

Disclosure requests and confidential information

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Freedom of Information Act 2000

Exceptions to the duty to disclose on request:

- Where disclosure would be an actionable breach of confidence – section 41
- Where the information is a *trade secret*, or its disclosure would *prejudice the commercial interests of any person*, it will be exempt from disclosure if *the public interest in maintaining the exemption outweighs the public interest in disclosing the information* – section 43 (together with s. 2(2)(b))

Environmental Information Regulations 2004

- A specific regime, implementing EU Directive 2003/4, for “environmental information”. This includes information on (e.g.):
 - *Plans and activities which are likely to affect land*
 - *Waste, emissions, discharges and other releases into the environment* (r. 2(1))
- The general duty to disclose information on request (r. 5(1)) is subject to exceptions where disclosure would adversely affect:
 - the confidentiality of commercial or industrial information (r. 12(1)(a) and (5)(e)); or
 - the interests of the person who provided the information (where the person was not under a legal obligation to provide it to the authority, the authority is not otherwise entitled to disclose it, and the person has not consented to disclosure) (r. 12(1)(a) and (5)(f))
- ...in each case subject to a public interest balancing test (r. 12(1)(b))

FOIA s. 41 (confidentiality)

- Starting point: a duty of confidence

three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information [...] must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. (*Coco v Clark* [1969] RPC 41 at 47 (Megarry J))

- Development: misuse of private information

- *Campbell v MGN* [2004] AC 457
- *Google v Vidal-Hall* [2015] EWCA Civ 311 (e.g. at 25)
- *PJS v NGN* [2016] EWCA Civ 393 at 34-39; [2016] UKSC 26 at 25

FOIA s. 41 (confidentiality) (2)

Recent tribunal decisions:

- *RB v Information Commissioner* [2015] UKUT 614 (AAC), 9 November 2015
- *Murphy v Information Commissioner* (EA/2010/0055), 18 April 2016
- What is the correct test for whether *private* information is covered by s. 41?
 - is the information “private in the sense that it is in principle protected by Article 8 ECHR”?
 - Did the individual have *a reasonable expectation of privacy*?

McKennitt v Ash [2006] EWCA Civ 1714 at 11

PJS v NGN [2016] EWCA Civ 100 at 32

FOIA s. 43 (commercial interests)

Recent tribunal decisions:

- *London Legacy Development Corporation v IC* (EA/2015/0223), 11 April 2016: request for disclosure of terms of West Ham's concession agreement to use the Olympic Stadium
- *Ballan v IC* (EA/2015/0021), 28 July 2015 - request by a disappointed tenderer in a public procurement process to see the winning tender
- *Jordan v IC* (EA/2015/0146), 9 November 2015: request for details of payments by a local authority to its contractor for works on the requestor's house

FOIA s. 43 (commercial interests) (2)

Lessons:

- “commercial interests” are broad, and relate to the ability to participate in the *purchase or sale* of goods and services – e.g. *Ballan* at 8
- If s. 43 is to be engaged, there must be a "very significant and weighty chance" that disclosure would cause prejudice which is "real, actual or of substance" (*LLDC* at 9, citing *Dept for Work and Pensions v IC* [2014] UKUT 0334 (AAC))
- Might disclosure prejudice future procurements? (e.g. *LLDC* at 43; *Ballan* at 25(c), 29)

EIRs r. 12(5)(e) (confidentiality)

C-442/14 *Bayer CropScience* – AG Kokott, 7 April 2016:

- “the Member States’ power to protect confidential information” is not “contingent on a request for confidential treatment previously having been made” (at 37)
- However “the absence of a request for confidential treatment may nevertheless have consequences for the protection of the confidentiality of commercial or industrial information. Without such a request the competent authorities can, as a rule, assume that information which is not obviously to be protected as industrial and commercial secrets may be disclosed. In such cases, they are not required to consult the undertaking prior to disclosure” (at 43)

EIRs r. 12(5)(e) (confidentiality) (2)

- When is information *obviously* confidential?
- Will the national courts take a similar approach to FOIA – for example in respect of public tenders which are not marked as confidential?
 - *Croft House v Durham CC* [2010] EWHC 909 at 39-40 (Ramsey J): a failure to mark information as confidential, where the authority had included a disclaimer requiring it to be marked as confidential, was “a factor to be taken into account”
 - *LLDC* at 37: a failure to designate some of the disputed information as confidential was “highly relevant to the weight” to be given to LLDC’s claim that disclosure would cause it prejudice

EIRs r. 12(5)(e) (confidentiality) (3)

- Are financial viability assessments which support planning applications confidential?
 - *Southwark v IC* (EA/2013/0162): projections of commercial returns are confidential
 - *Greenwich v IC* (EA/2014/0122): contra
 - See now IC decision of 16 March 2016 re *Westminster City Council* (FS50587175): no redactions permitted

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