



## **FREEDOM OF INFORMATION AND INFORMATION LAW ISSUES**

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### **Introduction**

Information law issues in public law:

- rights of access to information held by public authorities – especially under the Freedom of Information Act 2000 (“FOIA”) and the Environmental Information Regulations 2004 (“EIR”);
- judicial review in information privacy cases about the retention/disclosure of information by public authorities, involving Data Protection Act 1998 (“DPA”) and/or Article 8 of the Convention.



## **FOIA and closed material procedure**

On closed material generally, see the provisions for a closed material procedure (“CMP”) in civil litigation:

- Justice and Security Act 2013, Part 2
- CPR Part 82

Particular difficulty in information law cases: the whole point of the case is to obtain access to information; but if the court proceedings themselves lead to its disclosure, then the issue is effectively determined in the requester’s favour.

DPA – subject access claims to court under section 7(9); express power for Court to view the target information without the claimant seeing it, under DPA section 15(2).

FOIA – appeals to the First-tier Tribunal against determinations of the Information Commissioner under FOIA section 50 – closed hearings are commonplace. May involve:

- legal submissions about the target information;
- consideration of other information (e.g. that would in itself be exempt under FOIA/EIR, if sought);
- oral evidence and questioning of witnesses.



Guidance on closed hearings in FOIA/EIR cases:

- GRC Rules, rule 14(6) (closed material), 35(4) (closed hearings);
- May 2012 Tribunal Practice Note, available at:

<http://www.justice.gov.uk/downloads/tribunals/information-rights/how-to-appeal/practicenote-closed-material.pdf>

- Decision of Upper Tribunal in *Browning v Information Commissioner and DBIS* GIA 25/12

### **Assessing the public interest in FOIA cases**

Many of the FOIA exemptions are “qualified”, i.e. they turn on an application of a public interest test. Balance between public interest in disclosure and in maintaining exemption: only if the latter is stronger is the information exempt from disclosure. Comparable balance under EIR, with an express presumption in favour of disclosure.

In making this assessment, does the Article 10 right to receive information have any part to play?

See the *Kennedy* case, due for hearing in Supreme Court at end of October, on appeal from *Kennedy v Charity Commission* [2012] EWCA Civ 317.

## Judicial review and public sector databases

The retention and disclosure of information held on large public sector databases is frequently challenged in judicial review cases, on the basis of Article 8 and/or the DPA.

There are a number of cases arising out of the CRB (now DBS) disclosure system in relation to the disclosure of criminal convictions and of “soft intelligence”.

Criminal convictions – is the system too broad/indiscriminate to comply with Article 8?

- See *R (T & others) v Chief Constable of Greater Manchester & others* [2013] EWCA Civ 25, Court of Appeal; due for hearing in Supreme Court in December.

Soft intelligence – how should the police exercise their discretion in relation to disclosure?

- *R (L) v Chief Constable of Cumbria Constabulary* [2013] EWHC 869 (Admin): accusation but no prosecution; disclosure in breach of Article 8
- *RK v (1) Chief Constable of South Yorkshire (2) Disclosure and Banning Service* [2013] EWHC 1555 (Admin): acquittal on charges of sexual assault; disclosure in breach of Article 8
- *R(AR) v Chief Constable of Greater Manchester Police & Secretary of State for the Home Department* (Case No: CO/13845/2012): disclosure of information about rape acquittal, in connection with licence application to work as private hire driver – not in breach of Article

Retention of information on police records:

- participation in demonstrations: *Catt v ACPO and others; T v Commissioner of Police of the Metropolis and another* [2013] EWCA Civ 192
- arrest for alleged sexual assault, where no further action taken: *R (TD) v Commissioner of Police for the Metropolis and Secretary of State for the Home Department* [2013] EWHC 2231 (Admin)

Retention of information about an individual's period spent in care:

- *JR60's Application* [2013] NIQB 93

Compare the debate about a “right to be forgotten” in the context of data protection legislation:

- Advocate General's opinion in *Google Spain* case;
- Draft EU Data Protection Regulation.