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Compared with its overseas cousins, there are many facets of the UK's freedom of information regime which deserve celebration. The Freedom of Information Act 2000 (FOIA) is currently free to use (up to a point), applies to virtually all branches of government and, judged on the evidence of the last 18 months, has been fairly successful in blowing away the traditional culture of secrecy which had pervaded Westminster for decades. There is nevertheless one alarming omission from the UK rules which has brought unanimous condemnation from the supplier community: while most freedom of information regimes entitle third parties to receive notice when a public authority gets a request for their information (and some even allow them to participate in the decision whether to disclose), no such protections exist in the rules here.

In the US (whose freedom of information act turned 40 in July), companies can apply for a court order restraining disclosure – a process known as reverse-FOI. South African legislation requires public authorities to pay “due regard” to representations from companies. In both Canada and Japan, there is a notification obligation once a public authority has decided to release information. By contrast, FOIA contains nothing at all in the way of third party rights. This absence is strange given that third parties will often be better qualified to assess whether something is commercially sensitive, better informed about whether its disclosure would prejudice the regional economy and better able to appreciate the public interest arguments for maintaining an exemption. Nevertheless, the lacuna is deliberate. It reflects the view that third parties will naturally want to shield their information from public view. As a result, companies have no right to be consulted on how to answer a request, no right to be told when an applicant requests an internal review of an authority's refusal, no right to be notified that an authority has decided to disclose, no right to apply to the Information Commissioner for an adjudication on whether a decision to disclose is correct, no right to be consulted by the Commissioner when he is considering a challenge to a public authority's refusal, no right to be informed of any decision taken by the Commissioner ordering the release of information, and no right to appeal a decision of the Commissioner to the Information Tribunal. Companies do not even have a right to be notified when a public authority receives a request.

FOIA does contain 23 exemptions built into the Act, each one representing a specific interest which Parliament recognises as requiring special dispensation from the duty to disclose. Accordingly, FOIA provides exemptions for personal privacy (s.40), confidentiality (s.41) and commercial interests (s.43). (I examined ss.41 and 43 in my article last month.) Significantly, however, while ss.41 and 43 can operate to protect sensitive corporate information, this is always dependent on a public authority making use of them. FOIA never absolutely prohibits disclosure, even where an exemption is available – it merely offers a means of refusing to disclose if the authority so chooses. Furthermore, since many of the exemptions can only apply where the public interest allows, companies are reliant on a public authority's assessment of the factors for and against disclosure when forming a judgment on this. There is also of course the possibility that a public authority fails to appreciate the relevance of an exemption altogether, or simply discloses information inadvertently. So, given that relying for protection on the FOIA exemptions alone is such a perilous exercise, companies have a strong commercial and reputational interest in understanding what other means exist to prevent or limit the release of information which could be damaging.

### **The S45 Code of Practice**

The Lord Chancellor's Code of Practice provides some help on the question of consultation. Paragraph 27 says that consultation with a third party will "in some cases ... be necessary" to determine whether an exemption applies or to reach a view on "whether the obligations in section 1 of the Act arise". The reference to s.1 is presumably intended to make it clear that authorities should consult on the public interest, although this must be implicit anyway in the earlier reference to the exemptions. The important point is that the word "necessary" does not impose an obligation. It is just a simple acknowledgment that informed and balanced decisions may be difficult without consultation taking place. The Code goes on to say that even where not actually necessary, consultation "will be good practice". Unfortunately, it recommends only that authorities take "reasonable steps...where appropriate, to give [third parties] advance notice [of disclosure], or failing that, to draw it to their attention afterwards".

Ultimately, however, the Code of Practice provides very limited comfort. First, its provisions are not legally binding. They are only indications of good practice which, in the opinion of the Secretary of State, it is desirable for public authorities to follow in discharging their FOIA obligations. Failure to comply can theoretically result in service of a Practice Recommendation by the Commissioner, but this is of no practical worth to a supplier who has suffered detriment from disclosure of sensitive information. Secondly, even where an authority does

consult, it is not obliged to act on the representations it receives. The disclosure decision remains solely at the authority's discretion.

### **Court action**

Companies always have the option of going to court to prevent a public authority disclosing something. Court action is fraught with practical and legal difficulties, however, and in the context of FOIA there is also the obvious matter of timing. Where an authority has ignored the recommendations for consultation in the Code of Practice (or worse, ignored its obligation to notify in the contract negotiated by the company), the information may already have been released when the company gets wind of the request (perhaps when a Times journalist calls to ask for comment on a story about the company's failure to live up to its service levels). The company may not, therefore, be in a position to apply to prevent the disclosure. Suing for damages after the event is a possibility, but the cost, uncertainty of outcome, potential liability for the authority's legal bill should the claim fail, and the difficulty of quantifying losses in the first place, make this something of a nuclear option. And it rarely makes business sense to drag a customer through the courts.

A supplier looking to prevent disclosure by an authority (or, indeed, to restrain an applicant who had obtained information under FOIA from making any further disclosure) could apply for an injunction. For an interim injunction, a company would normally have to make out its case on the balance of convenience (i.e. demonstrating that disclosure would cause it greater inconvenience than restraining disclosure would cause the public authority or the applicant). In a FOIA context, however, a higher test might apply – that of more likely than not to succeed at trial – given that an injunction pending a trial several months later could effectively deprive an applicant of their FOIA rights (if, for example, the value of the information will have disappeared by the time the trial takes place).

An alternative to full-on litigation is judicial review. It is arguable that public authorities, including the Information Commissioner and the Tribunal, have a duty to take proper account of third parties' views when deciding how to deal with a request for access to information. This could imply an obligation to consult. If so, then failure to do so could render a decision or order to disclose unlawful and liable to be quashed by the Administrative Court. The requirements for proper consultation have been established by the courts (it must take place when the decision is still at a formative stage, it must allow adequate time for consideration and response, and the product of the consultation must be conscientiously taken into account), but even a duty to consult does not imply a duty to obtain agreement before acting. There could be grounds for judicial review to challenge the decision of a public authority or a

determination by the Commissioner or Tribunal where a decision was flawed by errors of law or fact, by substantive unfairness or unreasonableness, by unjustifiable inconsistency with earlier decisions or because supported by inadequate reasons, or because of a breach of the Human Rights Act 1998. Bear in mind, however, that a different outcome will not necessarily result from a court ordering a public authority to reconsider.

A public authority could potentially be liable to a supplier if it disclosed information which was defamatory (that is, which lowered the supplier in the estimation of the public). Section 79 of FOIA precludes a claim for defamation if it was caused by a FOIA disclosure made without malice, but the immunity only applies to information which was supplied to the authority by another party. It does not therefore apply to allegations contained in papers generated by the authority internally, nor to FOIA applicants who further circulate the material. It is nevertheless extremely difficult to get a pre-publication restraining order on the basis of defamation because of the importance ascribed to free speech. Unless a company can show that an authority has no arguable defence (e.g. that allegations are substantially true or amount to fair comment), its options will normally be limited to seeking damages after the event.

### **The Information Tribunal**

Since the advent of FOIA itself, rule 7 of the Information Tribunal (Enforcement Appeals) Rules 2005 has introduced an entitlement for third parties to apply to be joined as parties to any appeal against a Decision Notice of the Commissioner. Unfortunately, the practical value of this is limited because it is not open to a third party to appeal a Decision Notice in the first place (only the requestor or the public authority can do so), and there is no obligation on the parties to an appeal (nor on the Tribunal) to notify others. Where the third party does not itself apply to be joined to proceedings, the Tribunal may invite it to join. A third party which joins a Tribunal hearing is entitled (like the other parties) to lodge a further appeal to the High Court on a point of law.

### **Data protection**

The Data Protection Act 1998 (DPA) provides various ways for individuals to prevent disclosure of personal data or to claim compensation following disclosure. Under s.10, a data subject can serve notice on a data controller requiring him not to disclose personal data where this would cause substantial and unwarranted damage or distress. Service of a s.10 notice would bring the information within the s.40(3)(a)(ii) exemption under FOIA provided the damage or distress claimed was valid. In addition, an individual could apply to the County Court for an order enforcing his s.10 notice, for an order under s.14 of the DPA to block

disclosure or erase/destroy the data altogether, and for an order for compensation under s.13 of the DPA where disclosure had taken place.

## **Copyright**

Some commentators have raised the possibility of preventing FOIA disclosure on the ground that disclosure would constitute an infringement of copyright (where a third party owns copyright in the information requested). The veracity of this remains uncertain. The Department for Constitutional Affairs has issued guidance stating that a public authority will not infringe copyright by responding to a FOIA request because it will be able to claim the defence of statutory authority (s.50 of the Copyright Designs and Patents Act 1988 (CDPA) permits copying where "specifically authorised by an Act of Parliament"). This does not quite hold true, however. FOIA requires information to be "communicated" but it does not specify how communication must be made. It does not therefore "specifically authorise" copying and so it is not clear that s.50 of the CDPA will apply, particularly where an authority could communicate information via a digest or summary, or by inviting an applicant to inspect a record. Further, a company may counter the DCA position by arguing that copyright material should be absolutely exempt under FOIA s.44(1)(a), which applies to information whose disclosure is "prohibited by or under any enactment" (in this case the CDPA), although this would seem to fall foul of the same point about copying as opposed to summarising or permitting inspection. In any event, it is unlikely in the author's view that the courts would countenance a position whereby the law of copyright automatically trumped FOIA because this would significantly impair the effectiveness of the Act in providing access to information.

## **Conclusion**

The uncomfortable truth for suppliers is that they must live in hope that public authorities, the Commissioner and the Tribunal will invite them to participate in dealing with FOIA requests. And while there are potential sources of protection from the law outside FOIA, these are almost all problematic. Companies should recognise that the best protections against FOIA disclosure-risk continue to be a close and open relationship with public authority customers, the clear designation of information which may be exempt, contractual rights to be notified and consulted (including in relation to any Decision or Enforcement Notice, so that companies can consider scope for appealing or for applying to be joined as a party to an appeal), and communicating with the Commissioner in relation to any request which relates to their information, including if necessary drawing to the Commissioner's attention any failure by the authority to consult in accordance with the s.45 Code of Practice.

## References

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