into previously.

The Tribunal commented on the appeal provisions in section 58 of the Act and held that, in relation to the applicability of the public interest test, the decision as to how competing public interests should be balanced does not constitute an exercise of discretion. Rather, it is a mixed question of fact and law. A question of law would arise if the Tribunal considered that the Commissioner was wrong in his judgment of the public interest balance and the Tribunal could overrule the Commission.

The Tribunal held that the decision to withhold the information under section 30 was correct. It supported the Commissioner's analysis of the public interest, which had concluded that the revelation of the whereabouts of sensitive post boxes would increase the risk to their security. The Tribunal's view was reinforced "perhaps conclusively" by a related letter from Strathclyde Police which had set out their views on the matter.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/p\\_toms.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/p_toms.pdf)

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**Scottish National Party v the Information Commissioner**

**EA/2005/0021**

**Regime: Privacy and  
Electronic Communications  
Regulations 2003**

**15 May 2006**

**Focus:**

The Information Commissioner served an Enforcement Notice on the Scottish National Party (SNP) regarding an automated telephone campaign it ran during the 2005 general election campaign. The automated calls consisted of a 35-second pre-recorded message from Sir Sean Connery, a long term supporter of the SNP.

The Privacy and Electronic Communications Regulations 2003 prohibit the use of automated calling systems for direct marketing to subscribers who have not consented to receive such calls. The Commissioner had previously consistently stated that the definition of "direct marketing" in these and earlier Regulations applied "not just to the offer for sale of goods or services, but also the promotion of an organisation's aims and ideals. This would include a...political party making an appeal for funds or support..." Following the calling of the May 2005 election, the Commissioner wrote to all major

political parties, including the SNP, reminding them of their obligations under the Data Protection Act 1998 and the 2003 Regulations. He specifically drew the attention of the SNP to the requirement that recipients of automated calls should have “opted-in” to receiving them.

The SNP began its programme of automated calls and declined the Commissioner’s request for assurances that the campaign would be discontinued. The Commissioner served an Enforcement Notice on the SNP, requiring it to cease using automated calls for direct marketing purposes to callers who had not previously indicated their consent to receiving such calls. As well as referring to the 2003 Regulations, he also considered the balance between the rights conferred by Articles 8 and 10 of the European Convention of Human Rights (ECHR). The SNP appealed the notice.

The Tribunal dismissed the appeal. It rejected the SNP’s arguments that the DPA and the 2003 Regulations did not apply to direct marketing by political parties. The Tribunal considered that such an interpretation might result in both political parties and other not for profit organisations, such as charities, falling outside all the provisions of the 2003 regulations relating to direct marketing. It also found that there was not a disproportionate interference with the SNP’s rights to freedom of expression under the ECHR, because the only limitation being placed on the SNP was as to the method of communication, not its content, and only to the extent that an individual had not previously consented to receiving automated calls.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/scottish\\_national\\_party.pdf#search=%22EA%2F2005%2F0021%22](http://www.informationtribunal.gov.uk/our_decisions/documents/scottish_national_party.pdf#search=%22EA%2F2005%2F0021%22)

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### **Bellamy v the Information Commissioner**

**EA/2005/0023**

**8 May 2006**

**Regime: FOI**

**Focus: ss.42, 43**

The appellant, Mr Bellamy, appealed the Commissioner’s decision to uphold DTI’s withholding of “the brief and evidence provided to Treasury Counsel” and “the opinion of Treasury Counsel, including any notice of meetings or telephone conversations, emails and letters” related to the opinion. DTI withheld the information under section 42 of the

FOI Act, and neither confirmed nor denied the existence of additional material under section 43.

The Tribunal acknowledged that legal professional privilege (LPP) lay at the centre of the appeal. DTI had argued that the public interest in disclosing the information subject to LPP was not sufficient to outweigh the inherent public interest in maintaining confidential communications between lawyer and client, and nor were the circumstances of the case such as to favour disclosure. The Commissioner had upheld this view.

In its findings the Tribunal made clear that it had conducted a 'merits review'. It also confirmed that the case would be decided as a matter of law because, in determining the public interest in disclosure, the Commissioner had not been exercising his discretion. The Tribunal agreed with the ICO and DTI that the exemption at s.42 applied and that the public interest favoured withholding the information. It acknowledged (at para. 35) that "there is a strong element of public interest inbuilt into [legal professional] privilege itself" and that no sufficiently strong countervailing considerations had been adduced.

At an earlier directions hearing no order had been made for disclosure of the disputed information. Subsequent to the full hearing, however, the Tribunal decided that it did wish to view all the information that the ICO had seen. It declared that, having studied the information, its view on the principles did not change. Having determined that the information was exempt by virtue of s.42, the Tribunal found it unnecessary to express a view on the applicability of s.43. It did, however, register its puzzlement about the use of the exemption to NCND 'the remainder of the information' when all the relevant information attracted LPP.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/bellamy_v_information_commissioner1.pdf)

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### **Prior v the Information Commissioner**

**EA/2005/0017  
27 April 2006**

**Regime: FOI  
Focus: ss.10 and 21**

Mr Prior's mother was moved by Hertfordshire County Council from hospital to a care home, where she died. He asked for the legal basis on which the move was made and evidence that the Council had complied with the law. The Council felt that it had already passed such information to Mr Prior.

The Council's initial response – sent within 20 days of the request, on 26 January 2005 – stated that the case was complex and that exemptions might apply. It did not specify which exemptions and claimed a reasonable extension of time to weigh the public interest in disclosure. A final response, refusing the request under s. 21, was only given in June 2005.

The Commissioner decided that the January letter amounted to a refusal notice (albeit that it did not cite exemptions). However, the Tribunal stated that it would expect the Commissioner to ensure that extensions of time are only permitted in accordance with the provisions of section 10(3). In this case no qualified exemptions were cited at the time and nor was any relied on in the final letter in June, so s.10(3) did not apply.

The Tribunal held the January and June letters were not valid section 17 refusal notices, and noted “with concern” the time taken to issue the final notice.

Mr Prior disagreed with the use of s.21 because he did not feel that his questions had been answered. The Commissioner held that the information was reasonably accessible to him, but Mr Prior appealed on the ground that the Commissioner had made a “peculiar decision ... without the provision of evidence”. Although he did not provide any details, the Tribunal took the view that it must look at all the documents submitted with the appeal notice to determine whether there were substantive grounds of appeal, particularly as the appellant was a litigant in person.

The case was dealt with on the papers. The Tribunal upheld the Commissioner's decision on the application of the exemption, and noted that the Act did not give requestors a right to obtain the information which they thought they should receive, but only that which was actually held. Mr Prior had received that information, so no remedial action was ordered.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/prior\\_v\\_information\\_commissioner.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/prior_v_information_commissioner.pdf)

### **Hemsley v the Information Commissioner**

**EA/2005/0026**

**10 April 2006**

**Regime: FOI**

**Focus: ss.31, 38**

The appellant requested information about the operation of a speed camera that had captured photographs of his car travelling above the speed limit and led to his prosecution. The Commissioner upheld Northamptonshire Police's decision to withhold the information under sections 31(a) and (b) and 38(1)(a) of the Act.

The Information Tribunal noted that there was no practical distinction between the concepts of "prejudice" under s.31 and "endangerment" under s.38 for the purposes of the appeal. The appellant did not dispute that some prejudice to the relevant interests would result from disclosure, or that the exemptions were engaged, and the Tribunal also recognised that prejudice would result from disclosure. The focus of the appeal was whether the public interest favoured disclosure despite such prejudice, which the appellant argued would be slight.

The Tribunal confirmed that it had the jurisdiction to consider all of the evidence by way of rehearing, and that it was not restricted to a form of judicial review. The important consequence of that was that the Tribunal was obliged to make its own findings as to the balance of the public interest.

The Tribunal found that the public interest fell in favour of withholding the information. While it acknowledged that every request should be treated on its own merits, it accepted in particular the Police's argument that acceding to this request could set a dangerous "precedent", and encourage subsequent requests for information which could undermine the speed enforcement regime.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/hemsley\\_judgment.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/hemsley_judgment.pdf)

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### **Markinson v the Information Commissioner**

**EA/2005/0014**

**28 March 2006**

**Regime: EIR**

**Focus: Regs. 8, 16**

The applicant wished to photocopy documents relating to planning permission for his house. However, he believed that the level of the Council's charges meant that he could not afford to take copies of all those that he wanted. He complained to the Commissioner, who subsequently held that the charges applied by the Council were reasonable.

Although the applicant's original complaint was made under the FOI Act, both the Commissioner and the Tribunal accepted that a request for information about a planning application fell under the EIRs.

On appeal, the Tribunal issued a Substitute Decision Notice on the basis that the Commissioner's decision was not in accordance with the law and that s.58(1) entitled it to issue a Decision Notice that included either a direction as to the amounts to be charged for copying, or detailed guidance on how they should be calculated. The Council was ordered to reassess the charges it made for providing copies of environmental information, and was told that in doing so it must adopt the guide price of 10p per A4 sheet, as suggested by the Office of the Deputy Prime Minister and recommended by the DCA. It should exceed the guide price only where there was good reason to do so, and must take into account the statutory Code of Practice issued under Reg.16 of the EIRs and the Department for the Environment, Food and Rural Affairs (DEFRA) guidance on EIRs charging. Staff costs for finding the information should not be included in charges, but staff time in copying the information could be included.

The Tribunal noted that the DCA Fees Guidance was a relevant document that the Council should have considered when deciding which charges were reasonable.

The charging rules at Regulation 8 of the EIRs require that: "A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount." The Tribunal held that Reg. 8 was to be interpreted in the context of the normal English law rules that apply to decisions of public bodies. If a decision of a public authority is "Wednesbury unreasonable", it may be judicially reviewed even when it would appear, from the language of the legislation in question, that the public authority has been given an unfettered discretion to make whatever decision it chooses. Therefore, the Information Commissioner should have determined not just that the public authority was satisfied that its charges were reasonable, but also that the public authority's view was reasonable. The public authority must not have disregarded relevant considerations (including compliance with the Directive) or had regard to irrelevant ones.

The Tribunal held that the Commissioner had failed to apply the legal test to the facts. He failed to consider a number of relevant factors, including guidance on appropriate regimes for charging for copying issued by DEFRA and the DCA.

The Tribunal further held that the Council, in fixing its charges, failed to address, properly or at all, the test imposed on it, and the Commissioner, in reviewing the Council's decision, failed to investigate, and identify, any of the relevant guidance, and was consequently in error in not ruling against the Council as having breached Reg.8(3).

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/david\\_markinson\\_v\\_info.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/david_markinson_v_info.pdf)

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### **Smith v the Information Commissioner**

**EA/2005/0001**

**Regime: FOI**

**20 February 2006**

**Focus: s.1**

The appellant represented the Kingsbury North West Jewish Youth and Community Centre (Kinnor) in North-west London. Kinnor had previously leased a property from Brent Borough Council which was sold in 1999. The Council had maintained that Kinnor was offered the opportunity to buy the property but that no agreement was reached. On 4 January 2005, the appellant requested copies of information generated at the time of the supposed offer to sell to Kinnor, including copies of the letters offering and turning down the opportunity to buy the freehold.

The Council responded to the request by supplying all the information requested except for the two letters, which it said it did not hold. Kinnor requested an internal review. The Commissioner accepted that the Council did not hold the information.

The Tribunal determined that the only issue that it was required to review was whether the Commissioner, on the materials before him, had properly found that the Council did not hold the letters at the time of the request. The Tribunal found that there was no question of any error of law, and that there were no grounds to find that the Commissioner should have exercised his discretion differently in investigating the complaint. The appeal was dismissed.

[http://www.informationtribunal.gov.uk/our\\_decisions/documents/smith\\_v\\_commissioner.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/smith_v_commissioner.pdf)



## Decisions of the Information Commissioner

15 February – 7 July 2006

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### **Cabinet Office**

**FS50083138**

**7 July 2006**

**Regime: FOI**

**Focus: s.16**

The applicant asked how many Government legal advisors fully supported the view of Lord Goldsmith on the legality of military action in Iraq, and how many expressed doubts, similar to the position taken by Elizabeth Wilmshurst. The Prime Minister's Office responded by referring the applicant to Ms Wilmshurst's resignation letter on the internet, and advised that no other information relevant to the request was held.

The Commissioner was satisfied that the Cabinet Office did not hold the exact information requested, and accordingly that it had complied with the requirements of section 1. However, in referring the applicant to Ms Wilmshurst's letter, it had not made clear how exactly it had interpreted the request, and what information was considered relevant to it. The Commissioner considered that it would be reasonable for a member of the public to expect the Cabinet Office to hold legal advice on the legality of the military action in Iraq, and for the applicant to expect them to hold information relevant to the request. In light of this, the Cabinet Office should have provided further advice about the type of information it held relating to legal advice on military action in Iraq to assist the applicant in clarifying or refining their request. In failing to provide advice and assistance, they failed to comply with section 16.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_FS50083138.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_FS50083138.pdf)

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**Cabinet Office**

**FS50086128**

**Regime: FOI**

**3 July 2006**

**Focus: s.36**

The applicant requested the dates since 30 September 2002 on which the Prime Minister met or had a telephone conversation with newspaper proprietors Rupert Murdoch or Richard Desmond. The Cabinet Office refused to release the information citing sections 36(2)(b)(i), (ii) and (2)(c), on the grounds that disclosure might undermine the PM's ability to hold such conversations in future. The decision was upheld at internal review.

The applicant argued that the public interest favoured disclosure and adduced journalistic coverage to suggest that the two proprietors hold undue sway over the Government. Cabinet Office argued that the PM's various roles (official, political, personal) made it difficult to distinguish those occasions of contact that would be caught by the request. Further, disclosure may act as a disincentive to record the dates of telephone calls.

The Commissioner concluded that where the meeting or call was of an "official nature" the information on timing should be disclosed. The Commissioner concluded that where a note had been taken of the meeting or call this would be enough to suggest that the conversation was official as opposed to personal or party political.

He found that the public interest favoured disclosure of the dates of those meetings. He was not convinced that disclosure would prevent people from seeking to influence the government, or automatically inhibit the Prime Minister from engaging in discussions with individuals of his choosing, and he considered that any such impact was outweighed by a stronger public interest in understanding how government operates. He acknowledged that exemptions other than s.36 might apply to such information, and expressed confidence that those exemptions would provide sufficient safeguards.

The Commissioner accepted that, where there was no record of the discussion at a meeting, the meeting could be regarded as non-official and the Cabinet Office was entitled to withhold the dates of the discussions.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50086128.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50086128.pdf)

**IRJ comment:** The disclosure statement in relation to this case can be found at <http://www.cabinetoffice.gov.uk/foi/pdf/murdoch.pdf>

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**London Borough of Richmond upon Thames**

**FS50073576**

**Regime: FOI/DPA**

**29 June 2006**

**Focus: s.40**

The applicant requested copies of letters, memorandums, notes of meetings and other information relating to a matter discussed at a meeting of a council committee. This information was supplied with various names and addresses redacted under section 40.

The Commissioner held that the public authority had incorrectly applied the s.40 exemption in respect of some information and had withheld some non-exempt information from the applicant.

Among the relevant documents were letters to former council officers who had once held senior positions within the council. The Commissioner decided that it would not breach the Data Protection Principles to release their names, because the documents related to their working lives when they held senior positions in the council. However, he upheld the decision to redact their home addresses, which related to their private rather than professional lives. (Serving councillors' contact details were included on the council website, so disclosure was held not to breach the Data Protection Principles.)

One individual whose details had been withheld was a journalist who had written a newspaper article on the matters under consideration. The Commissioner found that, as the journalist was not working in a public role nor for a public authority and had no contractual role with the council, it would be reasonable for her to expect that her name and e-mail address would not be released by them. To disclose this information would breach the Data Protection Principles, and the council had therefore applied s.40 correctly to this information.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50073576.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50073576.pdf)

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**Lancashire County Council**

**FS50101193**

**Regime: FOI**

**26 June 2006**

**Focus: s.40**

The applicant requested details of successful prosecutions for selling alcohol to underage children, including the names of those prosecuted. Lancashire County Council (LCC) refused the request, citing section 40.

The Commissioner determined that the information was personal data, but that it could be anonymised by removing names and dates of birth. Disclosure of this anonymised information would not contravene the Data Protection Principles. Furthermore, recognising the damage that might attach to the reputations of businesses which had since changed hands, the Commissioner suggested that the information should carry caveats to state that a different business might now be operating from the same address and some of the staff prosecuted at the time might no longer be associated with the premises in question.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50101193.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50101193.pdf)

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**North Down Borough Council**

**FS50075947**

**Regime: FOI**

**14 June 2006**

**Focus: s.14**

The applicant requested information about the Town Clerk. North Down Borough Council refused the request citing section 14 on the basis that the request was vexatious. During the Commissioner's investigation, the council stated that "a number of other requests made by the applicant had caused considerable disruption to the council" and suggested that the test for vexatiousness under s.14(1) was analogous to that for declaring a person to be a vexatious litigant in the High Court.

The Commissioner held that the council had incorrectly applied s.14(1). He stated that the test applied to vexatious litigants was not directly analogous because "a public authority must remain mindful that it is the request, rather than the requester, which must be vexatious". The council had treated all requests from the applicant as vexatious,

rather than considering whether the particular request formed part of a series of requests which was obsessive or manifestly unreasonable.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50075947.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50075947.pdf)

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**Department for Communities and Local Government (formerly Office of the Deputy Prime Minister)**

**FER0086629**

**13 June 2006**

**Regime: EIR**

**Focus: Reg.12(4)(e)**

The applicant requested information relating to the representations made to the Deputy Prime Minister (DPM) following the report of the planning inspector into the application to build the Vauxhall Tower in London. The DPM subsequently granted planning permission, against the advice of the inspector. The Department disclosed some information but withheld submissions made to the DPM by officials.

The Commissioner agreed that the information was excepted from the duty to disclose by virtue of Regulation 12(4)(e), relating to the internal communications of a public authority. He also held that, until a decision to grant planning permission had been made, the public interest favoured withholding the information, since its disclosure would have protracted the proceedings by reopening debate. Once the decision had been announced the Commissioner found that the public interest required the disclosure of the factual elements of the submissions to Ministers and those elements setting out the questions for consideration. The Commissioner agreed that the public interest did not require disclosure of the advice given or the opinions of officials.

In considering the public interest, the Commissioner accepted there would be a significant prejudice to the giving of impartial advice if the advice by officials were to become a matter of public comment. He considered that disclosure of the factual elements or the exposition of issues for consideration would not be likely to inhibit officials in the future from laying relevant facts before Ministers. The Commissioner accepted that the description of matters for consideration is more sensitive than the factual information, but found that the public interest in understanding the basis for the decision outweighs the risk that officials' advice could be inferred from that description. The Commissioner took account of the fact that this was an unusual and controversial

decision but found that fact to be a neutral factor in the public interest considerations. Although there was a strong public interest in understanding how such controversial decisions are made, these difficult decisions are precisely the ones that require private thinking space.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fer0086629.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fer0086629.pdf)

**IRJ Comment:** Lord Baker is appealing this decision to the Information Tribunal.

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### **Medicines and Healthcare Regulatory Agency (MHRA)**

**FS50072939**

**Regime: FOI**

**12 June 2006**

**Focus: ss.36, 38**

The applicant requested detailed information relating to the licensing of a medicine, in particular the names of those involved in the licensing process. The Medicines and Healthcare Regulatory Agency (MHRA) disclosed some information, but withheld the remainder, relying on sections 27, 40 and 43. With agreement from both the MHRA and the Commissioner, the applicant appealed directly to the Commissioner (the MHRA having previously conducted internal reviews on similar cases indicated that it would uphold the original decision in this case as well).

During the course of the Commissioner's investigation, the MHRA stated that it would no longer rely on s.40 to withhold the names of officials, rather it would rely on sections 36 and 38. The Commissioner considered that the most appropriate exemption in this case would be s.38, and to that extent did not consider the application of s.36 in his decision.

The Commissioner accepted that as the MHRA would rely on either direct or indirect testing of medicines on animals there was a real risk to the health and safety of either those persons named, or their families and that it was "not in the public interest for officials or commissioned experts to work against a background of anxiety as to how their professional background or advice may endanger their personal safety or reputation." He also held that the information which the MHRA made publicly available should be sufficient to inform and reassure the public about its activities.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50072939.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50072939.pdf)

**Pembrokeshire County Council**

**FS50069498**

**Regime: FOI**

**8 June 2006**

**Focus: s.40**

The applicant requested print-outs of a specified series of e-mails. These were supplied with the names of the senders and recipients (council employees) redacted under section 40(2) of the Act.

The council subsequently argued that the names of the employees did not constitute a material part of the request, and that the council had therefore responded in full to the request. They also argued that the information constituted personal data which it would be unfair to disclose, thus breaching the first Data Protection Principle. In particular, the council emphasised that the individuals, who were middle-ranking employees, were not in a position to make a final decision on the issues discussed in the e-mails.

The Commissioner rejected the argument that the information fell outside the scope of the request. He said that where authorities were unclear as to the scope of a request, they should take steps to clarify it with the applicant. The Act did not permit a public authority to take an independent view as to what information an applicant wanted, or to take a restrictive view of a request simply because that suited the wishes of the public authority.

The Commissioner accepted that the information constituted personal data. He accepted that there would be circumstances in which there would be clear unfairness to individuals in the disclosure of their names alone, citing as examples staff working in the prison service or in controversial scientific research. However, he did not accept that disclosure of the names in this instance would be unfair, and therefore held that s.40(2) had been incorrectly applied. He noted that four of the five staff involved were “relatively senior”, and might be expected to have relations with the public and with organisations outside the council, in the course of which their names would be routinely disclosed. The fifth member of staff was relatively junior, and it appeared that her name only appeared in the chain because she forwarded one e-mail to others. However, the Commissioner did not accept it would be unfair to disclose her name, and said he would have no objection to the council explaining her role to the applicant.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50069498.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50069498.pdf)

**Environmental Resources Management Ltd.**

**FER0090259**

**Regime: EIR**

**7 June 2006**

**Focus: Reg. 2(2)**

The applicant requested documents relating to a review carried out by Environmental Resources Management Ltd. (ERM) of the potential implications of the 2005 UK Sustainable Development Strategy on the North East Regional Strategy ('RSS'). Relying on advice received from the Information Commissioner's Office in respect of a previous request for information, ERM refused the request stating that it was not subject to the FOI Act or the Environmental Information Regulations.

The applicant disagreed and argued that ERM was subject to the EIRs because ERM had been contracted by the Regional Assembly for the North East (RANE) to carry out 'environmental assessments' in accordance with the Strategic Environmental Assessment Directive. By virtue of Regulation 2(2)(d)(ii), ERM was subject to the EIRs as a body exercising functions of a public nature in relation to the environment, under the control of a public authority. RANE was itself a public authority by virtue of Reg.2(2)(c), as a body carrying out functions of public administration. The Commissioner agreed with this analysis and held that, for the purpose of this request, ERM was a public authority subject to the Regulations.

The Commissioner noted that he took a broad interpretation of the definition of 'public authority' in the Regulations, in line with the Environmental Information Directive. He recognised that "it is therefore wholly possible that there may be cases where external service providers to public authorities are subject to the provisions of the EIRs. It is also possible that organisations may be public authorities in respect of some of the information they hold and not others."

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50090259.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50090259.pdf)

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**HM Treasury**

**FS50088619**

**7 June 2006**

**Regime: FOI**

**Focus: s.35**

The applicant requested information about the estimated impact of the decision to remove pension funds' ability to reclaim tax credits on dividends in the Finance Act 1997. HMT confirmed that it held relevant information, but withheld it citing section 35 (formulation of government policy) on the basis that, *inter alia*, its disclosure would damage ministers' and officials' confidence in the confidentiality of the budget process, and have an adverse effect on the nature of the advice given.

The Commissioner agreed that s.35 was engaged, since the information included details of policy options and the assumptions upon which they were predicated. In considering the public interest, he accepted that some aspects of the budget-making process involved complex policy considerations where the public interest in maintaining the confidentiality of candid debate outweighed that in disclosure. He also agreed that the government's pensions policy was sensitive and current at the time of the request. However, given the time which had elapsed since the forecasts were prepared, he was not convinced that disclosure would make officials less willing to be candid in their advice to ministers, deter them from providing comprehensive objective written advice, or lead them to "close off" policy options without giving them full consideration.

Furthermore, he took the view that the greater the impact of a policy on public revenues, the greater the public interest in its disclosure to promote accountability in the decision-making process. Accordingly, he considered that the public interest in transparency in the decision-making processes within government outweighed that in maintaining the exemption in this case.

In response to HMT's concern that the information in the forecasts could be misunderstood out of context and would not assist the current pensions debate, the Commissioner held that HMT could publish background information about the limitations of the forecasts and the wider policy objectives.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50088619.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50088619.pdf)

**IRJ Comment:** HMT is appealing the Commissioner's decision to the Information Tribunal.

**Devon & Cornwall Constabulary**

**FS50089518**

**Regime: FOI**

**06 June 2006**

**Focus: s.31**

The applicant requested “details of the schedule of foot patrol beat officers during the hours of darkness” during a recent six month period. Devon & Cornwall Constabulary (DCC) replied that they neither confirmed nor denied that they held such information, and that in any case if they did it would be exempt under section 31(1)(a) (law enforcement).

DCC argued that disclosure of such information would impede the operational effectiveness of the Constabulary because the release of information about the number of police on duty would assist those who intended to commit crimes. As shift patterns were cyclical in nature, the information would assist criminals in committing crimes when there was the least police cover. An internal review upheld the original decision and the applicant appealed to the Commissioner.

The Commissioner disagreed with DCC. He accepted that the information may be of conceivable use to criminals but held that disclosure would not prejudice, or be likely to prejudice, law enforcement and so s.31 was not engaged. Furthermore, as the information was historical it further weakened the case for withholding the information.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50089581.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50089581.pdf)

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**Pembrokeshire County Council**

**FS50067633**

**Regime: FOI**

**6 June 2006**

**Focus: s.41**

The applicant requested information submitted by a company (ORA) in respect of a tendering exercise. The information included a list of past projects the company had undertaken, which it considered relevant to the tendering exercise. The information was withheld under section 41 (information provided in confidence).

In examining whether the project list was exempt under s.41, the Commissioner considered whether the information was obtained in circumstances giving rise to a duty of confidentiality, whether the information was confidential in nature, and whether there would be any detriment suffered if the information were to be released.

The Commissioner held that none of the conditions was satisfied. Although he acknowledged that ORA would not have anticipated a request for release of the information at the time it was supplied (July 2000), and that a retrospective assertion of confidentiality had been made in October 2004, he did not consider this sufficient to persuade him that the information was obtained in circumstances which gave rise to a duty of confidentiality. In concluding that the information was also not confidential in nature, he noted that ORA's website stated that the information was available on request and that it did not reveal any commercial data or information that could be regarded as sensitive. He did not therefore believe it could legitimately be withheld from public scrutiny.

The Commissioner also said that there was "no conclusive evidence of significant detriment" were the information to be released. He had been informed that an acrimonious relationship existed between the applicant on the one hand, and ORA and its managing director, Dr. Ryan, on the other. It was suggested that the applicant might approach the organisations detailed in the project list that Dr. Ryan claimed to have worked for. The Commissioner held that it had not been established with sufficient certainty that such approaches would take place, but that if they did, and they were merely designed to ascertain whether work was undertaken with those organisations, disclosure would serve the interests of greater transparency in relation to the council's relationship with ORA. While this might represent a detriment to Dr. Ryan in the event that the claims were proved to be untrue, the Commissioner held that this was not the sort of detriment needed to establish a duty of confidentiality.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50067633.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50067633.pdf)

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**Newry and Mourne Health and Social Services Trust**

**FS50093734**

**5 June 2006**

**Regime: FOI/DPA**

**Focus: s.40**

The applicant requested information relating to the salaries of the authority's directors, and requested that it be set out in a table following a particular format. The authority provided some information about the salary bands of directors, although it did not provide it in the format requested. It initially refused disclosure of the salary bands for the Chief Executive or the Director of Acute Services, relying on section 40(2). Following the intervention of the Commissioner, this information was provided, although again, not in the format requested.

The Commissioner took the view that section 11 of the Act related to the means by which communication of the information to the applicant was made, as opposed to the actual format in which the information is presented. He therefore held that the authority had not failed to comply with the Act by providing the information in a format other than that requested.

The Commissioner decided to issue a decision notice with regard to the authority's initial reliance on s.40(2), as he considered that "the issue of the disclosure of salary information of senior public officials is a matter of public interest." He was satisfied that the information requested was personal data, but held that its disclosure would not breach the first Data Protection Principle, which states that personal data are to be processed fairly and lawfully and must not be processed unless at least one of the conditions for processing in Schedule 2 to the Data Protection Act is satisfied. He took the view that, as senior staff in the Trust ought to have had a reasonable expectation that salary bands would be made public, disclosure would not be unfair. He also stated that disclosure of the salary information in question would not constitute an actionable breach of confidence or breach the Human Rights Act 1998, and as such would not be unlawful.

The Commissioner was further satisfied that, having regard to the need for accountability of public funds, the Trust could satisfy the sixth condition in Schedule 2 to the DPA, and that disclosure would not constitute unwarranted processing.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50093734.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50093734.pdf)

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**Department for Work and Pensions**

**FS50083103**

**5 June 2006**

**Regime: FOI**

**Focus: s.35, s.43**

The applicant requested the cost benefit analysis carried out by DWP on the impact of the introduction of Identity Cards on the benefits system. The information had been created by DWP as part of an exercise carried out by a number of departments in advance of the Identity Cards Bill being introduced into Parliament. DWP refused the request, citing section 35 as it related to policy development and section 43 as it was argued that releasing the cost projections underlying the ID cards scheme could prejudice later procurement exercises.

The Commissioner agreed that the material related to policy formulation and that s.35 was engaged on the basis that, while it was arguable that macro policy decisions had been made, policy also developed at a micro level. However he concluded that the public interest favoured the debate about the introduction of identity cards being informed by more detailed figures as to the costs and benefits of the scheme for the benefits system. He did not accept that disclosing the information would prejudice the government's ability to develop its policies or carry out its work. The Commissioner ruled that s.43 did not apply, as he was not convinced that revealing these figures could harm a future procurement exercise.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50083103.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50083103.pdf)

**IRJ Comment:** DWP is appealing this decision to the Information Tribunal.

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### **West Yorkshire Metropolitan Ambulance Service**

**FS50065043**

**31 May 2006**

**Regime: FOI**

**Focus: ss.21, 40, 41, 42**

The applicant requested a copy of the report of an investigation carried out by West Yorkshire Metropolitan Ambulance Service (WYMAS) into the handling of a grievance procedure and other information related to other claims settled with employees. WYMAS refused to release the report under sections 21, 38, 40 and 41. Some of the other information was withheld under sections 41 and 42.

In relation to the report, the Commissioner found that s.21 had been incorrectly applied, although he acknowledged that the applicant already held a copy, albeit without the consent of WYMAS. He decided that the report could not be considered reasonably accessible whilst WYMAS continued to refuse access to it officially. The Commissioner

also found that s.41 had been incorrectly applied as no duty of confidence can apply to information provided by employees in the course of, and relating to, their official duties. This exemption could be used for information provided by employees in a private capacity.

The Commissioner also found that s.42 had been incorrectly applied as the purpose of the exemption is to protect legal advice, not all information relating to the outcomes of legal processes, as cited by WYMAS.

However, the Commissioner agreed that some personal data should be withheld under s.40. The names of many of the individuals involved in this matter were released into the public domain when a draft version of the report was published in a local newspaper. Therefore the Commissioner was only prepared to uphold the use of s.40 in order to protect the identities of the two individuals involved in the original allegation leading to the grievance procedure, who were not named by the newspaper plus “personal data about any other employee in respect of private matters”. Despite a failure by WYMAS to consider the public interest, the Commissioner also held that s.38 had been correctly cited.

Therefore the Commissioner ordered the release of some of the withheld information, including a copy of the report with redactions to protect some “personal data.”

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50065043.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50065043.pdf)

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### **Cabinet Office and the Chief Officer of Sussex Police**

**FS50099755 and FS50099691**

**31 May 2006**

**Regime: FOI**

**Focus: s.14**

The applicant made in excess of 750 Freedom of Information requests to various public authorities. Both the Cabinet Office and Sussex Police refused one of his requests on the grounds that it was vexatious. The Commissioner upheld these decisions.

In coming to his conclusion, the Commissioner considered the volume of requests made across the public sector, rather than the identity and supposed intentions of the requester. He determined that, notwithstanding the Police’s assertions about the

requester's criminal past, the requests in question were vexatious simply because they were part of a wider pattern. In reference to his Awareness Guidance No.22, the Commissioner stated that "although it may not have been the explicit intention of the applicant to cause inconvenience or expense, the main effect of the requests would be to impose disproportionate inconvenience and expense to the public authorities taken together".

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50099755.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50099755.pdf) (Cabinet Office)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50099691\\_v2.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50099691_v2.pdf) (Sussex Police)

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### **Chief Officer of Sussex Police**

**FS50069091**

**26 May 2006**

**Regime: FOI**

**Focus: ss.31, 38**

The applicant requested the exact number of Registered Sex Offenders in the Sussex Police Authority area, and a geographical breakdown of where those individuals were. Sussex Police released information on the relevant numbers, but refused to disclose the locations, citing sections 31 and 38. While the police did not hold this information at the level of the 16 policing districts, they did hold it for the six divisions.

The Commissioner concluded that both exemptions had been applied incorrectly. He said that, although he accepted that disclosing the whereabouts of registered sex offenders might, for example, drive them underground or expose them to vigilante attacks, the likelihood of being able to identify an individual from the figures at divisional level was remote.

In assessing likelihood of prejudice to law enforcement, he relied on case-law which stated that "likely" connoted a degree of probability where there was "a very significant and weighty chance of prejudice to the identified public interest. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

In the context of s.38, the Commissioner also considered the potential risk of release causing anxiety to the wider community. He accepted that press coverage of registered

sex offenders resident in a community could serve to raise anxiety among local residents, but took the view that it did not amount to endangering the mental health of members of the community.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50069091.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50069091.pdf)

**IRJ comment:** Whether this is the correct threshold of prejudice under the FOI Act is subject to appeal in the case of Derry City Council (case FS50066753 at page 75 below).

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**Legal Secretariat to the Law Officers (LSLO)**

**Enforcement Notice 22/05/06 and  
FS50069105 / 50063472 / 50064590  
22 May 2006**

**Regime: FOI  
Focus: ss.27, 35, 42**

Three applicants made similar requests for the Attorney General's advice on the legality of military action in Iraq, earlier iterations of that advice, and correspondence relating to it. LSLO refused all three at first request, citing sections 42, 35, 41 (which was later dropped by LSLO) and 27. This decision was upheld at internal review in respect of two; some Ministerial correspondence was released in response to the third, though not a letter from the Attorney General to a member of the Cabinet. Other similar requests were addressed with a standard form statement agreed across government setting out the reasons for refusal.

In the course of the Commissioner's investigation, some legal advice from the Attorney on the legality of military action was released. As it was in the public domain and no remedial steps would have been required, the Commission did not consider whether or not that legal advice was exempt from disclosure under the Act.

In each of these Decision Notices, the Commissioner summarises the reasons he gave in his Enforcement Notice by which he ordered that some but not all of the requested information be made public through a Disclosure Statement.

He accepted that all of the withheld information engaged either s.35 or s.42 and that some of it also engaged s.27. In balancing the public interest arguments under s.27, the

Commissioner decided that the public interest required the information to which s.27 applied to be withheld. There was a strong public interest in maintaining the well-established convention that diplomatic discussions are normally treated in confidence. It is important that government has good relations with other states in order to enable it to obtain information on a confidential basis (even if the information lacked the quality of confidence). All states should feel able to provide free and frank views on the understanding that these will be treated in confidence – release of information here would have risked states feeling unable to enter into discussions with the government.

The Commissioner dealt with the public interest arguments in respect of s.35 and s.42 together, acknowledging, *inter alia*, the public interest in allowing government space away from scrutiny to debate matters internally; and to take and receive legal advice in confidence. He also identified the strong public interest in legal advice remaining confidential and in not disclosing preliminary or provisional legal advice. Balanced against these were the considerable public interest in understanding the legal basis for the military action in Iraq, particularly in knowing how the Attorney reached his final conclusion. Taken as a whole, the balancing exercise could not yield a single answer applicable to all the requested information.

Overall, the Commissioner concluded that material of a preliminary, provisional or tentative nature, or which “may reveal legal risks, reservations or possible counter-arguments” need not be disclosed on the basis that the public interest fell in favour of withholding it. The public interest required the disclosure of only that information which “led to, or supported, the concluded views which were made public in the 17<sup>th</sup> March statement to Parliament”. Given the difficulty in separating the material that supported the Attorney’s conclusions from all the requested information, he required the public authority to produce a Disclosure Statement setting out the substance of the information which led to or supported the Attorney’s conclusions, save that specifically exempt under s.27.

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/notices/full\\_transcript\\_of\\_enforcement\\_notice\\_220506.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/full_transcript_of_enforcement_notice_220506.pdf) (Enforcement Notice)

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/notices/appendix\\_6\\_disclosure\\_statement.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/appendix_6_disclosure_statement.pdf) (Disclosure Statement)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50069105.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50069105.pdf) (Decision Notice FS50069105 – 7 July)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50063472.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50063472.pdf) (Decision Notice FS50063472 – 7 July)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50064590.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50064590.pdf) (Decision Notice FS50064590 – 7 July)

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**General Register Office/Office for National Statistics**

**FS50102683**

**Regime: FOI**

**5 May 2006**

**Focus: s.41**

The Commissioner upheld the GRO's decision that correspondence relating to the decision to allow a particular individual to register a death was exempt under section 41.

The Commissioner was satisfied that members of the public, when dealing with the GRO, had an underlying and reasonable expectation that their correspondence would be in confidence. He took account of the effect disclosure of the correspondence would have, both on the confider and on other individuals asked to provide information in similar circumstances in the future.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notece\\_FS50102683.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notece_FS50102683.pdf)

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**Transport for London**

**FS50075171**

**Regime: FOI**

**5 May 2006**

**Focus: ss.21, 40(2)**

The applicant requested from Transport for London (TfL) information contained in prosecution files relating to fare evasion. TfL withheld the information citing section 40(2) and section 21, as the applicant could apply to the relevant magistrates' courts for information held on court records.

The Commissioner agreed that the information contained in the prosecution files constituted personal data and had been properly withheld under s.40(2). Although the prosecutions would have been held in open court, he concluded that in practice public knowledge of such prosecutions would be short lived and limited to a small number of people. To release the information under the Act would be unfair.

However, the ICO agreed with the applicant that the information was not readily accessible to the applicant by other means, and that s.21 therefore did not apply. He had regard to the difficulty of collating the information relating to 15,971 prosecutions from individual magistrates' courts.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50075171.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50075171.pdf)

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### **Mid Devon District Council**

**FS50082890**

**Regime: FOI/DPA**

**4 May 2006**

**Focus: s.40**

The applicant requested the addresses of all residential properties owned by the council. This information was refused under section 40(2) on the basis that it constituted personal data of which the requestor was not the data subject and that it would be unfair to release the information.

The Commissioner held that the information was not exempt under s.40. He agreed that the data requested constituted personal data as the addresses could be linked to particular tenants using other easily available sources of information (e.g. the electoral register). However he disagreed with the council that the release of these data would breach any of the Data Protection Principles. The Commissioner decided that there was no general unfairness in identifying individuals as council tenants, though it was recognised that in some limited cases to reveal the locations of previously unknown council properties could reveal the locations of vulnerable individuals. So while the council was ordered to disclose the information it was invited to consider if any of the data should be withheld on the basis that release would cause distress to the residents of those properties.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50082890.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50082890.pdf)

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### **Department of Health (NHS Purchasing and Supplies Agency)**

**FS50063717**

**Regime: FOI**

**4 May 2006**

**Focus: ss.3, 40, 41**

The applicant requested information held by the NHS Purchasing and Supplies Agency (PASA) about companies that had registered as suppliers and would-be suppliers to the agency. He specifically requested their names, addresses and telephone and fax numbers. The authority disclosed some information but withheld telephone and fax numbers, citing the Data Protection Act.

During the Commissioner's investigation, PASA and the Department of Health argued that they did not in fact hold the information requested. Rather, a private company, which maintained the database under contract, both held and owned the information, and a confidentiality clause prevented its disclosure. PASA said it was in the meantime in the process of renegotiating the contract to make explicit provision for response to requests made under the Act for supplier information.

The Commissioner considered the contract and the information available on the PASA website describing the operation of the database. He found that the role of the private company in maintaining the database was largely invisible, and so potential suppliers were given the clear impression that their details were being provided to PASA rather than the private company. He concluded that, although the private company had a right under the contract to use the information, it held the information on behalf of the PASA. He acknowledged that any uncertainty over the ownership of the information had subsequently been resolved contractually.

The Commissioner was of the view that there was no evidence that s.40 applied to the information: some of the telephone and fax numbers were company numbers and did not therefore comprise personal data. He accepted that private telephone numbers and numbers relating to suppliers supporting controversial research might be caught by section 40 but the onus was on the public authority to demonstrate where there were such risks to data subjects.

The Commissioner went on to consider the relevance of s.41, even though this had not been argued by the department. He found that s.41 was unlikely to prevent disclosure because, while the contractual terms might amount to an undertaking of confidentiality in respect of certain information, telephone and fax numbers could not be said to have the necessary quality of confidence. They were supplied in the expectation that they may be accessed by large numbers of NHS staff and civil servants. Unless it could be demonstrated that an actionable breach of confidence would arise, he did not accept therefore that the information could be withheld.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50063717\\_Version2.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50063717_Version2.pdf)

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### **National Assembly for Wales**

**FS50077868**

**4 May 2006**

**Regime: FOI**

**Focus: s.42**

The National Assembly for Wales withheld information relating to the consideration of whether a free breakfast initiative could be made compulsory for all primary schools, citing the exemptions at sections 35 and 42.

The Commissioner agreed that the information in question was information that related to the formulation and development of government policy and in respect of which a claim to legal professional privilege could be maintained.

The Commissioner acknowledged that there was significant public interest in the information requested, particularly as the free breakfast scheme was a key part of the Labour Party's manifesto for the 2003 Assembly elections.

However, the Commissioner relied on the Information Tribunal's findings in *Bellamy v the Information Commissioner* that "there is a strong element of public interest inbuilt into maintaining legal professional privilege. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest." The Commissioner did not consider the public interest in disclosure in this case to be sufficiently strong to override the public interest in maintaining the exemption in s.42. He limited his analysis of the public interest test to the exemption under s.42 of the Act.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50077868.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50077868.pdf)

**IRJ comment:** This case has been appealed to the Tribunal by the applicant.

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**Cabinet Office**

**FS50090699**

**20 April 2006**

**Regime: FOI**

**Focus: ss.12, 17(5)**

The Cabinet Office was asked for "copies of all correspondence and evidence supplied by Sir Nicholas Bonsor, Bt., a former Foreign Office Minister and former Chairman of the Defence Select Committee, to the Scott Inquiry." In its response, the authority stated that it had searched the most likely locations for the information but found none there. It did not point out that, in order definitively to state that no information were held, it would need to broaden its search to the entire archive, and that doing so would incur costs in excess of the appropriate limit of £600.

A senior representative of the Commissioner's office visited the Cabinet Office to inspect the Scott Inquiry archive as part of the Commissioner's investigation.

The Commissioner noted that the Cabinet Office had not, when responding to the initial request, stated that only a partial search of the Scott Inquiry records had been undertaken. Under section 17(5) of the Act, public authorities are required to inform a requester where they are relying on a claim that section 12 of the Act applies. He also said that he would expect public authorities to provide a breakdown of how the cost estimate was formed when replying to requesters. The Cabinet Office had therefore failed in its duty under s.17(5). However, the Commissioner noted that this failure was remedied at internal review and ordered no remedial steps.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50090699.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50090699.pdf)

**IRJ comment:** Although there is no specific requirement under the Act or the section 45 Code to provide a breakdown of costs, the Commissioner has taken the view, by reference to section 16, that under certain circumstances it will be appropriate to provide details of why s.12 applies. This case is being appealed to the Tribunal by the requestor.

**Ministry of Defence**

**FS50073980**

**Regime: FOI**

**19 April 2006**

**Focus: ss.21, 36, 38, 40**

The request was for a copy of the Defence Export Services Organisation (DESO) directory. A redacted copy was provided showing the organisation's structure and various post titles. The names of staff, their contact details and the locations of staff based in Saudi Arabia were withheld.

The MoD cited sections 21, 36(2)(c), 38(1)(b) and 40(2). The Commissioner was satisfied that s.36 did apply to the information, accepting the MoD Under Secretary of State's view that release would cause prejudice to the effective conduct of public affairs. However, he concluded that the public interest nevertheless lay in the material being released to the public, to secure the accountability of officials working for DESO. He noted that the directory was widely distributed within the defence industry and was not protectively marked, which suggested to the Commissioner that the MOD did not regard its contents as "warranting special protection".

The Commissioner concluded that s.38 did not apply as there was insufficient evidence of a risk to health and safety. Section 40 was not examined in detail on the basis that the MOD had relied primarily on s.36. However, the Commissioner said he was "doubtful" that release would breach any of the Data Protection Principles.

The Commissioner accepted that some of the information was reasonably accessible by other means, including through the Civil Service Yearbook, and was therefore exempt under s.21. Although he could see no reason why, having ordered disclosure of the remaining information, the MOD would continue to rely on s.21, he accepted that it was the MOD's prerogative not to supply the information already detailed in such publicly available sources.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50073980.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50073980.pdf)

**IRJ comment:** This case has been appealed to the Tribunal by the Ministry of Defence.

**Home Office**

**FS50082472**

**19 April 2006**

**Regime: FOI**

**Focus: ss.38, 40**

The applicant requested the names of 35 individuals, companies and/or academic institutions in Scotland that were licensed to conduct scientific procedures using animals.

The Commissioner upheld the Home Office's decision to rely on sections 38(1) and 40(2) to withhold the information. He found that there was clear evidence that organisations and individuals involved in animal research had been targeted and their health and safety put at risk by militant anti-vivisection groups and that the requested information was therefore exempt under s.38(1). In finding that the public interest fell in favour of maintaining the exemption, he said that the increased likelihood of risk to the health and safety of any individual was, of itself, a powerful public interest argument against disclosure, and that it was difficult to envisage public interest arguments so strong that they would justify the disclosure of such information. He was also persuaded by the Home Office's argument that it already released sufficient information to facilitate public debate on animal experimentation.

The Commissioner accepted that information which identified individuals holding the relevant licences constituted personal data, and that disclosure would be unfair to them. The information was therefore also exempt under s.40.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50082472.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50082472.pdf)

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**Department for Constitutional Affairs**

**FS50067992**

**12 April 2006**

**Regime: FOI**

**Focus: ss.1 and 12**

The applicant asked the Court Service what judgments there were relating to the Copyright and Related Rights Regulations 2003. The Court Service stated that it did not hold the information requested.

The applicant provided the Commissioner with a copy of one relevant judgment obtained from the Courts Service Selected Judgments Database, part of its publication scheme.

The Courts Service subsequently clarified that it did not hold a complete “list of judgments” that would allow it readily to identify judgments of the kind requested. The Selected Judgments Database only provided details of a selection of particularly significant judgments, whereas individual judgments were more likely to be held on individual case files.

The Commissioner concluded that if judgments held by the Court Service on individual files contained information saying which statute they pertained to, then the Courts Service did hold the information requested. He said that a public authority’s failure to organise information in a way that would allow for easy retrieval did not mean that the information was not held.

After further investigation of the records storage system, the Commissioner decided the Courts Service was not obliged to comply with the request by virtue of section 12, and the Court Service had failed in its duty under section 1(1)(a) to confirm or deny whether it held the information requested.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50067992.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50067992.pdf)

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### **UK Trade and Investment**

**FER0071799**

**Regime: FOI/EIR**

**11 April 2006**

**Focus: ss.27, 40, Reg.12**

A number of documents were disclosed in response to a request for information concerning the West Africa Gas Pipeline and the Chad/Cameroon Petroleum Development and Pipeline project. UKTI withheld various documents on the grounds that their release would prejudice/adversely affect international relations (s.27 and Reg.12(5)(a)) and that they contained personal data exempt under s.40.

The Commissioner was satisfied that the release of the information would be detrimental to relationships between the UK and other states, and to working relations between the government and international financial institutions. The withheld information contained candid assessments of other administrations that were clearly made with the expectation that they would not be disclosed. The Commissioner was satisfied that disclosure would affect the government's ability to protect and promote the UK's interests overseas.

He agreed with UKTI's use of s.40 and accepted that the information in question constituted personal data relating to a living individual and that its disclosure would be unfair and a breach of the 1<sup>st</sup> Data Protection Principle.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FER071799.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FER071799.pdf)

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### **Bristol North Primary Care Trust**

**FS50066908**

**Regime: FOI/DPA**

**10 April 2006**

**Focus: s.40**

The applicant requested CCTV footage of a hospital car park in which an incident of alleged vandalism to the applicant's car had taken place. Bristol PCT refused to release the footage under section 40, on the grounds that it contained personal information relating to a third party individual.

The Commissioner upheld the application of s.40. He concluded that the CCTV footage (which did not show the alleged vandalism to the applicant's car) contained images of identifiable natural persons and so constituted personal data. The Commissioner stated that the capturing of images of people through CCTV "can amount to an infringement of personal privacy". While the public generally tolerated use and disclosure of CCTV images for limited purposes such as maintaining law and order, allowing a general right of access to these images would be contrary to the expectations of those whose images had been captured and therefore unfair. He also was of the opinion that disclosure of the CCTV footage would be an unnecessary and disproportionate interference by a public authority in individuals' private lives, and as such contrary to Article 8(2) of the European Convention on Human Rights.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50066908.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50066908.pdf)

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### **Chief Officer of Staffordshire Police**

**FS50086598**

**Regime: FOI**

**6 April 2006**

**Focus: s.14**

The applicant requested a range of information relating to an alleged malicious informant and alleged breaches by Staffordshire Police of the Data Protection Act. The Police

refused the request, citing section 14. At internal review, they also stated that sections 30, 31, 38, 40 and 41 would apply to any information which identified an informant.

The Commissioner disagreed with the use of s.14. Although pejoratively phrased, the Commissioner did not agree that the request (the first from this applicant) was vexatious. It clearly had a serious purpose (because the requestor was seeking the information to correct a perceived injustice) and was not intended to cause annoyance. In the Commissioner's view, for a complaint to be considered vexatious it should be manifestly unreasonable, designed to cause disruption or annoyance, harassing, or without serious purpose or value.

The Commissioner agreed with the authority that no information directly relevant to the specific requests about a "malicious informant" was held. He noted that Staffordshire Police took a wide view of the request, in line with the Information Tribunal's approach in *Barber v The Information Commissioner*<sup>18</sup>, and treated it as a request for information relating to an informant who had made a statement about the requestor.

The Commissioner agreed that s.30(2)(b) applied to information which would identify the informant and that there was a clear public interest in maintaining the exemption. He recognised the strong public interest in ensuring that members of the public felt able to come forward with evidence, and accepted that disclosing the identity of the informant would be likely to deter potential witnesses and thus hamper the prevention and detection of crime. He further found that s.40(2) would apply. The Commissioner was satisfied that disclosing the informant's identity would breach the first Data Protection Principle, both because none of the conditions for processing in Schedule 2 to the Data Protection Act was satisfied and because the informant had made clear his opposition so that any disclosure would be unfair.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50086598.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50086598.pdf)

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<sup>18</sup> [http://www.informationtribunal.gov.uk/our\\_decisions/documents/barber\\_v\\_information.pdf](http://www.informationtribunal.gov.uk/our_decisions/documents/barber_v_information.pdf) See Volume 1 Issue 2 of the Information Rights Journal for a summary of this decision.

**Chief Officer of Suffolk Constabulary**

**FS50095304**

**Regime: FOI**

**6 April 2006**

**Focus: ss.30, 31, 40**

The applicant was involved in an incident that led to prosecution for a motoring offence, but was subsequently found not guilty. The applicant had also made a related complaint about a police constable, which was investigated by a senior officer but was not upheld. The applicant then requested a copy of a report detailing an interview with the police constable (conducted by the senior officer), as well as a copy of the constable's pocket notebook entry relating to the incident that had given rise to the complaint. Suffolk Constabulary refused to confirm or deny whether it held the information requested, citing sections 30, 31 and 40.

The Commissioner held that there was no reason to NCND as the applicant had known about the existence of the complaint. He agreed that s.30 applied to information about the unsuccessful prosecution of the applicant, but said that because the prosecution had been concluded and there was nothing in the information that could prejudice future investigations (such as information on investigative techniques), there was no compelling case for maintenance of the exemption. He rejected the argument that disclosing the information would have a "chilling effect" on the willingness of members of the public to come forward in future investigations, saying that if the reasons why the information could be safely released in this case were made explicit, any risk would be successfully managed.

The Commissioner also accepted that information about the complaint against the police constable was held for purposes specified in s.31 but, in relation to the majority of the information, did not accept that release of the information would cause prejudice. While accepting the public interest in ensuring the confidentiality of witness statements, he repeated his point that released information could be placed in context to ensure there was no prejudice to the provision of such statements in future. He accepted that much of the information withheld constituted personal data, but did not believe it would be unfair to release the majority of it.

The Commissioner also noted that a letter to the applicant from the Deputy Chief Constable had in fact already provided much of the relevant information that was withheld. He said that although the public authority may have wished to argue that the

information was therefore exempt by virtue of section 21, he considered there to be “a real value in providing copies of the actual documents so that the applicant can compare them with the information which he has received.”

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50095304.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50095304.pdf)

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### **Boston Borough Council**

**FS50064581**

**Regime: FOI**

**6 April 2006**

**Focus: ss.41, 43**

The applicant requested a report detailing progress on the construction of a sports arena in Boston. The council initially refused to supply any information citing section 43(2), but subsequently provided a copy of the report with redactions made under s.43. When the Commissioner contacted the council it changed its view and relied on section 41 as well as s.43.

The Commissioner accepted that disclosure of the redacted information would constitute an actionable breach of confidence under s.41. The information related to commercial, legal and financially sensitive information, and was supplied to the council in the expectation that it would remain “in confidence”. The third party had been consulted and had identified all information which they felt could be disclosed without undermining commercial interests. The Commissioner accepted that no defence to a breach of confidence would exist, as the public interest reasons for maintaining the confidence were more compelling than those in favour of disclosure. He noted that the third parties were private organisations not subject to the Act, and that it was important that the council, as a stakeholder in the project, was able to obtain information from such bodies on a confidential basis, without fear that such information would be disclosed as a result of an FOI request.

Because he found in favour of the application of s.41 to the information, the Commissioner did not consider further the applicability of s.43, although he accepted that some of the information would fall within that exemption.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50064581.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50064581.pdf)

**IRJ comment:** In concluding that a breach of confidence would be “actionable” in this case, the Commissioner examined the possibility of a public interest defence to any potential action. In doing so, he appears to have performed a balancing exercise similar to that required under the qualified exemptions in the Act. It is not clear that this approach is one that would normally be taken in relation to a common law action for breach of confidence.

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### **The Farndon Green Medical Centre**

**FS50065663**

**Regime: FOI/EIR**

**3 April 2006**

**Focus: ss.3, 43,**

The applicant requested information about the proposed development of a new surgery, which was being undertaken by a private developer. He alleged that some information had been improperly withheld, including the Heads of Terms and requests for financial assistance held by the developer on behalf of the Medical Centre.

The Commissioner concluded that the “primary focus” of the information still in dispute was not information on the state of elements of the environment or factors or actions affecting those elements. The appropriate regime under which to consider the information was therefore the FOI Act. He agreed that some information in the Heads of Term, such as information relating to annual rent, was exempt under section 43(2), and concluded that while no reasoning on the public interest had been supplied under this exemption, he was content that the public interest favoured withholding the information. He found that, while the private developer concerned held information relating to financial assistance that was available from the associated primary care trust, this information was held for its own commercial purposes rather than on behalf of the Medical Centre.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Noticice\\_FS50065663\\_V2.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Noticice_FS50065663_V2.pdf)

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### **City of Bradford Metropolitan District Council**

**FS50085601**

**Regime: FOI**

**21 March 2006**

**Focus: s.16**

The applicant submitted a request to the City of Bradford Metropolitan District Council for

information about speed cameras. After resubmitting his request on a number of occasions, because he had not received any response, he was provided with some of the information requested.

The applicant twice expressed dissatisfaction with the response, and twice requested details of the council's internal review procedure. He was twice refused those details and referred to the Commissioner.

The Commissioner held, among other things, that the council had not dealt with the request in accordance with section 16, in that it had not provided details of its complaints procedure when requested. He noted that compliance with the section 45 Code, which states that "any written reply from the applicant...expressing dissatisfaction with an authority's response...should be treated as a complaint", was likely to demonstrate compliance with the requirement to provide advice and assistance.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50085601.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50085601.pdf)

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**Department for International Development.**

**FS50082257**

**Regime: FOI**

**21 March 2006**

**Focus: s.16**

DfID refused a request for information relating to minutes, notes, etc. of meetings between CAFOD and DfID ministers since 1997, on the grounds that it would exceed the appropriate cost limit. The authority advised the applicant to refine his request to bring it under the appropriate limit. Specifically, DfID suggested that the applicant narrow his request to minutes and notes of meetings relating to a specific area, and suggested "Health and Education". The applicant followed DfID's advice. DfID again refused the application, stating that compliance with the refined request would breach the appropriate limit.

The Commissioner held that DFID was in breach of its obligations under section 16. He said that "given that when the applicant refined his request, DfID subsequently stated that to comply with this refined request would also exceed the appropriate limit, DfID's suggestion that the applicant refine his request can not be seen to be an offer of advice and assistance."

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50082257.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50082257.pdf)

**IRJ Comment:** This case highlights what the Commissioner considers acceptable in terms of advice and assistance. He considers that advice and assistance should not lead to the same situation in which the applicant originally found himself, and should offer a constructive way forward for the applicant.

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### **The Independent Police Complaints Commission**

**FS50066868**

**Regime: FOI**

**15 March 2006**

**Focus: s.31**

The request was for correspondence concerning an investigation carried out by the IPCC into the conduct of a case by Humberside Police. The IPCC identified eight letters covered by the applicant's request. Following an internal review, the IPCC refused to disclose the letters in reliance on s.31(1)(a), (b) and (g) of the Act, arguing that disclosure would prejudice a criminal investigation being conducted by the police.

The IPCC raised particular concerns with regards to three of these letters, as it felt they contained errors that, if disclosed, would be misleading. It felt that the only way to correct these errors would be to release further information which was not in the public domain.

The Commissioner rejected these arguments and held that no prejudice would flow from the disclosure of the information. In relation to the three letters containing errors, he said the IPCC should have followed the guidance issued by the ICO and furnished those letters with accompanying explanation, or put the information in context.

In interpreting the meaning of "likely to prejudice" the Commissioner relied on his own guidance, which concentrates on a degree of probability where there is a significant and weighty chance of prejudice. He said that the degree of risk must be such that there "may very well" be prejudice, even if the risk falls short of being more probable than not.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50066868.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50066868.pdf)

**Birmingham City Council**

**FS50078594**

**Regime: FOI**

**8 March 2006**

**Focus: s.14**

The applicant made 49 requests to Birmingham City Council over a four-month period. The Council complied with 22 of the requests, but refused to comply with 25 of the most recent 27 requests, citing section 14. The requests related to rights of way, access and footpaths. The applicant argued that as a member of the Local Access Forum, with a particular interest in the areas of rights of way and footpaths, his membership conferred a duty of overview and scrutiny of these issues.

In reaching his decision the Commissioner stated that his general approach had been to consider whether the authority had clearly demonstrated that the requests imposed a significant burden on the Council, had the effect of harassing it, or could otherwise fairly be characterised as obsessive or manifestly unreasonable. He upheld the Council's decision to refuse the request under s.14, concluding that, while it may not have been the applicant's intention to cause inconvenience and expense to the public authority, the effect of the requests was a disproportionate inconvenience and expense to the public authority. The cumulative effect of the requests was to harass the public authority. The thematic nature of the requests, and the number and frequency of the requests, also contributed to the requests being deemed vexatious. However, he held that two of the requests did not fall within the thematic nature of the requests, and that these should therefore have been dealt with in accordance with the requirements of the Act.

The Commissioner also noted that an interest in an issue, and membership of an interest group or political party, does not confer an enhanced right of access to individual requesters.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50078594.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50078594.pdf)

**IRJ Comment:** The Commissioner made his decision largely based on the “effect” of the request rather than the applicant’s intent. He also took into account the fact that the public authority tried to give advice and assistance but the applicant did not modify his behaviour, even when the burdensome nature of his requests were explained. Although the Commissioner noted that his Awareness Guidance 22 is not legally binding, he expressly refers to it in his decision and gives a clear indication of the factors he considers that public authorities may have regard to when considering whether requests are vexatious.

**Avon and Somerset Constabulary**

**FS50081409**

**Regime: FOI**

**7 March 2006**

**Focus: s.30**

The applicant requested “all information you possess relating to the trial of Jeremy Thorpe in 1979 for alleged murder”. This initial request was refused on the grounds of costs, and the applicant submitted a narrowed request for the Senior Investigating Officer’s report

The Constabulary initially refused this request citing sections 30, 31, 40, 41 and 44. On internal review, the Constabulary upheld the original decision not to release the information, citing ss.30, 40(2) and also section 38 as an additional reason for withholding the information.

The Commissioner was satisfied that all the requested information fell within the scope of s.30. In spite of the passage of time, he noted that s.30(1) applied if information had been held for the purpose of an investigation “at any time”. The Commissioner found that the public interest lay in favour of maintaining the exemption.

In particular, given the length of time elapsed since the police investigation and trial, and the absence of any suggestion of miscarriage of justice, the Commissioner found it difficult to envisage the usefulness of a repeated scrutiny of events. The public interest in the administration of justice argued strongly against disclosure of any information which had not been used in court; and any “re-trial by media” resulting from media attention to the information would be wholly undesirable.

The Commissioner also accepted that members of the public believe that information provided by them during the course of a police investigation will be treated in confidence. He accepted the “serious argument” that people might be discouraged from providing information to the police if they thought their information might be released publicly without a compelling reason.

Whilst the Commissioner found that s.38 did not apply, he considered that the need to avoid unnecessary distress to family and friends long after the trial contributed to the public interest in maintaining the s.30 exemption.

It had been argued that there might be a greater public interest in disclosure because the s.30 exemption only applies for a period of 30 years, which would soon expire. However, the Commissioner held that this suggested that there was a strong public interest in maintaining the exemption for the 30-year period unless there were strong arguments in favour of disclosure.

The Commissioner also found that some of the requested information constituted personal data and had been correctly withheld under s.40.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50081409.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50081409.pdf)

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### **De Montfort University**

**FS50080353**

**Regime: FOI**

**7 March 2006**

**Focus: ss.36, 40, 43**

The applicant requested information relating to an investigation about the maintenance of standards on the university's pharmacy courses. The university withheld some information under sections 36, 40 and 43.

The Commissioner found that, while information identifying students, lecturers and examiners constituted personal data, those working in an official capacity, in particular senior members of staff, should expect their names to be released in relation to their professional activities. He concluded that the names of senior staff could therefore be released without breaching the Data Protection Principles, and that s.40 had been wrongly applied in respect of that information.

The Commissioner did not explicitly reject the university's arguments that ss.36 and 43 were engaged. These included arguments that internal debate would be inhibited by release of the information, and that the commercial interests of staff, students and the university would be prejudiced by release of the information.

The Commissioner focused on the public interest arguments. He noted that the matter had been widely reported in the press, and that this weakened arguments against disclosure that were based on the detrimental effect that disclosure might have on the university. He also had regard to the fact that there were serious concerns about the

academic standards of a university degree sat by large numbers of students each year, and that graduates of the degree might, on completion of their courses, dispense medicines to the public. He found that the public interest favoured disclosure of the information.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50080353.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50080353.pdf)

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**Plymouth County Council**

**FER0069925**

**Regime: EIR**

**2 March 2006**

**Focus: Regs.12(4)(d), 12(5)(a)**

The applicant requested the Stage 2 safety audits for a proposed new pedestrian crossing. The request was initially treated under the FOI Act and withheld under section 22. On internal review, the s.22 decision was upheld but the authority also commented that the information might be environmental information, and that if so, regulation 12(4)(d) of the EIRs would apply.

The Commissioner held that the information requested was environmental information, and the request should therefore have been handled under the EIRs from the start. Although the authority had chosen to treat the three stages of the safety audit as a single process, and argued that premature disclosure of the Stage 2 report could compromise the final safety audit, the Commissioner held that each stage report constituted a separate document, distinct from the others in the series. The Stage 2 report could not therefore be withheld under regulation 12(4)(d) pending the completion of the Stage 3 report.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50069925.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50069925.pdf)

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**Cyngor Cymuned Llandysul**

**FS50069396**

**Regime: FOI**

**1 March 2006**

**Focus: s.11**

The applicant made it clear that he was requesting 'sight of' rather than copies of all the correspondence specified in his request. However, Cyngor Cymuned Llandysul ("the Council") advised him that the information requested would only be disclosed on

payment of a fee to cover postage and photocopying, refusing to allow the applicant to inspect the documents.

The Commissioner found that, in not providing the applicant with a reasonable opportunity to inspect the documents, the Council had breached section 11(1)(b), in that the applicant's request amounted to a preference for communication by a certain method. The Commissioner recognised the difficulties faced by some smaller councils that operate from domestic dwellings, but was of the view that it should usually be possible to use an alternative location such as a public library. In this case, the local police station had been suggested as a possible venue.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_69396D.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_69396D.pdf)

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### **House of Commons**

**FS50071194**

**26 February 2006**

**Regime: FOI**

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

The applicant requested details of individual MPs' travel expenses. The House of Commons refused, citing section 40(2).

The Commissioner agreed that the information constituted personal data, but did not agree that its disclosure would be unfair. Although the MPs had only been told that certain details of their expenses would be published via the House publication scheme, they had not been given any explicit assurances that additional information would not also be disclosed. The Commissioner also noted that the information requested only differed from that already in the public domain by dividing total figures for annual transport expenses into figures for three separate categories of transport.

The Commissioner held that the information related to MPs operating in their official capacities, for which they received a Parliamentary allowance. The legitimate public interest in disclosing this information outweighed the legitimate interests of the individual MPs in withholding it.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50071194.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50071194.pdf)

**IRJ comment:**

This case has been appealed to the Tribunal by the House of Commons.

**Avon & Somerset Constabulary**

**FS50078588**

**Regime:FOI**

**22 February 2006**

**Focus: ss.30, 40(2)**

The applicant requested the opportunity to inspect and take photocopies of a police case file relating to Jeremy Thorpe, the former liberal leader. At internal review, the authority upheld its decision to refuse all of the requested information, citing sections 30, 38, and 40(2).

The Commissioner, upholding the use of s.30, accepted arguments that the expectations of those who provided information to the police during an investigation created a strong public interest in maintaining the confidentiality of the information provided, although he did not accept that this would apply in every situation. In addition, the fact that Parliament had provided for the s.30 exemption to fall away in respect of information aged over 30 years old implied that there was a public interest in maintaining the exemption until that time had elapsed, unless there were strong countervailing public interest arguments in favour of disclosure.

The Commissioner also upheld the use of s.40(2) in respect of some of the information, as disclosure could damage the personal reputations of those involved and cause distress to them and/or their surviving relatives. Witnesses also had a legitimate expectation that their information would not be disclosed except in the context of court proceedings. However, he found that there was no evidence that s.38 was engaged, and stated that he was “not prepared to accept mere speculation on this point.”

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50078588.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50078588.pdf)

**Derry City Council**

**FS50066753**

**Regime: FOI**

**21 February 2006**

**Focus: ss.29, 41, 43**

The applicant requested information about Ryanair's use of Derry City Airport, including how much Ryanair paid for use of the facility. This was refused under sections 29(1)(a), 41 and 43(2). The Commissioner held that none of the exemptions was engaged and ordered the council to release the information requested.

In interpreting the meaning of "likely to prejudice" in relation to sections 29 and 43, the Commissioner adopted the approach taken by Mr Justice Munby in the case of *R (On the application of Alan Lord) and The Secretary of State for the Home Department*<sup>19</sup>, on which the Information Tribunal had relied in its decision in *John Connor Press Association v the Information Commissioner*. The Commissioner held that the chance of prejudice being suffered should be more than a hypothetical or remote possibility: there must have been a real and significant risk. The Commissioner was not convinced that the council had demonstrated that this threshold for prejudice had been achieved in relation to the information requested. He noted that some of the information requested was almost six years old, that circumstances had changed since it was created, and that some of it was already in the public domain through various sources.

The Commissioner concluded that s.41 was not engaged because the Heads of Agreement did not comprise any specific information received from Ryanair.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Notice\\_FS50066753.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Notice_FS50066753.pdf)

**IRJ Comment:**

In interpreting the meaning of "likely to prejudice" in ss.29 and 43, the Commissioner has relied on the Court's interpretation of the Data Protection Act in the case of *Lord*. The provision in question in that case gives effect to a derogation from a community law obligation under the Data Protection Directive (Directive 95/46/EC), and might therefore be expected to be construed more restrictively than provisions in the Freedom of Information Act containing similar wording. Derry City Council has appealed this decision to the Information Tribunal.

<sup>19</sup> [2003] EWHC 2073 (Admin)

**British Broadcasting Corporation**

**FS50066295,**

**FS50073129**

**FS50070769**

**15 February 2006**

**Regime: FOI**

**Focus: s.36**

The Commissioner upheld the BBC's reliance on section 36(2)(b)(ii) in relation to requests for the minutes of meetings held by the BBC Board of Governors to consider their response to the Hutton report.

The Commissioner was satisfied that the qualified person formed a reasonable opinion that this section applied to the information requested, and found that currently the balance of the public interest favoured maintaining the exemption.

The Commissioner recognised that attendees at the meeting believed their discussions to be in confidence, and that they would have been less frank and candid had they expected a record of the meeting to be released. In this case, the importance and sensitivity of the subject matter added weight to these arguments. Disclosure of these minutes would, in the Commissioner's view, have an inhibiting effect on future discussions of matters of comparable importance.

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50066295.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50066295.pdf)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50073129.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50073129.pdf)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision\\_Note\\_FS50070769.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/Decision_Note_FS50070769.pdf)

**IRJ comment:** This case has been appealed to the Tribunal.



## Decisions of the Scottish Information Commissioner

11 April – 14 July 2006

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**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.

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### Stirling Council

**135/2006**

**Regime: FOI(S)A**

**14 July 2006**

**Focus: ss.1, 11, 12**

The applicant submitted a questionnaire to Stirling Council containing 24 separate requests for information regarding the council's building control function. The council refused 17 of the requests, arguing that a response would require it to analyse the raw data it held, and that it was not required under FOI(S)A to do so. It acknowledged that responses to the request could be extracted from the data it held, but maintained that it did not produce reports of the kind requested. The information was therefore not "held."

The Commissioner disagreed. He took the view that the information requested was clearly held. The council's suggestion that the extraction of the requested information would be considered the creation of "new information" was rejected, as the Commissioner characterised such extraction as "information retrieval", and what was being requested was for existing data to be presented in a particular digest, as per s11(2)(b) of the FOI(S)A. He said that the definition of "digest" went beyond the narrow definition of a summary or brief synopsis of information, as proposed by the council, and that it should be considered to mean a systematic compilation of information, which might be in a condensed form. While there would be cases in which the retrieval of information from raw data would exceed the fees limit, in this case the council admitted that the provision of a response to certain questions would require only the tallying of the total number of entries within a spreadsheet.

Some other requests, however, could only be answered by manually searching through a group of 1,400 files. At a rate of one file every 4 minutes, this would take some 93 hours. The Commissioner agreed that the cost limit applied to these requests.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6135.htm>

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**West Dunbartonshire Council**

**132/2006**

**Regime: FOI(S)A**

**3 July 2006**

**Focus: ss.3, 36, 38**

The applicant requested copies of e-mails sent between council officials headed "Milton Primary School", against the background of two public consultations regarding the closure of the school. Some e-mails were withheld under sections 30(b)(i) and (ii) (prejudice to effective conduct of public affairs), 36(1) (confidentiality), 38 (personal information) and 3(2)(a)(ii) (information held on behalf of another person).

The Commissioner accepted that the general searches carried out by the council for relevant e-mails were sufficiently thorough to retrieve any relevant information from accessible servers. He also noted that, by the time the request was received, it was unlikely that back-up tapes would have held any email from the key period, as established procedures meant that such back-up data would have been overwritten. Given the cost of restoring old back-up files and that it was not likely that relevant information would be contained on them, it would not be "reasonable" to require them to be restored. However, he reminded public authorities that he considered it reasonable to include the e-mail archives of key officials in searches carried out in relation to information requests.

Some information was correctly withheld as personal data that it would be unfair to release, including information about school staff and the potential effects of the planned school closure on them. He found that detailed information about an employee's rate of pay and terms and conditions of employment was generally regarded as confidential information which an employee would not normally expect to be disclosed. He also noted that the staff in question were not remotely senior officers of the council, and it was therefore more likely that disclosure of such personal data would be unfair. He upheld the council's reliance on s.38 in this context. He also considered whether information

about the employment status of the unnamed school crossing patrol person following closure of the school could constitute personal data. It was unnecessary for the e-mails to refer to the crossing patrol person by name to constitute personal data. He said it was “likely that the crossing patroller would be well known to local residents, and identified on the basis of their job title,” and that therefore the decision to withhold the e-mails under s.38 was correct.

The Commissioner considered a number of e-mails withheld under s.36(1) (LPP). He accepted that the exemption applied to the majority of e-mails withheld under this section, including e-mails regarding the preparation of the council’s response to a legal aid application from a person seeking judicial review of the school closure, which had been sent from one council official to another but with council solicitors copied in. The context in which these e-mails had been sent showed them to be communications from the client department providing updated information to the solicitors from whom legal advice had been sought. However, another document consisted of an e-mail with an attached list of people and public bodies consulted on the school closure that was copied to council solicitors. The council argued that the e-mail had been provided to update the solicitors in the context of possible judicial review proceedings. The Commissioner said the e-mail itself did not reveal the context in which it was sent, and the s.36 exemption therefore did not apply. Where the exemption did apply to documents, the Commissioner found the public interest favoured maintaining the exemption, as the public interest in respecting LPP was very strong and there was no “highly compelling” public interest in release.

The Commissioner also accepted that information relating to a councillor’s party political activities or constituency business was not “held” by the council for the purposes of FOI(S)A.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6132.htm>

**The Scottish Executive**

**130/2006**

**Regime: FOI(S)A**

**29 June 2006**

**Focus: ss.29, 30**

The applicant requested details of every meeting held in 2004 between Scottish Ministers and Scottish MPs, including minutes, dates and locations. The minutes of a meeting held between the Minister for Health and Community Care and MPs were withheld under ss 29(1)(a) (formulation of government policy) and 30(b)(ii) (disclosure would inhibit substantially the free and frank exchange of views for the purposes of deliberation).

The Commissioner decided that the information in question did not relate to the formulation or development of government policy, and therefore held that s.29(1)(a) did not apply.

The purpose of the meeting was to discuss a specific proposal of another public authority which had aroused controversy. The Minister's intention was to allow a free and frank discussion of the relevant issues, which the Commissioner characterised as problem-solving leadership rather than the formulation of government policy. It was for the authority to take decisions following the meeting. The involvement of a Minister did not automatically transform the process into one involving the formulation or development of Scottish Administration policy. "Relate to" must mean more than simply having some association with an area of activity that is devolved to the Executive.

The Commissioner also considered the application of s.30(b)(ii). He noted that the manner in which participants had expressed their concerns as represented in the minutes was forthright, and not at variance with publicly expressed positions or views. He did not believe that participants would be inhibited from making such comments or from participating in future such meetings if disclosure was made. The timing of the request was crucial. It was clear that participants viewed the issues as being sensitive at the time of the meeting. The group had agreed not to make public comments, save to say that the meeting had been useful, until certain actions had been completed. The request had been made after those actions were due to have been completed, although other associated actions were still ongoing at the time the request was received. Given the strength of feeling held by those present at the time of the meeting, he did not believe that the prospect of a future release would have inhibited them substantially in a free and frank exchange.

With regard to a possibly chilling effect, the Commissioner said that disclosure of information on one occasion “should not be regarded as setting a precedent for all other information of this type under similar circumstances.” However, while the meeting in question had taken place before FOI(S)A was in place, participants in future meetings “should be aware that there is no guarantee that what they say would not be disclosed, especially if there is a public interest in disclosure.” He did not accept that there was anything in the minutes that would have been likely to have been omitted from discussion if it had been known at the outset that the minutes would be subject to a request under FOI(S)A, and found that s.30(b)(ii) did not apply.

However, the Commissioner went on to consider the public interest test in the event that it should be decided that either of the two exemptions cited should in fact apply. He held that the public interest fell in favour of disclosure. He noted that any expectation of confidentiality on the part of the participants had been temporary, as they had agreed to refrain from revealing the details of the meeting until a certain action had been completed, and that had happened.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision130-2006.pdf>

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### **The Scottish Executive**

**076/2006**

**16 May 2006**

**Regime: FOI(S)A**

**Focus: ss.29, 30**

The applicant requested dates and minutes of all meetings within the Health and Education Departments during a specified period on the sexual health strategy. The Executive refused disclosure, citing sections 29(1)(a) (formulation of government policy) and (b) (ministerial communications), but subsequently agreed to disclose a list of dates of meetings that had taken place, together with a description of the purpose of the meetings.

The Commissioner reiterated some of the reasoning set out in his linked decision notice in relation to case 075/2006<sup>20</sup>, which looked at the breadth of the phrase “relates to the formulation and development of government policy”. He suggested that while this was a broad phrase, information which communicated or presented a finalised and/or published

policy (e.g. an article, press statement, etc.) would not “relate to” its formulation or development. However, he accepted that, where the communication or presentation was directly linked to the publication of a new policy, discussion of the communication/presentation, its audience and how it should be worded could relate to the policy’s formulation.

The Commissioner’s reasoning in relation to the public interest test under s.29(1)(a) was similar to that set out in his linked decision notice in relation to case 075/2006. He said that a key factor in determining whether the public interest would favour disclosure would be the sensitivity of the discussions and comments recorded. If the exchanges or information were routine in nature this would normally point to disclosure. If he considered that disclosure would significantly harm the candour with which such exchanges or discussions were recorded in the future then this would raise an expectation that the information would be withheld, unless there was some compelling reason for disclosure. He found that, in the case of one document, the information was “routine in nature”, and ordered disclosure.

The Commissioner also considered the applicability of the exemption at s.29(1)(b) (ministerial communications). He accepted that the exemption was not limited to written communications between ministers, but could also cover records of discussions between ministers. However, he said that he was unable to accept the application of the exemption to any record or note simply because more than one minister was present. Where the record did not make explicit a communication between ministers he would need further information about, for example, the purpose of the meeting: whether it had been set up for discussion between ministers or for ministers to instruct officials.

In this case, he accepted that, in relation to a note of a meeting attended by a minister and deputy minister, as there was an explicit reference to action to be taken by the deputy minister, it was implicit that there was communication between the two ministers and the exemption applied. However, in relation to the note of a similar meeting where only the views and wishes of the Minister were made explicit (and not those of the deputy), he did not accept that he had sufficient information to determine that a discussion took place between Ministers, and held that that the exemption did not apply.

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<sup>20</sup> See page 83 for a summary of this decision.

In respect of the information to which the exemption did apply, and even though the information raised questions of collective responsibility of ministers, the Commissioner decided that the public interest favoured releasing some of the information.

The Commissioner also considered the applicability of s.30(a) (substantial prejudice to the maintenance of the convention of collective responsibility). To rely on this exemption, the Executive would have to do more than assert that the documents contained views expressed by a Minister. For collective responsibility to be prejudiced substantially, the views would have to be significant. This might apply where the view expressed was at variance with the final policy, or where the information revealed disagreement by another Minister or where the view expressed was outwith the scope of the Minister's responsibility. He found that the exemption did not apply in this instance.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision076-2006.pdf>

**IRJ Comment:** See also the Commissioner's decision notice in relation to case 077/2006, at:

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision077-2006.pdf>

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### **The Scottish Executive**

**075/2006**

**16 May 2006**

**Regime: FOI(S)A**

**Focus: s.29, 30**

The applicant requested all drafts of the Executive's sexual health strategy that were drawn up between January and December 2004. The Executive refused disclosure, citing sections 29(1)(a) (formulation of government policy) and (b) (ministerial communications). The Executive later added sections 30(b)(i) and (ii) (the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation), but without sufficient evidence, the use of these exemptions was not upheld.

The Commissioner, accepting that the information related to the formulation and development of government policy, said he took the view that "formulation" meant the output from the early stages of the policy process where options were generated and

sorted, risks were identified, consultation occurred, and recommendations or submissions were put to a minister. He said that “development” may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy. He accepted that the information requested fell within this category, and said that the use of the term “relates” ensured that the application of s.29(1)(a) was so broad as to include even the most innocuous of information.

The Commissioner then set out his thinking in relation to the public interest test and policy making. He considered judicial decisions of other jurisdictions, including Queensland, Western Australia and Canada. He said the assessment of the public interest had to be made quite independently of whether the information fell within the description at s.29(1)(a). There was no assumption that harm would automatically result from disclosure of such information. The assumption that information held by government is secret had been replaced by the assumption that information held by government is available, and the burden fell on the public authority to show why the information should not be disclosed on public interest grounds.

The Commissioner considered arguments about the need to protect the “process” of policy formulation, the sensitivity of the subject matter, “candour versus accountability”, the timing of the request, the extent of the information already in the public domain, and the “proximity” of the information to policy development. He said that the Executive had failed to provide a balanced consideration of the public interest test, and had focussed too heavily on the need to protect the policy formulation process. He said that, ultimately, the determination of the public interest test must be made on the actual content and sensitivity of the information.

While the Commissioner did not accept that any draft policy document would automatically deserve protection, in this case, he accepted that the subject matter of the strategy was of particular sensitivity, and that the views expressed by stakeholders were diverse and strongly held. As a consequence, the drafting to reconcile these conflicting views had required particular care. He also took into account the fact that the request was made a matter of weeks following the publication of the strategy, and that the sensitivity of the subject matter had not diminished. He said that disclosure of the information in this case might lead to comments of substance not being recorded in the future, or result in drafts simply being deleted, which would not enhance transparency.

Where the Commissioner found that information was of sufficient sensitivity that disclosure would, for example, seriously harm the candour of such discussions in the future, he said he would be likely only to order release where he found some “compelling” public interest ground for doing so. This might include cases where wrongdoing was in issue (for example, where the Executive was improperly influenced in its work), or a policy decision involved an unexplained or unacknowledged departure from routine procedures or standard practices.

In this particular case, after considering the type of information sought, the amount and nature of the information already in the public domain, the sensitivity of the information requested, the timing of the request and the actual content of the amendments to the draft, he agreed that the public interest fell in favour of withholding the information. However, he required the release of all statistical and factual information from the most complete draft as it would represent all such information from the drafting process used to inform the decision-making.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision052-2006.pdf>

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### **The University of Aberdeen**

**052/2006**

**11 April 2006**

**Regime: FOI(S)A**

**Focus: ss.30, 33**

The applicant requested copies of the University’s internal audit reports relating to Travel, Review of the Business School, Contract Management and Tendering, and the Medical Practice & Dental Unit.

The Commissioner found that the university’s decision to rely, *inter alia*, on sections 30(b)(i) (free and frank provision of advice) and (ii) (free and frank exchange of views for the purposes of deliberation), and section 33(1)(b) (substantial prejudice to commercial interests), to withhold the detailed findings and recommendations of the reports, and the initial management response, was incorrect. The university had argued that disclosure would damage the rigour of the internal audit process. It stated that the report and the management response were only the start of a continuing process, which would be monitored through follow-up audits. Premature disclosure would be interpreted as disclosure of a final decision on policy or procedure.

The Commissioner said that the standard to be met in applying s.30 was high. The key consideration was not whether the information constituted advice or opinion, but whether its disclosure would inhibit substantially the provision of advice or exchange of views. The Commissioner said the university had not demonstrated this. He said the university could easily supply the applicant with a caveat stating that the information represented the start of a continuing process to improve practices in the university, and that practices actually implemented might not resemble what is discussed in the report. The university had not provided evidence that the internal auditors (an external firm of accountants) had raised concerns about release of the information, which did not suggest that they (or others) would be inhibited substantially from the provision of advice in the future. The Commissioner also noted that public authorities had an obligation to address areas of non-compliance “transparently and without prejudice”, and he therefore could not see how disclosure of the information would inhibit an exchange of views for the purposes of deliberation.

The Commissioner also considered the test of substantial prejudice to “commercial interests”. He interprets “commercial interests” to mean “a person's ability to successfully participate in a commercial activity, e.g. the sale and purchase of goods or services.” He continued: “There is no requirement that these activities are profit making before this exemption can be engaged, although it would be normal. It should also be noted that this is substantially different from financial interests.” The test is to be far higher than just proving a possible jeopardy to the ability to purchase something, since this may not represent a commercial interest at all, but rather “an isolated engagement with commercial activity”.

The university had negotiated a contract with external travel agents in order to provide for an occasional requirement for its staff to be able to travel on business. The Commissioner decided that this could *not* be said to be a commercial interest, as the university was only engaging in commercial activities to the extent that such engagement was necessary to carry out its core functions. He therefore did not accept that the university's purchase of travel services could be said to be a commercial interest.

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision052-2006.pdf>



## Other Cases

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**Please note:** the information set out below is a summary of some other published decisions on Information Rights issues. 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.

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### **Stone v South East Coast Strategic Health Authority et al.**

**[2006] EWHC 1668 (Admin) (12/07/2006)**

The applicant, a convicted murderer, applied to prevent the publication of the report of the independent Inquiry into his care and treatment on the grounds, in essence, that the report contained confidential medical information and that publication would breach the DPA and his right to privacy under article 8 of the European Convention on Human Rights (ECHR).

The Court found that publication of this particular report was not contrary to the DPA or to his Convention rights. The judge performed a detailed and sensitive balancing of the data subject's interests and those of others. He decided that the report should be published in its entirety. It would not be possible to redact medical details because they were integral to the report. It was important that the report not be misleading, nor imply criticism of health care workers that was unfounded. Due to the celebrity of the case, many of the sensitive details were already in the public domain. He noted that some of the publicity was due to the data subject putting himself into the public domain (by committing these crimes).

The decision contains several comments of note on the art. 8 ECHR and on interpretation of the DPA.

1. The requirement that any interference with Article 8 rights be "in accordance with the law" is met by the common law of confidence. The Court held that "at the hearing, no further independent argument by reference to the requirement of "in accordance with law" for the purposes of Article 8 proved to be necessary. It was common ground that, under English common law, there is a general principle that a duty of confidentiality may

be overridden where the public interest so requires: and that threw up in this case the like issues as would arise under Article 8(2) itself” (at para. 26).

2. The necessity test in many of the Conditions in Schedule 2 and 3 DPA should be read like the necessity test in article 8 ECHR. The Court held that “It is common ground that the word “necessary”, as used in the Schedules to the 1998 Act, carries with it the connotations of the European Convention on Human Rights: those include the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued” (at para. 60).

3. Condition 5(b) of Schedule 2 and Condition 7(b) of Schedule 3 DPA, processing “necessary for the exercise of any functions conferred on any person by or under any enactment”: the Court held that this Condition is met where a public authority has either a duty or a power to process data (para. 63).

4. The Court took a very wide view of Condition 8 in Schedule 3, and any data controller subject to a common law duty of confidence would meet the requirement in Condition 8(1)(b).

On the scope of the article 10 ECHR right to freedom of expression, the Court held that although the public bodies cannot themselves rely on art. 10 to claim a right to publish the report, article 10 “comes into play: if only because of the general corresponding right of the public to be free to *receive* information where it is sought to be published” (para. 33, emphasis in the original). That the freedom of the press to report on the subject depends in reality on the public authority being able to publish the report supports the conclusion that it does not breach the convict’s article 8 right to permit publication.

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### **Plon (société) v France**

**58148/00 [2004] ECHR 200 (18 May 2004)**

The European Court of Human Rights (ECtHR) found that the initial publication ban on a book called “The Big Secret” (about former President Mitterrand’s cancer and his medical treatment while in office, written by his doctor and a journalist) by a judge 10 days after Mitterrand died was a proportionate and did not breach the publishers’ rights under article 10 to the European Convention on Human Rights (ECHR).

However, the continuation of the ban at the merits hearing 9.5 months later did breach art. 10. It was not proportionate because it no longer met a 'pressing social need'. The public interest in the debate about the health of the President outweighed considerations of medical secrecy and protecting the rights of others (his widow and children complained).

The ECtHR held that while "requirements of historical debate [do not] release medical practitioners from the duty of medical confidentiality, which under French law is general and absolute, save in strictly exceptional cases provided for by law. However, once the duty of confidentiality has been breached, giving rise to sanctions ..., the passage of time must be taken into account in assessing whether ... banning a book ... was compatible with freedom of expression" (para. 53). It was not proportionate, and breached art. 10. Freedom of the press and the public interest in the health of the President, who promised 6-monthly updates on his health but was less than frank in them, were key concepts.

<http://www.worldlii.org/eu/cases/ECHR/2004/200.html>

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