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BRIEFING

Freedom of Information Act 2000 *Update: July 2004*

Executive Summary

1. The Freedom of Information Act 2000 ("the **Act**") is, despite its low key introduction, a piece of legislation which will have a revolutionary impact on the running of public authorities, including both central and local government.
2. The Act's objective is to open up all the decision making elements of almost all public authorities in England and Wales¹, including Birmingham City Council. This is achieved by allowing any individual, including corporate entities, from anywhere in the world, the general right to inspect and have copies of any documents or information the public authority may hold ("**the Right of Access**"). Furthermore, the Act also places a presumption that the information must be disclosed unless it falls under one or more of a very limited number of exemptions, the majority of which are qualified with a public interest test.

Publication Scheme

3. Whilst most of the key provisions of the Act take effect from the 1st January 2005, public authorities have already been required to implement one element of the Act, the Publication Scheme.
4. The Act places a statutory duty on each public authority to adopt,

maintain and keep under review a Publication Scheme, in a form that is approved by the Information Commissioner. This scheme should list all the publications that the City makes available to the public.

5. Most public authorities provide copies of their Publication Schemes on their web site as a convenient way of allowing people access to the information. The Act, however, requires that hard paper copies of the Publication Scheme must be available for the public, at their request.
6. A copy of Birmingham City Council's publication scheme was first published in February 2003, and can be located on the Birmingham City Council's web site².
7. The Act requires that the Publication Scheme³ contains:-
 - (a) *what specific classes of information the public authority publishes or intends to publish;*
 - (b) *the manner in which the information of each class is or is intended to be published; and*
 - (c) *whether the material published is to be free of charge or available after a payment;*
8. When considering the content of a Publication Scheme, the public authority needs to take into account

¹ Similar legislation applies to public authorities in Scotland

² <http://www.birmingham.gov.uk/>

³ s19 Freedom of Information Act 2000

the public interest in providing the information and publishing the reasons of the decisions made by the public authority.

9. The Publication Scheme should not be seen purely as bureaucratic red tape, but rather as an opportunity, to firstly inform and educate the public, and also to reduce the workload on staff in dealing with requests made under the Right of Access established in the Act.
10. By placing details of information that the public are entitled to access in the Publication Scheme, that information is then removed from the Right of Access. That information now falls under the absolute exemption of information that is accessible by other means⁴, i.e. the Publication Scheme, and thus, is excluded from the Right of Access.
11. Although outside the scope of the 20 working days time limit, the public authority is still obliged to assist the public to obtain the information contained in the Publication Scheme.
12. By having a comprehensive Publication Scheme, a public authority should be able to reduce the number of requests made under the Act, as much of the information sought will be contained in the Publication Scheme. However, further consideration should be made to place items frequently requested under the Right of Access into the Publication Scheme. This ties into the requirement to monitor requests, as summarised below.⁵

Right of access

13. From 1st January 2005, the Act⁶ allows any person, from anywhere in the world, the right to request access to any information held by a public authority in the United Kingdom, irrespective of when the information was obtained. This right is allows corporate persons. i.e. companies, to make requests under the Act. Experience from other countries suggests that up to half the applications made under their respective Freedom of Information legislation are made by commercial organisations.
14. This differs from most other countries' Freedom of Information legislation, which normally stipulate that the right to access information lies solely with the residents of that country, or that the right to access relates only to information created after the date of the implementation of the country's respective Freedom of Information legislation⁷. The Act covers all information held by a public authority, irrespective of when the information was obtained.
15. There are two distinct elements to the Right of Access created by the Act. The applicant is entitled, on request, to:-
 - (i) be informed in writing whether the authority holds any information of the description specified in the request (called "**the duty to confirm or deny**"); and
 - (ii) if the public authority does hold any such information, to have it communicated to him.
16. The public authority must comply with the request promptly and normally within 20 working days. In certain

⁴ s21 Freedom of Information Act 2000

⁵ para 40

⁶ s1 Freedom of Information Act 2000

⁷ e.g. Republic of Ireland

situations, this deadline may be extended. If the information sought has implications for a third party, e.g. contains personal data belonging to an individual, then this 20 working days may be extended. However, before the 20 working days have expired, the applicant must be informed of the reason for the delay and given a date by which disclosure, if permitted, will take place. Furthermore, any information not subject to the delay must still be disclosed within the 20 working days. The extended deadline must not exceed sixty working days from the date of receipt of the request.⁸

17. The applicant is entitled to specify the form in which he wants the information to be provided and the public authority must comply with the applicant's requests in so far as it is reasonably practicable to do so⁹.
18. The public authority is not obliged to comply with a request if either the cost of compliance exceeds a limit of £550 as set by the Secretary of State or, as with the Data Protection Act 1998, with requests which it considers to be vexatious or repeated¹⁰.
19. The authority may charge a fee up to a maximum prescribed in regulations¹¹. The maximum that a public authority is permitted to charge will be £55.00 per request, plus disbursements such as photocopying costs, postage, etc.
20. If the public authority does not hold the information sought, but knows that another specific public authority holds the required information, the public authority is then obliged to inform the applicant of this, and then either forward the applicant's request for

information to the appropriate public authority(s), or supply the applicant with details of the public authority holding the data sought.

Exemptions

21. Whilst the Act provides for a general duty of disclosure, it recognises that there are situations where the refusal to disclose information may be required in order to allow the functions of government to work effectively. Most of these exemptions merely give the public authority the **right** to refuse to disclose the information sought, not a prohibition from disclosing the information.
22. The exemptions are either **absolute or qualified**, (i.e. subject to a public interest test).

Absolute exemptions

23. These exemptions, if utilised, will allow the public authority to:-
 - i. refuse to confirm or deny the holding of the information subject to the absolute exemptions; and
 - ii. refuse to disclose the information sought, which falls under absolute exemption category.
24. The absolute exemptions which may be applicable to local authorities are as follows:-
 - (a) Information which is accessible to the public by other means. This will include, for example, any books or pamphlets produced by the authority¹². This promotes a culture of open information and transparency. This exemption ties in to the Publication Scheme, which gives the public details of documents they are entitled to, and how to get it. Therefore,

⁸ s10(4) Freedom of Information Act 2000

⁹ s11 Freedom of Information Act 2000

¹⁰ s14 Freedom of Information Act 2000

¹¹ s9 Freedom of Information Act 2000

¹² s21 Freedom of Information Act 2000

information contained in the Publication Scheme would be exempt from disclosure under the Act. However, public authorities are still under an obligation to provide assistance to the public seeking information contained in the Publication Scheme, which would normally amount to forwarding copies of the information sought.

- (b) Information which constitutes "personal data" for the purposes of the Data Protection Act 1998¹³("DPA"). This is in line with the DPA and the principals contained in it, in that the public authority, acting as a data controller, can not normally disclose, without the consent of the data subject, personal data relating to the data subject.
- (c) Information that was provided in confidence and the disclosure of which would constitute an actionable breach of confidence. Whilst this is an absolute exemption, it is not as clear cut as it first appears, as the word "actionable" suggests that an assessment needs to be made as to whether the disclosure would be viewed, in the eyes of the Court, as being a breach of confidence. The test, as set out in the case of the *Attorney General – v – Guardian Newspapers (No.2)*¹⁴, contains three elements, the last of which is a public interest test. Accordingly, in deciding whether or not to disclose any confidential information, a public interest element would have to be considered.
- (d) Information which may not be disclosed under any statute or

rule of law¹⁵. Public authority private agenda reports would be covered under this exemption, as the Local Government (Access to Information) Act 1985 would apply to such reports. This would also cover personal data, as unauthorised disclosure of personal data would be prohibited under the DPA. In addition, the qualified exemption of preventing disclosure on the grounds that it prejudices the commercial interests of a party may also be of use¹⁶.

Qualified Exemptions

- 25. Unlike the absolute exemptions referred to above, in determining whether or not information sought falls under a qualified exemption, **the public authority has to apply a 'public interest test'**. This test is used to determine whether the exempt information should, nevertheless, be **disclosed on the grounds that the public interest in disclosure out-weighs the public interest in denying its disclosure**.
- 26. More often, the exemption only applies to the extent that complying with a request would prejudice the purpose for which the exemption exists. For example, Section 30 refers to commercial information, however it does not apply to all commercial information, only to information which, if disclosed, would prejudice someone's commercial interests.
- 27. In those cases where the partial exemption applies, the authority is required, firstly, to balance the public interest in complying with the duty to confirm or deny against the public interest in not doing so.

¹³ s40 Freedom of Information Act 2000

¹⁴ [1990] 1 AC 109

¹⁵ s44 Freedom of Information Act 2000

¹⁶ s43 Freedom of Information Act 2000

28. Secondly, if the authority does confirm information is held it must balance the public interest in disclosing it against the public interest in not doing so.

29. The qualified exemptions include:

- (a) Information which is intended for future publication. This will include, for example, press releases, budgets, or information relating to research projects¹⁷. In addition, it can also be used in commercial agreements, where it can be agreed that the agreement in full will be disclosed after a set number of years.
- (b) Information which may prejudice the UK economy. This will include for example, information concerning a public authority's finances and budget planning (subject to the existing rules relating to the publication of public authority accounts)¹⁸.
- (c) Information held for the purposes of criminal investigations or criminal proceedings¹⁹.
- (d) Information the disclosure of which would prejudice law enforcement. This essentially protects the conduct of investigations and proceedings which may lead to prosecutions²⁰.
- (e) Information the disclosure of which would endanger the physical or mental health of any individual or the safety of any individual²¹.
- (f) Legally privileged information²².

(g) Information which is a trade secret or which may prejudice the commercial interests of any person²³.

30. Unlike the absolute exemptions, where the public authority does not have to confirm whether or not it has the information sought, the Act²⁴ provides that the public authority, when relying on a qualified exemption, must, in writing:-

- a) confirm that it holds the information sought;
- b) set out the qualified exemption used to deny disclosure; and
- c) if appropriate, provide the reasons why it is in the public interest that the information sought should be withheld.

Regulation by the Information Commissioner's Office.

31. An applicant dissatisfied with the outcome of a request for information made under the Act, may seek its enforcement by the Information Commissioner's Office ("ICO").

32. ICO, formerly known as the Data Protection Registrar, is the body appointed by Government to regulate and enforce both the DPA and the Act. It is widely expected that it will also be tasked to regulate the new Environmental Information Regulations when they take effect at the start of 2005²⁵.

33. Only if there has been no resolution to the applicant's complaint through all the public authority's internal appeals

¹⁷ s22 Freedom of Information Act 2000

¹⁸ s29 Freedom of Information Act 2000

¹⁹ s30 Freedom of Information Act 2000

²⁰ s31 Freedom of Information Act 2000

²¹ s38 Freedom of Information Act 2000

²² s42 Freedom of Information Act 2000

²³ s43 Freedom of Information Act 2000

²⁴ s17 Freedom of Information Act 2000

²⁵ See Birmingham City Council Briefing note: ENVIRONMENTAL INFORMATION REGULATIONS 1992 & 2004

and complaints procedures can the applicant then go to the ICO. Any complaint to the ICO made before the completion of all internal procedures will result in the applicant being referred back to the public authority's internal complaint procedure.

34. All public authorities are under a statutory duty to have and operate a complaints and appeals procedure to deal with dissatisfied applicants.
35. The Lord Chancellor's Code of Practice²⁶ states that the complaints procedure should be prompt, fair, impartial and easy to understand. It also recommends that the investigation of the complaint should be undertaken by somebody other than the original decision-maker. Target times for determining complaints and the results should be published and recorded.
36. An applicant who is dissatisfied with a public authority's response to a request for information will be able to apply to the ICO for a decision as to whether the public authority has complied with the Act. However, the ICO will only be able to investigate once it can be shown that the applicant has exhausted the public authority's internal complaints procedure before contacting the Commissioner.
37. On receipt of an applicant's complaint the ICO will arrange for an investigation to take place.
38. An applicant who is dissatisfied with the decision of the Information Commissioner, may appeal to the Information Tribunal. Any further

²⁶ Lord Chancellor's Code of Practice on the Discharge of Public Authorities' Functions under Part 1 of the Freedom of Information Act 2000.
<http://www.dca.gov.uk/foi/codepafunc.pdf>

appeal will be to the High Court on points of law only.

39. If a public authority fails to comply with the findings of the ICO, the ultimate sanction is for the ICO to take the public authority to Court. Failure to comply with the Act is viewed as Contempt of Court, and at present, one public authority is being prosecuted by the ICO for failing to comply with the Act in relation to the Publication Scheme.

Monitoring

40. The Act also requires public authorities to keep records of:-
 - a) numbers of requests made;
 - b) details of the request;
 - c) details of replies to the requests; and
 - d) details of how many requests were answered within the 20 working days time limit.
41. This will be used by the ICO in assessing the public authority's compliance with the Act, and will most likely also be used by the Audit Commission when they will be reviewing performance under a revised CPA targets.

Penalties

42. Failure to comply with the Act has a number of possible implications, some of which has been listed above, including being deemed to be in contempt of court. Other possible penalties and implications are summarised below.
43. Initially, the ICO will be publishing league tables, shaming the poorest performers, but the Audit Commission has suggested that compliance with the Act will form part of the

Comprehensive Performance Assessments ("CPA") regime in relation to local authorities.

be quicker to locate specific files and documents.

44. In addition to these penalties, perhaps the most important is the loss of reputation in the eyes of the public. If a public authority is seen to be refusing to comply with its obligations of openness to the public, the public, together with the media, will take the view that the public authority has something to hide.

Records management

45. In order to meet the Act's obligations, it is imperative that an efficient records management system be put into place.
46. Records management includes not only locating and recording where information is held, but also determining what information is to be held, and for how long.
47. The Act does not penalise non-disclosure of information on the basis that the information is not held, thus encouraging effective document and record management. However, destruction of documents should only take place in conjunction with an established retention schedule policy, which should be open and publicly available.
48. There are advantages of having an effective records management and disposal system. These include:-
- (a) a reduction in costs, by freeing up storage space used in storing information and documents which are no longer needed, which may then be freed, either for more working space, or disposed of; and
 - (b) an increase in efficiency. As there is less information and documents to go through, it will

Conclusions & Implications for Birmingham City Council

49. The Act is an ambitious and revolutionary measure, in that it attempts, abruptly, to change the culture of government from having a presumption of secrecy to one of openness.
50. The Act negates the effect of the decision of *Durant – v – FSA*²⁷, which narrowed down the extent of the Data Protection Act 1998 and the definitions of personal data and manual filing systems²⁸. Any data that does not fall under the definition of personal data, as set out in the *Durant* judgment, falls under the scope of the Act, and thus, is potentially subject to the Right of Access. Under *Durant*, the scope of personal data was narrowed, as was the exclusion of the requirement to search unstructured manual filing systems, i.e. paper files, for personal information. This exemption does not apply under the Act, which makes no distinction as to how the information is stored.
51. However, the risks of not complying with the Act, both on a political and regulatory level, make compliance with the Act a necessity. The potential effect of the Act should not be underestimated, as experience from other countries with well established Freedom of Information legislation has shown. Pressure arising from disclosures under Freedom of Information legislation has led to some senior officials in various governments resigning, and to the

²⁷ (2003 EWCA Civ 1746)

²⁸ see Birmingham City Council Briefing Note: Data Protection Act 1998: Disclosure of information following *Durant -v- FSA*

commencement of criminal and fraud investigations.

52. Birmingham City Council's Freedom of Information Corporate Working Group, chaired by John Wynn of Legal Services, is in the process of preparing the structures and procedure in place to handle the obligations imposed on it by the Act. It is envisaged that the structures and procedures will be in place by the Autumn of 2004.
53. The corporate champion for FOIA is the Chief Legal Officer and Malkiat Thiarai has been seconded for a period of 6 months, from 19 July 2004, as the Corporate Governance & Information Manager.
54. It is expected that the systems to comply with a Freedom of Information Act request will operate on a similar basis as the existing Data Protection system, by having a central unit to co-ordinate and monitor requests, co-ordinate multi-directorate requests and to liaising with the ICO.
55. The Publication Scheme is a vital element of the City's response to the Act, and **it is imperative that all Directorates co-operate with each other and with the Freedom of Information Corporate Working Group in order to firstly collate a revised publication scheme and update it.** In addition, it would be advantageous for the directorates to co-ordinate in developing and maintaining common policies in relation to records management, as well as common systems and procedures to enable the locating and gathering of information requested together with dealing with requests made under the Act in general.

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