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Access to Information in Public Law Cases

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Introduction

1. The *Freedom of Information Act 2000* was passed on 20 November 2000. The Government's stated intention is that it will come fully into force in January 2005. In any event, as drafted, it must come fully into force by 1 December 2005: s. 87(3).

2. The Act marks an important step in the evolution of the modern relationship between the executive and the individual. In the last 60 years we have seen:

   (1) The establishment of a coherent body of principles governing the supervision of the executive decision-making process — judicial review.[1]

   (2) The appointment of permanent office holders to investigate maladministration — ombudsmen.[2]

   (3) The spread of independent tribunals whose remit is to come up with not just a lawful decision, but with the right decision.[3]

   To this trinity, we can now add a fourth:

   (4) A general right to see all that the executive holds, without having to demonstrate any need or interest, subject only to such exemptions that are required to protect some wider, overriding interest.

3. The USA was the first to term this "freedom of information."[4] We have been happy to follow.

4. The *Freedom of Information Act 2000* marks the final step in a journey that, in the United Kingdom, began 40 years earlier with a Private Member's Bill. In her maiden speech to Parliament, the Member for Finchley, Mrs Margaret Thatcher, introduced *The Public Bodies (Admissions to Meetings) Bill 1960*.[5] This gave, for the very first time, a right to see certain official information.[6] Although the scope of the right was narrow, to some any such notions made the Act "a very controversial piece of legislation."[7] Yet, apart from the right of access to documents, there was little new in the Act:

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1 Lord Diplock wrote (in 1982) of the progress that had been made in the 30 preceding years "towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime." - *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Buinesses Ltd* [1982] AC 617 at 641.

2 A term of Swedish derivation, happily imported into the English language. Sweden has had one since 1809, Denmark since 1955 and Norway since 1962. The Parliamentary Commissioner for Administration was first appointed in 1967.

3 Proposals for a coherent merit review tribunal were made in Sir Andrew Leggatt's *Report of the Review of Tribunals*, 16 August 2001. That report recommended, amongst other things, that "the citizen should be presented with a single, overarching structure giving access to all tribunals" (recommendation 5), the creation of a single tribunal system divided by subject matter into divisions (recommendation 89) and that there be a single route of appeal for all tribunals (recommendation 95). The Government has broadly accepted the Leggatt recommendations, issuing a White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, 15 July 2004.

4 (1966) 5 USC 552. Elsewhere the legislation is, perhaps more accurately, variously entitled the *Official Information Act 1982* (New Zealand) or the *Access to Information Act* (1982) (Canada).

5 *The Public Bodies (Access to Information) Act 1960* remains both in force and, by virtue of section 21 of the *Freedom of Information Act 2000*, of continuing significance.

6 The Act applies to local authorities, education committees, parish meetings of rural parishes, various NHS boards, bodies and executive councils, as well as their committees. It makes the meetings of all such bodies open to the public, except where publicity "would be contrary to the public interest." Section 1(4)(b) provides that where the meeting is required to be open to the public, a newspaper can request, and on payment of postage must be supplied with, the agenda of the meeting "...together with such further statements or particulars, if any, as are necessary to indicate the nature of the items included or, if thought fit in the case of any item, with copies of any reports or other documents supplied to members of the body in connection with the item."

7 *Hansard*, HC, vol. 616, 5 February 1960, col. 1366 (Mr G.W. Reynolds, Islington North).

> "As the Hon. Member for Islington North said, unless the spirit of the Bill is observed, it will do little more than the existing legislation. It will, however, do one thing more, and that is the most important feature to have come out of the Bill. It is not so much the admission of the public, curiously enough, but the provisions relating to the distribution of documents, that may well turn out to be the most important part of the Bill."[8]

The reasoning behind the 1960 Act and its identification of the competing considerations for and against disclosure of official information anticipated the preoccupations of Parliament 40 years later.[9]

5. I have assumed that most of you are not greatly familiar with the Act, so I shall start from the beginning. What I propose to do this morning is:

   (1) Set out the underlying purpose of the legislation. As you will see, this is critical to its operation.

   (2) Give a thumbnail sketch of the Act.

   (3) Then consider its implications for judicial review proceedings.

The purpose of the Act

6. As I hope to explain, the *Freedom of Information Act 2000* frequently makes the existence of the obligation to disclose information depend upon a balancing of competing facets of the public interest.[10] Exempt information,[11] unless exempted by an absolute exemption,[12] must nevertheless be disclosed unless:

> "...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."[13]

7. A proper weighing of the public interest in disclosing information requires an identification of the purpose of the Act. The long title of the Act gives little away:[14]

> "An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them..."

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8 *Hansard*, HC, vol. 617,13 May 1960, col. 830 (Mr Peter Kirk, Gravesend).

9 It was feared at the time that this might be the thin end of a wedge that would eventually reach central government: "How Parliament would get on in those circumstances I really dread to think," *Hansard*, HC, vol. 616, 5 February 1960, col. 1384 (Mr Arthur Skeffington, Hayes and Harlington, quoting from the Official Report of the Standing Committee D on the Local Government Bill in 1958).

10 *Freedom of Information Act 2000*, s. 2(1) and (2)

11 In other words, information that is exempt by virtue of any provision in Part II (ss. 21-44) of the Act: s. 84.

12 Enumerated in s. 2(3).

13 Section 2(2)(b).

14 An amendment to the Bill that would have seen a purpose clause included in the Act was defeated: *Hansard*, HC, vol. 347, 4 April 2000, col. 830 (Amendment no. 100). For discussion on the proposed purpose clause, see: *Hansard*, HC, vol. 347, 4 April 2000, cols. 830-855; *Hansard*, HL, vol. 617, 17 October 2000, cols. 886-888 and 892-900. It was opposed on the basis that it was "pointless" because it would add nothing to what was explained "more comprehensively" in the long title and that it would cause confusion to those minded to compare the long title with the purpose clause: *Hansard*, HC, vol. 347, 4 April 2000, col. 844 (Mr Mike O'Brien); Hansard, HL, vol. 617, 17 October 2000, col. 894 (Lord Brennan). Instead, it was considered that changing the preposition *about* in the long title of the Bill to *for* would adequately articulate the purpose of the Act: see *Hansard*, HL, vol. 617, 17 October 2000, col. 890.

8. One gets further insight from the background material. In the preface to the White Paper[15] that anticipated the introduction of the Bill, the Prime Minister said:

> "This White Paper explains our proposals for meeting another key pledge - to legislate for freedom of information, bringing about more open Government. The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know.[16] This fundamental and vital change in the relationship between government and governed is at the heart of this White Paper."

The Minister in charge of the Bill declared in his foreword:

> "Openness is fundamental to the political health of a modern state. This White Paper marks a watershed in the relationship between the government and people of the United Kingdom. At last there is a government ready to trust the people with a legal right to information. This right is central to a mature democracy."

9. The opening paragraphs of the White Paper give a straightforward statement of purpose:

> "1.1 Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.
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> 1.2 .....The purpose of the Act will be to encourage more open and accountable government by establishing a general statutory right of access to official records and information."

10. These passages accord with the statements of purpose made in relation to like legislation by the highest courts of comparable democracies. Thus, the US Supreme Court, in one of the most important judgments on its Act, reduced it to:

> "The basic purpose of [the Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[17]

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15 Cabinet Office, *Your Right to Know. The Government's Proposals for a Freedom of Information Act*, (White Paper), Cm 3818, 11 December 1997.

16 Implicit in this statement is a recognition that the *Code of Practice on Access to Government Information* (1994; 2nd ed. 1997) to which the same public sector had been subject for the preceding 8 years had not effected the "cultural" or "fundamental" change hoped for. So far as central government departments are concerned, the most significant change between the regime under the Code and the regime under the *Freedom of Information Act 2000* is the replacement of voluntariness with compulsion. In light of this history, notions of due deference to a public authority's claims of exemption should, it is suggested, play little or no part in the determination of claims of exemption save to the extent that those claims are substantiated by objective evidence.

17 *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 US 214 at 242 (1978). Similarly, the Supreme Court of Canada:

> "The [Access to Information] Act is concerned with securing values of participation and accountability in the democratic process. The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.....Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403 at 432-433.

In *Kuijer v. Council of the European Union (No. 2)* [2002] 1 WLR 1941 at [52] the Court of First Instance, dealing with

11. So much for the purpose of the Act. I turn now to my thumbnail sketch.

A thumbnail sketch

12. The Act starts boldly with the hand that gives. Section 1(1) of the *Freedom of Information Act 2000* reads:

> "1. (1) Any person making a request for information to a public authority is entitled-
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
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> (b) if that is the case, to have that information communicated to him."

13. By this provision, for the first time in the United Kingdom, the individual is given a universal right of access to official information. It is not confined by subject matter; it is not confined by the persons who may exercise that right; and it is not confined by some recognised need to know. There have been and there continue to be other rights of access to government information. To name a few:

- section 7 of the *Data Protection Act 1998*;[18]
- Part VA of the *Local Government Act 1972*; and
- the *Environmental Information Regulations 1992*.[19]

But all of these are confined in some significant way: by subject-matter of information; by identity of applicant; by demonstrated need; or by some combination of these.

14. You will have noticed that section 1(1) actually contains two rights:

(1) a right to be informed whether a public authority holds information answering a particular description; and

(2) a right to have communicated information held by a public authority answering a particular description.

15. Taking them in the order that they appear, the first right is what may be called the "existence right." The Act looks at it from the other end, calling it "the duty to confirm or deny."[20] This right is the less important. Its performance will generally be subsumed within the duty to communicate.[21] However, it is as well to understand why it is there as a separate duty.

16. The "duty to confirm or deny" deals with a particular problem which preoccupied the draftsman throughout the Act.[22] The problem arises in this way. Normally, where a public authority takes the view that requested information should not be disclosed, the public authority will respond

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Council Direction 93/731/EC, said: "It is first necessary to point out that the principle of transparency is intended to secure a more significant role for citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system. It helps strengthen the principle of democracy and respect for fundamental rights."

18 This right is not confined to official information, of course.

19 Which implement Council Directive 90/313 on Freedom of Access to Information on the Environment.

20 Section 1(6).

21 See s. 1(5).

22 The *Freedom of Information (Scotland) Act 2002* provides a more elegant solution to the problem: see ss. 16(3), 17(3) and 18 of that Act.

with a "refusal notice."[23] The refusal notice acknowledges that the public authority holds information answering the terms of the request and specifies the exemption relied upon. For most requests, there is no difficulty with this. However, where a person makes a very specific request, the mere acknowledgment that the information is held may be sufficiently revelatory to prejudice one of the interests that are supposed to be protected by the Part II exemptions. Two examples will illustrate the point:

(1) X asks the Inland Revenue for any correspondence from any member of the public suggesting that X under-declares his income. If the Inland Revenue held any such correspondence, it would almost certainly issue a refusal notice claiming that the release of that sort of information would or would be likely to prejudice the assessment or collection of tax or, possibly, the detection of crime or the administration of justice. Subject to a consideration of the public interest, the information would be exempt from disclosure: see s. 31(1) of the *Freedom of Information Act 2000*.

Let us now change the terms of the request a little.

(2) X asks the Inland Revenue for any correspondence from a named individual suggesting that X under-declares his income. Like the earlier request, the information would be exempt from disclosure for the same reason as before. However, in this case merely acknowledging that such information is held would reveal the Inland Revenue's source of information. That in itself might prejudice the assessment or collection of tax or, possibly, the detection of crime or the administration of justice. Subject to a consideration of the public interest, the duty to confirm or deny that the Inland Revenue holds the information requested would not arise: see s. 31(3) of the *Freedom of Information Act 2000*.

17. A similar provision is found in relation to each of the exemptions (save for two[24]). A moment's reflection will reveal that in order to be effective, the public authority must adopt the "neither confirm nor deny" approach whenever an overly-specific request is made for "sensitive information", irrespective of whether it holds information of that kind. To give such a notice only when it holds the information would, of course, equally give the game away. That is all that need be said about the duty to confirm or deny.

18. We turn then to the access right: s. 1(1)(b).

19. The breadth of the right needs to be kept firmly in mind: it is a right, described without reference to subject-matter, bestowed upon every person, to have disclosed all information answering the terms of a request held by the requested public authority. There are four observations I should make about the right:

(1) It is retrospective. It does not matter that the information pre-dates the *Freedom of Information Act 2000*. Nor does it matter that the information might have been given to a public authority by a person or company at a time when such

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[23] See *Freedom of Information Act 2000*, s. 17(1).

[24] Sections 21(1) and 43(1). The former is understandable; the latter is puzzling. Perhaps the draftsman thought that if an applicant had guessed that the public authority held the information, it was, at least to that extent, not a trade secret.

disclosure was unthinkable.[25]

(2) The right is given to every "person." It thus includes bodies corporate[26] and any person within the jurisdiction, however fleeting their presence.[27]

(3) The access right attaches to information held by a ***public authority***. The term "public authority" is defined: s. 3(1). An extensive list of public authorities is given in Schedule 1. It includes government departments, the Houses of Parliament, emanations of local government, health authorities, doctors and dentists, schools, universities, the police forces, and hundreds of specifically-named public bodies and officers (including the BBC, the Audit Commission, the Environment Agency, the GMC, the HSE, the Post Office and the WDA). It also includes publicly-owned companies: ss. 3(1)(b) and 6. It should be noted that, for the purposes of the Act, each government department is a separate "public authority." The significance of this lies principally in the width of the required trawl for requested documents.

(4) A public authority is only obliged to disclose information ***held by it***: s. 1(1).[28] Thus, a request made of one government department will yield nothing if all the information answering the terms of a request is held by another government department.[29]

20. The scope of the access right is shaped by a series of specific exemptions: s. 1(2). These exemptions are set out in Part II (ss. 21 - 44) of the Act. They restrict the right given by section 1. I will list some of the principal exemptions, but I want first to deal with them in general terms.

21. The exemptions may be grouped into two broad types:

(1) Those that the Act terms "absolute exemptions."[30]

(2) The rest, which the Act does not give any name but which we may usefully call "qualified exemptions."

If information falls within the terms of a provision conferring "absolute exemption," then the access right is thereby disapplied: see s. 2(2)(a). If information falls within the terms of a provision conferring what I term "qualified exemption", then the access right will be disapplied only if the public interest in maintaining that exemption outweighs the public interest in disclosure of the information: see s. 2(2)(b).

22. The public interest test in section 2(2)(b) deserves close reading. In applying the Act, one only reaches section 2(2) if information has been found to fall within one or more of the provisions

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25 Thus, the *Freedom of Information Act 2000* replaces the *Public Records Act 1958* as the means by which access to historical records is secured: see ss. 62-67 and Schedule 5.

26 *Interpretation Act 1978*, s. 5 and Schedule. This is to be contrasted with the subject-access right given by section 7 of the *Data Protection Act 1998*.

27 Those outside the jurisdiction can, of course, simply ask someone within the jurisdiction to make a request on their behalf without affecting the efficacy of the request.

28 The Act makes specific provision where information is held by a third party on behalf of the public authority: see s. 3(2).

29 The Code of Practice issued by the Lord Chancellor under section 45 of the Act (November 2002) provides that if the public authority to whom a request is made believes that some or all of the information sought is held by another public authority, the recipient public authority (as part of its section 16 duty to give assistance) may be required to tell the applicant that the information requested is held by another public authority or to transfer the request: see paras 24-25 of the Code of Practice.

30 Section 2(3).

of Part II (ss. 21-44). The information has, by this point, already attained the status of "exempt information."[31] But attainment of that status does not, of itself, disapply the access right. Disapplication of the access right is effected by section 2(2). Where one is dealing with "exempt information" other than by virtue of an absolute exemption, it is also necessary to carry out the public interest balancing exercise set out in section 2(2)(b). Look carefully at what is put on either side of the balance:

- On one side is the public interest "in maintaining the exemption." This is, I would suggest, the public interest underlying the applicable exemption(s) rather than a generalised public interest that may be thought to be served by the non-disclosure of the information. It is against that public interest that all the circumstances of the case are considered.
- On the other side is the public interest "in disclosing the information." This, I would suggest, brings in the basic purpose of the Act, together with any particular benefit in disclosure of the subject information that may be thought to arise from all the circumstances of the case.

It is, then, a focussed public interest test. It is not a general invitation to an idiosyncratic assessment of the pros and cons of the information being disclosed.

23. The exemptions may also be divided into:

(1) Those that merely look to the characteristics of the information itself — what may be termed "purely class-based exemptions"; and

(2) Those that also require harm or a likelihood of harm to result from the disclosure of the information — what may be termed "prejudice-based exemptions".

Examples of the former include:

- information that is reasonably accessible to the applicant otherwise than under the FOI Act;[32]
- information intended for future publication;[33]
- information held by the requested public authority that was directly or indirectly supplied to it by, or that relates to, any of the defined security bodies;[34]
- confidential information obtained from a foreign state or from an international organisation or court;[35]
- information held by a public authority for the purposes of a criminal investigation or proceedings;[36]
- certain policy information;[37]

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31 Somewhat misleadingly in the case of information that does not fall within one of the provisions that confers absolute exemption. See definition of "exempt information" in s. 84.

32 Section 21(1).

33 Section 22(1)

34 Section 23(1).

35 Section 27(2)

36 Section 30(1).

37 Section 35(1). This exemption, together with the exemption in section 36(2), appears to be the phantom of a presentiment that was generally debunked in the second half of the 20th century. Lord Radcliffe faced with this line of argument in the *Glasgow Corporation v. Central Land Board* [1956] SC (HL) 1 at 20 said that he would have supposed Crown servants to be "made of sterner stuff," a view shared by Harman LJ in *Re Grosvenor Hotel, London (no. 2)* [1965] Ch 1210 at 1255E. In *Conway v. Rimmer* [1968] AC 910 at 992, 994 Lord Upjohn picked up the sword: "...the executive have relied upon the *Cammell, Laird* [1942] AC 642 case to claim privilege in class cases on the ground that the public interest requires that the writings of every member of the executive from the highest to the lowest...must be protected from production for the reason

- information that constitutes personal data;[38]
- information obtained by the public authority from any other person (including another public authority) the disclosure of which would constitute an actionable breach of confidence by the public authority;[39]
- information in respect of which a claim to legal professional privilege could be maintained.[40]

Examples of the latter include:

- information for which exemption from the duties is required for the purpose of safeguarding national security;[41]
- information whose disclosure would or would be likely to prejudice the defence of the British Isles;[42]
- information whose disclosure would or would be likely to prejudice relations between the United Kingdom and any other State or international organisation or to prejudice the interests of the United Kingdom abroad;[43]
- information whose disclosure would or would be likely to prejudice relations between administrations within the United Kingdom;[44]
- information the disclosure of which would or would be likely to prejudice the economic or financial interests of the United Kingdom or any part of it;[45]
- information the disclosure of which would or would be likely to prejudice the prevention or detection of crime *etc.*;[46]
- information the disclosure of which would or would be likely to endanger the physical or mental health of an individual or endanger an individual's safety;[47] and
- information the disclosure of which would or would be likely to prejudice the commercial interests of any person.[48]

24. As you will have observed from paragraph 22 above, many of the specific exemptions resemble well-established grounds for non-disclosure of information in other branches of the law. Thus we see:

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that the writer of the document must have a full, free and uninhibited right to pen his views without fear that they will ever be subject to the public gaze; in other words, secure in such knowledge he can then, and apparently only then, write with the complete candour necessary for the discharge of his functions as a member of the public service [992]....I cannot believe that any Minister or any high level military official or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day [994]." See also *Burmah Oil Company Limited v. Bank of England* [1980] AC 1090 at 1133 per Lord Keith; *Sankey v. Whitlam* (1978) 148 CLR 1 at 40, per Gibbs ACJ, 63 per Stephen J and 96 per Mason J; *Williams v. Home Office* [1981] 1 All ER 1151.

38 Section 40(1).

39 Section 41(1).

40 Section 42(1).

41 Section 24(1).

42 Section 26(1).

43 Section 27(1).

44 Section 28(1).

45 Section 29(1).

46 Section 31(1).

47 Section 38(1).

48 Section 43(1) and (2).

(1) An exemption for information for which a claim of legal professional privilege could be maintained: s. 42. Interestingly, this is a qualified exemption, implying that there will be some circumstances when privileged information should be released.

(2) Exemptions for information the disclosure of which would be harmful to national security or to the defence of the nation: ss. 24 and 26. Again, both of these are qualified exemptions.

(3) An exemption for information the disclosure of which is prohibited by statute, *e.g.* under the *Official Secrets Act 1989*: s. 44.

(4) An exemption for information the disclosure of which would constitute an actionable breach of confidence by another person: s. 41(1).[49]

(5) An exemption for information that constitutes a trade secret or which, if disclosed, would be likely to prejudice the commercial interest of any person: s. 43.

(6) An exemption for personal information relating someone other than the applicant: s. 40(2)-(7).

25. Importantly, there are exemptions for information for which a person has a right of access under other legislation: ss. 21(1), 39(1) and 40(1). The point here is that the *Freedom of Information Act* tries, as far as possible, to route an applicant through any specific statutory rights to information (*e.g.* under section 7 of the *Data Protection Act 1998* - personal information relating to the applicant) before turning to the *Freedom of Information Act*. The exercise is a fairly pointless one: if the other statutory regime provides more extensive exemptions than the *Freedom of Information Act 2000*, the applicant's rights under the latter Act thereby remain unaffected by the rights given by the specific regime.[50]

26. The Act also provides for conclusive certificates in relation to particular heads of exemption: ss. 23(2), 24(3), 25, 34(3) and 36(7). A conclusive certificate stands as conclusive evidence of the "facts" certified in it, irrespective of the reality. In so doing, a certificate effectively ousts merit review of any refusal to disclose.

27. There is no obligation on a public authority to rely on an available exemption. Nor is there any obligation on a public authority to refuse to disclose information that may legitimately be refused under the Act. A public authority can decide for whatever reason that it does not wish to rely on a particular exemption. Similarly, although information may be exempt information under the Act, a public authority may decide that it nevertheless wishes to disclose that information. I term this a "discretionary disclosure."

28. Once a request for information has been received, a public authority essentially has 20 working days to answer the request: s. 10(1). If and to the extent that a public authority relies on a qualified exemption, then extra time is allowed for the public interest balancing exercise to be carried out: s. 10(3). The public authority may issue a fees notice, so as to defray the cost of

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[49] Where the information was obtained from another country or from an international organisation or court, it is enough that that country/organisation/court gave the public authority the information in confidence or with that expectation: s. 27(2)-(3).

[50] See *Freedom of Information Act 2000*, ss. 21(2)(b) and 21(3).

communicating the information that it is obliged to disclose: s. 9.[51]

29. Finally, the Act includes a four-tiered review structure:

(1) The first stage is an internal reconsideration of the decision.[52]

(2) If, after that, the applicant (who now gets called a "complainant"[53]) remains dissatisfied, an application can be made to the Information Commissioner under section 50(1) of the Act. The Commissioner is given a wide remit to deal with refusals, the level of fee charged, the time taken and so forth. Unless a conclusive certificate has been issued, the Commissioner will undertake a merit review of the public authority's decision. The upshot of the Commissioner's review is what is termed a "decision notice."

(3) If a person is dissatisfied with a decision notice, that person may appeal to the Information Tribunal: s. 57(1). It is not just the complainant who may appeal to the Information Tribunal: if a public authority does not care for the decision of the Information Commissioner, it too may appeal to the Tribunal. The Information Tribunal must allow the appeal if the notice is "not in accordance with the law." If the Information Commissioner's decision involved the exercise of discretion, the Tribunal can interfere if it takes the view that the Commissioner should have exercised his discretion differently: s. 58(1).

(4) If a party is still unhappy, it may appeal to the High Court on a point of law: s. 59.

30. The Act makes no provision for third party rights: in comparative jurisdictions this is often termed "reverse FOI."[54] The point here is that what for one is "freedom of information" may for another be an invasion of privacy or a breach of confidence. The preoccupation of the Act is a two-way struggle between a public authority's power not to disclose certain information and the right of an applicant to see whatever a public authority holds. The legitimate interests of a third person who may be affected by a public authority's release of information are not reflected in any rights given by the Act to such persons.[55]

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51 A fees notice has the effect of freezing the clock so far as answering the terms of the request is concerned. The level of the fee is to be set by as-yet unpublished regulations.

52 The Code of Practice issued under section 45 requires public authorities to provide internal procedures for dealing with complaints. Although the Act itself does not provide for internal review, under s. 50(2)(a) the Information Commissioner should not deal with a complaint if it appears to him that the complainant has not exhausted any complaints procedure.

53 Section 50(1).

54 In the USA a third party can bring proceedings to prevent an agency releasing documents under the FOI Act on the basis that the applicant has no entitlement under that Act, even though the agency either is of the view that the applicant does have an entitlement or does not wish to invoke the exemption. These proceedings are not based upon the *Freedom of Information Act* but upon the *Administrative Procedures Act* (5 USC §§ 701-06). See generally *Chrysler Corp. v. Brown* 441 US 281 (1979). Elsewhere, specific statutory provision is made to enable a third party to participate either in the original decision or in an appeal.

55 There is a non-statutory statement of expectation that a third party whose interests may be affected by disclosure under the Act be consulted before any such disclosure: see the Secretary of State for Constitutional Affairs' *Code of Practice on the discharge of public authorities' functions under part I of the Freedom of Information Act 2000*, 20 November 2002. In brief, the Code advises that:

(1) where the third party's consent is required (*e.g.* because otherwise disclosure would be an actionable breach of confidence), public authorities should consult the third party unless that would be impracticable - para. 32;

(2) where the third party's consent is not required, consultation may be appropriate - para. 34;

(3) public authorities should consult affected third parties where the third parties' views may assist in determining whether an exemption applies or where the public interest lies - para. 35; and

(4) however, public authorities may consider that consultation would not be appropriate where its cost would be

31. That, then, is my thumbnail sketch of the Act.

The implications for judicial review proceedings

32. Given that judicial review is almost always sought against a body that is subject to the *Freedom of Information Act 2000*, the Act might seem to present information-gathering opportunities in the conduct of such proceedings. In order to assess these opportunities, it is sensible to remind ourselves of the current position so far as concerns disclosure in judicial review.

33. The obligation to give disclosure in proceedings derives from CPR r. 31.12. There is nothing in CPR r. 31 confining it to private law proceedings.[56] Nevertheless, it is well known that disclosure is not ordinarily required in judicial review proceedings.[57] The harshness of this is tempered by the obligation on a defendant to judicial review proceedings to ensure that the material before the Court is not a skewed selection of all the relevant material:

> "Certainly it is for the [claimant] to satisfy the Court of his entitlement to judicial review and it is for the [defendant] to resist the application, if he considers it unjustified. But it is a process which falls to conducted with all the cards face upwards on the table and the vast majority of the cares will start in the authority's hands."[58]

This, of course, distinguishes it from private law litigation, even where a public body is a party to that litigation. Where disclosure is sought in judicial review, it is usually confined to specific documents or classes of documents. To obtain such an order, the claimant will need to demonstrate some reason to believe that the contents of the authority's evidence may be inaccurate or not tell the full story.[59]

34. The defendant's obligation undoubtedly assists the Court in its supervision of an administrative decision for which permission to review has been granted. It is, however, less than optimal for a claimant:

(1) The power arises after the claimant has drawn his claim. This impairs a claimant's ability both to assess whether or not to make a claim and to draw his claim. To a certain extent the latter disadvantage can be lessened by requesting information pursuant to the pre-action protocol.

(2) There is no enforcement mechanism, other than the making of an application for

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"disproportionate" - para. 36.

56 See CPR r. 31.1(2). The power to inspect documents referred to in witness statements, Claim Forms *etc.*, which applies equally to proceedings under CPR r. 54, arises from CPR rr. 31.14-31.15.

57 See also CPR PD54, para. 12.1: "Disclosure is not required unless the court orders otherwise."

58 *R v. Lancashire County Council, ex parte Huddlestone* [1986] 2 All ER 941 at 945 per Lord Donaldson MR. Similarly, in *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409: "There is - of course - a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide" per Laws LJ at [50].

59 *R v. Secretary of State for the Home Department, ex parte B.H* [1990] COD 445; *R v. Secretary of State for the Environment, ex parte London Borough of Islington and London Lesbian and Gay Centre* [1991] COD 67; *Re McGuigan's Application* [1994] NI 143; *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 396-397. The Court will not permit "contingent" or "Micawber" discovery - in other words, discovery in the hope that something might turn up: *R v. Secretary of State for the Environment, ex parte Doncaster Borough Council* [1990] COD 441.

specific disclosure. As noted above, a claimant has a difficult threshold to cross in order to succeed in such an application.

(3) Even where such an application is made, it is open to the authority to make a summary of the information held, to assert that it is full and complete and to leave the matter there.[60] There is no independent arbiter of the assertion.

35. The *Freedom of Information Act 2000* changes all this. There is nothing to stop a person using the Act in support of litigation, be it a public law claim or a private law claim. There is nothing to stop a person exercising his rights under the Act before or after the commencement of proceedings. Whereas previously "fishing" for supporting documentation was prohibited, the Act permits a would-be litigant not only to fish but to trawl.[61] Save to the extent that it may be relevant to a consideration of the public interest, the motives of a person in making a request are irrelevant to its prospects of success. This is conventional in freedom of information legislation:

> "Congress granted the scholar and the scoundrel equal rights of access to agency records."[62]

This was recognised during debate on the Bill.[63] And this is recognised in the Lord Chancellor's Code of Practice under section 45 of the Act.[64] For that reason, it matters not that the Act is being brazenly used to get around the limitations of disclosure.[65]

36. In this, the *Freedom of Information Act 2000* differs from that other important right of access, section 7 of the *Data Protection Act 1998*. The purpose of that section, we have been told:

> "....is to enable him [*i.e.* the data subject] to check whether the data controller's

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60 As was done in *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386.

61 Provided only:

(1) That the cost of compliance with request does not exceed "the appropriate limit" - section 12(1). The draft *Freedom of Information (Fees and Appropriate Limits) Regulations* r. 6(1) set these at £550. This is estimated by reference to the marginal cost (*i.e.* staff costs, but not overheads) of locating and providing the information and associated disbursements. Provision is made for amalgamating the cost of separate requests put in as part of a "campaign" - section 12(4).

(2) That the request is not "vexatious" - section 14(1).

(3) That the request is not identical or substantially similar to an earlier request made by the applicant and a reasonable time has not elapsed since the earlier request - section 14(2).

62 *Durns v. Bureau of Prisons*, 804 F 2d 701 (DC Cir. 1986). Similarly: *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 US 749 (1989); in Australia, *Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556; and in Canada, *Intercontinental Packers Limited v. Canada (Minister of Agriculture)* (1987), 14 FTR 142.

63 "It is perfectly legitimate for an official to have a discussion with the applicant with a view to helping the applicant to refine the request he or she is making so as to use better the provisions of the Bill. That is only for the purpose of assistance, not for examining motive with a view to determining whether to proceed with the request because that is quite irrelevant in the context of the Bill as drafted." *Hansard*, HL, vol. 617, 17 October 2000, col. 921, Lord Falconer (Minister of State, Cabinet Office).

64 Paragraph 9 of the *Code of Practice on the Discharge of the Functions of Public Authorities under Part I of the Freedom of Information Act* (November 2002) (issued under section 45 of the Act) states: "where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest or that he or she will be treated differently if he or she does."

65 Elsewhere it is generally accepted that the right of access is not affected by the fact that there is pending or potential litigation between the person making the request and the agency to whom the request is made: *In the Matter of M. Farbman & Sons Inc v. New York City Health and Hospitals Corp* 62 NY 2d 75 (1984) at 78; *Johnson Tiles Pty Ltd v. Esso Australia Ltd* [2000] FCA 495 (Federal Court of Australia); *Sobh v. Police Force of Victoria* [1994] 1 VR 41 at 50.

> processing of it unlawfully infringes his privacy and, if so, to take such steps as the Act provides, for example in sections 10 to 14, to protect it. It is not an automatic key to any information, readily accessible or not, of matters in which he may be named or involved. Nor is it to assist him, for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties."[66]

The narrow interpretation that has been given to the term "personal data"[67] results in a correspondingly narrow operation for the two personal information exemptions in the *Freedom of Information Act 2000*.[68]

37. A properly-drawn request under the Act can thus secure in advance of the pre-action protocol letter an identification of all the information that was taken into account in the making of a particular decision. A would-be claimant need no longer conjecture from the decision itself as to what was taken into account or as to what was omitted from consideration.

38. Does this enable an applicant to submit a request that asks for all information held by a public authority that will assist the applicant to succeed to bring a particular claim against that public authority? I think not. Such a request does not so much "describe the information requested"[69] as require the public authority to undertake an assessment of the value that each piece of information it holds would give to a particular claim and then disclose the outcome of that exercise.

39. The *Freedom of Information Act 2000* is not itself concerned with the correction of maladministration.[70] Its concern is openness of government. It is, to return to the words of the US Supreme Court, to ensure an informed citizenry.[71] It reflects a maturity of relationship between the State and its citizens. That maturity extends to a judicial supervision of decisions in which "the placing of cards on the table" is not solely entrusted to the body whose decision is being challenged.

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66 *Durant v. Financial Services Authority* [2003] EWCA Civ 1746 per Auld LJ at [27]. Mr Durant had been involved in unsuccessful litigation with Barclays Bank, where he had been a customer. He made 2 requests under section 7 of the *Data Protection Act 1998* to the FSA, hoping that the information revealed would enable him to re-open his claim against Barclays or secure an investigation of its conduct. The FSA refused to disclose certain information it held in various files and that related to Mr Durant's complaint against the bank on the basis that the documents did not "relate to" Mr Durant. Under section 1(1) of the *Data Protection Act 1998*, "personal data" is defined to mean data which relate to a living individual.

67 Namely, that the information should have the applicant as its focus "rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest....In short, it is information that affects [the applicant's] privacy, whether in his personal or family life, business or personal capacity" - *Durant v. Financial Services Authority* [2003] EWCA Civ 1746 per Auld LJ at [28]. Buxton LJ agreed, saying: "The notions suggested by my Lord in his para. 28 will, with respect, provide a clear guide in borderline cases" at [79].

68 Section 40(1), which grants an exemption for information that "constitutes personal data of which the applicant is the data subject," and section 40(2)-(4), which grants an exemption for information that constitutes personal data of which the applicant is not the data subject (provided that the information also has certain other attributes). By section 40(7) "personal data" bears the same meaning in section 40 of the *Freedom of Information Act 2000* as it does in the *Data Protection Act 1998*. Thus, paradoxically, the exemption in the *Freedom of Information Act 2000* that was intended to protect a third party's privacy, has effectively been given a self-avowedly "narrow interpretation" (*Durant* at [27], [29]) in its acceptance of an argument said to be concerned with the privacy of personal data (*Durant* at [45], [54]).

69 As is required by section 8(1)(c).

70 Although that may impinge upon the operation of the public interest balancing exercise.

71 *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 US 214 at 242 (1978). See paragraph 10 above.