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Access to Information and the Public/Private Divide

Northumbria Information Rights Conference, 6 June 2011

1. Introduction

Around the world, freedom of information legislation seeks primarily to make the workings of government more open, transparent and accountable. It is not primarily intended to provide access to information about organisations within the private sector. The debate around freedom of information is couched in terms of access to information from and about government and public sector authorities. For just one of many examples, see the comments by the Minister introducing the Freedom of Information Bill in Parliament: “Unnecessary secrecy in Government and our public services has long been held to undermine good governance and public administration”.¹

The enactment of the Freedom of Information Act 2000 (“FOIA”) has been described as a “significant step” in widening access to government information, a process which had begun with the Public Bodies (Admission to Meetings) Act 1960, because for the first time the right of access was general, not limited by its subject matter or by the persons who could exercise the right².

That widening of access is important and it has meant that vastly more information about the workings of government has been released. However it does not mean that FOIA is only relevant to the public sector. Examination of the legislation and of the growing volume of case law shows that it has a significant impact on the private sector, and on organisations which could be said to straddle the public/private divide: privatised companies such as the utility companies, carrying out functions which were previously within the remit of the public sector; other private companies which have taken on public sector contracts under contracting-out and PFI/PPP initiatives; quangos; and in recent years organisations such as banks, previously firmly in the private sector, which have received quantities of public money and some degree of government influence (if not control³) over their activities.

This paper discusses two aspects of the impact which freedom of information legislation has had on private sector organisations:

1. the extent to which private sector bodies carrying out some form of public function are, or could become, directly subject to FOIA and the Environmental Information Regulations 2004 (“EIR”); and

¹ Jack Straw MP, Hansard HC 340 col 714 (emphasis added)

² Coppel, *Information Rights Law and Practice* at 1-002.

³ For an interesting commentary see Birkinshaw, *Freedom of Information: the Law, the Practice and the Ideal* at 359 et seq

2. the extent to which information about private sector bodies can be accessed through FOIA

2. Which bodies are subject to the legislation?

The idea that organisations within the private sector might be subject to the access regimes was present right from the outset. In the White Paper which preceded FOIA, the government sought to include the privatised utilities and “private organisations insofar as they carry out statutory functions within the ambit of the legislation”⁴. However that intention did not survive into the legislation. In the event both FOIA and the EIR were written to apply directly only to “public authorities”. But the way in which use of the term is structured is significantly different between the two regimes.

FOIA s 1 provides that “any person making a request for information to a public authority is entitled (a) to be informed...whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.” The term “public authority” is defined in s 3 (1) as “(a) any body which, any other person who, or the holder of any office which (i) is listed in Schedule 1, or (ii) is designated by order under section 5, or (b) a publicly-owned company.”

The approach in FOIA is to provide a complete list of all the public authorities to which it applies. Schedule 1 does list many of these by category⁵ but many are named individually. The list of individual bodies to which the Act applies⁶ is very long and includes large numbers of non-governmental and quasi governmental bodies such as advisory committees. Bodies can be added to Schedule 1 by the Secretary of State under s 4, principally where new authorities are established. This power has been used many times. In addition the Secretary of State can designate other bodies as being public authorities for the purpose of the Act, under s 5 (1). This power arises where the body “(a) appears to the Secretary of State to exercise functions of a public nature, or (b) is providing under a contract made with a public authority any service whose provision is a function of that authority”.

Of course the disadvantage of this approach is that bodies which might appear to be exercising public functions are not included unless and until they are added under s4 or designated under s5. Given the political significance of inclusion within FOIA, proposals have been put forward at various times for the designation of bodies which appear to exercise some form of public role: Network Rail, Northern Rock, the Press Complaints Commission, the Association of Chief Police Officers and others. However while the extension to ACPO appears to be going ahead together with a

⁴ *Your Right to Know: The Government's Proposals for a Freedom of Information Act* Cm 3318 (1997) at 2.2

⁵ Eg Schedule 1 Part 1 “any government department...”

⁶ Listed in Schedule 1 Part VI, with a further list in Part VII for bodies in Northern Ireland

range of other regulatory bodies⁷, others are not. Both the Conservatives and the Liberal Democrats said prior to the 2010 General Election that they would add Network Rail; the Conservatives also planned to add Northern Rock. It appears that these are not now going ahead⁸. In Scotland, the situation is much the same. The Scottish Government announced in December 2009 that it was considering extending the Freedom of Information (Scotland) Act (which applies to Scottish Public Authorities) to contractors who build or maintain hospitals or schools, who operate or maintain trunk roads under PFI contracts, and who run privately managed prisons or prison escort services. These proposals appeared to be quite detailed and to have reached an advanced stage. However in January 2011 it was announced that they would not be taken forward, a decision that the Scottish Information Commissioner described as a “worrying slide to less freedom of information”⁹.

The position under EIR is structurally different, in that there is no list of public authorities but a definition. A public authority is defined in Regulation 2 (2) as “(a) government departments; (b) public authorities as defined in s 3 FOIA (which will therefore incorporate the list); (c) any other body or other person, that carries out functions of public administration; and (d) any other body or other person under the control of a person falling within (a) (b) or (c) and which has public responsibilities relating to the environment; exercises functions of a public nature relating to the environment, or provides public services relating to the environment.”

Deciding whether a body is a public authority for the EIR therefore depends not solely on a list but on whether the body falls within the definition.

This definition derives directly from the Aarhus Convention¹⁰ but its apparent breadth has been narrowed considerably by the Upper Tribunal recently.

In *Smartsources v Information Commissioner*¹¹ the Upper Tribunal held that privatised water companies were not public authorities for the purposes of the EIR. The UT decision involves a detailed and closely argued analysis of the Aarhus Convention¹², Directive 2003/04/EC¹³, the Aarhus Implementation Guide¹⁴, DEFRA’s guidance on the EIR¹⁵, and a significant quantity of statute and case law, including the two leading previous decisions of the Information Tribunal on the matter, *Network Rail*¹⁶ and *Port of London Authority*¹⁷. Despite several references in the

⁷ See MOJ press release 7 January 2011. The other bodies include the Law Society and Advertising Standards Authority

⁸ They are not listed in the MOJ proposals.

⁹ Kevin Dunion, Scotland on Sunday 5 March 2011

¹⁰ Aarhus Convention article 2.2

¹¹ [2010] UKUT 415 (AAC)

¹² Available at <http://www.unece.org>

¹³ Available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF)

¹⁴ <http://www.unece.org/env/pp/acig.htm>

¹⁵ Available at <http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/full-guidance/pdf/guidance-2.pdf>

¹⁶ *Network Rail Ltd v Information Commissioner* EA/2006/0061 and EA/2006/0062

¹⁷ *Port of London Authority v Information Commissioner* EA/2006/0083

Aarhus Implementation Guide to the possibility of privatised utilities being subject to access regimes, the Upper Tribunal held that the water companies were not carrying out “functions of public administration” for the purposes of regulation 2 (2) (c). The requirement was not the carrying out of public functions, but functions of public administration. On this basis the water companies were not public authorities. No single factor was decisive. Instead the Tribunal adopted a “multi factor” approach, comparing features of the water companies with Network Rail (which had been held not to carry out functions of public administration) and assessing whether they were more or less like a public authority than Network Rail was. On balance, it was held that the water companies had fewer characteristics of public authorities than did Network Rail. Nor did the fact that they were subject to detailed regulation by the Secretary of State and/or OFWAT mean that they were “under the control of” those bodies to bring them within regulation 2 (2) (d), even though they clearly provide public services related to the environment.

It is difficult to argue with this as the correct legal outcome of the case, given the wording of the regulations and the preceding case law. However it seems equally clear that even though they are private companies, the water companies’ functions are exactly the sort of functions which are so crucial to the environment that they should be encompassed by the EIR. This argument is alluded to by the Upper Tribunal, in a postscript to its judgement:

“107 The Aarhus Guide suggests as follows....:

“Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public.”

108 The DEFRA guidance states that there can be “ no comprehensive list of those bodies that are under the control of another body because such relations are dynamic and are prone to frequent change” (paragraph 2.21, original emphasis). Clearly the authors of the Aarhus Guide did not see that as an insuperable problem. In addition, while it may be a valid argument against having an authoritative list of public authorities in primary legislation, on the same model as FOIA 2000 , it would not preclude such a list being kept up to date through secondary legislation. However, that is a matter for others to determine.”¹⁸

Neither model of determining which bodies are “public authorities” is perfect. The FOIA model is clear but dependent on a political assessment of whether to add bodies to the list. The EIR model offers less scope for political decision making but its drafting is open to interpretation in ways which do not always make sense of the underlying purpose of the regulations.

¹⁸ Smartsource v IC [2010] UKUT 415 at paragraph 107

The government's intention at the moment appears to be not to bring private commercial bodies within the legislation, even those which are providing services which previously were regarded very much as public functions. This is in part a reflection of changing times and the ongoing impact of privatisation. As the Information Tribunal pointed out in the *Network Rail* case "Whatever the position in 1947, running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority."¹⁹ However, where should the line be drawn? It could be argued that, certainly in relation to environmental information, the crucial factor is what the information is about, rather than the exact nature of the body holding it. That argument is less clear in relation to FOIA. Making access dependent on the type of information held or service provided rather than on the public nature of the holder might lead to a lack of certainty and in many ways would be a retrograde step (see the comments from Coppel, *supra*). But more could certainly be done to extend the regimes to bodies which do carry out public functions.

One avenue which could and perhaps should be explored is extending the category of public authorities which are only partly subject to the legislation. There is precedent for this approach under FOIA. The BBC is the most widely known, in that it is subject to FOIA in respect of information held for purposes other than those of journalism art or literature²⁰. But there are many other organisations which are "public authorities" for only part of their activities, including the Bank of England. It should not be impossible to devise a scheme for more borderline bodies, which carry out some public functions but do not fit comfortably within the category of public authorities, to be partly covered by FOIA rather than wholly excluded. The Tribunal however rejected this approach in *Smartsources* in relation to the EIR, concluding that as a matter of statutory interpretation, regulation 2 did not suggest that a body could be simultaneously both within and outside the EIR²¹.

3. Access to commercial information

Although bodies which are not "public authorities" are not directly subject to FOIA or the EIR, information which they have provided to a public authority will generally be regarded as "held" by the authority and therefore potentially releasable to a requester, subject to any exemptions which might apply. Issues here have arisen mostly in the context of contracts between public authorities and private bodies, and information supplied during procurement processes. The next section of this paper examines FOIA exemptions as they apply to these public/private contracts.

3.1 The exemptions

The most important exemptions in this context are likely to be FOIA s 41 and 43. Under FOIA s 41(1), information is exempt if "(a) it was obtained by the public

¹⁹ *Network Rail Ltd v Information Commissioner* EA/2006/0061 at paragraph 29

²⁰ FOIA Schedule 1 Part VI

²¹ *Smartsources v IC* [2010] UKUT 415 at paragraph 104.

authority from any other person (including another public authority) and (b) the disclosure of the information.. by the public authority.. would constitute a breach of confidence actionable by that or any other person.” Section 41 is an absolute exemption (so no application of the public interest test is required).

Section 43(1) FOIA is a qualified exemption (requiring application of the public interest test) protecting trade secrets. Section 43(2) is also qualified, and exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

There are broadly equivalent (but not identical) exceptions under the EIR²². As has been noted by several commentators²³ the confidentiality exemptions under the EIR are materially narrower than those under FOIA, by largely excluding private information²⁴.

3.2 Confidential information

The reference in s 41 to an “actionable breach of confidence” means that the common law case law on breach of confidence is imported into FOIA. This requires that the information: has the necessary quality of confidence; was communicated in circumstances which created an obligation of confidentiality; and that disclosure would be a breach of that obligation²⁵. In addition there will be no actionable breach if it is in the public interest for the information to be disclosed, thereby introducing a public interest test into what otherwise appears in FOIA as an absolute exemption. Detailed discussion of the common law rules on breach of confidence is beyond the scope of this paper, but some of the FOIA case law applying those rules is noteworthy.

²² Regulation 12 (5) provides that a public authority may refuse (subject always to the public interest test) to disclose information to the extent that its disclosure would adversely affect (inter alia):

(c) intellectual property rights;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority; (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and (iii) has not consented to its disclosure

²³ See Richard Spearman QC in *Coppel Information Rights Law and Practice* at 25-065

²⁴ Limitations of time and space preclude consideration of the EIR exceptions here but they will appear in a later extended version of this paper.

²⁵ See *Coco v AN Clarke(Engineers) Limited* [1969] RPC 41, *Derry City Council v IC EA/2006/0014*

One of the interesting differences between FOIA and the case law on commercial confidentiality outside FOIA is the relative frequency of FOIA cases in this area²⁶, although as the FOIA case law is largely at tribunal level its precedent value elsewhere is limited. Another interesting difference is in the relationship between the parties to the case. Outside FOIA, the confidentiality obligation is one which is created by and between the parties to the original provision of information, either by contract or in equity. The disclosure, or potential disclosure, of the information tends to result from the breakdown of their relationship and the consequent decision of one party either to release the information or to use it for their own benefit – as in the leading case of *Coco v Clarke*²⁷, which arose from the breakdown of a partnership agreement. Often the cases are between an employer and a former employee who is in possession of confidential information²⁸. Only rarely does the information fall into the hands of a third party, and even if it does, they will only be liable for breach of confidence if the manner in which they obtained the information placed them under a duty of confidence²⁹.

Under FOIA, by contrast, the information is sought by a third party, who could be a competitor or a member of the public. In most cases neither of the original parties to the confidentiality agreement wishes it to be released. For example, many FOIA requests are made by unsuccessful bidders for public sector contracts, seeking more information about the successful bid and the decision making process than is otherwise available to them³⁰.

The fact that most of the previous cases involved a breakdown in a relationship and subsequent breach of contract by the defendant is perhaps one reason why many public authorities and their private sector contractors have placed so much reliance on contractual confidentiality clauses, expecting that while both parties abided by the contract, material in it, or referred to in it, as “confidential” would be treated by the courts as such. The early FOIA jurisprudence on section 41 therefore came as something of an unwelcome surprise.

The first important issue here was the whether an entire contract between a public authority and a third party could be confidential. In order to rely on s41 the information must have been obtained by the public authority from another person³¹. In *Derry City Council v The Information Commissioner*³² the Tribunal upheld the IC decision that a written agreement between two parties (in this case, a contract between the Council and Ryanair) did not constitute information provided

²⁶ There have been significant developments in the common law of confidence in recent years, but the cases have mostly concerned private information about individuals rather than commercial confidentiality

²⁷ *Coco v AN Clarke(Engineers) Limited* [1969] RPC 41

²⁸ See for example *Faccenda Chicken v Fowler* [1987] RPC 449

²⁹ The most common case law example being photographers taking pictures of celebrities, as in *Campbell v MGN* [2004] UKHL 22

³⁰ Under the Public Contracts Regulations 2006. See the interesting discussion in *Public Procurement Law Review* 2010,4, NA 148-152

³¹ S 41(1)(a)

³² EA/2006/0014

by one of them to the other, and that therefore, a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.

The Tribunal stated that “we are aware that the effect of our conclusion is that the whole of any contract with a public authority may be available to the public, no matter how confidential the content or how clearly expressed the confidentiality provisions incorporated in it, unless another exemption applies.”³³

A very sweeping statement, but tempered by the recognition just a few paragraphs later that a contract might in reality contain genuinely confidential technical information provided by the contracting party, or information regarding a pre-contract negotiating position, which could be redacted and not disclosed.

The same general statements about the disclosability of the entire contract were repeated by the Tribunal in the *Department of Health* case³⁴ which involved a request for the contract between the Department and a private contractor for the provision of an E-Recruitment service for the NHS .

The Commissioner and the Tribunal have in numerous decisions reiterated some basic points about confidentiality which previously had perhaps been overlooked by public authorities and those dealing with them: that labelling information as “confidential” does not make it such³⁵; that information ceases to be confidential once it is in the public domain; and that information can cease to be confidential with the passage of time³⁶.

Overall, this robust approach means that the s41 exemption has been successfully relied on to resist the disclosure of commercial information in only a relatively small number of cases. These have been situations where the information was objectively confidential, and where the public interest in releasing the information was held not to outweigh the duty of confidentiality so that there would have been an actionable breach of confidence if the information was disclosed. For example reports delivered to public authorities under express confidentiality terms³⁷ with significant public interest weight, and detailed economic models and costings³⁸, although even the latter tend to have been dealt with under s43(2).

3.3 Section 43(2)³⁹

³³ Ibid at paragraph 13(e)

³⁴ *Department of Health v IC EA/2008/0018*

³⁵ See DTI FS 50069394; also *Derry City Council*, supra

³⁶ Eg valuation information see *Oxford City Council FS500090744*

³⁷ As in *Boston BC FS50064851*; *NICE FS50082569*

³⁸ As in *FSA FS 50094583*

³⁹ The line between trade secrets and confidential information is a narrow and not very well-defined one, and most of the issues which could potentially have been dealt with as trade secrets have tended to be dealt with under s 41. So the discussion here will cover s 43(2) only. Again the extended version of this paper will examine this in more detail.

Very often cases where s 41 is claimed also involve s 43(2), as the information which is claimed as confidential is also claimed as information, the disclosure of which would, or would be likely to, prejudice the commercial interests of any person. As noted above, the s41 exemption will not apply to the contract itself, but s 43(2) can still apply.

In an early Information Tribunal case *John Connor Press Associates v IC*⁴⁰ the Tribunal ordered the release of financial information about payments made by the National Maritime Museum to an artist for an exhibition. The argument that this was a disclosure which would, or would be likely to, prejudice the commercial interests of the museum was rejected. This rejection of the s 43(2) exemption caused some consternation. However the Tribunal's reasoning was perhaps more limited to its particular facts than some commentators suggested. While it is true that the interpretation of the phrase "likely to prejudice" as meaning a "real and significant risk" meant that organisations might find it difficult to succeed in a s 43(2) argument, the facts here were quite unusual. The National Maritime Museum had already released a good deal of relevant financial information, and in particular had disclosed some of the unusual features of this agreement, making the commercial value of the further information it wanted to withhold rather limited.

Further cases on similar facts illustrate that in appropriate circumstances the Tribunal is willing to accept s 43 (2) arguments, including cases where the section 41 exemption is rejected.

In the *Department of Health* case⁴¹, involving a contract between the Department and a private contractor, although the contract was held not to be confidential, the Tribunal also considered s 43. They held that although for the majority of the contract terms the public interest lay in disclosure, for some of them the public interest lay in withholding.

Again the *Derry City Council* case is relevant. The Tribunal considered that s 43 (2) was engaged in relation to the commercial interests of the Council, although then went on to decide that the balance of the public interest lay in disclosing the relevant information. However they did not consider the commercial interests of Ryanair – but indicated that this was because they had been given no evidence of Ryanair's commercial interests, rather than because such interests were not relevant⁴².

The recent case of *BBC and One Transport v IC*⁴³ illustrates a seemingly ready acceptance by the Tribunal of arguments on the prejudice to commercial interests, where such arguments are supported by evidence. Here, the request was for the amount paid by the BBC to a taxi company under contractual arrangements following a tender process. The Tribunal accepted in full the argument that

⁴⁰ EA/2005/0005

⁴¹ Supra at n 26

⁴² Derry case at paragraph 24 (b)

⁴³ BBC and One Transport Limited v IC and Davis EA/2010/0150

disclosure would be likely to prejudice the BBC's commercial interests in that it would "set the expectation of what the BBC will pay for a service"⁴⁴ and prevent the BBC from obtaining best value for money; disclosure would also be likely to prejudice the commercial interests of the taxi company by providing a mechanism by which its competitors could work out its pricing structures. There was held to be a clear public interest in a genuinely open, fair and competitive tendering process, which would be hindered rather than helped by release of this pricing information.

There are still cases where disclosure is ordered of commercial items the parties do not wish to release: in *Channel 4 v IC*⁴⁵ it was held that the entirety of a contract could not be withheld under s 43(2): the individual clauses must be examined and justified individually. But overall the fears of private sector contractors do not currently seem to be borne out by the cases: where information is genuinely commercially sensitive the exemption will be applied, and more readily than under s 41.

3.4 Other recent case law on commercial information

The position of the parties to commercial contracts has arguably been considerably strengthened by the decision of the Court of Appeal in *Veolia v Nottinghamshire County Council*⁴⁶. This involved an ingenious attempt by an environmental campaigner to access confidential commercial information (details of a multi-million pound waste management contract) via the previously little used s 15 of the Audit Commission Act 1998 rather than FOIA or the EIR. S15 gives a right to "any persons interested" to inspect the accounts of a local authority for a limited period at the time of the annual audit. That right extends to inspection not only of the accounts but also of contracts "relating to" the accounts. Cranston J at first instance⁴⁷ had held that this included the contracts and related financial documentation. The Court of Appeal, however, held that s15 had to be read in a way which would preserve the confidentiality of the company's confidential information. They held that the company had a right under the ECHR to peaceful enjoyment of its possessions, that this right extended to its commercially valuable confidential information, and that therefore the Council had to carry out a balancing act, assessing whether the public interest in maintaining confidentiality outweighed the public interest in disclosure. On this basis, the financial information was protected from disclosure.

In two related cases, the Tribunal has followed this lead. In *Staffordshire CC v IC and Sibelco*⁴⁸ a quarry operator had voluntarily provided the council with information about its sales and reserves, on the basis of strict and specific obligations of confidentiality. The tribunal followed the reasoning in *Veolia* and held that the public

⁴⁴ BBC, *ibid* at para 25

⁴⁵ EA/2010/0134

⁴⁶ [2010] EWCA 1214

⁴⁷ [2009] 2382 (Admin)

⁴⁸ EA/2010/0015

interest favoured the maintenance of the exemptions in regulations 12 (e) and (f) EIR.

These decisions would appear to herald a new direction for the protection for commercially confidential information, by engaging the human rights of the owner of the information and reading access rights as subject to an exception.

That said, the tribunal in *Nottinghamshire CC v IC and Veolia*⁴⁹ held that while the ECHR rights could be engaged, in reality that would add little to the analysis and the balancing act already required for the public interest test under FOIA.

The conclusion to be drawn from recent developments seems to be that after a few false starts, where the Courts and the Tribunal reached decisions which were justified in law but caused consternation to private organisations because they did not reflect widespread practices, the practice and the case law are now more closely aligned. Genuinely confidential information, and information which would genuinely prejudice commercial interests if released, will be protected against disclosure. However what counts as confidential information is narrower than was often supposed, and the evidence of prejudice must be clear. Commercial parties (and the public authorities dealing with them) still need to be more careful not to commit basic errors of the type which plagued early tribunal cases. Claiming blanket exemptions for whole contracts or all the information provided in connection with them, rather than identifying genuinely sensitive areas; placing supposedly “confidential” information on their websites or otherwise into the public domain; and claiming prejudice to a third party without evidence, still carry a high risk of the exemption being rejected.

⁴⁹ EA/2010/0142

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