Using the Data Protection Act and Freedom of Information Act in Employment Discrimination cases

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for the Equality and Human Rights Commission
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td><strong>The Data Protection Act 1998</strong></td>
<td>5</td>
</tr>
<tr>
<td>Jargon used in DPA • Which data is protected • Data Protection principles • Workers’ access to data about other people • Workers’ rights to their own data • Enforcement</td>
<td></td>
</tr>
<tr>
<td><strong>Freedom of Information: procedure</strong></td>
<td>14</td>
</tr>
<tr>
<td>Who is covered • The Publication Scheme • How to apply for Information • What is the cost? • What information can be asked for? • The public authority’s response • Time for response • The duty to provide advice and assistance</td>
<td></td>
</tr>
<tr>
<td><strong>Freedom of Information: exempt Information</strong></td>
<td>21</td>
</tr>
<tr>
<td>Categories of exempt information • The public interest test for qualified exemptions • The exemption for the applicant’s own personal data • The exemption for other people’s personal data • Minutes</td>
<td></td>
</tr>
<tr>
<td>Examples of successful requests</td>
<td>27</td>
</tr>
<tr>
<td><strong>Using Data Protection and Freedom of Information requests to identify discrimination in employment</strong></td>
<td>31</td>
</tr>
<tr>
<td>How to formulate requests • When are FOI and DPA requests useful for individual cases? • When are FOI requests useful to identify discriminatory trends?</td>
<td></td>
</tr>
<tr>
<td><strong>Other ways to get information in employment discrimination cases</strong></td>
<td>41</td>
</tr>
<tr>
<td>Informal conversations, letters, e-mails • Internal grievances • Public sector duty • Questionnaires • Disclosure and additional information</td>
<td></td>
</tr>
<tr>
<td><strong>APPENDIX</strong></td>
<td></td>
</tr>
<tr>
<td>Information Commissioner Decisions on exempt information</td>
<td>44</td>
</tr>
<tr>
<td>Resources</td>
<td>56</td>
</tr>
</tbody>
</table>

Click on headings to go straight to the relevant section
Introduction

The purpose of this guide is to give readers some ideas as to how to use the Data Protection Act and Freedom of Information Acts to obtain information and evidence regarding discrimination in the workplace in order to identify potential cases or areas for action, and to help prove individual discrimination cases.

The summaries of the provisions of the relevant Acts are therefore focussed on aspects of the legislation relevant to these purposes and do not cover other issues, such as how to correct inaccurate data held on yourself.

If you are actually running a case or requesting information, you need to read the wording in the legislation, especially if there is a dispute over whether information is exempt from disclosure. This guide simply provides an overview.

The guide only deals with discrimination in employment, but there is plainly a lot of scope to use it in respect of other areas such as housing, allocation of public sector resources and education.

Journalists, campaigners and policy workers have made good use of the Freedom of Information Act, but it is more of a challenge how to use it well in individual cases of discrimination in employment. Moreover, because of the availability of the questionnaire procedure in discrimination cases, the Freedom of Information Act may be more useful in cases not concerning discrimination. I have tried to put together some thoughts of myself and colleagues as to the uses we can nevertheless make of the Act in the discrimination context. Some of this will be experimental but I have a feeling that the potential has been underused, especially in proactively finding out information to support campaigns and identify discriminatory trends. If you have some good ideas, where questionnaires would not have met the need, do let me know and we can update this guide in the future.

Acknowledgements

With many thanks to the Equality and Human Rights Commission for funding this guide. Many thanks also to all those who have generously contributed their ideas.
Disclaimer

While every effort has been made to ensure the law contained in this guide is accurate, the author cannot take responsibility for any advice given on the basis of its contents. For more advice on the legislation and its application, the site of the Information Commissioner at www.ico.gov.uk is extremely useful. In general, for more fully detailed guidance on the law, relevant evidence and procedure, see the latest edition of Employment Law: An Adviser's Handbook by Tamara Lewis (resources, p56).

The law is as known at 1st March 2009.

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The Data Protection Act 1998

The Data Protection Act 1998 (DPA) provides data protection controls in all fields of life. It implements the EC Data Protection Directive and various statutory instruments have also added requirements. There is an Information Commissioner with powers to enforce the DPA and issue Codes and guidance.

The Commissioner has issued an Employment Practices Data Code of Practice. The code has four parts. Part 1 concerns recruitment and selection; Part 2 concerns employment records; Part 3 concerns monitoring at work; and Part 4 concerns medical information. The Code does not constitute the law but it provides useful guidelines on how the Commissioner will interpret the law.

There is also substantial guidance from the Information Commissioner listed at www.ico.gov.uk/tools_and_resources/document_library/data_protection.aspx

The DPA needs to be interpreted in the context of the Human Rights Act 1998, especially the potentially conflicting provisions of article 8, the right to private life, and article 10, freedom of expression.

The rules under the DPA are detailed and complex. This Guide only provides an introductory overview.

Jargon used in the DPA¹

The ‘data controller’ is the person who collects and processes the data, eg the worker’s employer.

The ‘data subject’ is the person whose rights are protected and who the data gives information about, eg workers, job applicants, trainees, agency staff.

‘Processing’ data means obtaining, recording or holding data or carrying out any operation on the data, eg using it, disclosing it or destroying it.

¹ DPA s1
Which data is protected?

‘Data’ covered by the DPA is:2

- Electronic data: information set out on automated systems, eg computers, CCTV or telephone logging systems.

- Manual information which forms part of an ‘accessible record’ including health records, or a relevant filing system. A relevant filing system is where a set of non-automated information is structured in such a way that specific information related to a particular individual is readily accessible, eg manual personnel files stored in alphabetical order with the contents of each file in chronological order or indexed.

- Any other recorded information held by a public authority (as defined by the Freedom of Information legislation, see p16). But many of the data protection principles do not apply to unstructured manual data held by public authorities.3

‘Personal data’ is data relating to an individual who can be identified from the data alone or taken together with other information in the data controller’s possession.4 A combination of data about gender, age and grade or salary, for example, may well enable an individual to be identified.

It includes an expression of opinion about the individual or indication of anyone’s intentions towards him/her, eg a manager’s view on a worker’s promotion prospects.

It is not enough that the data simply refers to the individual. It must significantly focus on him/her, with content which would affect his/her personal or professional privacy.

It is often hard to decide whether the contents of minutes of a meeting are personal data about those attending the meeting or about individuals discussed at the meeting. This may depend on the focus of the minutes. Where an individual’s suitability for a particular post is discussed, the minutes of this discussion are likely to be personal data about the individual in question.

The Information Commissioner has produced a detailed note on his website, www.ico.gov.uk: ‘Data Protection Technical Guidance: Determining what is personal data’ for situations where it is unclear.

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2 DPA s1
3 DPA s33A
4 DPA s1
‘Sensitive personal data’ means personal data containing information on a worker’s race or ethnic origin, religious belief, political opinions, trade union membership, health, sexual life or the commission of any offence.⁵

The data protection principles

The data controller must comply with the eight data protection principles.⁶ In summary, these are:

1. To process personal data fairly and lawfully and to meet at least one of the conditions set out in DPA Schedule 2 (summarised below). For sensitive personal data, at least one of the conditions set out in Schedule 3 (summarised below) must also be met.
2. To obtain and process data only for specified and lawful purposes.
3. To hold data only where it is relevant and not excessive to the purpose.
4. Data should be accurate and up to date. It is sufficient if the employer took reasonable steps to ensure the accuracy of the data and if the worker has notified the employer that the data is inaccurate, that a note of this is made.
5. Not to keep data for longer than necessary.
6. To process data in accordance with the rights of data subjects.
7. To take measures to prevent unauthorised processing of data and against accidental loss.
8. Not to transfer data outside the European Economic Area unless to a country which has adequate data protection and controls.

Schedule 2 conditions (relevant to the 1st data protection principle)

In summary, the schedule 2 conditions are:

1. The data subject has given consent to processing.
2. Processing is necessary for performing a contract to which the data subject is a party.
3. Processing is necessary for compliance with any legal obligation to which the data controller is subject, other than any obligation imposed by contract.
4. Processing is necessary to protect the vital interests of the data subject.
5. Processing is necessary for the administration of justice or to exercise the functions of a government department or other functions of a public nature.

⁵ DPA s2
⁶ DPA s4 and Schedule 1
etc.

6. Processing is necessary for the purposes of legitimate interests pursued by the data controller or by third parties or those to whom the information is disclosed, except where the disclosure is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

**Schedule 3 conditions (relevant to processing sensitive personal data)**

In summary, the schedule 3 conditions are:

1. The data subject has given explicit consent to the processing.

2. The processing is necessary for exercising any right or performing any obligation conferred or imposed by law in connection with employment.

3. The processing is necessary to protect the vital interests of the data subject or someone else in a case where consent can’t be given by the data subject or the data controller can’t reasonably be expected to obtain the data subject’s consent or, in order to protect the vital interests of another person, the data subject's consent has been unreasonably withheld.

4. The processing is carried out in the course of its legitimate activities by a not-for-profit body in relation to its members (subject to specific requirements).

5. The data has been made public as a result of steps deliberately taken by the data subject.

6. The processing is necessary for the purpose of or in connection with any legal proceedings (including prospective legal proceedings), is necessary for obtaining legal advice or is otherwise necessary for establishing, exercising or defending legal rights.

7. The processing is necessary for the administration of justice etc

7A. The processing is by a member of an anti-fraud organisation and necessary for preventing fraud

8. The processing is necessary for medical purposes and undertaken by a health professional or someone owing an equivalent duty of confidentiality.
9. The processing consists of information as to racial or ethnic origin, is necessary for reviewing equality of opportunity and is carried out with appropriate safeguards.

Note: the above is a summary. For exact wording of the data protection principles and schedules, you need to read the DPA.

Worker’s access to data about other people

In discrimination cases, it is crucial to get information about how the employer has treated other people of a different race, religion, age, gender etc. As is clear from the above principles, in many instances employers can say that the DPA does not permit them to disclose such information.

Getting documents and information for a tribunal case, once it has started, is not a problem because section 35 applies where disclosure is ordered by the tribunal or is necessary for the proceedings (see below).

Section 35 also applies before a case has started, provided it is necessary in connection with the prospective proceedings or for getting legal advice. It is uncertain whether there needs to be a concrete indication that proceedings are pending or it is enough that they are definitely intended or even that they are simply under consideration. However, since the exemption also applies to getting legal advice, this suggests a low threshold. Also unclear is how ‘necessary’ the information must be. But since discrimination cases usually cannot be proved without comparative information, it is highly likely that the information in question will be necessary.

There are several possible approaches when confronted with an employer who, on grounds of the DPA or confidentiality, withholds comparative information requested in a pre-litigation questionnaire or even in grievance or disciplinary proceedings before a tribunal case has started:

- Invite the employer to provide the information on an anonymous basis. This does not work if the comparator is a named individual.
- If the third party is willing to help, gain their consent.
- Invite the employer to seek the third party’s consent.
- Assert that s35 applies, because either it is information necessary for getting legal advice or it is for prospective legal proceedings. It will be a tactical matter whether the worker wants to concretely assert that s/he is intending to bring legal proceedings at such an early stage since this could damage workplace relations and also put employers on their guard.
‘Section 35
(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by order of the court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary -
(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
(b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.’

Workers’ rights of access to their own data

Workers may want to see their personnel file or other information held on them before deciding whether to take a discrimination case. One way to get this information may be to ask for it under the DPA. Unfortunately, the time-scales can be very slow.

Workers have a right of access to their own personal data,7 eg their computerised personnel information, if they make a written request and pay a fee up to £10. This is called a ‘subject access request’.

Employers must comply promptly and within 40 calendar days at the latest from when they have received the fee. Repeated requests for access can only be made at reasonable intervals.

If the employer refuses to give access, the worker can apply to the High Court or county court for an order or to the Information Commissioner for an assessment.

The employer must not tamper with the information before disclosure, except to conceal identity where required.

The worker is entitled to a description of any personal data held on him/her, its purposes and the recipients to whom the data may be disclosed. The employer must show the data to the worker in an intelligible form and, provided it is possible, give the worker a hard copy to keep. The employer must provide information on the source of the data except where it identifies an individual.

7 DPA s7
Exceptions to workers’ rights of access to their own data

Where the data reveals information about any other individual including an individual who is the source of the information (e.g. the author of an appraisal or reference), the employer can conceal his/her identity or, if that is impossible, withhold the data. This is the position unless the individual consents or it is reasonable for the employer to dispense with his/her consent. It may be unreasonable of the employer to refuse to dispense with consent where s/he has not even tried to get it.

There are other exceptions to the right of access, e.g., documents which are legally privileged (i.e., confidential documents between the employer and legal advisers), and information revealing the employer’s intentions in any situation where s/he is negotiating with the worker. There is no right to data processed for management planning if it would prejudice the conduct of the business, e.g., confidential plans regarding future staff reorganisations. There is also no right of access to data processed for assessing suitability for a Crown or ministerial appointment.

There are special rules regarding whether data relating to the worker’s health needs to be disclosed if it would be likely to cause serious harm to his/her health or anyone else’s.

Access to references

If a worker is concerned about a potentially discriminatory reference, one way to find out details before issuing any discrimination case is to ask for details in a questionnaire. However, this is a controversial step which can have repercussions, and it would be better to obtain the reference by a simple request, either from the employer who wrote the reference or from the new or prospective employer who received the reference. Unfortunately, although workers are usually entitled to information written about themselves, the DPA contains restrictions regarding references, depending on who the worker asks for a copy.

Asking the employer who received the reference (‘the recipient’)

Workers can ask their current or prospective employer to show them a reference written by someone else, e.g., their former employer. Unfortunately, this will almost always fall within the rules set out above, i.e., the reference need not be disclosed if it reveals the identity of its author (‘the referee’) and the author cannot be disguised. However, the reference can be disclosed:

→ if the referee consents, or
→ if it would be reasonable for the recipient to dispense with the referee’s consent. In deciding whether this would be reasonable, relevant factors are any duty of confidentiality owed to the referee; any steps taken by the

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8 DPA s7(4) – (6)
recipient to seek consent; whether the referee is capable of giving consent; and any express refusal of consent by the referee.

The Information Commissioner has issued a ‘Data Protection Good Practice Note: Subject access and employment references’, which is available on the website: www.ico.gov.uk It gives this advice to recipients who are asked to disclose references:

- The reference may have been marked ‘in confidence’, but the recipient should consider whether the information actually is in confidence. Factual information (employment dates; absence record) will be known to the worker and should be provided. Information related to performance may well have been discussed with the employee as part of an appraisal system.
- Where it is unclear whether information, including the referee’s opinion, is known to the worker, the recipient should ask the referee whether s/he objects to it being provided and why.
- Even if the referee objects, it may still be reasonable to release the reference without his/her consent. The recipient should weigh the referee’s interest in having comments treated confidentiality against the worker’s interest in seeing what has been said about him/her. Good employment practice suggests a worker should already have been advised of any weaknesses. Without access to a reference, a worker is not in a position to challenge its accuracy. This is particularly important if the reference has prevented a job offer.
- In most circumstances, the recipient should provide the information in the reference or at least a substantial part of it, even if the referee has not consented, unless there are good reasons not to do so, eg a realistic threat of intimidation by the worker.
- The recipient should consider whether the identity of the referee can be concealed (though realistically, the worker usually knows who it would be).

**Asking the employer who wrote the reference**

Workers cannot insist on the employer who wrote the reference disclosing it to them. However, the Information Commissioner encourages employers to provide a copy of the reference if it is wholly or largely factual in nature, or if it contains an appraisal of the worker’s performance or ability of which the worker is already aware.

**Rights in relation to automated decision-making**

If data is automatically processed for evaluating matters such as the worker’s performance, reliability or conduct and solely relied on as a basis for any decision significantly affecting him/her, the worker is entitled to be told of the logic

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9 DPA Schedule 7
involved in the decision-taking. In many situations, where an adverse decision is made on this basis, the DPA gives workers a right to have the decision reconsidered and make representations.

Unstructured manual data

Workers can also ask a public authority to see unstructured manual personal data about themselves provided it isn't too expensive to search out and they identify what they want. This may cover information held about them on an unstructured personnel file or on someone else’s file or generally elsewhere.

Enforcement

If any of the Data Protection Principles are not complied with, the worker can either go directly to court or approach the Information Commissioner. To ask the Commissioner to investigate, the worker must request an ‘assessment’ under s42 as to whether the employer is complying with the DPA. The Commissioner must notify the worker of how he is going about the assessment and the outcome. The Commissioner has power to serve an information notice on the employer requiring information for the investigation and an enforcement notice if he finds the employer has contravened the DPA. The enforcement notice can require the employer to take or stop taking specified steps or to refrain from processing certain data. However, the Commissioner is not obliged to take action on each occasion he believes there has been a breach of the DPA, and he says he will only do so if he considers it is a serious contravention or if it affects a large number of people and is an ongoing breach. The Commissioner has no power to order compensation. The worker can also go to the High Court or a county court if any of his/her rights under the DPA are breached and claim compensation if s/he has suffered any damage, or damage plus distress, as a result. Unfortunately, these methods of enforcement are not very practical in terms of the tight time-scales necessary for running discrimination cases.

There is a notification scheme and register under the DPA on which employers should have registered. With a few exceptions, it is generally an offence to process data if the employer is not registered. For a small fee, members of the public can get a copy of the data entries, which should include details of what sort of data the employer holds, its purposes and to whom it may be disclosed.

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10 DPA s12
11 DPA s7(1) and s9A
Freedom of Information: procedure

The Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOI(S)A) give the public a general right of access to information held by public authorities, including information held by other bodies on behalf of public authorities.

The (UK) Information Commissioner’s website is at www.ico.gov.uk He provides substantial guidance on the operation of Freedom of Information law at www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx The guidance notes quoted in this Guide are taken from this site, but appear to be followed in many cases by the Scottish Information Commissioner.

The Scottish Information Commissioner’s site is at www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp

There is also an Access Code of Practice issued under s45 of the FOIA and a Records Management Code under s46, which is currently under review. The Codes are hard to track down, but seem to be available via the website of the former Dependant for Constitutional Affairs (although the site is not updated): www.dca.gov.uk.

A worker who is employed by a public authority may be able to use the Freedom of Information legislation to get relevant information, which s/he cannot get in any other way. There is no restriction on how the information supplied under it may be used. However, if the information sought by the worker concerns him/herself, s/he must apply under the Data Protection Act, which involves a different procedure (see p10 above for subject access requests).

Who is covered?

The FOIA applies to public authorities in England, Wales and Northern Ireland, UK government departments, parliament and the Welsh and Northern Ireland assemblies. The FOI(S)A applies to Scottish public authorities, the Scottish Executive and Scottish parliament. It is similar to the FOIA, but gives slightly better rights.

Schedule 1 to the FOIA lists the public authorities to which it applies and this list is updated every October. Some authorities are listed by category and others are precisely described. The list includes central and local government, the NHS, state schools, colleges and universities, the Employment Tribunals Service, the Police and publicly owned companies.
The publication scheme

All public authorities must produce a publication scheme, which sets out what kinds of information the public authority will proactively make available, how it can be accessed and the cost.\(^\text{12}\) Very often these schemes are published on the authorities’ websites. The scheme must be approved by the Information Commissioner.

The Information Commissioner produced a model publication scheme for all public authorities from January 2009. It suggests information is made available under these headings:

- what we are and what we do
- what we spend and how we spend it – financial information
- what our priorities are and how we are doing – plans and assessments
- how we make decisions – policy proposals and decisions, decision-making processes and internal criteria
- policies and procedures
- lists and registers
- services

The publication scheme should itemise what information it has within these classifications. Much of the information can be accessed directly on the authority’s website, but sometimes it is necessary to e-mail a request for access. It is worth checking what information is already available on the scheme before making any specific requests.

Some authorities have ‘disclosure logs’, which list previous requests and the replies. The police authorities seem to be particularly good at this. The logs are usually organised by category (‘Human Resources’ seems the best one), date and heading of request. You can then download the request (anonymised) and reply on any subject in which you are interested. Less accessible logs require you to e-mail in to get copies. Either way, it can be interesting – though time-consuming – to check through previous requests.

How to apply for information

A member of the public can request any information held by the public authority, whether or not it appears on the published scheme.

There is no special format for the request. It need only be in writing (eg letter or e-mail), state clearly what information is required, and state the name of the applicant and an address for correspondence.\(^\text{13}\) The request should be sent to

\(^{12}\) FOIA s19; FOI(S)A s23
\(^{13}\) FOIA s8; FOI(S)A s8
someone appropriate, eg the authority’s Freedom of Information Officer, if it has one, or the chief executive.

The applicant does not need to explain the reason for wanting the information and the authority should not try to find out.

**What is the cost?**

Often authorities make no charge, but they can ask for disbursements, eg postage and copying costs. They cannot charge for their own time unless the request would cost more than £450 to answer (£600 for requests to central government), currently calculated at the rate of £25/hour. In that case, they can either charge or refuse to supply the information altogether. In Scotland, the hourly rate is £15/hour and no charges at all can be made for the first £100 and thereafter, only 10% of charges over £100 and up to £600.

Where there is any cost, the authority should issue a Fees Notice within 20 working days of receipt of the request for information. The 20 days stops being counted when the Notice is issued and restarts when the authority receives payment. If no fee is paid within 3 months, the authority need not comply with the request.

**What information can be asked for?**

‘Information’ is wider than ‘data’ covered by the Data Protection Act. It covers information which is recorded in any form, including paper records, handwritten notes, e-mails, photos, reports, computer information and information on audio cassettes and videos. Information which is purely in the knowledge of the authority but unrecorded is not covered.

Non-official information in the possession of public authorities, but not created by their staff in the course of their duties, is not covered.

The applicant can state a preference for how s/he wants the information communicated, eg by hard copy, electronically, verbally, on audio or video tape, by inspection during working hours or any combination of these. As far as reasonably practicable (taking account also of the cost), the authority must accede to that preference.14

There is no requirement under the FOIA to translate information into other languages, although there may be such a requirement under other legislation –

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14 FOIA s11; FOI(S)A s11
eg an authority having to provide information in Welsh in line with its Welsh Language Scheme.

There is no duty on the authority to create information, but it can be asked to provide a summary or digest of information provided it is reasonably practicable.\textsuperscript{15} The Information Commissioner gives guidance on his site \url{www.ico.gov.uk}: ‘Information held: retrieving and compiling information from original sources’. It is not ‘creating’ information to extract it from an electronic data base or to do a simple manual manipulation of information held in files – it is simply a re-presentation of existing information. On the other hand, if retrieving and extracting the information requires a high level of skill and judgement, this would amount to creating new information.

See p31 regarding formulating a request.

**The public authority’s response**

The applicant has two entitlements:\textsuperscript{16}

1. to be told whether the information is held by the authority. This is the authority’s ‘duty to confirm or deny’;
2. to be provided with the information.

In some cases, an authority will withhold information because it is exempt, but will still confirm that it holds such information. In other cases, even confirming or denying whether it holds the requested information is exempt because the answer is too revealing. For more guidance, see ‘Awareness guidance 21: The duty to confirm or deny’ on the Information Commissioner’s site.

The authority can seek clarification of what is wanted, but only in order to identify and locate the relevant information. Provided this is reasonable, the authority need not provide the information unless clarification is made.\textsuperscript{17} This is a good reason to ask precise questions in the first place.

The authority can refuse to supply the information on the basis that:

- it is exempt (see below)
- it exceeds the costs limits (see above)
- the request is vexatious or repeated.\textsuperscript{18} There is guidance on the Information Commissioner’s site: ‘Guidance, section 14: vexatious requests – a short guide’ and ‘Vexatious or repeated requests’. On ‘vexatious’, the Commissioner says the key question is whether the request is likely to cause distress, disruption or irritation without any

\textsuperscript{15} FOIA s11(1)(c); FOI(S)A s11(2)(b)
\textsuperscript{16} FOIA s1; FOI(S)A s1
\textsuperscript{17} FOIA s1(3); FOI(S)A s1(3)
\textsuperscript{18} FOIA s14; FOI(S)A s14
proper or justified cause. Taking account of the context and history of the request, is it obsessive or harassing or causing distress to staff? Does it lack serious purpose or value? Would complying with the request cause a serious burden? To be vexatious, there should usually be fairly strong factors under more than one of these headings. A request is ‘repeated’ if it is made by the same person, it is identical or substantially similar to a previous request, and no reasonable interval has elapsed since the previous request.

If the authority wishes to refuse to give the information, it must provide a refusal notice, clearly stating the reasons for refusal and setting out the internal review process if there is one. There is no requirement to have a review process in the FOIA, but it is recommended in the Code of Practice. It is also recommended that reviews are dealt with in a reasonable time-frame, which the Information Commissioner considers to be 20 working days. In Scotland, there must be an internal review process which is completed in 20 working days.

If a review is held and fails, a complaint can be made to the Information Commissioner. The Commissioner considers the matter and issues a decision notice. If the Commissioner finds the authority in breach of its obligations, he must specify in the notice what steps the authority should take and within what time-scale. Decision notices are available on the UK Information Commissioner’s website at www.ico.gov.uk/tools_and_resources/decision_notices.aspx Scottish decision notices are available at www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.php

If the refusal is based on an exemption, the authority must set out in its notice which exemptions it is relying on and why it believes they apply. Where the exemption is qualified, the authority must explain the public interest arguments it addressed in reaching its decision.

**Time for response**

One problem in effective use of this procedure, especially where discrimination cases are planned or run with tight time-limits, is that authorities do not answer as quickly as they should. The Information Commissioner provides advice to organisations in its ‘Freedom of Information Act: Awareness guidance 11, Time for compliance’.

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19 FOIA s17; FOI(S)A s16  
20 FOI(S)A s20 - 21  
21 FOIA s50; FOI(S)A s47
The authority must respond as soon as possible and no later than 20 working days after receiving the request.\textsuperscript{22} This means stating whether it has the information and providing the information unless exempt. Some authorities seem to take the 20 day limit as simply meaning they must make first contact within that time-scale. That is not in fact the case and they should be reminded at every opportunity that the legislation requires full compliance within 20 days.

A request is received when it is delivered to the authority, not when it is passed to the appropriate person for processing. However, if an ‘out-of-office’ e-mail message provides instructions on redirecting a message, the request is received when it is sent to the alternative contact.

It is advisable to make requests clear and precise. If the authority cannot find the requested information because the applicant has not provided sufficient details, it can ask for clarification. The 20 day limit does not start until the authority has sufficient information to enable it to deal with the request.\textsuperscript{23} The Information Commissioner warns authorities not to delay seeking this clarification in order to give themselves more time to answer the request.

On the other hand, the 20 day limit still runs if the authority is simply helping an applicant to reduce a voluminous request so as to avoid exceeding the costs ceiling.

Except in Scotland, the authority can take longer than 20 days where it is considering the application of a qualified exemption, ie one which is subject to a public interest test. The authority must then make a decision ‘within such time as is reasonable in the circumstances’.\textsuperscript{24} The Information Commissioner sets firm guidelines regarding what he considers is ‘reasonable’ in ‘Freedom of Information Good Practice Guidance No.4: Time limits on considering the public interest following requests for information under the Freedom of Information Act 2000’. Unless the public interest considerations are especially complex, authorities should aim to respond to all requests within the 20 days. Even in exceptional cases, the total should not exceed 40 working days.

Where additional time is required to consider the public interest exemption, the authority must still serve a refusal notice, even though strictly-speaking it has not yet refused to supply the information. The notice must give an estimate of when it will make the decision.

Failure to respond within the correct time-limit is a breach of the Act. If the Information Commissioner becomes aware of a consistent failure to respond to requests within the time-limit, he may issue an enforcement notice. The threat of

\textsuperscript{22} FOIA s10; FOI(S)A s10
\textsuperscript{23} FOIA s1(3); FOI(S)A s1(3)
\textsuperscript{24} FOIA s10(3)
reporting the matter to the Information Commissioner may be enough to prompt a faster response from the authority.

The duty to provide advice and assistance

Authorities are under a duty to provide reasonable advice and assistance to people who propose to or have made requests for information.\(^\text{25}\) This simply refers to the way an authority interacts with applicants in order to discover what they want and to help them obtain this. The Information Commissioner in ‘Freedom of Information Awareness Guidance No 23: Advice and Assistance’ says examples of what would be reasonable are:

- keeping applicants informed of progress with regard to their requests
- helping applicants focus their requests where they are unclear or may exceed the costs limit), eg by advising of the types of information available within the requested category. But the authority must not use this as a way to find out the reasons for a particular application.

\(^{25}\) FOIA s16; FOI(S)A s15
Freedom of Information: exempt information

Categories of exempt information

There are two categories of exempt information:

- **absolute exemptions**: these are not subject to the public interest test.\(^\text{26}\)
- **qualified exemptions**: information which is exempt if the authority can prove the public interest in keeping it exempt is greater than the public interest in its disclosure. The ‘public interest test’ is discussed further below.

Part II of the FOIA (sections 21 – 44) sets out the categories of exempt information. You will need to study these closely if information is refused on the basis of one of the exemptions. Broadly speaking, the categories most likely to arise in the context of employment discrimination cases are:

- **s21**: Information which is reasonably accessible to the applicant by other means.*
- **s24**: The information must be withheld to safeguard national security.
- **s29**: Disclosure would be likely to prejudice the economic interests of the government.
- **s32**: Information which is held by the authority only because it is a court document or a document filed for court proceedings.*
- **s36**: Information, the disclosure of which would be likely to inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation or otherwise prejudice substantially the conduct of public affairs.
- **s38**: Disclosure would be likely to endanger the physical or mental health or safety of any individual.
- **s40(1)**: Personal data of which the applicant is the data subject. (See below for more detail.)*
- **s40(2)**: Other personal data (including manual data), where disclosure would contravene any of the data protection principles in the Data Protection Act 1998 or would be likely to cause unwarranted substantial damage or substantial distress under s10 DPA. (See below for more

\(^{26}\) FOIA s2(3); FOI(S)A s2(2) list the absolute exemptions.
s41: Information obtained by the authority from any other person where disclosure of the information would constitute an actionable breach of confidence.*

s42: Information covered by legal professional privilege (in Scotland – confidentiality of communications).

s43(1): Trade secrets.

s43(2): Disclosure would be likely to prejudice the commercial interests of the authority or anyone else.

Exemptions marked with * are absolute. Also absolute exemptions are s36, in so far as it covers information held by parliament, and s40(2) in so far as disclosure would contravene one of the data protection principles in the DPA.\(^\text{27}\)

Exemptions under the FOI(S)A are set out in Part 2 (sections 25-41). These cover very similar ground.

Section 38 FOI(S)A (similar to s40 FOI) exempts disclosure of personal information including personal information of which the applicant is the data subject; other personal data where disclosure would contravene the data protection principles; personal census information; and the health records of a deceased person.

The public interest test for qualified exemptions

Where qualified exemptions apply under FOIA, there is no duty to confirm or deny where ‘in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information’.\(^\text{28}\)

Similarly, there is no duty to disclose information where ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’.\(^\text{29}\)

Under FOI(S)A, there is no duty to confirm or deny or to disclose information covered by qualified exemptions where ‘in all the circumstances of the case, the

\(^{27}\) For the exact scope and wording of this absolute exemption, see FOIA s2(3) and s40(2) and (3).

\(^{28}\) FOIA s2(1)

\(^{29}\) FOIA s2(2)
public interest in disclosing the information is not outweighed by maintaining the exemption.'\(^{30}\)

The term 'public interest' is not defined in the legislation, but it is a fairly common sense concept and the Information Commissioner has issued a guidance note: ‘Freedom of Information Act, Awareness Guidance No 3: The Public Interest Test’. The Commissioner makes these points:

- There is a distinction between things which are in the public interest and things which merely interest the public.
- The competing interests to be balanced are the public interest in disclosure against the public (not private) interest in withholding the information – though it is true that the private and public interest in withholding information may coincide.
- It is not a good ground to refuse disclosure on the basis that the information is too complicated for the applicant to understand or may mislead the public because it is out of context. If the authority fears this, it should provide more explanation.
- The main reasons against disclosure are those set out in the exemptions themselves. The European Convention on Human Rights may also provide a reason against disclosure, eg if disclosure breached the right to privacy.
- Reasons in favour of disclosure would include:
  - furthering understanding of and participation in debate about the issues of the day.
  - promoting accountability and transparency regarding the spending of public money.
  - improving decision-making by obliging officials to make reasoned explanations for their decisions.
  - allowing individuals to understand decisions made which affect their lives and enabling them to challenge those decisions.
  - bringing to light information regarding public health and safety.

The exemption for the applicant’s own personal data\(^{31}\)

This refers to personal data as defined by the Data Protection Act (see p6). It includes electronic data, paper-based structured filing systems and unstructured manual data held by a public authority. If the requested information is the applicant’s own personal data, there is an absolute exemption from the FOIA and FOI(S)A, but s/he can acquire it by means of a subject access request under the DPA (see p10).

\(^{30}\) FOI(S)A s2(1)

\(^{31}\) FOIA s40(1); FOI(S)A s38(1)(a)
The exemption for other people’s personal data\textsuperscript{32}

This exemption is the one which is most likely to cause problems and the Information Commissioner has considered many complaints about information withheld on this ground. He has produced a detailed guidance note: ‘Freedom of Information Act, Environmental Information Regulations: The exemption for personal information’.

The difficulty is that there is a potential clash between the right to information under the Freedom of Information legislation and protection of individuals’ personal information under the Data Protection Act.

Personal data is as defined by the Data Protection Act (see p6). The data must relate to a living person and that person must be identifiable.

The exemption most commonly applies where disclosure of such third party data would breach one of the eight data protection principles in the Data Protection Act (see p7). In this case, it is an absolute exemption and no additional public interest test applies. Even where the exemption applies, the authority is still under a duty to confirm or deny whether the information is held – unless the confirmation or denial would in itself breach the DPA.

The Information Commissioner thinks disclosure is unlikely to breach any of the data protection principles other than the first one. Under the 1\textsuperscript{st} data protection principle, data cannot be disclosed unless at least one of the conditions in Schedule 2 is met. In the case of sensitive data, at least one of the conditions in Schedule 3 must also be met. See pages 7-8 for more detail on these. Disclosure must also be fair and lawful.

The Information Commissioner says only conditions 1 (the data subject gave consent) and 6 should be relevant to disclosure under the FOIA. This is because the other conditions all refer to disclosure for a specific purpose, which cannot apply, because the FOIA is applicant and motive blind – disclosure is effectively to the public at large and the authority cannot take into account the applicant’s identity, intentions or purpose.

Schedule 2 condition 6 says:

‘The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.’

\textsuperscript{32} FOIA s40(2); FOI(S)A s38(2)
This is not the same as the public interest test for qualified exemptions (see above). The Information Commissioner recommends a three part test:

1. There must be a legitimate public interest in disclosure. (Disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant.) This means a genuine public interest not mere public curiosity.
2. The disclosure must meet that public interest.
3. The disclosure must not cause unwarranted harm to the interests of the individual.

Factors to consider when weighing the interests of the individual may include:
- Whether the information relates to the individual’s public life or private life (which would include their finances). Information about private life deserves more protection.
- The seniority of the employee or whether s/he has public-facing duties. Information about a senior official’s public life should generally be disclosed.
- The potential harm or distress in a personal capacity caused by disclosure.
- Risk of embarrassment or public criticism over administrative decisions or the interests of the authority itself should not be taken into account.
- Whether the individual has objected to disclosure and their reasons are relevant but not conclusive.
- The reasonable expectations of the individual as to whether such information would be disclosed may be relevant but not conclusive in the absence of other factors.
- Whether information can be edited to remove personally identifiable information without reducing the value of the information (this is called ‘redacting’ the information.) This is not feasible where, eg, information regarding a named individual is sought.
- Disclosure always involves some intrusion with privacy, but that intrusion will not always be unwarranted.

By way of illustration some Information Commissioner decisions reviewing authorities’ refusal of disclosure are set out in the Appendix at p44. From these decisions, as well as the Information Commissioner’s Guidance Notes, the following indicates the likely approach:

- the more senior the employee, the less likely it is that disclosure about him/her acting in an official capacity would be unfair. This is because senior employees are more likely to be responsible for making important policy decisions or decisions regarding expenditure of public funds.
- information about an individual’s home or family life or personal finances is likely to deserve protection. Information about someone acting in a work capacity should normally be disclosed unless there is some risk to the person concerned.
disclosure of a salary band may well be fair, even though it infringes on privacy to some extent, whereas disclosing an individual’s precise gross salary is unlikely to be fair as it would cause unwarranted distress. There is a detailed guidance note on the Information Commissioner website: ‘Freedom of Information Act: When should salaries be disclosed’. Where scales are very wide or the mechanism for choosing where someone fits on a scale is unclear, disclosure should narrow the scale disclosed, eg to the nearest £5000. More senior staff can expect greater scrutiny of their pay than junior employees. Legitimate concerns about corruption or mismanagement could suggest greater disclosure. Presumably a legitimate concern regarding widespread discrimination could also favour disclosure though the Information Commissioner does not address this point.

information on the application forms of other candidates in a recruitment process can be provided in a generalised form if it would cause unwarranted distress to provide too much precise detail.

information about disciplinary action against a particular employee is more likely to be disclosed where it concerns a measure taken against a senior employee over a serious allegation of impropriety or criminality. This is particularly so where an external agency is involved in an investigation. Disclosure is less likely about an internal disciplinary procedure concerning a relatively minor matter.

where parties have agreed confidentiality clauses in compromise agreements made on termination of employment, it is probably unfair to disclose the information contained in those agreements

sensitive information regarding a named individual’s health, ethnic origin, religious belief or sexual life is unlikely to be released.

Minutes of meetings

The Information Commissioner has given topic specific practical guidance: ‘What should be published: minutes and agendas’. As a general rule, an authority should publish minutes of senior-level policy and strategy meetings and background documents for the meeting. These should be unedited where possible and if they are edited, this should be made clear. If a request is made for the full document, the authority must consider whether to disclose information in the usual way. Minutes which were exempt at the time of the meeting because of sensitive circumstances, may well be less sensitive some time later once the policies being discussed have been implemented.

Even where some information is still exempt and can be edited out, in most cases it will be possible to give broad headings of what was discussed, the dates and times of meetings and names of who attended.
Examples of successful requests

The following are examples of Freedom of Information requests in the employment context which appeared to be fully – though succinctly - answered by the authority concerned. All these appeared on the disclosure logs of the relevant authorities. The full request is quoted verbatim, so that you can see what kind of requests may be successful. This is not to say that this is the best or only way to formulate a request. (See p31 regarding formulating requests.)

To a government department: Can you provide the number of job vacancies which were externally advertised by the department between April 2007 and April 2008?

To a council: Is your authority expecting to reduce the number of staff employed by the authority in 2009 due to the economic downturn? If so, how many FTE staff posts may be reduced and what percentage is this of the authority's workforce? Is your authority expecting to make compulsory redundancies and if so, how many FTE posts may be lost this way?

To a council: Please supply a full copy of the single status / job evaluation agreement for phase 1 which was signed by the Council and the unions and the date it was signed. If different elements were signed at different times, please indicate each element and the date, ie agreement in principle, pay protection, implementation etc.

To a government department: How many people have left since January 2005 citing Bullying and Harassment and / or the department’s inadequacies in dealing with such complaints as their reasons?

To a police force:
(1) How many officers have left the force in the last 12 months?
(2) What were the 3 most common reasons given for leaving arising out of exit interviews?
(3) If you do not have a list of reasons, what were generally the most common reasons given for leaving?

To a police force: How long do you have to work as a police constable before applying for a specialist area like the mounted division?

To a police force:
(1) How many applications to join the force as police officers in the last full year were received from (a) white males (b) females (c) minority ethnic candidates?
(2) Of those, how many were offered jobs in each category?

To a police force:
(1) How many police officers were serving with your force as of 1 January 2007?
(2) How many of those officers had less than 5 years service as at 1 January 2007?
(3) How many officers in your force resigned between 1 January 2006 and 31 December 2006?
(4) How many officers transferred out of your force to another force between 1 January 2006 and 31 December 2006?
(5) How many officers in your force will reach 30 years’ service/their scheduled retirement date (i) between 1 January 2007 and 1 January 2008 (ii) between 1 January 2008 and 1 January 2009?

To a police force:
(1) The number of police hours or days lost through sickness in the last 3 years, ie sickness which is recorded as work-related stress and traumatic stress for operational officers, not civilian staff?
(2) What is your force’s policy on the treatment of officers affected by work-related stress and traumatic stress?
(3) Does your force’s training department have any sessions dealing with stress and trauma and how to deal with it? If not, are there plans to implement any such sessions?
Comment: 1st question could not be answered because the force did not record causes of sickness absence.

To a police force:
(1) In the financial year 2007/8, what was the total amount of police officer (not staff) days lost to you force through medical problems associated with stress, anxiety or depression?
(2) In the 2007/8 financial year, how many officers were off sick all year through medical problems associated with stress, anxiety or depression?

To a police force:
(1) How many officers were on restricted and recuperative duties as at 31 December 2007?
(2) How many of these are working less than their normal contracted hours?
(3) How many of these are working for 4 or less hours per day?

To a council:
(1) In the last financial year, how many individual payouts for racial discrimination were made by the authority (i) to employees and (ii) to members of the public? This relates to payouts in 2007/8, regardless of when the discrimination took place.
(2) What was the total value of all the claims in (i) and in (ii)?
(3) Please provide a brief description of the circumstances surrounding the award of the single biggest payout.
Comment: As the answer to question (1) was ‘none’, it is hard to know whether the council would have willingly answered questions (2) and (3).
**To a police force:** For each of the last 5 financial years,

1. What are the total number of public complaints recorded against minority ethnic police officers (classified by category)?
2. What are the total number of investigations conducted by Professional Standards against minority ethnic police officers (by category)?
3. What are the total number of minority ethnic police officers (by category) suspended?
4. What are the total number of public complaints recorded against all police officers?
5. What are the total number of formal investigations conducted by Professional standards?
6. What are the total number of police suspended?

*Comment: the original request asked for statistics regarding ‘Black Minority’ officers. The authority clarified with the applicant that statistics were wanted regarding all minority ethnic officers by category.*

**To a police force:** During each of the last 5 financial years,

1. How many officers/staff have made complaints against your force or issued grievances over racial discrimination?
2. How many Employment Tribunals have been instigated containing a racial element?
3. How many of the ET cases have been settled or lost?
4. How much money has the force paid out in settlements or awards as a result of race discrimination claims which may or may not have reached ET stage?

**To a police force:**

1. How many complaints of discrimination have been made by police officers and staff and recorded during the years 1 April 2005 – 31 March 2006 and 1 April 2006 – 31 March 2007?
2. Of these, how many were recorded as discrimination each year in each of the following areas: (a) race (b) gender (c) disability (d) faith (e) sexual orientation (f) age?
3. How many of these complaints have resulted in the force paying financial compensation to police officers and staff during the years 1 April 2005 – 31 March 2006 and 1 April 2006 – 31 March 2007?
4. How much financial compensation has the force paid to police officers and staff following these complaints during the years 1 April 2005 – 31 March 2006 and 1 April 2006 – 31 March 2007?

**To a police force:**

1. Number of ethnic minority police officers employed by the force at present?
2. Number of resignations of officers from the force from April 2000 to date?
3. Number of ethnic minority officers resigning from April 2000 to date?
4. Number of officers sacked from 2000 to date?
5. Number of sackings of officers due to drink driving from 2000 to date?
(6) Number of race/religious complaints from police officers from 2000 to date, including the number of complaints in which police officers were disciplined, including the level of discipline ie sackings, resignations, misconduct hearings etc

(7) How much is the cost of training a police officer from the recruitment date to the end of the probationary period?

(8) Percentage of probationers resigning within the probationary period over the last 5 years?
Using Data Protection and Freedom of Information requests to identify discrimination in employment

How to formulate requests

Information requests can be put in simple letters or e-mails containing this basic information:

- Date.
- Name and address of applicant.
- Optional: A statement that the request is made under the Freedom of Information Act 2000 or Freedom of Information (Scotland) Act 2002 (as relevant).
- Information requested.
- The format in which the response is wanted, eg electronic or hard copy.
- A reminder that the date for indicating whether the information is held as well as the date for supplying the information is promptly and at the latest, 20 working days from receipt of the request by the organisation.

It is not required to state the reason you want the information and it is best not to do so, unless you are seeking assistance on what kind of information may exist around a certain issue.

As with writing discrimination questionnaires, it is important to itemise precisely what you want. If the questions are too vague, the authority might either guess wrongly at what you want, deliberately provide a misleading answer, delay or refuse to answer.

**Number questions:** Questions and sub-questions should be numbered so that answers are not merged, fudged or overlooked.

**Don’t be vague:** Requests like ‘please provide details of all employees recruited this year’ is insufficiently precise because it does not itemise what details are wanted. A better question would be ‘Please provide a list of all employees recruited this year by reference to job title, department and date of birth’.

Also avoid vague and potentially enormous requests like ‘Please state everything you know about the level of bullying in the organisation.’ Again, this may not give you what you want, it is likely to lead to delay and could exceed the costs limit.

**Be precise:** When asking for statistics, be precise about (i) the description of workers about whom you want the statistics (ii) the period over which you want
the statistics to be covered (iii) the categories you wish listed when asking about ethnic origin or religion.

**Give alternatives:** If you are unsure in what categories information is held or can be identified, give alternatives to save time, eg: ‘Please state all staff employed in the IT department as at 1st January 2009 with their date of birth or, if unknown, age in the categories (a) up to 30 (b) 30 - 39 (c) 40 – 49 (d) 50 – 59 (e) 60 and above.’

**Don’t only ask for global statistics:** Global statistics are not always particularly informative. Breaking them down into smaller categories is better. For example, rather than asking ‘Please state all employees employed by the authority as at 1st January 2009 by reference to gender’, it may be more useful to ask ‘Please state all employees employed by the authority as at 1st January 2009 by reference to gender, job title and department’.

**Ask the comparative question:** In discrimination cases, the comparative question is always crucial, eg

- don’t just ask: ‘How many part-time employees were working for the authority as at 1st January 2009’. Instead ask: ‘How many employees were working for the authority as at 1st January 2009? Of these, how many worked full-time and how many worked part-time?’
- don’t just ask: ‘How many black employees were dismissed in the years 2006 – 2008 inclusive?’. Instead ask: ‘How many employees were dismissed in the years 2006 – 2008 inclusive? Of these, how many were black and how many were white?’
- don’t just ask: ‘How many employees aged 50 and above were made redundant in 2009?’ Instead ask ‘State all employees who were made redundant in 2009, giving their date of birth’.
- don’t just ask: ‘In the 2007/8 financial year, how many police officers were off sick all year through medical problems associated with stress or depression?’ Instead ask ‘How many police officers were employed in the financial year 2007/8? Of these, how many were off sick for a continuous period of 6 months or more (stating the length of time in each case)?’

To save time to-ing and fro-ing, where there is doubt as to what kind of information is held, the initial enquiry should include a question as to what data is held in the particular area and in what format.

For more guidance on how to formulate questions precisely, see the Central London Law Centre guides on writing discrimination questionnaires which are on the EHRC website (resources, at p57). The examples of actual requests given on pages 27 – 30 above are not all as precise and useful as they could be.
When are FOI and DPA requests useful for individual cases?

- It is a way to find out information at an early stage without the worker having to stick out his/her neck by alleging discrimination in a grievance or questionnaire. It is even possible for someone other than the worker to make the request, which does not draw attention to the worker at all.

Advantages over tribunal orders
- Once a case is running, a tribunal will only order an employer to disclose information or documents if they are clearly relevant. Moreover, the worker must explain to the tribunal why the information is potentially relevant when seeking an order. If a worker is exploring evidence and unsure whether it will be relevant, or does not want to give away his/her thinking to the employer, a FOI request may be a more successful route.

- A FOI request is a good way to get relevant information from someone other than the worker’s employer. For example, employment agencies often have useful information but are reluctant to get involved where the employer is their ‘client’. Although employment tribunals can order third parties to disclose documents once a case is running, they can be reluctant to do so.

Advantages over the questionnaire procedure
Note: Freedom of Information (FOI) requests should never be used instead of a questionnaire. The questionnaire procedure is always important (see p42).

- You could use both a questionnaire and the FOI, asking FOI questions either before or after sending a questionnaire. An early and to the point FOI request may help focus the questionnaire.

- Where a questionnaire cannot be served because it is out of time and the tribunal refuses to give permission or only gives permission for a few questions. There is no time limit beyond which you cannot make a FOI request.

- Where a questionnaire has been used but you failed to anticipate some answers and want to ask follow-up questions. Although a tribunal may give permission for a second questionnaire or allow questions as part of tribunal interim procedures, this cannot be relied on.

- A FOI request at a very early stage, before sending a questionnaire, is useful because (unlike for the questionnaire procedure) it is not necessary to write out a statement of the events which lead the worker to think s/he
has been discriminated against. FOI requests need not state motive or reason.

- The authority may be less on its guard if an early request is made before discrimination is even suggested and may therefore give a more accurate answer. Under the FOI, the authority is not entitled to enquire why the applicant wants the information in question. Though obviously an enquiry which asks for information by reference to matters such as ethnic origin signals that discrimination is a potential issue.

- The authority may also be less on its guard if information is requested by someone other than the worker and is sent to the authority’s Freedom of Information officer as opposed to a manager who is already in dispute with a worker over a particular issue.

- In theory, you should get a reply within 20 working days, which is quicker than the 8 weeks allowed for answering a questionnaire. Make sure you do not give the authority an excuse to delay, eg by not paying any copying fee promptly or making a vague request which needs clarification before it can be answered.

- You don’t need permission to ask follow up questions. As long as you don’t do it too often and become vexatious. But the Information Commissioner’s definition of ‘vexatious’ suggests something more malicious (see p17 re guidance).

- The tribunal cannot order an employer to answer a questionnaire. An employer may choose not to answer and gamble on the employment tribunal at the final hearing not drawing an adverse inference of discrimination. This is a particular risk following the recent *D’Silva* case. Whereas a public authority is under a statutory duty to answer a FOI request (as long as the information is not exempt).

**The worker’s personnel file**

Once a tribunal case is running, it is almost always possible to get a copy of the worker’s personnel file as part of the disclosure procedure, but if there is any doubt as to its relevance, a tribunal may not make an order. Also, disclosure in a tribunal case happens quite late in the day, after the claim has been written and response received. It can be an advantage to see the file at an earlier stage, and ideally, even before any tribunal case is started. In all these situations, a subject access request under the Data Protection Act may be a better route – assuming the file is held electronically or on a relevant filing system or, if unstructured, held by a public authority.
There is always a danger that the personnel file may contain matters unhelpful to the worker and by asking for it, these will be drawn to the employer’s attention. In this respect, it may be safer to look at the file as part of a pre-litigation DPA request than to ask for disclosure during a tribunal case, where disclosed documents tend to become part of trial bundles.

**Other personal data belonging to the worker**
Again, it can be useful to get electronic data and other data covered by the DPA which is held on the worker before a case starts or where a tribunal may be reluctant to make an order because it is not clear the data is relevant.

**References**
Workers may suspect their previous employer has written a discriminatory reference. A worker would not want to start any tribunal case without actually seeing the reference. If informal attempts to get a copy from either the referee or the recipient don’t work, the worker can make a subject access request to the new or prospective employer. See p11 regarding whether the recipient should disclose the reference. The worker may not want to upset a new employer so may choose instead to serve a discrimination questionnaire (see p42) on the original employer, but this could take a long time to answer. Also, a questionnaire can be written more effectively if the worker has seen the questionnaire content first. Cases regarding a negligent reference (as opposed to a discriminatory one) would be taken up in the county court or High Court and it may be possible to get a copy of the reference by means of pre-action disclosure under the Civil Procedure Rules.

**When are FOI requests useful to identify discriminatory trends?**
A trade union or campaign organisation may use the Freedom of Information legislation to find out information without any particular case in mind for various purposes, eg
- policy work
- campaigning
- identifying discriminatory practices
- identifying problems in advance
- checking on how the authority is performing its public sector duties
- researching indirect discrimination as a preliminary to seeking out test cases
- collating information for use in individual cases as they arise

Unions and organisations need to be careful how to use the procedure most effectively:
Formulate requests so far as possible to avoid the exemptions. In particular, avoid requests which entail disclosure of private information (pay, appraisals, conduct records etc) of identifiable individuals. This is a considerable restriction on what can be found out, and in borderline cases, organisations may want to take a case to the Information Commissioner. But on the whole, you want to avoid becoming bogged down in arguments about disclosure.

Keep requests manageable so that they are within the costs ceilings, bearing in mind the hourly rate which can be attributed to staff time collating the information. Otherwise, not only may you be asked to pay, but you may be refused the information altogether. To keep costs down:
- don’t ask for what you can find out easily by other means
- don’t ask for what is published anyway on the authority’s website as part of its publication scheme
- break down your requests, eg if you want to find out detailed statistics regarding the treatment of staff across a whole organisation, you could make separate requests at intervals department by department. Be careful because the employer can combine the total cost of all requests received from one person, or several acting together, over 60 working days as long as the requests relate to similar information. Also avoid making vexatious or repeated requests (see p17 for definition).

In your overall strategy, do not become vexatious in your requests (see p17). Generally this is easy to avoid as it refers to obsessive and harassing behaviour. The Information Commissioner says it can include imposing a significant burden on the employer, but not if it is the only factor indicating vexatiousness and not simply because of the overall time and cost involved. The example given by the Commissioner in his guidance note ‘vexatious or repeated requests’ is where an applicant sent 20 requests, 73 letters and 17 postcards over a 2-year period, repeating many requests even before they were answered.

Overleaf are some ideas as to areas to explore and possible questions.
Sexual harassment

You may feel there is a general problem of sexual harassment in the authority or you may be concerned about a particular individual. If you ask for information which identifies the alleged harassers or those who have been harassed, the employer is likely to claim the personal data exemption. In the first instance, you may have to be satisfied with more general statistics. You can follow up with more questions subsequently. For example:

‘1. Please state the number of employment tribunal cases for sexual harassment which have been brought against the authority in the last 5 years. In each case, what was the outcome?

2. Please state the number of internal grievances regarding sexual harassment which have been brought in the last 3 years by reference to (a) outcome (b) whether any involved the same alleged harasser.

3. Please state whether you have taken any form of action, including informal advice, against anyone accused of sexual harassment over the last 3 years. In each case, what was the action?

4. In the Leisure Department, please state for over the last 3 years (a) the number of complaints of sexual harassment and the outcome (b) the number of grievances brought regarding bullying or unfair treatment (i) by female employees (ii) by male employees (c) the number of employees by reference to sex transferred out of the department and whether at their own request (d) the number of employees by reference to sex who have left the authority, whether they resigned or were dismissed and their reasons.’

Redundancy - prevention

If a large redundancy exercise is on the horizon, and the union wants to ensure the employer does not use selection criteria which disproportionately target certain groups, an option is to check the impact first. For example:

‘1. Please state the number of employees in the Housing Department at today’s date by reference to:
(a) start date
(b) racial group (please use categories adopted by the Council in its monitoring)
(c) gender
(d) whether full-time or part-time
(e) live disciplinary warnings
(f) appraisal rating in the year 2008/9
(g) number of days absent through sickness in the year 2008/9.

2. If you have any potential redundancy selection criteria in mind, please state what these are and in each case
(a) how you intend to measure them against each employee
(b) who will do the measuring
(c) what you would be trying to achieve by using such a criterion.’

Comment on question 1: The answer would show you whether criteria such as length of service, full-time status, clean conduct record, appraisals or attendance record, disproportionately target women or certain minority ethnic groups. If the authority does not have computerised monitoring systems, obtaining the information in a large department may exceed the costs limit. You could break down the requests to avoid this, but you need to stagger them over a long period (see above). Regarding the personal data exception, this information could be provided on an anonymous basis unless there were so few workers of one sex or racial group that they would be easily identifiable. In such a case, you could get the consent of the minority workers to disclosure or agree the Council omits them from its disclosure and you can fill the gap by talking to the individuals themselves.

Comment on question 2: This question arises at a later stage, when redundancy selection is more imminent. The point of (c) is to ascertain the nature of the employer’s defence to any indirect discrimination claim.

Redundancy – what happened

Where you have the impression that a redundancy selection exercise has disproportionately targeted employees of a particular race or sex etc, you could try to get more information via a FOI request at an early stage to feed into the appeals process generally. For example (depending on the discrimination strand which seems targeted):

‘1. Please state in relation to everyone in the redundancy selection pool
(a) their start date
(b) their racial group (as defined in the authority’s monitoring categories)
(c) male or female
(d) whether pregnant or on maternity leave
(e) whether selected for redundancy and the reason
(f) their score on each of the redundancy selection criteria.

2. Who chose the redundancy selection pool, when and in consultation with
3. Who chose the redundancy selection criteria, when and in consultation with whom.

4. In relation to each selection criterion,
   (a) how was it measured and by whom?
   (b) why did you choose it as a criterion and what were you trying to achieve?’

Comment: Do not ask for information which you already have by other means, since you need to keep the cost of the total request below the limit. Questions 1 and 4 are the most important. Regarding possible use of the personal data exemption in relation to question 1, see comments on the previous example (Redundancy – prevention).

**Flexible working**

Despite an authority’s positive policy regarding flexible working, it may be operating very differently in different departments. To highlight inconsistency in its application and problem areas, you need to do some research. For example:

1. Please state as at today’s date the (i) number of full-time (a) male and (b) female employees and the (ii) the number of part-time (a) male and (b) female employees employed in each department.

2. Please state by reference to sex the number of formal requests under the Flexible Working Regulations in each department over the last 2 years. Of these, by reference to sex, how many in each department were agreed and how many were refused.

3. Please state in each department how many women have become pregnant over the last 3 years and in each case (a) how many went onto maternity leave and how many were dismissed before; (b) how many returned after maternity leave and whether this was on full-time or part-time working; (c) how many returned full-time to the same job they held previously as opposed to full-time in a different job.’

Comment: You need to adapt these questions to the relevant issues in the authority, also bearing in mind the costs limit. In a discrimination questionnaire in an individual case, you would be able to explore statistics to a greater extent.
Public sector duties

It should not be necessary to use the FOI legislation to gain information regarding how authorities are complying with their public sector equality duties in the field of race, gender and disability, since part of the duties themselves is to be open, consult and monitor. Nevertheless, FOI may be a useful tool with uncooperative authorities. Bearing in mind the costs limits and that the duty continues over time, staggered requests may be necessary (see above). But you could invite the authority to provide information even if it does exceed the costs limit, bearing in mind their general duty. The questions below as a starting point should not be too time-consuming for the authority to answer.

1. Please list all policies which you have introduced in the last 2 years concerning the recruitment of staff, treatment of existing employees or which in any way affect existing employees. In each case, please state whether you carried out an equality impact assessment. If so, please provide a copy. If not, please state why not.

2. With regard to the policy on reducing homeworking, which you introduced last month, please state whether you carried out an equality impact assessment. If so, please provide a copy. If not, please state why not.

3. What monitoring have you carried out over the past 3 years with regard to (a) recruitment (b) promotion (c) disciplinary action (d) dismissals (e) redundancies (f) appraisal markings (g) pay (h) flexi working. In each case, which categories have you measured, ie (i) sex (ii) race (iii) disability (iv) religion (v) sexual orientation (vi) age?

4. If you have not monitored any of the above working practices or if you have omitted any of the categories, please explain the reasons.

5. In relation to question 3, please state (A) at what intervals you have evaluated the monitoring results and by what method (b) any action you have taken as a result.'
Other ways to get information for employment discrimination cases

Informal conversations, letters or e-mails

Informal approaches are often the best starting point, as they cause less upset in the workplace and employers may be less on their guard, especially if the letter or e-mail comes from the worker rather than the union or lawyer. This is usually a good first step for finding out whether there is an issue to explore, eg asking for feedback after failing in a promotion attempt may instantly reveal there is a valid non-discriminatory reason. It is also useful to pin employers down on their reasons for certain decisions at an early stage, when they may be more open. Purely verbal conversations, though, may not be very useful as evidence later.

Internal grievances

Grievances can be a way to find out more information, especially regarding a manager’s reasons for taking certain actions. How much evidence can be gathered through a grievance exercise rather depends on the issue, the type of workplace and the nature of the grievance procedure. Managers may resist revealing information to the worker about treatment of comparators on grounds that it is irrelevant or is a breach of the Data Protection Act.

There are many reasons why it may be necessary to bring an internal grievance. But if the aim is purely as a method to collect information for potential future cases, it may not be completely effective. The downside of grievances is that they tend to damage work relations. Also, the worker is likely to be forced to decide at an early stage whether or not to allege the unfair treatment is discriminatory.

Collective grievances are sometimes appropriate, especially in a unionised workforce where an issue affects several workers. These make individuals less vulnerable to subsequent repercussions.

Public sector duty: race, gender, disability

Public sector employers are under a duty to eliminate discrimination and promote equality of opportunity across all their functions, including the employment function, in the areas of race, gender and disability. This requires them to consult, evaluate and make impact assessments. Under the Race Relations Act 1976, in particular, authorities must monitor existing staff, job applicants, staff
applications for training and promotion. Authorities with 150 or more full-time staff must also monitor disciplinaries, grievances, performance appraisals, training and leavers. Results must be published annually. This is a good way to find out important statistical information – provided the authority is monitoring as it should.

The questionnaire procedure

This is the most important and useful source of information for individuals bringing – or thinking of bringing – discrimination cases. If this is used properly, there may be nothing extra to be gained from Freedom of Information requests.

The questionnaire procedure enables workers in discrimination cases to send their employers a set of written questions asking for evidence and information, eg regarding:

- why the employer made key decisions
- about a comparator’s circumstances, to see why s/he was treated better
- statistics generally by reference to the discriminated-against characteristic (race, sex, age etc)
- in a disability case, what steps the employer took to make reasonable adjustments

If the employer fails to answer fully within 8 weeks, the tribunal can reach adverse conclusions at the final hearing of the case, and it may help the worker prove discrimination.

The questionnaire can be sent to the employer before a tribunal discrimination case is started, but in order to get an answer before deciding whether to go ahead, it will need to be sent very early. Otherwise, a questionnaire can be sent within 21 days after a case has started (28 days for a disability discrimination questionnaire). The tribunal's permission is needed for a late or second questionnaire.

Central London Law Centre has produced detailed guides to using the discrimination procedure which are listed at the end of this Guide (p57) and available on the EHRC website.

A questionnaire should be used to its full potential. It is the procedure designed for individual cases, and tribunals and employers’ representatives are used to the concept. FOI requests should never replace the procedure for tribunal cases but may supplement it. They may also be useful in other contexts.

In theory, a letter formulating a FOI request could be written the same way as a set of questions for a questionnaire, but it is less likely to be answered properly.

Some advantages of the questionnaire procedure over Freedom of Information (FOI) requests are:
- It does not exclusively apply to public authority employers.
- Far more information can be requested, because the cost to the employer in gathering the information is irrelevant (though a completely over-the-top questionnaire would provide the employer with a good reason for not answering it all). To see the length of a typical questionnaire, see the Central London Law Centre guides mentioned above.
- The exemptions, including those regarding personal data, do not apply because of s35(2) of the DPA (see p10). Although it is untested whether a pre-litigation questionnaire falls into this exemption in the same way that a questionnaire does once a case has started, the wording of s35 does appear to cover that situation. If the employer cites the DPA as a reason for not answering a pre-litigation questionnaire, the worker should write a letter stating that s/he intends to bring a discrimination case and the questionnaire is for the purpose of those prospective proceedings and/or for establishing legal rights.
- Although in theory FOI requests should be answered within 20 days, experience suggests that delays occur, with unhelpful and partial responses, whereas questionnaires might be answered more quickly. (Note that it is only in exceptional cases, where there is a complex public interest test to be considered for a qualified exemption, that an authority may take up to 40 days to provide the information.)

**Disclosure and additional information during a case**

As previously mentioned, disclosure of personal data is permitted under s35 once an employment tribunal case is running. During a case, the employer must disclose all relevant documents, even if helpful to the worker. In addition, the worker can ask the tribunal to order that the employer (or, less commonly, a third party) disclose specific documents. The tribunal can also ask an employer to provide ‘additional information’ – this means answering some questions to clarify the nature of the employer’s defence. However, the worker cannot ask detailed questions of the kind which would be asked in a questionnaire. The tribunal will only order disclosure and additional information on relevant matters and will not allow the worker to ‘go on a fishing expedition’, ie to explore evidence to see what might be helpful. This is where questionnaires and FOI requests are more useful, because the worker is entitled to ‘fish’ for information.
Appendix

Information Commissioner decisions regarding the personal data exemption

The following decisions are illustrative of what sort of information is likely to be successfully or unsuccessfully requested under the Act. But remember that the facts of every case are different. Remember also that in discrimination cases, the information can almost always be obtained through the questionnaire procedure. Decisions notices are available on the Information Commissioner’s website at www.ico.gov.uk/tools_and_resources/decision_notices.aspx

Scottish decision notices are available at www.itpublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.php

<table>
<thead>
<tr>
<th>Decision notice: 26 June 2008</th>
<th>FS50142539</th>
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<tr>
<td>Public authority:</td>
<td>De Montford University</td>
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<td>Request: Salary and additional payments, including performance payments, made in each of four successive financial years for the Vice Chancellor, for the Senior Management Team including the Director of Finance and Director of HR, and for the Deans of Faculties.</td>
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<tr>
<td>Exemption claimed: FOIA s40(2)</td>
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The University refused to disclose the information on grounds that the information regarding the Vice Chancellor was already accessible via other means, ie in its publication scheme, and the other information was exempt under s40 (personal data), s41 (information provided in confidence) and s43 (prejudice to commercial interests). It said it had consulted the 11 individuals involved and they were unwilling for the information to be disclosed. It offered to provide salary information in groups or categories which did not identify individuals. The complainant accepted the salary band information but asked the Information Commissioner to rule about the more precise information requested.

The Information Commissioner first had to decide whether the requested pay details constituted ‘personal data’. Data about the salary for a particular job may not be personal data in itself, eg if it is contained in a job advertisement, as opposed to linked to a named individual after the vacancy has been filled. Although the university could provide pay details without any names attached, the question was whether a determined person could work out which sum related to which post holder. The Commissioner believed university employees would be able to work this out relatively easily because of the small number of posts involved. Therefore the information requested constituted personal data and was
subject to the DPA.

The next question which arose was whether disclosing the information amounted to a breach of the 1st data protection principle, ie whether at least one of the conditions in Schedule 2 of the DPA could be met. The most likely condition was condition 6. The Commissioner therefore took into account:

- the reasonable expectations of the individuals as to what would happen to their personal data
- the seniority of the staff
- whether disclosure would cause any unnecessary or unjustified damage or distress
- the legitimate interests of the public in knowing remuneration details weighed against the effect of the disclosure on the members of staff.

The Commissioner said the individuals would not have had an expectation that their salary details would be disclosed. However, the fact that an individual does not have an expectation that information about them will be disclosed does not mean this expectation is a reasonable one. Public sector employees should expect some information about their roles and the decisions they make to be disclosed under the Act. Senior employees should also expect more information to be disclosed about them than junior employees because they are more likely to be responsible for influential policy decisions or decisions regarding the expenditure of public funds. Individuals would expect some details of their salaries to be in the public domain but not the exact details. Disclosure of the exact salary details would be unfair and was not outweighed by legitimate public interest.

The public does have a right to information about the efficient and proper use of public money and there is also a legitimate interest in openness in relation to the amounts a public body pays its senior managers. Disclosure of salary bands (which the university had agreed to) may infringe on a person’s privacy but not as much as disclosure of exact salary details.

The Commissioner did not make a decision as to whether disclosure of salary bands would have been required by the Act as this had been done voluntarily. He also did not need to make a decision regarding the other exemptions claimed as the s40(2) exemption applied.
Decision notice: 12 January 2009     FS50184888
Public authority: Leicester City Council
Request: Application forms of other applicants on a recruitment process.
Exemption claimed: FOIA s40(2) (Personal data of 3rd parties)

The complainant, who worked for the Council, unsuccessfully applied for two internal vacancies as Head of Department. He asked for the copies of the following documents, suitably redacted (see mid p25) if necessary:

1. The shortlisting matrix document for all candidates completed by each member of the shortlisting panel.
2. The application forms for each candidate.
3. The Candidate Assessment forms and interview notes completed by each panel member for each candidate.
4. The two references provided for the complainant.

The Council supplied items 1 and 4 plus the complainant’s own application form. It supplied item 3, but redacted to remove personal data. It refused to supply item 2, citing the s40 personal data exemption. It was concerned that the applicants could still be identified even if information was redacted. It was particularly concerned at releasing information about the successful applicants, as the complainant would be able to identify these. The Council felt that disclosure would make it harder to attract candidates for future jobs because they would be deterred from applying by the fear that information in their application would become public knowledge.

There were 12 applicants (2 internal) for the 1st post, of whom 9 were interviewed and 15 (4 internal) for the 2nd post, of whom 9 were interviewed. An external candidate was appointed in each case. The Council believed that disclosure of information about educational background, skills and qualifications, detailed work experience and referee details would make it relatively easy to identify individuals.

The Information Commissioner decided the requested information was ‘personal data’ under the DPA and the first data protection principle therefore applied. Condition 6 in Schedule 2 applied.

The Commissioner ordered the Council to provide a general summary of the experience and qualifications of each candidate, identifying the successful candidates. Alternatively, it should supply copies of the application forms, removing information which would identify the candidates.

Given the number of candidates and that most were external, this very general information would be unlikely to identify any individual. Regarding the successful
candidates, general ‘pen portraits’ of the kind found in conference speaker biographies, should be provided. Qualifications should be described, but particular educational establishments need not be identified. Previous employers need not be named – a general description and role fulfilled would be enough. This sort of information would consist largely of matters which could in any case be inferred from the person specification for the job.

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**Decision notice:** 20 February 2008     FS50147017  
**Public authority:** The Rotheram NHS Foundation Trust  
**Request:** Details of the retirement packages agreed between the Trust and two named senior employees.  
**Exemption claimed:** FOIA s40(2) (Personal data of 3rd parties)

The Trust refused to disclose the information on grounds that the information was part of a compromise agreement agreed with each employee and subject to a confidentiality clause.

The Information Commissioner decided first that the information requested constituted personal data as defined in s1(1) of the DPA. Under s40, it then had to decide whether disclosure would contravene the first data protection principle. The first data protection principle says information cannot be disclosed unless at least one of the conditions in Schedule 2 is met. The relevant condition here was the 6th condition.

Under the 6th condition, disclosure must be ‘necessary for the purposes of legitimate interests pursued by the data controller or by third parties or those to whom the information is disclosed’. Here, the third party whose legitimate interests should be considered was the general public. The Information Commissioner therefore took into account the existence of the compromise agreements, reasonable expectations of data subjects vis-à-vis their personal data, and the legitimate interests of the public in knowing the financial impact on the public authority of the early retirement of the data subjects.

The Information Commissioner observed that the Employment Rights Act 1996 establishes the opportunity to reach a compromise agreement. They avoid the time, expense and stress of litigation in an employment tribunal where an employer/employee relationship breaks down. Where a compromise agreement has been agreed, a balance has to be struck between a public authority’s duty to be transparent and accountable about how and why it decided to spend public money in a particular way, and its duty to respect its employees’ reasonable expectations of privacy.
Both compromise agreements contained compromise clauses which were binding on each side. The legitimate interests of the public knowing how much money was spent on the departures of both senior employees must be weighed against the senior employees' rights and legitimate interests.

The seniority of officials should be taken into account when personal data about them is requested under the Act. The more senior an employee, the less likely it will be that disclosure of information about them acting in an official capacity would be unfair. But in this case, it had to be weighed against the employees exercising their rights under the Employment Rights Act and thereafter had a legitimate expectation that their personal data would not subsequently be disclosed.

In conclusion, the legitimate rights of the data subjects in this case outweigh the legitimate interests of the 3rd party and release of the requested information would be unfair processing.

**Decision notice:** 11 December 2006   FS50102474

**Public authority:** BBC

**Request:** Details of the cost of the Children in Need charity appeal programme in 2005 including the pay for the night of individual presenters and other personalities, such as Terry Wogan, Eamon Holmes and Natasha Kaplinsky.

**Exemption claimed:** FOIA s43 (Commercial interests)

The BBC withheld information on various grounds including s43 (commercial interests), which is a qualified exemption. It argued that revealing details of presenters' pay would have adverse consequences, eg:

a. Knowledge of the rates would enable competitors to outbid the BBC, thus forcing the BBC to increase its pay to presenters.

b. If other BBC presenters found out the rates, they would bid or increased pay themselves.

c. It might discourage presenters from joining the BBC, as if they joined private companies, there would be less press coverage of their salaries.

The Commissioner said the BBC had failed to demonstrate the prejudice which would result from disclosure and the s43 exemption did not apply. It was not even necessary to go on to consider the public interest arguments. Regarding the above arguments, he said:

a. First of all, it was only a payment for a one-off evening. In any event,
presenters can disclose their earnings to the BBC’s competitors if they want to.

b. Individuals are free to disclose salary details to each other anyway.

c. There is no research which supports the hypothesis that that people generally made career choices across the public/private sector according to whether their salary would be disclosed in the press.

**Decision notice: March 2008   FS50070465**  
**Public authority: BBC**

The Information Commissioner decided the BBC should disclose the salary band of the Controller of Continuing Drama but not his exact salary, which was individually negotiated.

**Decision notice: February 2007   FS50092819**  
**Public authority: University Hospital Birmingham   NHS Trust**

The Information Commissioner decided the exact salaries of specialist registrars employed by the Trust should not be disclosed. As employees interacting with the public, they should expect some personal data about them to be released, but they were entitled to expect less scrutiny than senior executives who are responsible for policy decisions affecting the public and expenditure of public funds.

**Decision notice: January 2008   FS50067416**  
**Public authority: BBC Northern Ireland**

The Information Commissioner decided the BBC did not need to disclose the fee paid to a presenter. The fee had been agreed in confidential negotiations in accordance with standard practice in the industry and was therefore properly treated differently from the salary of a senior employee.
**Decision notice:** August 2005     FS50062124
**Public authority:** Corby Borough Council

The Information Commissioner decided that the Council should disclose the exact total amount paid to an interim Head of Finance, following a critical report from the Audit Commission. As a short-term post, it attracted a higher salary to compensate for lack of employment rights. But the contract was subsequently renewed at the same rate and with the addition of holidays and pension contributions. This justified the additional public scrutiny.

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**Scottish decision notice:** 16 September 2008   109/2008
**Public authority:** Unison Highland Branch and Highland Council
**Request:** Job gradings and comparators
**Relevant sections:** FOI(S)A s17 (No information held); s21 (Breach of time-limits)

On 5th September 2007, UNISON Highland Branch requested information from Highland Council regarding jobs in the Exchequer function of the finance service: ‘Details of how the gradings for the undernoted posts were arrived at and what posts in other services (if any) were used as comparisons. This should comprise details of how any assessment of job descriptions was carried out and what consideration was given to the relative placing on the current salary structure. If any job evaluation scheme was used then the breakdown of the scores of both these posts and the comparators should be given.
- Team Leaders
- Assistant Team Leaders
- Senior Exchequer Assistants
- Exchequer Assistants
- Operations posts (all)’

The Council responded on 20 September 2007. It stated that the new posts were determined in accordance with the Council's current procedures for establishing grades pending the introduction of the new pay structure. It said that the grades were assessed by its Personnel Department, in consultation with the Finance Service, on the basis of the job descriptions for the new posts, and the grades were then submitted to the Resources Committee for approval.

On 9 October 2007, UNISON wrote to the Council requesting a review of its decision as UNISON did not consider that the Council had provided the information requested. The Council notified UNISON of the outcome of its review on 19 February 2008, stating that there was no further information that could be supplied. The Council reiterated its previous explanation of the process of
grading the posts, and additionally stated that consideration was given to other posts in the Finance Service. It also explained a job evaluation scheme was not used, and so there was no breakdown of scores to be disclosed. UNISON complained to the Scottish Information Commissioner about the inadequate information.

In response to the Investigating Officer’s questions, the Council explained that Directors and Senior Managers were responsible for recommending changes to the relevant committees in consultation with Personnel. There was no formal procedure for how this was done. The Council provided copies of two published reports to the Resources Committee, which were made regarding the reorganisation of the Finance Service and the Exchequer Section of that Service. It explained that the process of agreeing the recommendations was that the Head of Exchequer drafted the report on that Section, and discussed the grades and job descriptions with the Head of Personnel. The Council stated that these two officials had confirmed that there were no documents in existence in relation to agreeing the grades or job descriptions of the new posts. The Council also explained that this restructuring process, and the job grading it prompted, was separate from the council-wide job evaluation project that had been ongoing for a number of years.

UNISON said nothing in this information explained how the grades for the relevant posts were arrived at. UNISON believed that the Council must have some assessment to determine the grades they did. If it was not the job evaluation scheme, then how were they decided? The investigating officer then emailed the Council seeking further information on the creation of the two published reports, and searches undertaken to identify relevant information. The investigating officer raised questions about the following types of information:

- any recommendations and associated correspondence made by the Directors and Senior Managers;
- any notes of the discussion between the Head of Exchequer and Head of Personnel;
- any background information used in the creation of the reports;
- any correspondence between officials regarding the grading of these posts; and
- any legal advice concerning the grading of the posts.

The Council provided responses to each of the specific questions raised, but stated again that no relevant recorded information was held by it apart from the reports already released.

The Decision

The Information Commissioner said that the Council had complied with FOI(S)A by notifying UNISON under s17(1) that it did not hold the requested information. Although he found it surprising, the Information Commissioner was satisfied that no recorded information is held that would explain how the Council decided upon the grading of the posts concerned, and which would fulfil UNISON’s request,
other than the two published reports. He noted that the restructuring within the Exchequer function and the associated job grading were a part of the Council's ongoing reorganisation and were not a part of a job evaluation process. He therefore accepted that the type of documents that might have been held in relation to job evaluation exercise were not held in this case.

However, the Council was in breach of s21(1) by taking over four months to deal with UNISON's request for a review rather than the 20 working days required by the Act. But since the Council had provided its response, albeit belatedly, the Commissioner did not require the Council to take any action in respect of this particular breach in response to this decision.

Scottish decision notice: 31 January 2008  018/2008
Public authority: Lanarkshire NHS Board
Request: Job reports produced during an equal pay matching process pertaining to the applicant's post
Exemption claimed: FOI(S)A s30(b) (Prejudice to the conduct of public affairs)

Mr Dickinson made two information requests, which together sought all information held by the Board pertaining to the job-matching process for his post from Lanarkshire NHS Board. Request 1 was for all matched job reports for his post produced during the matching process and request 2 was for all other information relating to the job matching process for his post. The reports concerned had been produced, as part of the process of job evaluation and assimilation under the "Agenda for Change" system.

In response to the first request, the Board stated that it only held the final matched job report, as the Computer Aided Job Evaluation (CAJE) system used in the job-matching process overwrites previous reports and updates the final report with any changes made during the matching process. Mr Dickinson requested a review, stating that it was his understanding, having spoken to persons involved with the CAJE system, was that it may still be possible to retrieve earlier information. In response, the Board explained that the company providing the CAJE system had confirmed that this software overwrites previous reports and that no print-outs are kept in order to avoid confusion.

Regarding his 2nd request, the Board said the only document it held was an auditable job report for Mr Dickinson's post. It refused to disclose this, claiming it was exempt under s30(b) of FOI(S)A.. As with s36 FOIA, s30 applies where disclosure of the information would be likely to inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation or otherwise prejudice substantially the conduct of public affairs. This exemption is subject to the public interest test.
The Board felt that to answer information requests while the Agenda for Change process was ongoing would be detrimental to the overall process since it would require staff to divert resources from the job matching process. It also felt that release of the information to Mr Dickinson would prejudice the ongoing discussions in relation to the area which Mr Dickinson's job fell under, and would prejudice the discussion and decision making process for that and other posts, because staff would have had access to partial or incomplete information. Also for Mr Dickinson's departments, some staff were still to submit job descriptions to be considered in the assimilation process. The Board suggested that should the auditable event report relating to his post be disclosed, then other staff may be able to amend their job descriptions to enable a more favourable outcome based on information contained in the log.

The Report was subsequently disclosed after completion of the process, but Mr Dickinson complained to the Scottish Information Commissioner about the way the matter had been handled.

**The Decision**

Regarding the 1st request, the Information Commissioner was satisfied that the Board did not hold earlier matched job reports. Regarding the 2nd request, the Commissioner accepted the only existing information was the auditable report. The Commissioner did not think disclosure of this would have substantially inhibited the free and frank provision of advice or exchange of views at the time. The persons engaged in the assimilation were doing so in an official capacity and other factors come into play such as their commitment to a quality service, and ensuring the quality of the Agenda for Change process. It was a rigorous process and disclosure of this material, in this instance, would not have had the effect argued by the Board. The identities of those involved in the assimilation process were removed from the version of the auditable event report supplied to Mr Dickinson (and he accepted this redaction). By disclosing the information in this form, the Board limited the scope for any inhibition that individuals might feel if they were identified with the decisions taken.

Also, it was irrelevant that the Board may have had to respond to further requests for similar material and this would have an adverse effect on the Agenda for Change process. Possible inconvenience were others to make a similar request is not a relevant consideration when applying the exemptions in s30(b).

The Commissioner stressed that he made decisions on a case by case basis and he was not in a position to decide, as Mr Dickinson requested, whether future requests for similar or analogous documentation would be exempt.

In conclusion, the Commissioner found that the Board misapplied s30(b) in withholding the auditable job report. However, as the Board had now provided Mr Dickinson with a copy of the auditable job report, no further action was required.
Scottish decision notice: 10 October 2007  184/2007
Public authority: Glasgow City Council
Request: Copy of the equal pay audit commissioned in 2005 by the Council
Exemption claimed: FOI(S)A s36(1)  (Confidentiality of communications / legal professional privilege)

UNISON requested from the Council a copy of the equal pay audit carried out on behalf of the Council by Link Group Consultants Ltd in 2005. The Council responded by withholding the information on grounds that it was covered by confidentiality of communications. (In England and Wales, this is known as legal professional privilege.) The Council said the trade unions were taken through the outcomes of the equal pay audit in November 2005 and a joint agreement had been reached that it was not in the best interests of the unions to have a copy of the audit in their possession. UNISON did not accept that any such agreement had been made.

The Council claimed the audit was legally privileged information because it was commissioned to assist the Council in defending itself at Employment Tribunal. FOI(S)A s36(1) exempts information from disclosure if it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication which falls into this category are communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege. In this case, the Council said the audit was subject to litigation privilege. This type of privilege applies to documents such as those created by a party to potential litigation in contemplation of the litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. For litigation privilege to apply litigation need not ever take place – the question of whether any particular document was actually created in contemplation of litigation will therefore be a question of fact. Where litigation does take place, litigation privilege continues to apply after the litigation has ended.

The Council said the audit was commissioned in order that the Council would be in a position to quantify its potential exposure to equal pay claims. The report was also commissioned by the Council to ascertain whether it was likely to be found liable at an employment tribunal and again to ascertain any defences which it would be able to deploy.

The Commissioner accepted the audit report was covered by litigation privilege as it was created in contemplation of litigation. He considered whether the privilege had been waived by the interim presentation to the unions regarding its findings, but he decided it had not. Although some information about this audit had been provided, it did not amount to "deployment" of the information to support the position of the Council with respect to contemplated litigation.
The exemption in section 36(1) is a qualified exemption and the exemption is therefore subject to the public interest test. The Commissioner agreed that disclosure would enable greater scrutiny of the Council's steps to comply with its equality obligations, and this would be in the public interest. However, in this case, the competing public interest in the effective administration of justice by allowing privileged communications with respect to adversarial proceedings was greater.

In conclusion, the Council did not have to disclose the audit report because privilege applied.

Scottish decision notice: 24 January 2008  012/2008
Public authority: North Lanarkshire Council
Request: Numbers of internal and external candidates appointed to permanent and temporary vacancies advertised by North Lanarkshire Council
Exemption claimed: s12 FOI(S)A (Excessive cost of compliance)

The applicant asked to know the number of advertised vacancies across all departmental functions of North Lanarkshire Council in the years 2006 and 2006, broken down according to whether internal or external candidates were successful.

The Council refused to provide the information on grounds that collating it would exceed the costs limit under s12. It said that for one department alone the estimated cost would be £1,841.00. In 2005 and 2006, this department had recruited 747 members of staff. The Council said its records management system would have to be checked to establish if the individuals were still employed, in order to ascertain whether their files would be active or archived. It would then have to access each file and check it manually to establish whether the successful individual was an internal or external candidate. The Council estimated it would take approximately 116 hours' work to locate, retrieve and provide the information requested, based on actual times required to provide the requested information per record.

The Commissioner allowed £8.50 / hour, being the standard hourly rate for the relevant staff. He refused to allow the time to be charged at overtime rates as the Council proposed. But even this totalled £1,005.50 for one department, which he accepted as a reasonable estimate in the circumstances. This exceeded the £600 costs ceiling and the Council was entitled to refuse to provide the information.
Resources

Websites

The Information Commissioner for the UK (not Scotland) is at www.ico.gov.uk

Data protection guidance is at www.ico.gov.uk/tools_and_resources/document_library/data_protection.aspx


Freedom of Information decision notices are at www.ico.gov.uk/tools_and_resources/decision_notices.aspx

The Scottish Information Commissioner is at www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp


The Campaign for Freedom of Information has an interesting website at www.cfoi.org.uk

The Equality and Human Rights Commission is at www.equalityhumanrights.com

Books and Guides

Central London Law Centre guides
Tel administrator: 020 7839 2998


Enforcing ET Awards and Settlements by Philip Tsamados. 2nd edn 2006. What to do when your employer won’t pay the tribunal award.


