Freedom of Information, data protection and papers of a previous administration

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The *Freedom of Information Act 2000* has now been in force from January 2005. This Standard Note examines the interaction between data protection with particular reference to the position of officials and the papers of a previous administration. A basic guide to the operation of FoI is set out in Library Standard Note no 2950 *Freedom of Information requests.* Background to implementation is given in Library Research Paper 04/84 *Freedom of Information implementation.*

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A. Freedom of information and data protection

1. Background

The Freedom of Information Act 2000 has a complex interaction with data protection legislation mainly set out in the *Data Protection Act 1998.* The FoI Act came into force on 1 January 2005 and applied to over 100,000 public bodies. A basic guide to its operation is set out in Library Standard Note no 2950 *Freedom of Information requests.* Background to implementation is given in Library Research Paper 04/84 *Freedom of Information implementation.*

The *Data Protection Act 1998* (hereafter DPA) gave effect in UK law to EC Directive 95/46/EC (the *Data Protection Directive*). It replaces the *Data Protection Act 1984*. Under the Act, anyone who holds personal information about living individuals on computer is required to register certain specified details of their processing activities. Registered data users must comply with eight data protection principles contained in the Act. The Information Commissioner ensures that the principles are observed. The Act gives various rights to individuals about whom information is recorded on computer (data subjects). Individuals may find out information about themselves, challenge it, have it corrected or erased if appropriate and claim compensation in certain circumstances. Further information about data protection is available from Library Standard Note nos 830 *Data Protection: Access to Personal Information* and 2962 *Data Protection Law: problems of interpretation.*

2. The *Durant* case

In 2003 the Court of Appeal delivered an important judgement with implications for the interpretation of the *Data Protection Act*.[1] The Court considered in particular two issues: 1) what makes data "personal" within the meaning of "personal data" and 2) what is meant by a "relevant filing system". As the result of the Durant judgement there has been a narrowing of the definition of "personal data". The judgement identifies two notions to determine whether information affects an individual's privacy, firstly whether the information is biographical and secondly whether the individual is the focus of the information. So simply because an individual's name appears on a document does not mean it is "personal data" and they are entitled to protection under the *Data Protection Act 1998*. It is more likely that when an individual's name is accompanied by other information relating to the individual, then this would be "personal data". The *Durant* case also has implications for the definition of a 'relevant filing system' for the purposes of data protection law, which is explained in Standard Note no 830. Mr Durant has been refused leave to appeal to the House of Lords, but is expected to apply to the European Court of Human Rights.[2] In the light of this judgement, the Information Commissioner has in February 2006 updated his guidance on the definition of personal data.[3]

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[1] *Michael John Durant v Financial Services Authority* [2003] EWCA Civ 1746, Court of Appeal (Civil Division) decision of Lord Justices Auld, Mummery and Buxton dated 8th December 2003. A full text of the judgment is available from the Court Service website at www.courtservice.gov.uk

[2] "House of Lords ends Durant's data protection saga" *Outlaw News* 30 November 2005

[3] http://www.ico.gov.uk/cms/DocumentUploads/Durant_27_feb_06.pdf

B. Requests for information about third parties under FoI

Section 40 of the FoI Act provides an exemption for personal data. The potential operation of the exemption was the source of much debate during the passage of the Bill in the 1999-2000 session. Now that the legislation has been in operation for over a year and following *Durant* and decisions by the Information Commissioners in the UK and in Scotland the operation of the exemption is becoming clearer. The key principle appears to be the question of fairness to the third party about whom a request for information has been received. However, every case needs to be examined on its merits.

1. Names of officials

A number of public authorities interpreted section 40 as prohibiting the disclosure of names of officials. The Information Commissioner has issued a number of decision notices in this area, indicating that names of officials do not fall under section 40.This is one example:

> **Case Ref: FS50074589**
> **Date:** 04/01/06
> **Public Authority: Department for Education and Skills (DfES)**
> Summary: The request was for minutes of senior management meetings at the DfES relating to the setting of school budgets in England between June 2002 and June 2003. Although some information was provided the majority of the information requested was withheld under section 35(1)(a), on the basis that the information related to the formulation and development of government policy. During the investigation the DfES also claimed that one particular minute related to Ministerial communications and so was exempt under section 35(1)(b) and that the identities of civil servants involved in the meetings were exempt under section 40(2) - personal information. Although the Commissioner accepted that the section 35 did apply to the majority of the information, the exemption could not be maintained in the public interest. Similarly the exemption provided by section 35(1)(b) could not be maintained in the public interest. The Commissioner decided section 40 was not engaged. Section of Act/EIR & Finding: FOI s.35 - Complaint Upheld; s.40 - Complaint Upheld

The DFES has appealed the case to the Information Tribunal. In April 2006 the Information Commissioner ruled that the Ministry of Defence was not justified in refusing to release the staff directory of the Defence Exports Services Organisation:

> Case Ref: FS50073980
> Date: 19/04/06
> Public Authority: Ministry of Defence
> Summary: The complainant requested a copy of the March 2004 edition of the Defence Export Services Organisation (DESO) Directory, but the MOD released only a redacted copy, citing section 21 (information accessible by other means), section 36 (prejudice to the conduct of public affairs), section 38 (health and safety) and section 40 (personal information). After investigating the case the Commissioner is satisfied that the section 36 is engaged but has judged that the public interest in maintaining the section 36 exemption is not strong enough to outweigh the public interest in disclosure. Full Transcript of Decision Notice FS50073980

In another case, the Information Commission decided that the total financial settlement given to a former employee was disclosable:

Case Ref: FS50062124
Date: 25/08/05
Public Authority: Corby Borough Council
Summary: The complainant requested details of the total amount of money paid to the Former Temporary Finance Officer employed by the Council. The Council refused to provide the information claiming that the exemption in section 40 (2) applied. The Council argued that disclosure of the information would breach the first data protection principle because they were unable to satisfy any of the conditions for processing stated in Schedule 2 of the Data Protection Act 1998 ("the DPA"). The Council also claimed that the Former Temporary Finance Officer would claim that they would suffer damage and distress if the information were released. When considering this complaint we have taken into account the fact that the Council has been publicly criticised for the way in which the Former Temporary Finance Officer's appointment was handled. The individual occupying the post received a significantly higher rate than would normally be paid to either a temporary or a full time employee. We are satisfied that the Council can satisfy the sixth condition for processing listed in Schedule 2 of the DPA because there is a legitimate interest in making the public aware of the amount of money spent employing senior staff. Further, in view of the circumstances in this case we are satisfied that disclosing the information would not be unwarranted by reason of prejudice to the rights, freedoms or legitimate interests of the Former Temporary Finance Officer. In addition it has been recognised for some time that individuals occupying senior posts within public authorities are likely to be subject to greater levels of scrutiny than those in more junior roles. This helps to ensure accountability of those individuals for their actions. We are satisfied that the Former Temporary Finance Officer could not have reasonably expected that the requested information would remain confidential. Disclosure of the requested information should inform the ongoing debate on this issue and help to ensure that processes are implemented by the Council to avoid similar problems in the future. In light of this we are satisified that disclosing the information would not be unfair or unlawful.
Section of Act & Finding: FOI s.40 - Complaint Upheld.
Full Transcript of Decision Notice FS50062124

The Scottish Information Commissioner has also examined the issue, under separate but very similar legislation. Although his decisions have no legal effect for UK FoI legislation, clearly there is a persuasive influence:

David McLetchie MSP's travelling claims since 1999 – taxi journey destinations
Applicant: Paul Hutcheon, The Sunday Herald
Authority: The Scottish Parliamentary Corporate BodyCase No: 200501974
Decision Date: 6 October 2005
Kevin Dunion
Scottish Information Commissioner
Facts
Paul Hutcheon, a journalist with The Sunday Herald, asked the Scottish Parliamentary Corporate Body (the SPCB) for a copy of David McLetchie MSP's travel claims supporting mileage, air travel, car hire and taxis since 1999. Copies of the travel claims were provided to Mr Hutcheon, but information, including the taxi destinations, was redacted. Mr Hutcheon asked the SPCB to review its decision to redact the destination in the taxi invoices. The SPCB subsequently carried out a review, but upheld its original decision, advising Mr Hutcheon that releasing the information would contravene the Data Protection Act 1998. Mr Hutcheon

subsequently applied to the Commissioner for a decision on whether the SPCB was correct not to provide the taxi destinations to him.

Outcome

The Commissioner found that the SPCB had breached Part 1 of FOISA in failing to release the destination points of taxi journeys undertaken by Mr McLetchie. Although the information was personal data, the release of the data would not breach any of the data protection principles. Accordingly, the information was not exempt under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). In addition, the Commissioner was not satisfied that the release of the information would endanger the safety of Mr McLetchie and, accordingly, held that the information was not exempt under section 39(1) of FOISA.

The Commissioner ordered the release of the information which had been withheld from Mr Hutcheon, but stressed that each case has to be treated on its own merits and that he will not order release of this information in future cases should the release of the information put a person at risk.[4]

There has been two decision notices in February 2006 from the UK Information Commissioner against the House of Commons in relation to the disclosure of Members' travel expenses.[5] It is possible to appeal against decision notices issued by the UK Commissioner, and these appeals are heard by the Information Tribunal. In Scotland the only appeal is to the Court of Session on a point of law. Another Scottish case has implications for Members. A request was received by the Scottish Parliament for annual breakdown of figures relating to requests for help, assistance or intervention from individual constituents to their MSPs. The Parliament refused the request on the basis that it did not hold the information. The refusal was upheld, but the Scottish Commissioner stated: 'The only circumstances where a request for information that is present within a public authority's buildings and systems would not need to be considered under FOISA is (by virtue of section 3(2)) where this information is held only on behalf of another person or organisation.'[6]

The DCA have issued guidance on the release of information relating to ministerial expenses, as part of their *Working Assumptions* series of guidance published in February 2006.[7] This states that factual information relating to ministerial expenses incurred as part of official Government business should be released.

C. Papers of a previous administration

The *Ministerial Code* contains the following guidance:

Cabinet documents

6.19 Ministers relinquishing office without a change of Government should hand over to their successors those Cabinet documents required for current administration and should ensure that all others have been destroyed. Former Ministers may at any time, and subject to undertakings to observe the conventions governing Ministerial

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4 The full transcript of the decision is available at http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision033-2005.pdf

5 Case Ref: FS50072319 and Case Ref: FS50071194, available from http://www.ucl.ac.uk/constitution-unit/foidp/resources/ICO-Cases/section40.html

6 http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision008.htm

7 http://www.foi.gov.uk/guidance/exguide/ministerial-expenses.pdf

> memoirs, have access in the Cabinet Office to copies of Cabinet or Ministerial Committee papers issued to them while in office.
> 6.20 On a change of Government, the outgoing Prime Minister issues special instructions about the disposal of the Cabinet papers of the outgoing Administration.
> 6.21 Some Ministers have thought it wise to make provision in their wills against the improper disposal of any official or Government documents which they might have retained in their possession by oversight. [8]

The Freedom of Information legislation is relevant since public records, including Cabinet documents, will be made available on request unless they fall within one of the exemptions specified in the Act and the public interest in refusing disclosure is greater than the public interest in releasing information. The public interest in favour of release increases in strength the older the records become.

In response to a request from the *Financial Times*, the Treasury released details of papers in February 2005 relating to Black Wednesday in 1992. It released the Treasury's analysis, carried out in the months and years following sterling's exit from the ERM in September 1992. The Treasury website stated:

> **Who is responsible for approving the release of the documents?**
>
> The papers released today relate to events under a previous administration formed by a different political party to that of the present Government. As such, under the long established conventions for handling papers of a previous administration, based on fairness, serving Ministers in the Treasury and wider Government, and their special advisers have played no role in considering any of the documents for release. They have not seen any of the papers in question in advance of their release.[1]
>
> In this case, decisions on the documents to be released are the responsibility of Treasury officials and, ultimately, the Permanent Secretary to the Treasury. In considering the papers relating to the UK's exit from the ERM in 1992, the Treasury has taken advice from the Cabinet Secretary and the Department for Constitutional Affairs, the department with overall policy responsibility for freedom of information within Government

The release prompted some press comment. The Treasury website noted that Ministers had been consulted:

> As part of applying the public interest test under the Act before releasing the information, the Treasury has consulted a number of individuals involved at the time, as well as the Bank of England. Those consulted are able to comment on the papers and suggest that text should be included or excluded within the terms of the law. While their views are taken into account, the ultimate decision on what to publish remains with the Department holding the papers, in this case the Treasury.
>
> As the Cabinet Secretary, Sir Andrew Turnbull, has stated,[2] it is in line with long established precedent to consult, where possible, the Ministers at the time. Therefore, in this case the Treasury has shown, in advance of release, both the full set of papers and the versions for publication to the Rt. Hon. John Major, C.H., the Prime Minister at the time, and the Rt. Hon. Lord Lamont of Lerwick, the then Chancellor.

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[8] from Cabinet Office website at http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code/6.asp

> It is not normally the Treasury's intention to comment publicly on the process for consulting externally in advance of freedom of information releases. However, given the press reporting in this case, we can confirm that neither Mr Major nor Lord Lamont have suggested any edits or deletions to any of the papers.
>
> Within Government, officials only, and not Ministers nor their political advisors, have seen the documents in advance of their release.
>
> 1 Under the Freedom of Information Act, certain exemptions can only be applied by Ministers. Where this relates to a previous administration, these decisions will be taken by the Attorney General. However, the Treasury has not sought to apply any of the exemptions requiring Ministerial approval, and hence this case has not been referred to the Attorney General at this stage.
> 2 See the letter to *The Times,* 5 February 2005, from Sir Andrew Turnbull, Secretary to the Cabinet and Head of the Home Civil Service.

The Treasury stated that it had applied various exemptions, including policy advice, under section 35 of the FoI Act to redact some of the documentation released.

The Cabinet Office operates a policy of consulting former Ministers before release of papers relating to a previous administration, and this has been agreed with the Opposition. As noted in the footnote above, the Attorney General will decide on exemptions relating to former administrations. Former Ministers do not have a veto over disclosure. The decision to release needs to be taken in accordance with the provisions of FoI and data protection law. For example, the decision by the Rural Payments Agency to release a list of the names of CAP subsidy recipients and the annual amount paid to them in the last two years in March 2005 provoked some protests from grant recipients who argued that this constituted personal data.[9]

There is provision in section 10 of the *Data Protection Act 1998* for a person who suffers substantial damage and distress which is unwarranted to give notice to a data controller (person holding data) to stop processing personal data. This section has been used occasionally, but does not yet appear to have been successful in a case involving the release of third party personal data under FoI.

The DCA have since February 2006 released a series of briefing notes for officials entitled *Working Assumptions* to assist with FoI disclosure decisions. The document *Cabinet and Cabinet Committee Information* notes that requests for information should be referred to a more senior official in a number of cases, including where:

> The information relate to or contain personal data or are concerned with a personal matter.
> This working assumption should only be considered to be valid in relation to requests for information less than 10 years old, since the public interest in withholding the information is likely to have changed and mean that a more careful argument is needed when refusing to release information. All such cases should be referred. [10]

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9 See http://www.defra.gov.uk/corporate/opengov/inforelease/index.htm
10 http://www.foi.gov.uk/guidance/exguide/sec35/annex-b.pdf

D. Public records

The introduction of FoI has implications for public records legislation. There is no longer a thirty year rule for the disclosure of public records. Instead, information must be released on request unless a relevant exemption applies. Relevant exemptions would include section 35 (formulation of government policy) and section 36 (effective conduct of public affairs) but might also include section 32 (legal professional privilege) as well as others. There is a code of practice on the management of records issued under section 46 of the FoI Act by the Lord Chancellor at http://www.foi.gov.uk/codemanrec.htm#part10

Guidance in the Code on the review and transfer of records is as follows:

> 11.2 Under the Public Records Acts, records selected for preservation may be transferred either to the Public Record Office or to places of deposit appointed by the Lord Chancellor. This Code applies to all such transfers. For guidance on which records may be transferred to which institution, and on the disposition of UK public records relating to Northern Ireland, see the Public Record Office Acquisition Policy (1998) and the Public Record Office Disposition Policy (2000).
> 11.3 In reviewing records for public release, authorities should ensure that public records become available to the public at the earliest possible time in accordance with the FOIA.
> 11.4 Authorities which have created or are otherwise responsible for public records should ensure that they operate effective arrangements to determine which records should be selected for permanent preservation; and which records should be released to the public.
> These arrangements should be established and operated under the supervision of the Public Record Office or, in Northern Ireland, in conjunction with the Public Record Office of Northern Ireland. The objectives and arrangements for the review of records for release are described in greater detail below.
> 11.5 In carrying out their review of records for release to the public, authorities should observe the following points:
> 11.5.1 transfer to the Public Record Office must take place by the time the records are 30 years old, unless the Lord Chancellor gives authorisation for them to be retained for a longer period of time (see section 3 (4) of the Public Records Act 1958). By agreement with the Public Record Office, transfer and release may take place before 30 years;
> 11.5.2 review - for selection and release - should therefore take place before the records in question are 30 years old….

…

> 11.7 If the review results in the identification of specified information which the authorities consider ought not to be released under the terms of the FOIA, the authorities should prepare a schedule identifying this information precisely, citing the relevant exemption(s), explaining why the information may not be released and identifying a date at which either release would be appropriate or a date at which the case for release should be reconsidered. Where the information is environmental information to which the exemption at Section 39 of the FOIA applies, the schedule should cite the appropriate exception in the Environmental Information Regulations. This schedule must be submitted to the Public Record Office or, in Northern Ireland, to the Public Record Office of Northern Ireland prior to transfer which must be before the records containing the information are 30 years old (in the case of the Public Record Office) or 20 years old (in the case of the Public Record Office of Northern Ireland). Authorities should consider whether parts of records might be released if the sensitive information were blanked out.

Section 66 of the FoI Act governs the operation of public records. It requires the public record offices to consult departments when receiving requests for information for public records which have not previously been open. At present decisions on public records as well as other documents held by central government which might be subject to an exemption are channelled through the central clearing house operated by the Department of Constitutional Affairs. This is to achieve a consistent approach by government departments as to the treatment of exemptions and the operation of the public interest test under FoI. The DCA website provides more information on the clearing house:

> A central clearing house was set up in January 2005 to provide advice and assistance to central government in responding to complex information requests. A toolkit document is available to download which provides guidance on the day to day operation of the clearing house, and sets out its processes and procedures. Annex B sets out a list of triggers which prompt referrals to the clearing house from government departments. Annex C is a referral form which departments are asked to complete when making a referral to the clearing house.[11]

Annex B lists the triggers for referral, including requests for Cabinet discussions and papers of a previous administration:

> **Prime Ministerial and Ministerial Issues**
> Requests for, or relating to:
> § Ministerial Diaries;
> § the role of Ministers e.g. Ministerial financial interests, and propriety issues related to the Ministerial Code; § the work of Private Offices; § the current Prime Minister; § Cabinet and its Committees, e.g. agendas, papers, minutes and meeting dates; § the operation of collective responsibility e.g. inter-Ministerial correspondence and notes of meetings between Ministers; § correspondence between the UK and the Devolved Administrations; § papers of a previous administration; and § Select Committee evidence and appearances where information is not already in the public domain,

The clearing house offers guidance to departments, and does not take the decision to release or withhold itself. There are procedures for resolving disagreements between the clearing house and departments. There has been criticism of the concept. For example, the *Independent* commented that at the heart of the Government's FoI strategy was 'the Orwellian-sounding Central Clearing House where all sensitive or difficult requests are sent'.[12] The Constitutional Affairs Select Committee is conducting an inquiry into the operation of FoI where these issues have been explored in more detail. See http://www.publications.parliament.uk/pa/cm/cmconst.htm

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[11] http://www.foi.gov.uk/guidance/index.htm#1

[12] "Right to know fails to open the Government's vaults of secrets