

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ

Tel: 020 7831 7477

Fax: 020 7831 7461

Email: admin@cfoi.demon.co.uk

Web: www.cfoi.org.uk



Information Tribunal's early decisions lead to greater openness

The Information Tribunal, which hears appeals against the Information Commissioner's decisions under the Freedom of Information Act, has issued its first three decisions.¹ Each of them advances the case for greater openness.

Case 1: Requests for deleted information²

In one of the cases, the Tribunal considered how authorities should respond to requests for information that had been deleted from their computer records but which might still be recovered by use of specialist techniques.

The applicant in this case, a Royal Mail employee, had asked how often his personal file had been requested during a particular period. The Royal Mail explained that the database which would have contained this information was deleted periodically in order to prevent system crashes and that the information was no longer held at the time of his request. Both the Commissioner and the Tribunal accepted that this was the case. His appeal to the Tribunal was not upheld.

¹ The Information Tribunal decisions can be downloaded from: <http://www.informationtribunal.gov.uk/decisions/decisions.htm>. The Information Commissioner's decisions are available on: <http://www.informationcommissioner.gov.uk/eventual.aspx?id=8617>

² See (i) Information Tribunal decision in the case of Paul Harper v the Information Commissioner and Royal Mail plc, Appeal No EA/2005/0001, and (ii) Information Commissioner Decision Notice 58993

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However, the Tribunal went on to consider what the position would be if such deleted information could still be retrieved from the computer. The FOI Act provides a right of access to information which is “held” by a public authority.³ Is such information still “held”?

The Tribunal pointed out that information which has been deleted from a computer, can usually still be retrieved so long as it has not been overwritten by new data. Retrieving the information will sometimes be a relatively simple matter. In other cases it might involve the use of specialised techniques.

The Tribunal did not rule out any of these options. It ruled that: *“Simple restoration from a trash can or recycle bin folder, or from a back-up tape, should normally be attempted, as the Tribunal considers that such information continues to be held.”*

What if restoring the data required something more than “simple” measures? The Tribunal stated that: *“Any attempted restoration that would involve the use of specialist staff time, or the use of specialist software, would have cost implications, which could be significant. In that event, the exemption arising from exceeding the appropriate limit, set from time to time under Section 12 of the Act, might be relied upon by an authority.”*

This makes it clear that the test of how far to go in attempting to retrieve deleted information depends on the cost involved, rather than the form in which the information is held or the kind of measures needed to recover it. Under the Act, authorities can refuse a request if the cost of locating and retrieving information would be more than £600, in the case of a government department, or £450 in the case of other authorities.⁴ If the cost of retrieving deleted information took these costs over the appropriate limit, the request could be refused.

This important judgement overturns guidance issued by both the Information Commissioner and the Department for Constitutional Affairs.

³ Freedom of Information Act 2000, section 1(1).

⁴ These so-called “appropriate limits” are laid down in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

The appropriate limit under the Scottish FOI Act is £600. See: The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

The Commissioner's guidance states that *"Information on a back-up server is not regarded as being held by a public authority for the purposes of FOI...information sent to the back-up server is no longer readily retrievable for business purposes, and unscrambling it would be 'unreasonable' for the purposes of FOI"*.⁵

The Tribunal, however, made it clear that information on a back-up system is "held" for the purposes of the FOI Act.

The DCA's guidance states *"Instructing a computer to delete a particular item may not result in the item being destroyed immediately. At least for a period, the information might still be retrievable albeit with substantial cost and disruption to the system. However, where it is the intention that data should be permanently deleted, and this is not achieved only because the technology will not permit it, authorities may regard such data as having been permanently deleted. This information is no longer considered to be "held" by the authority and does not have to be retrieved or provided in response to a request."*⁶

The Tribunal's decision suggests that the authority's "intention" towards the information does not affect the decision on whether it is in fact "held".

Both these sets of guidance will now have to be revised.

The Scottish Information Commissioner has adopted a broadly similar approach to his UK counterpart, though expressed in slightly different terms. According to the Scottish Commissioner: *"Where a public authority has deleted an e-mail or an electronic file and it can only be retrieved by an IT specialist, the Commissioner takes the view that the information is no longer held by the public authority."*⁷

⁵ Information Commissioner. Awareness Guidance No 8: Records Management FAQs, July 2004. <http://www.ico.gov.uk/documentUploads/AG%208%20Rec%20Man%20FAQI.pdf>

⁶ Department for Constitutional Affairs. Freedom of Information: Guidance on Procedures and Exemptions. Procedural Guidance, Chapter 2. <http://www.dca.gov.uk/foi/guidance/proguide/chap02.htm>

⁷ Scottish Information Commissioner. "Frequently Asked Questions - Public Authorities" <http://www.itspublicknowledge.info/yourrights/faqs/faqspastext.htm>

That view is also out of line with the Tribunal's decision. However, the Information Tribunal has no role under the Freedom of Information (Scotland) Act and its decisions are not binding on the Scottish Information Commissioner.⁸

Case 2: Does criticism invalidate a request?⁹

Another Tribunal decision involved a case in which the requester had asked the Inland Revenue for details of the action it had taken to deal with several examples of what he described as 'maladministration' and 'failed standards' in relation to the refunding of overpaid Self Assessment tax. Each of the specific elements of the request also implied criticism of the Revenue's performance. The Revenue did not accept that its standards had failed and said that it therefore held no information which met the terms of the request.

The Commissioner upheld the Inland Revenue's decision. His decision notice found that the request had been "*framed in general and subjective terms focusing on the complainant's opinions of the alleged actions of the Inland Revenue*". He agreed that the requested information "*is not held by the Inland Revenue and therefore cannot be provided*".

The Tribunal disagreed. It pointed out that in 2000 the Inland Revenue had apologised publicly for long delays in refunding overpaid tax. The shortcomings for which it had apologised broadly corresponded to the failings mentioned in the applicant's request. The Tribunal said "*Any reasonable Public Authority, knowing the historical context of the request in this case, would have understood the basis of [the applicant's] request.*" It found it "difficult to understand" how the Commissioner could have regarded the request as "general and subjective".

In this case the applicant, whose wife had been affected by the delays in refunding overpaid tax, "*had a genuine and unfulfilled requirement*" to know what steps had been taken to prioritise the tax refunds.

⁸ There is no Tribunal under the Scottish FOI Act. The right of appeal against decisions of the Scottish Information Commissioner is to the Court of Session on a point of law.

⁹ See (i) Information Tribunal decision in the case of Mr E. A. Barber v The Information Commissioner, Appeal No EA/2005/0004, and (ii) Information Commissioner Decision Notice 67001

But its observations were not limited to the specifics of this case. It commented more generally: *“If Public Authorities are permitted under the FOIA to pick and choose which requests they respond to on the basis of whether or not they approve of the language used by requesters, this would make a mockery of the legislation”*.

If an applicant’s language made it unclear whether he or she was seeking information rather than merely expressing criticism, the authority could require the applicant to clarify the request using its powers under section 1(3) of the FOI Act. The Tribunal said there was no evidence that the Inland Revenue had done this.

It went on: *“we find the Commissioner was wrong in law to find that the Inland Revenue ‘have no information to provide in response to the request’”*. To the extent that the Commissioner’s decision was based on the exercise of his discretion, *“we find that he ought to have exercised his discretion differently”*.

The Commissioner’s investigation

The Tribunal also expressed concern with the way the Commissioner’s office had investigated this complaint. It found that the Commissioner, like the Inland Revenue, seemed to have been *“overly influenced both by the history of complaints”* made by the applicant and by the *“style of his letters”*.

More significantly, it found no evidence that the Commissioner had contacted either the complainant or the Inland Revenue to discuss the complaint with them during the investigation. The Tribunal found that *“it would have been a more suitable course for the Commissioner to have made further investigation of the Inland Revenue and [the applicant] before making a decision.”* It added: *“We would have thought that there would be very few complaints where the Commissioner could only rely on the complaint notice and any accompanying documentation, particularly where the complainant is not [legally] represented.”*

Advice and assistance

Finally, the Tribunal pointed out that the Commissioner had failed to consider whether the Inland Revenue had provided the applicant with advice and assistance, as required under the FOI Act.¹⁰ The Commissioner said this was because the applicant had not mentioned this matter in his complaint. But the Tribunal observed that an applicant who was not legally represented could not be expected to be familiar with the Act's requirements. The fact that he or she did not mention the matter did not absolve the Commissioner of any duty to look into it.

The Tribunal commented: *“any exercise of discretion by the Commissioner which does not take this [duty to advise and assist] into account may be flawed”*. It added that the Commissioner was himself under a duty, under section 47 (1) of the Act to promote good practice in complying with the Act. If the Commissioner did not consider whether authorities had complied with their duty to advise and assist an applicant it could be argued that the Commissioner would be in breach of this duty.

Note

The Tribunal is clearly critical of the fact that the Information Commissioner's office decided that the Inland Revenue was justified in refusing this request solely on the basis of the initial papers submitted by both sides. No further investigation was carried out. Neither the applicant nor the authority was contacted during the investigation and the resulting decision overlooked critical elements of the case.

This decision notice was issued in May 2005, and was one of the Commissioner's earliest. The Commissioner's caseload at that time would have been relatively modest. His office now has a substantial backlog of undecided cases - over 1,300 at the end of November 2005. Some complaints have been with the Commissioner's office for more than six months without being allocated to an investigating officer.

The Commissioner is introducing measures to tackle this backlog. But in attempting to speed up the handling of cases, there must be a temptation to

¹⁰ Freedom of Information Act 2000, section 16(1).

identify “straightforward” cases that can be decided without time-consuming investigations. The lesson of this case is that such measures will have to avoid shortcuts which jeopardise the proper consideration of complaints.

Case 3. Are court transcripts exempt?¹¹

The third case involved a request made to Bridgnorth District Council for the transcript of a 2001 trial in which one of its councillors and two officials had been prosecuted for perjury. The council had refused the request, maintaining that the transcript was exempt under the Act’s exemption for court documents (section 32(1)(c)). The Commissioner agreed that this exemption, which is not subject to the Act’s public interest test, applied.

The exemption applies to documents created by a court, or by a member of the administrative staff of a court, for the purpose of particular proceedings. The Tribunal agreed that the tapes of the trial, and the transcript produced from those tapes, were both documents created for the purpose of the proceedings.

However, the Tribunal found that the exemption itself had a more limited scope than had previously been recognised. It held that it applies either to:

- (i) documents created by a court’s administrative staff in relation to particular proceedings, such as a note from an usher to the judge indicating a problem with a juror, or to
- (ii) documents created by “the court” itself which, in this context, the Tribunal held could only mean the judge. This might apply to documents such as draft directions and judgements.

Since the recording had not been produced by a member of the court staff or by the judge, but by an outside agency, it did not fall within either of these two categories, and was not exempt under this provision.

¹¹ (i) Information Tribunal decision in the case of Alistair Mitchell v Information Commissioner, Appeal Number: EA/2005/0002 and (ii) Information Commissioner Decision Notice 65282

The Tribunal made clear that it would normally have gone on to order disclosure. However, the Council had shredded the transcript, in accordance with the council's document management policy, before the FOI request had been made. The Tribunal pointed out that the Council could have refused the request on this more straightforward ground.

Note: One of the undesirable side effects of records management policies is the destruction of material of public interest, merely because the authority itself no longer requires it. This transcript had reportedly cost the council nearly £7,000. The applicant had first asked for it in December 2002 - at a time when he had no legal right of access to it - and had repeated his request on several other occasions. But by the time he was able to apply for it under the Act, the document had been shredded.