Freedom of Information Act Awareness Guidance No 15

The Economy

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know)** comes into force in January 2005. The **Awareness Guidance** series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation. Here we consider the exemption relating to information whose disclosure might prejudice the economic interests of the UK.

Particularly for central government departments (but also for other larger public authorities) more detailed advice on the scope and approach to be taken to the exemption relating to the economy will be available from the Department for Constitutional Affairs The Commissioner also intends to issue further advice over the course of 2004.

A) The Right to Know

Section 1 of the Act establishes the right to know by placing two related obligations on public authorities:

- the duty to confirm or deny whether it holds the information requested and, if the information is 'held'
- the duty to communicate the information to the applicant.

The duty to confirm or deny is considered separately below and in Awareness Guidance No 21. The Act recognises that there are reasons why information may have to be withheld and so there are a number of exemptions from the right to know. In considering the exemptions, public authorities must consider both obligations, although clearly if it decides not to confirm or deny the holding of information it will not go on to consider the question of disclosure.

B) What does the Act say?

The text of the exemption

"29 (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1) (a) would, or would be likely to, prejudice any matters mentioned in subsection (1)."

General

Section 29, generally referred to as the 'economy exemption', provides two grounds for withholding information. Firstly, information is exempt if its disclosure would, or would be likely to prejudice the economic interests of the UK or any part of it. Secondly information is also exempt where its disclosure would, or would be likely to prejudice the financial interests of the UK government or any of the devolved administrations.

The term 'prejudice', in this context, is generally taken to mean harm or damage. The term 'would be likely to' does **not** imply that the probability of the harm occurring has to be greater than the probability of no harm being caused, however there does have to be a significant and realistic prospect of the damage being incurred. (See also Awareness Guidance No 20 on the Test of Prejudice.)

The economy exemption is subject to the public interest test which is set out in section 2 of the Act. The duty to apply the public interest test means that even though the release of information may harm the economy or the financial interests of an UK administration, the information may still be released where there are important public interest arguments in allowing access to the information. Exemptions subject to the public interest test are known as 'qualified exemptions'.

Economic Interests of the UK or any part of it

By referring to the "economic interests of the UK or any part of it", the exemption seeks to protect communal interests rather than those of the individual. It is concerned with information that would damage the economy of the UK as a whole or a regional or local economy. The exemption does not prevent a public authority considering the effect of the release of information on an individual company where that company's performance has a major influence on the national or local economy.

The exemption concerns the effect on the economy rather than the government's ability to manage the economy. However since it is an aim of governments to improve economic prosperity, it may be difficult to argue that weakening the government's control over the economy would not also damage the economy itself.

The exemption does not concern the economic interests of states other than the UK unless those interests impact on the economy of the UK.

Financial Interests of any administration in the UK

The second part of this exemption is far narrower. It protects information which would, or would be likely to prejudice the financial interests of;

a) The government of the United Kingdom
b) The Scottish Administration
c) The Executive Committee of the Northern Ireland Assembly
d) The National Assembly for Wales

The scope of the exemption would include such matters as revenue raised through taxation, the funding of these administrations as well as the availability and cost of borrowing to these administrations.

The duty to confirm or deny

Section 29 provides the public authority with an exemption from the duty to confirm or deny that it holds the information but, only where this in itself would damage the economic or financial interest which the exemption seeks to protect.

For example if the Inland Revenue received a request for any information it held identifying tax loopholes in a particular section or subsection of a piece of legislation, then it is arguable that to confirm the existence of such information, could increase the likelihood of any loophole being exploited. However, as this is a qualified exemption and therefore subject to the public interest test, there may be overriding public interest arguments in favour of releasing such information.

For more advice on the duty to confirm or deny, see Awareness Guidance No 21.

C) What information is covered?

The exemption does not solely relate to information held by public authorities concerned with the management of the economy or economic development for it to affect the economy of the area in which it operates. Some examples of how public authorities affect the economy are suggested below.

- Planning/managing the economy - through setting or influencing interest rates, taxation, currency rates, controls on public spending etc.
- Promoting the economy – regional policy, overseas trade.
- Political considerations – trade embargos, European integration.
- Social/health/environmental policy – drinking, smoking, public transport versus private car use.
- Regulating industry– public health e.g. BSE, H&S, Employment law, licensing e.g. third generation mobile phones, regulation of financial services.
- Planning – local and national level, transport policies, airports.
- As a major customer, employer and investor.

(**Note:** Some of the information held in relation to these roles may constitute environmental information. Access to environmental information is provided by the Environmental Information Regulations. These are referred to in Section F below.)

D) Applying the Exemption

Because of the variety of ways in which public authorities interact with the economy it is only possible to discuss some of the main issues.

The complex nature of the economy

Public authorities withholding information on the grounds that it would damage the economy must be able to justify to the applicant and to the Commissioner why section 29 applies.

It is recognised that because of the complex nature of certain aspects of the economy it may be difficult to assess the likely impact of the release of information and the Commissioner may need to seek independent expert advice as to the validity of the arguments presented to him.

For example, the financial markets are very sensitive to the release of information about the economy and generally speaking information that distorts the financial markets is seen as damaging to the economy. However, it will not always be easy to demonstrate the impact on the markets of the release of particular information or how the reaction of the markets to the premature release of information would differ from if the information was released in accordance with a planned timetable.

Timing of disclosure

Many public authorities responsible for managing the economy, regulating industry or economic development will need to make information available in order to achieve their aims. However, the timing of the release of that information may be critical. For example, the premature release of proposals to introduce a new tax may undermine the policy by allowing people to reorganise their financial affairs.

Where proposals have been developed but not implemented, there would need to be a realistic possibility of the policy being implemented in the future for the exemption to apply.

There may also be situations where policy is not yet settled and the release of information may create a misleading impression of a public authority's intentions. In these circumstances other exemptions may also apply, for example, section 35 – which concerns information likely to prejudice the formulation of government policy.

Where the public authority intends to publish the information requested at a later date the exemption provided by section 22 (information intended for future publication, may apply). This is explained further in Awareness Guidance No.7 – Information Intended for Future Publication.

Negative economic assessments

There may be many reasons for a public authority to hold information on an area's economy. That information may present a negative impression of the area's current or potential performance and its release could discourage investment. Before relying on the exemption, however, a public authority would need to balance the level of damage to business confidence against the public interest arguments in favour of releasing information that would allow business to make fully informed decisions. Indeed, a well informed business community may have the opportunity and incentive to prevent a problem deepening into a crisis and there may be other occasions where restricting access to information may make a problem worse.

Managing relationships

Economic development or regeneration often involves public authorities in establishing strong relationships with the private sector. There may be fears that access to information about those relationships or to information that has been provided by private sector organisations may damage relations or inhibit future private sector involvement. In determining whether the exemption would in fact apply, it will be necessary to consider whether such fears are well grounded. It will not be sufficient simply to assert that as a result of disclosure a contractor would necessarily be unwilling to enter into an agreement with a public authority.

It is unlikely that the exemption could be claimed if information about that company is already available through access regimes in other countries where the company operates or, such regimes may exist in other countries where the company is considering investing.

(Even if the information is exempt, it may be necessary to disclose it given the public interest in understanding the nature of the relationships between the private and public sectors. The public interest test is considered in Section E below.).

Some of the information that private companies wish to protect may be covered by exemptions relating to commercial interests (section 43) and information provided in confidence (section 41).

E) The Public Interest

Section 29 is subject to the public interest test. This means that even where a public authority has decided that the release of information could prejudice the economy or the financial interests of a UK administration, it may still be obliged to disclose the information in the public interest. Some of the main public interest arguments that may arise are considered below. These arguments have to be balanced against any likely prejudice the release of the information could cause. It should also be remembered that there is a public interest in having a thriving economy and that any prejudice to the finances of a UK administration may impact on the taxpayers who fund them.

Understanding of and participation in debates of issues of the day: In order to preserve a healthy democracy it is important that people are able to discuss the important issues of the day. The quality of that debate will depend in part upon the information available. In many cases the topics under discussion will revolve around a pending policy decision, for example, the government's decision as to whether the five economic tests for joining the single European currency have been met. It is likely that the greater the potential consequences of a decision, the greater will be the public interest in having access to relevant information.

Accountability and transparency of public spending: Economic regeneration schemes can involve very large amounts of public money. There is a clear public interest in having access to information which allows public authorities to be held accountable for the spending of public money. The public interest is also served by there being transparency in any process through which private companies receive financial assistance from public authorities.

Access to information affecting investment decisions: Public authorities may hold information that would improve decisions about where to locate businesses or invest their money. There is a public interest in the business community being able to make sound investment decisions which in turn may benefit the economy as a whole.

Public safety: There is clearly a public interest in providing access to information which affects public safety. Public authorities responsible for regulating transport industries may hold information relating to public safety and will have to consider whether to release that information even though it may harm business or consumer confidence in that industry to such an extent that it impacts on the wider economy. It is likely that the greater the risk to public safety, the greater the public interest will be in giving access to relevant information.

In this context it may be helpful to bear in mind the general principle that giving access to the information on which official experts base their findings is likely to improve the quality of expert opinion and as a consequence to build public confidence in the validity of expert scientific or technical advice.

F) Access to Environmental Information

Access to environmental information will be provided by the Environmental Information Regulations 2004 (EIR) which are currently in draft form, available from the HMSO website. These are expected to come into force at the same time as the Act is fully implemented. The Information Commissioner will be the regulator of the EIR and will be issuing guidance on them by the end of 2004.

The definition of what is environmental information in the EU Directive upon which the EIR will be based is very wide. For instance it will include "the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements".

It is not difficult to see that the disclosure of some information covered by this definition might have implications for the economic interests of the UK (or parts of it).

Where a public authority receives a request for environmental information it can only withhold information if permitted by any of the exceptions provided by the regulations. However, there is no provision under the EIR for withholding information on the grounds its release would be likely to prejudice the economy of the UK.

In some, but clearly not all cases, it may be possible to rely upon another exception in the EIR, for instance the exception relating to information whose disclosure might have an adverse affect on “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

General guidance on the draft EIR is available from the Commissioner’s web site and also from Defra. The Commissioner intends to publish more detailed advice after the new regulations have been finalised.

G) Implementation issues

When applying section 29, public authorities may recognise that it overlaps with other exemptions provided by the Act. For example, information on the development of a new economic policy may also engage the exemption set out in section 35, the formulation of government policy. Similarly, sensitive information about a private company which a public authority holds in order to process a grant application may be protected by section 43, commercial interests.

Although there is nothing in the Act to prevent a public authority relying on more than one exemption to withhold information, and the Commissioner recognises that there may be cases where more than one exemption may apply, it makes sense to analyse exactly what harm the public authority is trying to protect against and apply the most appropriate exemptions. This process will make it easier for the public authority to justify why those exemptions apply. An attempt to rely on numerous exemptions could create the impression that a public authority is unnecessarily secretive.