

CURRENT DEVELOPMENTS IN FOI

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This part of the talk will focus on two major developments over the past year, which affect the way public authorities deal with requests for environmental information and with requests for statistics. The first is the judgement of the European Court of Justice in the case of *OFCOM v Information Commissioner*¹, which changes the way the public interest test is carried out when dealing with requests for environmental information, or at least when more than one exception has been applied to the information.

The second development is clarification from the courts on the definition of personal data, in particular when it comes to dealing with statistics. I'll look at the High Court judgement in the abortion statistics case (*Department of Health v Information Commissioner*²) and, closer to home, how this interacts with the Court of Session judgement on the disclosure of numbers of registered sex offenders in *Craigdale Housing Association and others v Scottish Information Commissioner*³.

Interestingly, both developments owe much to the EU Directives behind the legislation.

EIRs and the public interest test

I'll start off with a look at the ECJ decision in the case of *OFCOM v Information Commissioner*.

And although this is an English case, this case does have some Scottish blood in it – the person who asked OFCOM for the information is an Information Manager for Health Protection Scotland⁴, a branch of the NHS.

It's fair to say that, for many years, there have been concerns about the risks connected with mobile phones and, following an independent investigation carried out for the Department of Health, the location of mobile phone base stations was identified as a matter of public interest.

This led to a website called "Sitefinder"⁵ being set up. The site is operated by OFCOM and provides information on the location of base stations in the UK. The site is constructed from information voluntarily provided by mobile phone operators.

¹ Office of Communications v Information Commissioner [2011] EUECJ C-71/10 (28 July 2011) <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>

² Department of Health v Information Commissioner [2011] EWHC 1430 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1430.html>

³ Craigdale Housing Association and others v the Scottish Information Commissioner [2010] CSIH 43 <http://www.bailii.org/scot/cases/ScotCS/2010/2010CSIH43.html>

⁴ <http://www.hps.scot.nhs.uk/index.aspx>

⁵ <http://www.sitefinder.ofcom.org.uk/>

However, the website only shows the *approximate* location of each base station and doesn't show, for example, whether the base station is at street level or on top of a building.

In January 2005, Health Protection Scotland asked OFCOM for the exact location of each base station, apparently for epidemiological reasons⁶. However, OFCOM withheld the information under two separate exceptions under the UK EIRs: they believed that disclosure would adversely affect public safety⁷ as disclosure might lead to interference with the police and emergency service radio network. They also believed that disclosure would adversely affect the intellectual property rights of the mobile phone operators who had provided the information⁸. (It's worth noting at this point that the harm test in the UK EIRs – i.e. one of *adverse effect*, is lower than the harm test in the Scottish EIRs, which is one of *substantial prejudice*.)

The Information Commissioner, Information Tribunal and the High Court all ordered OFCOM to disclose the location of the base stations. They were satisfied that the exceptions applied, but that in each case the public interest favoured disclosure.

The legal arguments at this stage were focussed on how the public interest test should be carried out, given that more than one exception had been applied. The High Court took the view that the public interest test should be considered "exception by exception" in the same way that the public interest test is carried out under FOISA. In other words, you consider the public interest test in relation to each exception separately and don't "conjoin" public interest arguments which have been used in relation to other exceptions.

However, the Court of Appeal disagreed and the matter made its way to the Supreme Court, who decided to refer the matter to the ECJ for a ruling, given that the EIRs are based on an EU Directive – Directive 2003/4/EC on public access to environmental information⁹.

The ECJ issued its judgement in July, taking the view that, when a public authority applies more than one exception to the same piece of information, a *two stage* public interest test should be carried out by the authority.

⁶ According to Health Protection Scotland's website, it plans and delivers "effective and specialist national services which co-ordinate, strengthen and support activities aimed at protecting all the people of Scotland from infectious and environmental hazards".

⁷ Regulation 12(5)(a) of the Environmental Information Regulations 2004: a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety. There is an equivalent exception in regulation 10(5)(a) of the Environmental Information (Scotland) Regulations 2004.

⁸ Regulation 12(5)(c) of the Environmental Information Regulations 2004: a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property rights. There is an equivalent exception in regulation 10(5)(c) of the Environmental Information (Scotland) Regulations 2004.

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

The first step, in line with current practice, is to consider whether, in relation to each exception cited, the public interest in making the information available is outweighed by that in maintaining the exception.

Where more than one exception is considered to apply, the second test is then to cumulatively weigh all the grounds for refusing to disclose the information against all of the public interests served by disclosure and to come to a conclusion as to whether the information should be disclosed. The ECJ were clear that this could lead to information being disclosed which might otherwise have been withheld, and not just to information being withheld which might otherwise have been disclosed.

What difference is this likely to make in practice? It's perhaps a bit early to tell, but probably the most important thing to remember is that the judgement doesn't affect the way the public interest is carried out under FOISA. The ECJ judgement is based on the actual wording of the EU Directive, so with FOISA the public interest test will continue to be carried out on an exemption by exemption basis.

It's also likely that the judgement will have less effect in Scotland than in the rest of the UK. As noted earlier, the harm test in the rest of the UK is lower than in Scotland (that's the adversely effect v substantial prejudice). We know that, in practice, this means that exceptions are less likely to be found to apply in Scotland, with the consequence that we don't even get on to considering the public interest test.

At the Commissioner's office, we're updating our briefings to take account of the changes to how the public interest test should be carried out and, in the small number of live cases we have where authorities have applied more than one exception, we've sought additional submissions from the authorities on the public interest test. I expect our first decisions reflecting the judgement to come out in the next couple of months – but it'll be interesting to see how the Supreme Court carries out the public interest tests when it eventually issues its judgement in the OFCOM case.

Disclosing statistics under FOISA – the abortion statistics case

I'd now like to turn to the thorny question of disclosing statistics under FOISA. Anyone who's been involved with FOISA since the Act came into force will know of the legal minefield when dealing with the relationship between FOI and the Data Protection Act 1998 – and particularly when dealing with the disclosure of statistics. The very first application made to the Commissioner was for childhood leukaemia statistics in the Dumfries and Galloway area – that case, *the CSA case*, ended up before the House of Lords¹⁰; the first time the House of Lords had had to consider the definition of personal data.

¹⁰ Common Services Agency v Scottish Information Commissioner [2008] UKHL 47
<http://www.bailii.org/uk/cases/UKHL/2008/47.html>

Unfortunately, the judgement issued by the House of Lords wasn't the easiest thing to understand, and I've spent many days sitting at the Court of Session in Edinburgh or the High Court in London hearing entirely different interpretations being offered up by counsel for opposing sides. In the abortion statistics case, the High Court went so far as to comment, "*It would be wrong to pretend that the interpretation of the CSA case is an easy matter.*" However, what I'll look at today is how the case has been interpreted by the courts, starting off with what I've been referring to as the abortion statistics case.

The Pro-Life Alliance asked the Department of Health for abortion statistics for the whole of England. The figures had actually been published in the form the Pro-Life Alliance wanted them, up until 2002, when the DOH had changed its practice and decided not to publish statistics where the figure was less than 10.

The Information Commissioner ordered the DOH to disclose the information – they took the view that no-one could be identified from the statistics and so the statistics couldn't be personal data.

The Information Tribunal took a different view – they agreed with the DOH that the statistics *were* personal data, on the basis that the DOH held other information which would identify individual patients.

This, of course, all goes back to the definition of personal data in the Data Protection Act. Data will be personal data if (a) an individual can be identified from that data (ie from the statistics on their own) or if (b) an individual can be identified from the statistics and other information which is in the possession of, or likely to come into the possession of, the data controller¹¹.

In this case, the DOH was the data controller. It knew the names and details of all of the women who'd had abortions and therefore argued that the statistics were personal data given that it could identify the women from information in its possession.

However, the High Court disagreed with this interpretation, describing it as "divorced from reality" and saying that it could "seriously inhibit" the publication of statistics.

The High Court took the view that Lord Hope, who had given the leading opinion in the CSA case, had recognised that even if a public authority held information which would identify individuals, this did not mean that the authority was barred from processing the information in such a way that living individuals could no longer be identified from it. Or, to put it in the context of the abortion statistics case, if the information is disclosed in the form of

¹¹ Data Protection Act 1998, section 1(1): "personal data" means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

statistics and the public cannot identify individuals from the statistics, then the statistics will not be personal data.

This owes a lot to recital 26 to the EU Directive¹² on which the DPA is based; recital 26 says that the data protection principles won't apply to data rendered anonymous in such a way that the data subject is no longer identifiable.

The High Court ordered the DOH to disclose the statistics to the Pro-Life Alliance, which it subsequently did, even though many of us were expecting a further appeal.

Meanwhile, north of the border, the Court of Session, in the Craigdale Housing Association case, had also focused on whether statistics relating to numbers of sex offenders were sufficiently anonymised so that the offenders couldn't be identified by the public. The Court didn't seem to think it was relevant that Strathclyde Police held information which could identify individual offenders. As a result, it does look like we're finally moving towards a settled position north and south of the border for the first time since 2005.

Of course, the current position has its own problems. Just how do public authorities determine whether statistics are sufficiently anonymised, and what do we mean by "anonymised"? I think it's clear the courts don't mean that authorities must be able to *guarantee* that identification won't happen; in the abortion statistics case, identification was possible, if "extremely remote", and the High Court was happy to accept that the statistics were anonymised.

In the Craigdale Housing Association case, the Court of Session talked about "reasonably allowing" for identification, suggesting that if statistics did not reasonably allow for identification, then they could be disclosed.

We're used to public authorities refusing to disclose information simply because a number is less than five (or, as in the DOH case, less than 10). Both the Court of Session and the High Court are clearly uncomfortable with this approach and so, in the future, authorities withholding statistics will have to be able to explain why disclosing the statistic, would lead to the identification of individuals, rather than taking the simplistic "four is bad, but five is OK" approach.

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¹² Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>