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Title: The role of the information tribunal under the UK Freedom of Information Act 2000

Volume 1 issue 3

If freedom of information (FOI) legislation is to be of any real value then it must include a means of resolving disputes and enforcing compliance. The relevant provisions of the UK's Freedom of Information Act 2000 (FOIA)⁴ comprise two main elements. First, a dissatisfied applicant for information may apply to the Information Commissioner for a decision under FOIA section 50 as to whether his request has been dealt with in accordance with the Act; secondly, either the complainant or the public authority may appeal to the Information Tribunal ("the Tribunal") against the Commissioner's decision. There is a further right of appeal from the Tribunal to the High Court on a point of law⁵. This Note considers the role of the Tribunal under FOIA.

The Tribunal is not a newly created body. In its previous incarnation as the Data Protection Tribunal it considered appeals under the Data Protection Act 1998 ("DPA 1998"),⁶ and it retains this jurisdiction. FOIA has given the Tribunal a new name, and has greatly increased its importance and likely workload.

The Tribunal consists of a legally qualified chairman and deputy chairmen, together with non-lawyer members. There are two categories of member sitting in FOIA cases: those appointed to represent the interests of applicants for information, and those appointed to represent the interests of public authorities. For most purposes the Tribunal will consist of the chairman or a deputy chairman (presiding), together with two members, one from each category. This "interest representation" model is familiar from the workings of the Employment Tribunal system, where lay members

⁴ The Freedom of Information (Scotland) Act 2002 has a different regime, not discussed in this Note.

⁵ The Tribunal also considers appeals against information notices or enforcement notices issued by the Commissioner, under FOIA section 51 or 52.

⁶ And prior to that, under the Data Protection Act 1984.

are appointed to represent either employer or employee interests and the chairman is a lawyer⁷.

The relevant rules of procedure are contained in the Information Tribunal (Enforcement Appeals) Rules 2005 ("the 2005 Rules"). There is not space for a detailed analysis, but a few points of particular interest are noted below.

Under rule 16 the Tribunal has a discretion as to whether to determine cases at a hearing or on paper; the Tribunal must however hold a hearing if a party so requests, unless satisfied that the case can properly be determined without a hearing. It is suggested that relevant factors in deciding whether to hold a hearing may include: whether the case raises issues of general importance; whether there are difficult issues of law, on which oral argument would assist; and whether there are conflicts of fact which might be resolved by cross-examination of witnesses. So far a number of cases have been listed for oral hearing, but this may partly reflect a desire by the Tribunal to use the early cases in order to give general guidance on the operation of FOIA; hence the Tribunal's willingness to list cases for oral hearing may decrease with time, once a significant number of cases has been decided.

The appellant will be either the individual who complained to the Information Commissioner or the public authority that was the subject of the complaint. The respondent will in every case be the Information Commissioner. Thus the Commissioner has an unusual role under the Act: under section 50 he exercises a quasi-judicial function, but in appeals to the Tribunal he is a party, defending his own decisions. There are good pragmatic reasons for this. In appeals brought by public authorities it would clearly be unsatisfactory if the individual complainant, very likely without legal representation, was left with the task of defending the Commissioner's decision in his favour.

Where the appellant is the individual complainant, then the public authority will not automatically be a party to the appeal – and *vice versa*. However, the individual complainant or public authority may be joined as additional parties, on their own application or by the Tribunal of its own motion, under rule 7 of the 2005 Rules. Other parties may also wish to be joined. For instance, where a commercial

⁷ The special rules about the constitution and jurisdiction of the Information Tribunal in national security appeals are not discussed in this Note.

organisation has supplied information to a public authority, and the issue is whether that information should be disclosed in response to a request under FOIA, the commercial organisation may well apply to be joined under rule 7.

The Tribunal's powers in determining appeals against decision notices are defined in FOIA section 58⁸. The Tribunal must allow the appeal or substitute another decision notice if the decision notice is not in accordance with the law, or if any relevant discretion of the Commissioner ought to have been differently exercised. Otherwise, the appeal must be dismissed. The Tribunal may review any finding of fact on which the Commissioner's decision was based. Some interesting questions will need to be resolved about the scope of these powers, especially in cases involving the application of the qualified exemptions under FOIA. In applying these exemptions decision-makers must balance the competing public interests in disclosing the information in question and in upholding the exemption. It remains to be seen whether the Tribunal will simply substitute its own view for that of the public authority or the Commissioner as to where the balance should be struck, or whether it will adopt a more cautious approach.

An obvious practical point is this: can the Tribunal itself see the information that is in dispute? Clearly if the Tribunal is to do this then the individual who is seeking the information cannot be permitted to see it too – this is the very question at issue in the appeal. Under the 2005 Rules the Tribunal has a limited power to exclude one of the parties from the hearing (see rule 23: the power is exercisable only on application by a Minister of the Crown), but no specific power itself to examine information without disclosing that information to a party. Contrast DPA 1998, under which a Court considering a dispute about the right of subject access conferred by section 7 of that Act may examine the disputed information without disclosing it to the data subject: see DPA 1998 section 15(2).

At the time of writing⁹ the Tribunal's website lists 15 appeals currently being processed. Usefully, the website also gives the time and location of forthcoming hearings. There are three FOI decisions on the website: *Mitchell v Information Commissioner*, *Barber v Information Commissioner*, and *Harper v Information Commissioner*. Detailed analysis of these decisions must await a further article.

⁸ The same provision applies to appeals against information notices or enforcement notices.

⁹ 6th December 2005.

Within the next three to six months there is likely to be a significant volume of Tribunal case law, with the potential to be of great value to all those who need to interpret and apply FOIA.

References

Data Protection Act 1998. Chapter 29. HMSO. Available online at:
<http://www.opsi.gov.uk/acts/acts1998/19980029.htm>

Freedom of Information Act 2000 Chapter 36. HMSO. Available online at:
<http://www.opsi.gov.uk/acts/acts2000/20000036.htm>

The Information Tribunal (Enforcement Appeals) Rules 2005. SI 2005 no. 1. HMSO.
Available online at: <http://www.opsi.gov.uk/si/si2005/20050014.htm>

Information Tribunal Website: <http://www.informationtribunal.gov.uk/>