

Freedom of Information: The Story So Far in the UK

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The United Kingdom's Freedom of Information Act has had a far-reaching impact.

After almost a year of being in force, the main provisions of the Freedom of Information Act 2000 (FOIA) continue to have a wide-ranging and far-reaching impact across the public sector. The Information Commissioner has been adjudicating on various complaints since the start of the year, and the regular updates on his Web site show the failure of many elements of government to respond adequately to the demands of the act.

The overwhelming problem continues to be the ability of public authorities to respond within the 20 working days required of them by statute; the vast majority of decisions made by the Information Commissioner concern the failure of public bodies to respond within this deadline, with some such as the National Offender Management Service frequently taking as long as four months to reply. They are, however, in good company with many public bodies, including the Cabinet Office and the Foreign and

Commonwealth Office, being reprimanded for their tardiness in dealing with FOIA requests.

Equally concerning is the continued lack of resources being devoted to FOIA requirements as demonstrated by Cardiff County Council.

Replying to a request concerning documentation of a particular employee's position at the council, the council initially stated that it required an extension of time to evaluate the public interest test because of a lack of resources, and said it would respond within a month by February 11. Eight months on, the request still has not been met, and the council has also failed to show under which exemption they are applying the public interest test. This has forced the commissioner to exercise his powers under Section 50 of FOIA and demand that the request be properly met within 30 days;

otherwise, he may seek the ultimate penalty against the council — a declaration of contempt of court.

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office is the variety of reasons for which FOIA is being used. At the smaller end of the scale are questions to Sherwood Forest Hospitals NHS Trust concerning proposed changes to a community hospital and a request to Melton Borough Council to answer "Does MBC use plastic cups for dispensing beverages and drinking water to its staff?" Although the latter example may seem frivolous, the role of the Act in increasing transparency in relation to government both local and central has been significant, allowing the release, for example, of documents concerning the resignation of Elizabeth Wilmshurst, the former FCO Legal Adviser, who left having questioned the legality of the Iraq war.

The FOIA's importance to the commercial sphere was recently demonstrated in an incident regarding the termination of an outsourcing agreement between Hyder Business Services Group Ltd and Bedfordshire County Council. The terms of this agreement were originally kept confidential, but following a request under FOIA from local journalists, Bedfordshire CC decided to disclose the entire agreement. The terms of the confidentiality agreement were such that they did not apply if disclosure was required 'by compulsion of law' and therefore the request under the FOIA was sufficient to override this clause. Section 41 FOIA which may have provided an exemption to the need to disclose did not apply as consequently there was also no 'actionable breach of confidence' by the disclosure, on the drafting of that clause. This will naturally be of great concern for all private companies dealing with public bodies who seek to keep the commercial implications of

such deals from their competitors. Whether a stronger confidentiality agreement would have resulted in such complete disclosure is open to debate, but what is clear is that the possibility of disclosure should be factored into commercial considerations during negotiations on settlements of this sort, and where it is of concern, companies should, as a minimum, insist on consultation before disclosure takes place.

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The other significant area of development has been the interaction between the Data Protection Act 1998 (DPA) and the FOIA. In a decision concerning a complaint initially made to The Standards Board for England, the Information Commissioner held that where information requested

constituted personal data relating to the complainant, it was a correct approach of the board to examine it like a request made under Section 7 of the DPA. Thus where the information made under FOIA constituted personal data of the applicant, there was an absolute exemption from disclosure under Section 40 FOIA. Where the information was personal data relating to a third party, the Information Commissioner's office confirmed that there was an absolute exemption where disclosure would breach any of the data protection principles or where it would be exempt under the DPA regime. However, as shown in a decision on Corby Borough Council, it would be inappropriate to use the Section 40 exemption to fail to disclose the salary details of senior staff, as the public interest in disclosing such details to increase accountability and transparency meant that there would not be a breach of data protection principles.