

Freedom of Information Act 2000 Qualified Exemptions to Disclosure – “The Prejudice Test”

Introduction

This Briefing Note looks at how the Information Tribunal has interpreted the phrase “*would, or would be likely to prejudice*” in the Freedom of Information Act 2000 and considers the implications for public authorities seeking to rely on potential prejudice so that a relevant exemption is engaged.

Background - Absolute and Qualified Exemptions

The Freedom of Information Act (“FOIA”) introduced for the first time into UK law a general right of access by any person to information held by public authorities.

The Act contains two basic entitlements - the right to be informed in writing by a public authority whether it holds the information requested and, if it does hold that information, the right to have that information communicated. These entitlements are restricted by a number of exemptions, which are either “absolute” or “qualified”.

Where a qualified exemption is engaged, a balancing exercise has to be carried out as to whether, in all the circumstances of the case, the public interest in maintaining the exemption (non-disclosure) outweighs the public interest in disclosure.

Categories where the absolute exemption applies:-

- Information accessible by other means (s.21)
- Information supplied by, or relating to, security bodies (s.23)
- Court records (s.32)
- Parliamentary privilege (s.34)
- Personal information where the applicant is the subject of the information (s.40)
- Information provided in confidence by another person, if disclosure would be an actionable breach of confidence (s.41)
- Information covered by statutory prohibitions on disclosure (s.44)

Categories where a qualified exemption may apply:-

- Information intended for future publication (s.22)
- Where exemption is required to safeguard national security (s.24)
- Where disclosure would, or would be likely to, prejudice defence (s.26)

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- Where disclosure would, or would be likely to, prejudice international relations (s.27)
- Confidential information from a foreign state, organisation or court (s.27(2))
- Where disclosure would or would be likely to prejudice relations within UK administrations (s.28)
- Where disclosure would or would be likely to prejudice the economic or financial interests of the UK or of any part of it (s.29)
- Information held for the purpose of a criminal investigation or proceedings (s.30)
- Where disclosure would or would be likely to prejudice the prevention or detection of crime (s.31)
- Where disclosure would or would be likely to prejudice an auditing body’s audit functions (s.33)
- Information relating to the formulation of government policy (relates to 4 specific aspects) (s.35)
- Where disclosure would or would be likely to prejudice the effective conduct of public affairs (although the exemption is absolute in relation to the House of Commons and House of Lords (s.36)
- Communications with the Royal Family (s.37)
- Where disclosure would or would be likely to endanger health or safety (s.38)
- Environmental information, insofar as the Environmental Information Regulations apply (s.39)
- Where a claim to legal professional privilege could be maintained (s.42)
- Information that constitutes a trade secret (s.43(1)) or where disclosure would or would be likely to prejudice the commercial interests of any person (s.43(2))

The importance of the phrase “likely to prejudice”

It is clear from the categories of qualified exemptions that, with a handful of exceptions, information will only become exempt from disclosure where disclosure would or would be likely to cause prejudice and only once the exemption is engaged does the public interest balancing test apply.

Lord Falconer defined “prejudice” at the second reading of the Freedom of Information Bill in the House of Lords (Hansard 20.04.2000) in the following way:-

“an authority must point to prejudice that is real, actual or of substance”

The phrase “*would or would be likely to*” has not been specifically defined by the Act but has been considered in detail by the Information Tribunal.

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John Connor Press Associates Limited v The Information Tribunal (EA/2005/0005)
5th January 2006

This was the first decision of the Information Tribunal to provide guidance on how the test of how the phrase “*would, or would be likely to, prejudice*” should be applied in practice.

The appeal concerned a request by John Connor Press Associates Ltd to the National Maritime Museum in Greenwich for information relating to payments made to an artist named Conrad Shawcross, whose work had been exhibited at the museum as part of a contemporary art programme.

In response to the request, the museum provided a good deal of information relating to its transaction with the artist but redacted out any specific financial details. In doing so they relied upon the qualified exemption at section 43(2) of the Act, namely that the disclosure would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it). The museum justified its reliance on this exemption on the basis that disclosure at that time would be likely to prejudice the museum’s bargaining position during contractual negotiations with other artists, as well as Mr Shawcross’s bargaining position in relation to his subsequent sale of similar works.

The company applied to the Information Commissioner for a decision as to whether the museum had dealt with the request for information in accordance with the Act. The Commissioner agreed with the museum that premature release of such financial arrangements would prejudice its bargaining position. He gave particular weight to the fact that the museum was dealing with public funds and had to ensure value for money. Although the Commissioner was not persuaded that prejudice to Conrad Shawcross’s commercial interests was, of itself, sufficient to maintain the exemption, evidence was taken that, at the time of the request, the museum was actively involved in negotiations with another artist, Beth Derbyshire, over her participation for a second time in the art programme.

The company appealed to the Information Tribunal on 2 grounds:-

- That the Commissioner wrongly decided that the section 43(2) exemption was relevant to this case, and
- That the public interest in disclosure outweighed the public interest in protecting the museum from the prejudice it was likely to suffer as the result of disclosure.

The Tribunal found for the appellants on the first ground, so did not need to consider the second. It accepted that the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on subsequent transactions. This would depend on the nature of the information and degree of similarity between the two transactions. The Tribunal said:-

“We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.”

It referred to a decision by Mr Justice Munby entitled *R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)* in which the same expression fell to be construed under the Data Protection Act 1998. He states that ““I accept that “likely”...does not mean more probable than not. But on the other hand, it must connote a significantly greater degree of probability than merely “more than fanciable””. A little later he said that in his view the word

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“connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there “may very well” be prejudice to those interests, even if the risk falls short of being more probable than not”.

The Tribunal concluded that, in this case, the public authority had not achieved that threshold and no sufficient risk of prejudice to the commercial interests of the museum was demonstrated. It stated that the information already provided by the museum would be valuable to any artist entering into negotiations with it and materially reduced the value of the financial details that were withheld. Further, the nature of the work undertaken by the two artists concerned was so different that they could not be treated as true comparables for the purpose of negotiation.

Timing

The Tribunal decided that the question it had to answer was whether disclosure of the particular information withheld from the appellants would have been “likely” to cause such prejudice to the museum at the time when disclosure was refused. In the following case the Tribunal expanded on the “prejudice test” and how it should be applied in practice.

Hogan & Oxford City Council v The Information Commissioner (EA/2005/0026/0030)
17th October 2006

Mr Hogan requested information relating to the Council’s vehicles, including their Vehicle Information Numbers (“VINs”), with which the appeal was concerned. The local authority, invoking the law enforcement exemption (s.31), refused his request for the VINs on the basis of advice received by them from the DVLA and police that such information might be used for vehicle cloning. The Tribunal found that, on balance, the occurrence of prejudice to the prevention or detection of crime was more probable than not and that the s. 31(1) (a) exemption was engaged. They then went on to consider the public interest balance.

What is particularly helpful for public bodies about this case is that the Tribunal said that the application of the “prejudice test” should be considered as involving a number of steps:-

Step 1 - Identification of the applicable interest(s) within the relevant exemption.

There were only two under s. 31, namely the prevention or detection of crime.

Step 2 - The nature of the “prejudice” being claimed must be considered.

An evidential burden rests with the decision-maker to show:-

A causal connection between the potential disclosure and the prejudice and

- (i) That the prejudice is, as Lord Falconer stated, “real, actual or of substance”.
- (ii) The Tribunal described this as “*the de minimis threshold*”.

Since disclosure may not be made subject to any conditions governing its subsequent use, the public authority needs to consider prejudice from the perspective that disclosure is effectively being made to the general public as a whole, not just the individual applicant. However, while disclosure is “motive blind”, the Tribunal accepted that where a public authority is aware of the intended use, that use may be taken into account when assessing the nature of the prejudice. The public authority is required to consider whether to remove exempt information while disclosing all non-exempt information.

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Step 3 – The likelihood of occurrence of prejudice

The tribunal referred to the John Connor case and stated that there are two limbs on which a prejudice-based exemption might be engaged:-

- (i) Where the occurrence of prejudice to the specified interest is more probable than not;
- (ii) Where there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.

In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is being considered.

England & London Borough of Bexley v The Information Commissioner (EA/2006/0060 & 0066)
9th May 2007

It is not necessary to rehearse the facts in this case. What is notable is that the Tribunal repeated the steps set out in the Hogan case.

Further, the Tribunal found that the Information Commissioner had applied too high a test on the question of what “*would be likely to prejudice*”. It said “In our view, “*significant*” is used in the sense of a “*threshold*” i.e. it is “*of significance*” as opposed to being “*insignificant*”, when no regard should be taken of it. The magnitude of the effect is referred to by the word “*substantial*” and something may be significant, but not very substantial.”

Summary

These decisions are consistent in their interpretation of the prejudice test and provide useful guidance for all the qualified exemptions to which it applies. This comes as no surprise given that the test has already been interpreted in the related context of Data Protection. It is also clear that each case will depend upon the individual circumstances.

As for the timing point, it would seem no more than common sense to apply the test of prejudice to the time at which the request was refused, and not any other time.

Finally, it is worth looking at the contrast between two recent decision notices from the Information Commissioner:

National Gallery (FS50107458)
21 May 2007

This case could be held out as an example of good practice by a public authority. The complainant requested information relating to correspondence between the private owner of a painting and the National Gallery. The National Gallery disclosed some information and withheld the remainder under the s.43 exemption. The National Gallery explained to the applicant which exemption it was relying upon and set out reasons for withholding the information, which were in line with that exemption and how, once the exemption was engaged, it had applied the public interest test.

When the matter was investigated by the Information Commissioner’s office, the Gallery provided documentary evidence from third parties in support of its position and set out clear arguments, with examples, of the potential adverse effect of disclosure, based on the similarity of works (ie “Old Masters”) that the Gallery would be negotiating over in the future. It suggested that other exemptions also applied and provided a list of documents by exemption accompanied by further

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arguments and explanations for their application. In the word used repeatedly in the decision notice, the public authority clearly “*demonstrated*” the applicable commercial interests, the nature of the potential prejudice and the likelihood of prejudice occurring. The Information Commissioner found in their favour.

British Broadcasting Corporation (FS50105262)

27 March 2007

The BBC was also relying on the s.43 exemption. Although it put forward a number of arguments, the Information Commissioner found that “the BBC has not *demonstrated* that there is a real prospect that disclosure would, or would be likely to prejudice their commercial interests” or, indeed, the commercial interest of any third party. It is noteworthy that the BBC did not obtain any supporting evidence from appropriate third parties to support their position but appear to have relied solely upon their own arguments and explanations.

These cases emphasise the importance to public authorities of following a clear process linked closely to the Act in considering possible exemptions to disclosure and of treating each case on its evidential merits.

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.