

FOIA s.44 – Absolute exemption: prohibitions on disclosure

DPA s.59(1) – confidentiality of information

DPA s.59(2)(e) – confidentiality of information

Friends of the Earth v IC & Department for Trade and Industry (DTI)

EA/2006/0039

4th April 2007

Cases:

Facts

Friends of the Earth (FOE) as the appellant made a request from the DTI for an electronic file list from a system known as the Matrix System. The DTI informed FOE that the limit imposed by s.12 of FOIA was likely to be exceeded and in due course formally refused to accede to the request. Later FOE made a fresh request for disclosure of the information provided to the IC by the DTI in the course of the IC's investigation and analysis of the request. After an internal review the IC maintained the right not to disclose three particular letters provided by the DTI to the IC. Reliance was placed on s.44 FOIA which makes information exempt if its disclosure "is prohibited by or under any enactment ..." meaning in this case s.59 of the DPA.

Findings

The IC found that s.59 DPA was a statutory bar since the words "relates to an identified ... business" suggested the DTI as a public authority was excluded. However, the Commissioner was satisfied that in that case the words employed in s.59 being "relates to an identified ... business", albeit suggesting that the DTI is a public authority was excluded, given the context in which s.59 arose, in that context the term "business" included and includes public authorities.

Was the DTI a business?

The IC had sought a Joint Opinion from leading and junior counsel which in broad terms gave a wide reading to the word "business" relying in particular on the European Directive 94/46/EC on the protection of individuals regarding personal data and which was the background to section 59.

In addition the word "business" could be construed widely or narrowly dependent upon the context. Much turned on the evident object of the particular legislation: the purpose of section 59 was to protect those who had supplied information to the IC from "uncontrolled disclosure" of that information so that it was highly likely that the parliamentary intent was that only "commercial" entities and individuals supplying information would be entitled to the protection of s.59.

In the circumstances the Tribunal upheld the broader interpretation of the word “business” as commended to it by the IC and the DTI.

In particular, the Tribunal did not accept FOE’s argument that reliance could be placed on the so-called principle against doubtful penalisation, namely that a person should generally not be penalised except under clear law. The Tribunal also stressed that s.58 DPA showed that every data controller whether “commercial” or otherwise had to furnish the information referred to nor was there any warrant for claiming that only “confidential information” attracted the operation of the Director.

Did disclosure satisfy and of the conditions in s.59(2)?

The question here was whether disclosure would be lawful within s.59(2). This involved two sub issues, first whether disclosure would be made “for the purposes of and is necessary for, the discharge of ... any functions under the information Acts” and secondly, whether “having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest” within the meaning of s.59(2)(e).

As to the first issue it was right that in each case the IC should be able to balance the importance of the free flow of information contemplated by ss.58 and 59 as the case for disclosure of information relating to the public authority or whether or not the consent of the public authority was forthcoming. Here the Tribunal found that the IC had exercised its discretion properly.

As to the second sub issue in all the circumstances of the case the basic question was whether given the rights and freedoms or legitimate interests of various parties concerned in the issue, public interest considerations militated in favour of disclosure. There was inevitably an overlap with the issues dealt with in relation to s.59(2)(c)(i) and the Tribunal agreed that at least four elements entered into the equation. These were the extent of the legitimate interests of the FOE, second the extent of the DTI’s interest, thirdly the public interest in ensuring that there was a transparent public understanding as to the manner in which the IC discharged its functions and fourth the countervailing public interest in protecting the ability of the IC to carry out its statutory functions under s.50.

Conclusion

The Tribunal found that no distinction could be drawn between disputed information and adjectival Information. The Tribunal also took the view that overall there was a sufficient degree of risk attendant upon disclosure in the manner sought in the case and found in all the circumstances that there were no grounds for contending within the meaning of s.58 that the notice against which the appeal was brought was not in accordance with the law. In the alternative, insofar as discretion was exercised the Tribunal did not feel that the IC should have exercised its discretion differently and therefore the Tribunal dismissed the appeal on the basis of the second ground concerning s.59(2) of the DPA.