Freedom of Information Act Awareness Guidance No 2

Information provided in confidence

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 the issues. Here we consider the exemption relating to information subject to a duty of confidence. The exemption is set out in section 41 of the Act. The aim of the series is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation.

A) What does the Act say?

Section 41 of the Act sets out an exemption from the **right to know** if the information in question was provided to the public authority in confidence. There are two components to the exemption:

- The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". The exemption does not cover information which the public authority has generated itself although another exemption may apply (e.g. s.43 where the information may prejudice the commercial interests of the authority itself.)

- Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.

In trying to decide whether information received from a third party falls within this exemption, it may be necessary to think about two questions: "Can the authority disclose the information?" and, "Can the authority confirm or deny the existence of the information?" For instance, a financial regulator might decline to confirm or deny that it has been provided with a confidential report on a company since to confirm that it even held a report would indicate that it harboured suspicions about the activities of that company. However, if it was already public knowledge that a report had been sent to it, there would be no breach of confidence in confirming receipt. In both cases, the regulator might not wish to disclose the content of the report.

B) What is confidentiality?

A duty of confidence arises when one person (the "confidant") is provided with information by another (the "confider") in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

The law of confidence is a common law concept. This means that rather than an Act of Parliament setting out what is confidential, what is not and the penalties for a breach of confidence, the law in this area has been developed by the courts as individual cases have been brought before them. The common law has strengths, in particular it is flexible and develops over time. It also has some difficulties, for instance it is often necessary to apply the lessons of one case to another which may have very different elements.

For the purposes of FOI, the key issue is likely to be the disclosure rather than the use of information. In trying to determine whether an obligation of confidence has arisen in a particular case, it is likely to be necessary to think first about the circumstances under which information was provided to the authority and second about the nature of that information.

The circumstances under which the information was provided

There are essentially two cases:

- When the confider provides information to the authority, explicit conditions are attached to its subsequent use or disclosure. This may take the form of a contractual term or may be stated, for instance, in a letter.

- Conditions are not stated explicitly but are obvious or implied from the circumstances. For instance a patient does not need to tell a doctor not to pass his or her information on to a journalist: it is simply understood that those are the rules.

The second case is more likely to give rise to some uncertainty since there is always the risk that the expectations of the confider and the confidant may be different. Some of the circumstances which typically give rise to obligations of confidence are reasonably well known. In addition to the patient/doctor relationship, can be added a number of other relationships: client/lawyer, penitent/priest, customer/bank, client/social worker and so on.

Others are more difficult to pin down. For instance, employers clearly have obligations of confidence towards their employees although these are not all encompassing. While it is fairly obvious that information contained in staff appraisals should not be disclosed, other information such as names and job titles are unlikely

to be confidential. If in doubt, it may be sensible to take some advice and to consult whoever may be affected by the requested disclosure of information.

Public authorities that gather information by means of statutory powers, including regulatory and tax collecting bodies, should consider whether the law of confidence (in addition to any statutory prohibitions) would prevent the disclosure of that information to third parties.

The nature of the information

Information which is protected from disclosure by an obligation of confidence must have the necessary "quality of confidence". There are two key elements to this:

- The information need not be highly sensitive, nor can it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion is undermined if it is argued that even trivial matters are covered.

- The information must not be readily available by other means. Information which has been reported in the press or a chemical formula which can be worked out by any chemical analyst, for instance, are unlikely to be viewed by the courts as being confidential. On the other hand, it is not necessary that the information is completely secret. A patient does not lose the right to medical confidentiality, for instance, simply because he or she has given details of their condition to an employer or a friend.

C) When can confidential information be disclosed?

The duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:

- Disclosures with consent. If the person to whom the obligation of confidentiality is owed (whether an individual or an organisation) consents disclosure will not lead to an actionable breach of confidence.

- Disclosures which are required by law. "Law" in this context includes statute, rules of law, court orders etc. (Note, however, that if disclosures are requirements of law, it is unlikely that the person seeking the information will attempt to make use of FOIA in order to obtain it.)

- Disclosures where there is an overriding public interest. There are no hard and fast rules here. The important thing to note, however, is that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones. Confidentiality is recognised as an important thing in itself. In balancing confidentiality against the public interest, the task is not to weigh up the impact upon the individual against the good of society, but rather the good of society against the importance of preserving confidences. In a medical context,

confidentiality is important because is reinforces the bond of trust between patients and doctors, without which people may be reluctant to seek medical advice. In a banking context, confidences are respected in order to maintain trust in the banking system as a whole. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.

D) "Actionable" breaches of confidence

Public authorities relying upon the exemption must be satisfied that any breach of confidence would be actionable. "Actionable" means that an aggrieved party would have the right to take the authority to court as a result of the disclosure. There are essentially two considerations.

- The authority must be satisfied the information in question is in fact confidential. If in doubt, it may be necessary to take advice, including from the person affected. In the final analysis, however, the authority itself must be satisfied that an obligation of confidence exists: there is no veto given to third parties who object to disclosure.

- The aggrieved party must have the legal standing to take action. The Act makes clear, for instance, that one government department or one Northern Ireland department cannot sue another.

E) Issues for Implementation

Central government departments (and some other authorities) make use of systems of protective markings (e.g. Restricted, confidential, secret, top secret). While these markings may provide a useful preliminary indication, it would be a mistake to rely upon them to make final decisions. A document may have been marked "confidential" because it was sensitive at the time of creation but is no longer so. Documents may have been generated by the authority itself, and so not be capable of containing information falling within the exemption. If protective marking systems are to be of assistance, it may be necessary to also record the period of time for which the marking is anticipated to be relevant together with any other information that might assist an FOI decision maker.

Similar considerations will apply to information which has been provided to a public authority marked, "Confidential" or "Commercial in Confidence" and so on. Very often such markings do not provide a good indication of whether information has the necessary "quality of confidence". As with internal markings, what was confidential at the time of writing may no longer be at the time of a request for disclosure. It is also quite likely that some information will have been provided to an authority in the expectation that it would not be disclosed, even though no explicit restriction was placed upon it. In all these cases, if in doubt, it will be sensible to check the position with the provider of the information and any third parties, bearing in mind that it is the authority and not a third party which must decide if the exemption is relevant.

Given the scope for misunderstanding, for instance over the extent of the obligation of confidence in respect of employees, it may be sensible to set out formally the circumstances under which the authority will regard information as confidential. This will alert anyone who wishes to place restrictions upon the use of information of the need to do so explicitly.

The Access Code issued under s.45 of the Act by the Lord Chancellor giving advice on the handling of requests under the Act contains the following passage about contract terms with commercial organisations:

“When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted by the Act. Public authorities cannot "contract out" of their obligations under the Act. Unless an exemption provided for under the Act is applicable in relation to any particular information, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract.”

Although the focus of this advice is commercial interests, it can apply equally to the authorities faced with decisions as to whether to accept confidentiality clauses. (See also the Commissioner’s guidance on the exemption relating to commercial interests, Awareness Guidance No 5)

F) Other exemptions

The law of confidence (and therefore section 41 of the Act) can present difficulties, particularly to those who do not have access to legal advice. For this reason, it may often be worth considering whether there are any other exemptions in the Act which may be more immediately relevant.

Although relations between government departments and internally generated information cannot be protected by the duty of confidence, it may be relevant to look at, say, the exemptions relating to defence, the economy or prejudice to the effective conduct of public affairs.

Information which a court might find was subject to an obligation of confidence because it had been obtained using statutory powers, may also be protected by the exemptions relating to investigations, law enforcement or audit.

Information about personal finances, health of individuals is protected by the Data Protection Act. Section 40 of the Freedom of Information Act is therefore relevant (see Awareness Guidance No 1.)