Of interest? The public interest test under FOIA

Paul Gibbons, aka FOIMan, gives an overview on the importance in applying the public interest test correctly, referencing a series of relevant cases

One of the most controversial episodes in the recent history of the UK's Freedom of Information Act ('FOIA') might never have occurred had it not been for a particular feature of the legislation. Perhaps even more galling for ministers, but for a matter of timing, the issue would not have arisen.

I'm referring to the public interest test, and in particular its role in *R (Evans) v Attorney General* [2015] UKSC21, better known as the Prince Charles' 'black spider memos' case. The Supreme Court ruling was about the use of the ministerial veto by the Attorney General. The only reason it was necessary for Dominic Greave (AG at the time) to exercise the veto at all was because the Upper Tribunal had ordered disclosure, which it did because it believed that the Information Commissioner had misjudged the balance of the public interest. The UT recognised that the exemption for communications with the royals at section 37 of the Act applied, but because there was a public interest test, a whole can of worms was opened up.

What's more, the UT recognised that things had changed as a result of the amendment made to FOI by the Constitutional Reform and Governance Act 2010. It stated that "since these requests were made the legislation has changed. In future cases, in particular in relation to requests received on and after 19th January 2011, there will be severe limitations on the ability to obtain from public authorities information relating to communications with the heir to the throne." (*Rob Evans v IC* [2012] UKUT 313 (AAC), 18th September 2012, para. 8).

The amendment had the effect of making section 37 an absolute exemption in relation to correspondence with the Queen and her two closest heirs. One of the reasons why the Evans case was so significant was because if it had failed or had been abandoned, the public would never have an opportunity to see how the current heir to the throne interacted with government behind the scenes (unless the correspondence met the definition of environmental information, since all exceptions under the Environmental Information Regulations are subject to a public interest test).

The qualified nature of section 37 when the Act was first passed afforded us a brief glimpse into the room where royals and ministers conversed before those red velvet curtains were drawn firmly closed.

This case provides us with a striking illustration of the importance of the public interest test. If an exemption is subject to a public interest test, then there is a possibility that that exemption will be overturned because the Commissioner or a court disagrees with the public authority's assessment of the public interest — something which is subjective by its nature. For other exemptions, it is much easier to protect information as long as the authority can demonstrate that it falls within the exemption's scope.

What the Act says about the public interest test

Given the controversy that it provokes, there is remarkably little written within FOIA about the public interest test.

Section 2 of the Act describes the effect of all of the exemptions. It is here that the test is described in relation to any decision to neither confirm nor deny whether information is held:

"…in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information."

Also in section 2, the test is referenced in relation to the application of exemptions to withhold information (the most common use):

"…in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

The section then goes on to list the exemptions that are absolute. It was this section, in addition to section 37, that was amended by the Constitutional Reform and Governance Act in 2010, and which now provides protection for missives from the Prince of Wales.

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Section 10(3) FOIA, which sets out the time for compliance with requests, provides that public authorities do not need to reach a decision on the public interest 'until such time as is reasonable in the circumstances'.

Section 17 sets out what public authorities should include in their response when refusing a request. Where the public authority is claiming that the public interest favours refusing to confirm whether or not the information is held, or withholding the information, it must state its reasons for claiming this. It can do this in the initial refusal notice or in a subsequent notice if more time is needed to consider the public interest in line with section 10(3). If it does require longer to reach a decision on the public interest, then the initial refusal notice must provide an estimate of the date by which a decision is expected to be reached.

What exactly is the public interest?

The public interest is a term that has become increasingly common in legislation and in legal cases. An informal analysis of UK legislation over the last 100 years shows that the phrase was not often used before the start of this Century. That has changed since then, being utilised hundreds of times in some years (notably 2002 and 2011). Indeed it has become a common term internationally, not least in the field of freedom of information. One Australian judge described it as: "a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members" (*DPP v Smith* [1991] 1 VR 63 at 75).

"Practitioners struggling to identify arguments when applying exemptions could do worse than to look for previous decisions by the Commissioner or tribunal. Very often their authority will not be the first to have attempted to withhold the information concerned, so it is perfectly reasonable to find out what arguments have swayed the regulator and courts in the past."

The Information Commissioner's guidance explains that it 'can cover a wide range of values and principles relating to the public good, or what is in the best interests of society.' As established in *Guardian Newspapers Ltd & Heather Brooke v IC & BBC* (EA/2006/0011 and 0013, 8th January 2007), this doesn't necessarily include information that may be interesting to the public or media.

How do you carry out a public interest test?

For practitioners, this is the most important question. It's all very well politicians, regulators and barristers bandying around such terms, but on a day-to-day basis FOI Officers and their colleagues will have to apply this in practice.

Whenever a public authority decides that a qualified exemption applies — for example, perhaps they have decided that disclosure would prejudice the commercial interests of a supplier — they have to then go on and carry out the public interest test. Fundamentally there are two stages to this test:

1. identify the public interest arguments for and against applying the exemption; and
2. assess the weight or seriousness of the arguments put forward and conclude where the balance of the public interest lies.

Practitioners struggling to identify arguments when applying exemptions could do worse than to look for previous decisions of the Commissioner or tribunal. Very often their own authority will not be the first to have attempted to withhold the information concerned, so it is perfectly reasonable to find out what arguments have swayed the regulator and courts in the past. In some cases, the arguments – as long as they are relevant to the specific request – may almost be lifted word for word from previous decisions.

The most common arguments made are summarised in the Information Commissioner's guidance as:

- transparency and accountability;
- promoting public understanding;
- safeguarding democratic processes;
- good decision-making;
- upholding standards and integrity;
- ensuring justice;
- securing best use of public resources; and
- ensuring fair commercial competition.

Arguments in favour of disclosure can be very general, advises the Commissioner. Conversely, arguments against disclosure must be specific to the exemption claimed as explained in the still influential decision, *Hogan & Oxford City Council v IC* (EA/2005/0026 and 0030, 17th October 2006):

"In considering factors that mitigate against disclosure, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue."

If more than one exemption is being used, the arguments will need to be dealt with separately for each exemption. Public interest arguments

can be considered together (or in aggregated form as it is technically described) where they are relevant to all the exemptions cited (*Department of Health v IC*, EA/2013/0087, 17th March 2014).

Balancing the public interest

The language commonly used in discussion of the public interest conjures the image of a pair of scales. We talk about 'balancing' the interests involved. This can be a useful way to envisage the process.

It is important for public authorities to ensure that weight is allocated properly. When starting out as an FOI Officer back in 2005, in common with many others, I tended to list the arguments for disclosure, and then attempt to find more arguments in favour of withholding the information. The Hogan case referred to above clarified that this was not in fact the correct approach:

"The exercise of considering the competing public interests depends not upon the length of the list of the different sorts of public interests on one side or the other but upon how important each of the factors is."

Instead, what the practitioner needs to do is to add weight to each of the arguments. There might only be one argument in favour of withholding the information, but if it weighs a kilogram and the arguments in favour of disclosing the information weigh 750g between them, then the public authority can reasonably withhold the information.

How does this look in practice though? Perhaps the easiest way to illustrate is to look at some previous cases. Let's take a well known case that led to disclosure of information. In *Mersey Tunnel Users' Association v IC & Merseytravel* (EA/2007/0052), the FTT ruled that the public interest favoured disclosure, which was a surprise to many, as in *Bellamy v IC & Secretary of State for Trade & Industry* (EA/2005/0023), the FTT famously had stated that there was a strong inherent public interest in maintaining legal professional privilege.

The arguments that prevailed in *Mersey Tunnel* illustrate how that inherent interest can be overcome. Importantly, one factor was the age of the legal advice. Timing will always be a major factor when considering the public interest: the more time that has passed since advice was given, the less likely it is that disclosure will do any serious damage to the principle of legal professional privilege, or in other contexts, the relevant identified interest. Another successful argument in *Mersey Tunnel* was the amount of public money that was involved. If a public authority has spent a lot of money on a particular project, then there's clearly a much stronger argument in saying that the authority's management of that project needs scrutiny. In summary then, both time passed and money spent can weigh in favour of disclosure.

Another 'weighty' argument can be the existence of controversy about the issue the request concerns. In *University of Central Lancashire v IC & David Colquhoun* (EA/2009/0034, 8th December 2009, para 48), the 'significant public controversy' around the provision of a homeopathy degree course justified disclosure of course materials; 'that factor standing alone would have persuaded us that the balance of public interest favoured disclosure.' Many of the more contentious public interest decisions (at least from the point of view of public authorities) have placed weight on this or similar arguments, for example the NHS risk registers decision (*Department of Health v IC & Lewis* [2015] UKUT 0159) or the Iraq War Cabinet minutes decision (*Cabinet Office & Christopher Lamb v IC,* EA/2008/0024 and 0029, 27th January 2009).

Where a prejudice-based exemption is being applied, there is an inherent public interest in avoiding the identified prejudice. In *Voyias v Information Commissioner and London Borough of Camden* (EA/2011/0007), it was accepted that disclosure of a list of empty properties by the London Borough of Camden would prejudice the prevention of crime, which meant that the exemption at section 31 applied. The seriousness of the potential outcome of the disclosure and its high likelihood both weighed in favour of withholding the information.

Risk to life and limb will also add weight. In *Kalman v IC & Department for Transport* (EA/2009/0111), the applicant wanted to access information about security measures at airports. They acknowledged that there was a risk that the information could be of use to hostile third parties, but that the likelihood of that was low. The tribunal though found that whilst the likelihood was low, the potential outcome was severe — the deaths of hundreds of people. The public interest in avoiding this was clearly considerable. Similarly, the public interest in protecting employees from animal rights activists meant that there would need to be a strong argument in favour of disclosure in *PETA v IC & Oxford University* (EA/2009/0076).

Just as the spending of public money weighs in favour of disclosure, if a public authority can demonstrate that disclosure would cost the public purse, that's going to have some weight as an argument. In one recent case, the Home Office pointed to the fact that the Ministry of Justice had achieved less value for money as a result of previous transparency. The FTT was convinced by the witness who explained this ('he knows his business', they stated) and gave significant weight to the suggestion that disclosure 'would have an adverse financial impact' upon the Home Office (*Secretary of State for the Home Department v IC* & Miller, EA/2015/0143, 12th January 2016).

Arguments that it would be best to avoid

There are some arguments that public authorities have raised repeatedly that receive short shrift from the Commissioner and courts. Arguments concerning the cost of dealing with the request itself will be dismissed, as there are mechanisms within FOIA designed to manage cost. Embarrassment to government and officials will similarly receive little sympathy.

One regular argument is that information will be misinterpreted. Again, this will rarely be given much weight. In one recent case, for example, the FTT on the contrary argued that:

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"On the facts of this case disclosure might have corrected a false impression, derived from official government statements." (*Slater v IC & Department for Work and Pensions* (EA/2013/0145, 14th March 2016, para. 61).

Furthermore, public authorities arguing that correcting misinterpreted information will cost money are going to be on shaky ground, particularly if they have an established press office function:

"Nor do we accept that resources would be wasted in providing explanations. It is clear from the press releases that we have been shown that the Department has been adept at presenting its case to the public and that it clearly has the specialist staff to carry out that function. We do not accept that the disclosure of the withheld information on the dates we have identified would have imposed a significantly increased burden on the Department." (para 62 of *Slater*).

What to put in a response

Many responses that I've seen simply summarise the arguments in favour of withholding the information in a sentence or two. My own preference as an FOI Officer was to list all the arguments made on both sides, and indicate the relative importance (or weight) that I had ascribed to them. This gives an applicant insight into how the process works and perhaps makes it less likely that they will request an internal review. If there is a subsequent review, then the fact that all arguments are fully documented will assist whoever is carrying it out. Documenting the application of the public interest test as fully as possible seems best to meet the requirement at section 17 as well.

I also found it helpful to set out the arguments under each exemption — first in favour of disclosure, and then those in favour of maintaining the exemption. As suggested above, this isn't a mathematical process — the number of arguments in each column isn't important. However, it is a clear way to present the thought process involved. This can result in lengthy refusal notices, and if this is a concern, the detailed reasoning can be provided in an annex to the main response.

Timing

The timing of public interest tests has been a subject of emphasis — in tribunal decisions in particular. This is an issue that is only really relevant when cases go to further appeal. Should the tribunal consider the public interest as it stood at the time the request was answered, or at the time that the tribunal is considering it? There is considerable debate amongst lawyers on this point. For practitioners though, the issue is only rarely going to be a concern.

Summary

The public interest test is a fundamental feature of FOIA. In a nutshell, it requires public authorities to identify the arguments as to how disclosing and withholding the information will benefit the public, and then to ascribe a weight or importance to each of those arguments.

Despite some of the more arcane debates that arise from this area of FOI, it should be a fairly straightforward aspect of applying exemptions. The key is to ensure that arguments are as specific and evidenced as possible, particularly those in favour of maintaining exemptions.

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