Constitutional and Administrative Law Bar Association

Freedom of information: hide & seek

The public interest, prejudice and Århus

Philip Coppel
4-5 Gray's Inn Square

Inner Temple
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Introduction

1. On 1 January 2005 the provisions that animate the *Freedom of Information Act 2000* ("**FOIA**") came into effect. On that same day *The Environmental Information Regulations 2004* ("**EIR**"), conceived in 1998 in the Danish town of Århus, came into force. Together with the *Data Protection Act 1998*, these are the three principal instruments making provision for the disclosure of information held by public authorities.[1]

2. Richard Thomas has given you a thumbnail sketch of the FOIA. I want this evening to talk about two particular matters that are of over-arching significance to the Act:[2] the public interest and the notion of prejudice. Finally, I shall introduce you to the EIR, whose name is apt to belittle their importance.

The public interest

3. The rights bestowed by both the FOIA and the EIR are coloured by the concept of the public interest. Section 1(1) of the FOIA boldly proclaims that any person making a request for information to a public authority is entitled to be told whether the public authority holds that information and, if so, to be given that information.[3] 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. This seemingly unconfined right of access to all information is conventional in freedom of information legislation. It is what distinguishes it from the rights of access to information that are found in other legislation. 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.

4. Self evidently, such a broad right must be shaped so as not to harm other interests worthy of protection. Accordingly, subsection 1(2) tells us:

> "Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

It will be seen that the subsection giving rise to the entitlement is made subject to other provisions. We can thus say that the entitlement given by section 1(1) is shaped by the provisions referred to in subsection (2).

5. The principal shaping devices are the public interest balancing exercises contained in section 2.[4] We can see that there are two balancing exercises spelled out in section 2. The

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1 These are not the only instruments making provision for the disclosure of information held by public authorities: see, for example, Part VA of the *Local Government Act 1972*. Also, the right to obtain personal information given by section 7 of the *Data Protection Act 1998* is not confined to information held by public authorities, but extends to information held by many private organisations and individuals.

2 As well as to the EIR.

3 Similarly, EIR, r. 5(1).

4 Similarly, EIR, r. 12(1).

first is concerned with the "duty to confirm or deny": *i.e.* the duty imposed by section 1(1)(a). One only gets to a consideration of this duty if disclosure of the requested information is being refused.[5]

6. Let us therefore turn to section 2(2), which is directed to the duty to disclose:[6] *i.e.* the duty imposed by section 1(1)(b). Section 2(2) says:

> "In respect of information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-
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> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
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> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

7. The language may mislead on first reading. The reference to "exempt information" might suggest that the information in question is exempt from disclosure. Self-evidently from its own terms that cannot be the case. In any event, section 84 tells us that "exempt information" simply means information that falls within the grasp of one of the provisions of Part II (ss. 21-44) of the Act.

8. The provisions conferring absolute exemption are exhaustively listed in section 2(3). Of greater interest, and occasional surprise, are those provisions in Part II that do *not* confer absolute exemption:

- Section 24, which renders information "exempt information" where that is required "for the purposes of safeguarding national security."
- Section 26, which renders information "exempt information" where its disclosure would, or would be likely to, prejudice the defence of the British Isles or the capability of the armed forces.[7]
- Section 27, which renders information "exempt information" where its disclosure would, or would be likely to, prejudice relations between the United Kingdom and another country, an international organisation and so forth.
- Section 31, which renders information "exempt information" where its disclosure would, or would be likely to prejudice the prevention or detection of crime, the administration of justice, the assessment or collection of tax and so forth.
- Section 35, which renders information "exempt information" where it relates to the formulation or development of government policy or Ministerial

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5 FOIA, s. 1(5).

6 I am jumping over the first subsection, as it is solely concerned with the "duty to confirm or deny" bestowed by section 1(1)(a). The same principles apply to that duty as apply to the duty to communicate.

7 The provision is more sophisticating than my paraphrasing permits. The same comment applies to all of my paraphrasing.

communications and so forth.

- Section 36, which (in most circumstances) renders information "exempt information" where, in a senior official's reasonably opinion, its disclosure would, or would be likely to, prejudice Cabinet secrecy or inhibit the free and frank provision of advice or would otherwise prejudice the effective conduct of public affairs.
- Section 42, which renders "exempt information" information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- Section 43, which renders information that constitutes a trade secret "exempt information."

These are not the only"qualified exemptions": but they should be enough to illustrate the significance of the public interest test in section 2(2).

9. I said that there was an element of surprise in what had been omitted from the list of absolute exemptions. You will have observed in the above list of "qualified exemptions" that most of them require disclosure of the information to harm or prejudice, or at least have a likelihood of harming or prejudicing, a particular protected interest: defence, international relations, the administration of justice and so forth. One only arrives at the public interest balancing exercise once the information in question has satisfied this harm test.

10. Plainly, section 2(2) contemplates that there may be information which, although its disclosure would, or would be likely to, prejudice the protected interest, should nevertheless be disclosed. To operate section 2(2) so that the mere fact that disclosure would, or would be likely to, prejudice the protected interest, results in the public interest being against disclosure, would be to elevate that "qualified exemption" into an absolute exemption. Parliament has chosen not to make these exemptions absolute exemptions. One recalls the observation of Holt C.J. that:

> "Parliament can do no wrong, though it may do several things that look pretty odd."[8]

11. I turn now to the application of the public interest balancing exercise. It deserves close analysis, partly because it is so important to the operation of the Act and partly because what gets put on either side of the scales is a little less at large than is usual.

- On one side is the public interest "in maintaining the exemption." Bear in mind that by the time we reach section 2, all that has happened is that the information has been identified as being "exempt information" by virtue of a provision in Part II: the duty to disclose has not, as yet, been disapplied - that only comes after carrying out the section 2 exercise. "The public interest in maintaining the exemption" is thus, I would suggest, a reference to the public interest underlying the applicable exemption(s) rather than a

[8] *City of London v. Wood* (1701) 12 Mod. Rep. 669 at 687.

generalised public interest that may be thought to be served by the non-disclosure of the information.[9] 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.

12. The use of the phrase "the public interest in maintaining the exemption" was no mere looseness of language. It reflects the most significant change effected to the *Freedom of Information Bill* that was appended to the Government's consultation document on freedom of information.[10] Under clause 8(5) of the draft Bill a public authority was not obliged to comply with the disclosure duty if or to the extent that the information requested consisted of exempt information. Instead, under clause 14, in those circumstances a public authority was required to consider whether it should make a discretionary disclosure having regard to the public interest in allowing public access to information held by public authorities. The Information Commissioner, in reviewing a refusal, could not override the discretionary disclosure decision.[11] In short, there was no public interest override such as now exists in section 2.[12]

13. The Bill met with some criticism, and the public interest "override" in section 2 was one of the main devices used to defuse that criticism. Lord Falconer in introducing the amendments, explained how the balancing exercise would work:

> "The way that the Bill works in relation to the exemptions which the amendments affect is that, first, the public authority has to determine whether or not disclosure would prejudice, for example, relations between the United Kingdom and any other state. The public authority asks itself the simple question, 'If I disclose this document which indicates the greatest disdain being held for certain aspects of another country's activities, will that cause harm to my relations with that state?' That is a very simple question

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9 Contrast this view with that expressed in the Guidance given by the Department for Constitutional Affairs, Introduction to Exemptions, Chapter 7: What is the public interest test?, where it is said:

> "When considering a request for information that falls under one of the qualified exemptions, officials must weigh the public interest considerations in favour of releasing the information, and the public interest considerations in favour of not disclosing the information. If the public interest in withholding the information outweighs the public interest in disclosure, the applicant does not have a right of access to this information under the FOI Act."

See: http://www.dca.gov.uk/foi/guidance/exintro/chap07.htm

10 Home Office, *Freedom of Information. Consultation on Draft Legislation*, Cm 4355, May 1999.

11 Clause 43(7). The Information Commissioner could only require the authority to make a decision in accordance with section 14 and could specify the matters to which the public authority was to have regard in making that decision.

12 Within the context of the Bill, the term "exempt information" was more apposite than it is under the Act.

> for a public authority to ask. The answer will be either 'yes' or 'no'. If that were the end of the process, I could quite understand an argument which said, 'You have to set the test at some level.' But that is not the end in any of the exemptions which these amendments affect because the balancing act then has to go on between the public interest in disclosure and the public interest in maintaining the exemption. So, in the example given, **does the harm to our relations with state X** outweigh the public interest in the public knowing at that time what was going on in that country?"[13] (emphasis added)

Note that the harm on one side of the balance is, quite properly, related back to the exemption: it is not a general assessment of the public interest that might be thought to be against disclosure of the information.

14. Although there is no onus provision in the FOIA, the reference to "the public interest in disclosing the information" ropes in, to a degree, a presumption of disclosure. The FOIA describes at various points a public interest in disclosing information.[14] In introducing the Bill and in commending its provisions, the objectives and aspirations for it were said to be:

> "....the Bill will not only provide legal rights for the public and place legal duties on Ministers and public authorities, but will help to transform the culture of Government from one of secrecy to one of openness. It will transform the default setting from "this should be kept quiet unless" to "this should be published unless". By doing so, it should raise public confidence in the processes of government, and enhance the quality of decision making by the Government."[15]

15. That is all that I wish to say about the public interest exercise in the FOIA. As I hope I have shown, there is some subtlety in the provision. Given the importance of section 2, a proper understanding of section 2 can mark the difference between disclosure and non-disclosure.

Prejudice

16. I turn next to prejudice. The exemptions in Part II of FOIA may be divided into those that are purely class-based,[16] and the remainder, all of which require some form of prejudice before the exemption is engaged. We have seen above some of the "prejudiced-based" exemptions: prejudice to the defence of the British Isles; prejudice to international relations *etc.*; prejudice to the prevention or detection of crime; prejudicing the effective conduct of

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13 *Hansard*, HL vol. 617, 19 October 2000, col. 1265.

14 Sections 2(2)(b), 17(3)(b), 19(3), 35(4) and 46(3).

15 *Hansard*, HC, vol. 340, 7 December 1999, Mr J. Straw, second reading speech. See also: *Hansard*, HC, vol. 357, 27 November 2000, col. 719, Mr O'Brien (Parliamentary Under-Secretary of State for the Home Department) introducing amendments to the public interest provisions of the Bill.

16 Although the term "class-based exemption" is not used in the Act, they were so described in the *Explanatory Notes, FOI Act 2000* (see paras 12 and 85) and in House of Commons, *Public Administration - Third Report*, (Cm 4355), 29 July 1999, para 60. The following categorisation is consistent with that given in the *Explanatory Notes, FOI A and in the Public Administration - Third Report*.

public affairs; and so forth.[17]

17. With the exception of the national security and health and safety exemptions, under each of the prejudice-based exemptions[18] information only becomes exempt information if its disclosure under the FOI Act "would, or would be likely to, prejudice" that which the particular exemption seeks to protect.[19]

18. What, then, does "prejudice" mean? And what likelihood is "likely"?

19. To answer the first question, the lack of any qualifying adjective might suggest that any prejudice will do. That, certainly, was not the stated intention. Lord Falconer, in giving the Bill its Second Reading speech in the House of Lords, stated:

> "I want to emphasise the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is 'real, actual or of substance.' We do not think that reliance on undefined terms such as 'substantial' or 'significant' is a sensible way forward. We do not know how they will be interpreted by the commissioner or the courts. We can never deliver absolute certainty, but we can avoid making uncertainty worse by adding ill-defined terminology into the Bill."[20]

20. The Scottish Act does place reliance upon the undefined term "serious prejudice." In rejecting a proposed amendment that would have required a similar requirement in England and Wales, it was said:

> "...qualification of the term is unnecessary. The Government have consistently stated their views that prejudice means prejudice that is actual, real or of substance."[21]

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17 See Coppel, *Information Rights*, Sweet & Maxwell, 2004, pp. 372-373, for a listing.

18 FOIA, ss. 26(1), 27(1), 28(1), 29(1), 31(1), 33(2), 36(2), 38(1) and 43(2).

19 In Scotland the requirement is to show "serious prejudice." *Freedom of Information Act (Scotland) Act 2002*, ss. 27(2), 28(1), 30, 31(4), 32(1), 33(1), 33(2), 35(1) and 40.

20 *Hansard*, HL, vol. 162, 20 April 2000, col. 827, Lord Falconer of Thoroton (the Minister of State, Cabinet Office). When the Lord Chancellor (Lord Irvine) announced in the House of Lords the publication of the *White Paper, Your Right to Know*, (Cm 3818), Hansard, HL, 11 December 1997, col. 245, he identified as one of the key features of the proposed FOI regime: "Thirdly, fewer exemptions.....Significantly, in most cases information could only be withheld if its disclosure would cause 'substantial' harm--a further important advance on the Code." The House of Lords, *Draft FOI Bill - First Report, (Select Committee Report HL97), Session 1998-99*, 29 July 1999, had recommended that prejudice be qualified by "substantial:" para. 32.

21 *Hansard*, HC, vol. 347, 5 Apr 2000, col. 1067, Mr Mike O'Brien. The Government advised the House of Commons Select Committee that the formula required "probable prejudice, not just possible prejudice" - *House of Commons, Public Administration - Third Report, (Cm 4355)*, 29 July 1999, para 65-71; Annex 6, para 47-48. The Home Secretary specifically invited reliance upon his explanation in Parliament as a tool of interpretation in the Courts: *ibid*, para

That is about as clear as it gets.

21. Next, what level of likelihood is required by the word "likely." The range of meaning that might be given to the phrase was noted by the House of Commons Select Committee, which quoted Lord Woolf's evidence to it:

> "I think the words 'likely to prejudice' are ones which are not the most desirable to have in this field because there is a very considerable risk of conflict as to what the word 'likely' means. Does it mean 'likely to rain,' as in the possibility that it is going to rain, or does it mean 'it is more likely than that,' in other words that it is more probable than that .... If 'prejudice' is the appropriate word, surely the issue is whether some interest would be prejudiced, and the word 'likely' can be somewhat weasel."[22]

22. The closest we get is from Mr Justice Munby in considering the meaning of the phrase "would be likely to prejudice" for the purpose of considering certain exemptions under the *Data Protection Act 1998*.[23] In the course of judgment, he said:

> "I accept that 'likely' in section 29(1) [of the *Data Protection Act 1998*] does not mean more probable than not. But on the other hand, it must connote a significantly greater degree of probability than merely 'more than fanciful.' A 'real risk' is not enough. I cannot accept that the important rights intended to be conferred by section 7 are intended to be set at nought by something which measures up only to the minimal requirement of being real, tangible or identifiable rather than merely fanciful. Something much more significant and weighty than that is required....In my judgment 'likely' in section 29(1) connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. 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."

23. Between the speech of Lord Falconer and the judgment of Mr Justice Munby some definiteness is given to the prejudice formula in the Act. And again, a proper understanding of the phrase can mark the difference between disclosure and non-disclosure.

Århus

24. Now I want to move to Denmark.

68.

[22] Lord Woolf, quoted in *House of Commons, Public Administration - Third Report, (Cm 4355)*, 29 July 1999, para 66. The Government had argued before the Committee that the phrase required the prejudice to be at least "likely" or "probable," rather than merely "possible": *Public Administration - Third Report, (Cm 4355)*, 29 July 1999, para 68.

[23] *Lord (R on the Application of) v. Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at [106].

25. The UN Economic Commission for Europe[24] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* was adopted on 25 June 1998 in the Danish city of Århus.[25] It is generally called "The Århus Convention."[26] The Convention concerns itself with three matters or "pillars":

- access to environmental information;
- public participation in environmental decision-making; and
- access to a right to challenge decisions considered not to respect either of the above two.

It is the first of these that, after a 6-year gestation, found its way into the EIR. The route was indirect in that it was a European Directive that adopted the Convention so far as access to environmental information is concerned.[27]

26. The EIR are important for three principal reasons. First, through section 39 of the FOIA, Parliament has, in relation to "environmental information", largely subordinated[28] the otherwise universal regime of the Act to the regime established by the EIR.[29] This subordination is unique to "environmental information."[30]

27. Secondly, "environment information" is given a broad, if somewhat Byzantine, definition in the EIR:

> "'environmental information, has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any

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24 The UNECE is one of five regional commissions of the United Nations. It has 55 member states, which are geographically situated in the northern hemisphere. Member States include the 25 current EU member states, the US, Canada, Turkey, Romania, Bulgaria and certain of the former Soviet Union countries.

25 The Aarhus Convention itself had its source in Principle 10 of the Rio Declaration on Environmental Development, which states: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

26 The text of the Convention can be found at:-
http://www.unece.org/env/pp/documents/cep43e.pdf
The Convention entered into force on 30 October 2001. The Convention has so far been ratified by 26 countries, including five EU Member States (Belgium, Denmark, France, Italy and Portugal). It has not been ratified by the United Kingdom.

27 Directive 2003/4/EC "on public access to environmental information".

28 The subordination is not quite complete: section 39 is not an absolute exemption. Given that the exceptions under the Regulations are generally narrower than the exemptions under the Act and given that all the exceptions (save for one) require an analogous weighing of the public interest, it is difficult to anticipate many circumstances in which a request could be refused under the former but not the latter.

29 Whilst it is correct that there are numerous other statutory rights of access to subject-specific information, the existence of which gives rise to an exemption under section 21 of the *Freedom of Information Act 2000*, an exemption in the subject-specific regime will result in section 21 no longer being available. What is unique in relation to "environmental information" is that the exemption in section 39 also captures information that the public authority *would be* obliged to make available to the public "but for any exemption contained in the regulations."

30 Section 2(3).

other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."[31]

On any sober view, this is prone to capture a wide range of information of significance not just to those in the environmental sphere, but in planning, local government and cognate areas.

28. Thirdly, the exemption regime in the EIR[32] is significantly narrower than the exemption regime under Part II (ss. 21-44) of the FOIA. Not only are those exemptions more numerous and more broadly drafted that in the EIR, but the additional public interest requirement (which has the effect of reducing the circumstances in which a public authority may refuse to disclose information) does not apply to the absolute exemptions.[33] Exemptions that are in the Act but which are not exceptions in the Regulations include:

- policy information;[34]
- information in respect of which a claim to legal professional privilege could

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31 For an attempt to make sense of this, see Coppel, "Environmental Information: the New Regime", [2005] *JPL* 12-33.

32 They are called "exceptions" in the EIR.

33 Namely, those exemptions not listed in section 2(3), *i.e.* 21(1), 23(1), 32(1), 32(2), 34(1), 36(2), 40(1), 40(3)(a)(I), 40(3)(b), 41(1) and 44(1).

34 *Freedom of Information Act 2000*, s. 35(1). Some policy information may be captured by r. 12(4)(e).

be maintained;[35]

- information the disclosure of which would or would be likely to prejudice relations between the administrations within the United Kingdom;[36]
- information the disclosure of which would be or would be likely to be prejudicial to the economic or financial interests of the United Kingdom;[37] and
- information the disclosure of which is prohibited by or under any enactment or by rule of law (such as contempt of court).[38]

In other cases, exceptions are cast in significantly more restrictive terms than the analogous exemptions in the Act:

- confidential or commercial information;[39] and
- information relating to the detection of crime or to the conduct of criminal proceedings.[40]

Many of the exceptions in the Regulations that approximate class-based exemptions under the Act differ in their additional requirement that disclosure "adversely affect" the interest protected by the exception.[41]

Conclusion

29. I am conscious that I have dwelt on three of the more difficult aspects of the FOIA. My only excuse for this is that each is of central importance to the operation of the Act. My hope is that in so doing, some light has been shed on each of them.

PHILIP COPPEL
4-5 GRAY'S INN SQUARE
LONDON

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35 *Freedom of Information Act 2000*, s. 42(1). Although some protection may be afforded by r. 12(5)(b) and (d).

36 *Freedom of Information Act 2000*, s. 27(1).

37 *Freedom of Information Act 2000*, s. 29(1).

38 *Freedom of Information Act 2000*, s. 44(1). Regulation 5(6) specifically disapplies any enactment or rule of law that would prevent the disclosure of information in accordance with the Regulations. A full list of these statutory prohibitions on disclosure can be found at:
http://www.dca.gov.uk/foi/statbars.htm (statutes)
http://www.dca.gov.uk/foi/statbarssi.htm (statutory instruments)

39 Compare *Freedom of Information Act 2000*, ss. 41(1) and 43 with r. 12(5)(e) and (f).

40 Compare *Freedom of Information Act 2000*, ss. 30(1) and 31(1) with r. 12(5)(b).

41 In other words, what in the *Freedom of Information Act 2000* is a purely class-based exemption becomes a prejudice-based exception in the Regulations: see ss. 27(2), 30(1), 32(1), 34(1), 35(1), 41(1), 42(1), 43(1) and 44(1).