Freedom of information—reviewing the latest practice and procedure

07/09/2018

Public Law analysis: Jeremy Isaacson, associate at Farrer & Co, considers the latest law, practice and procedure in the area of freedom of information (FOI), including the impact of changes in data protection law, revised statutory guidance, changes to the listed public bodies and further legislation in the pipeline.

How does the General Data Protection Regulation, Regulation (EU) 2016/679 (GDPR) and Data Protection Act 2018 (DPA 2018) impact or amend the Freedom of Information Act 2000 (FIA 2000)? What is the practical impact for public authorities receiving information requests?

DPA 2018 has made some minor amendments to FIA 2000, primarily to reflect changes to provisions that cross refer data protection law, identifying where of the relevant data protection law can now be found, and to clarify the fact that public authorities can rely on the legitimate interests gateway as a lawful basis for disclosures under FIA 2000.

The definition of what constitutes 'personal data' and 'special category data' for the purpose of the FOI personal data exemption has also changed. In practice, public authorities will need to continue to ask themselves whether disclosure 'to the world' of the information requested under FIA 2000 will enable someone to be directly or indirectly identified.

For the time being, there are unlikely to be any major changes to the way public authorities handle FIA 2000 requests which include personal data, and public authorities will continue to be able to rely on FIA 2000, s 40, where they can demonstrate that disclosure of the requested information under FIA 2000 would breach one of the data protection principles.

More likely, perhaps, is that the increased awareness of individual privacy rights associated with the GDPR will make decision-making around FIA 2000, s 40, more difficult, as those individuals whose personal data falls within the scope of a particular FIA 2000 request will perhaps find it easier to object to disclosure and find arguments to show that disclosure would be unfair.

Is there any new/updated guidance from the Information Commissioner's Office (ICO) that you would highlight?

The ICO's guidance on FIA 2000, which includes specific guidance on FIA 2000, s 40, has a new section summarising the impact of the GDPR on FIA 2000 and the Environmental Information Regulations 2004, SI 2004/3391, but confirms that the Commissioner's approach remains largely the same, and that the existing guidance is still of use and will be updated in due course. The guidance will most likely be substantially updated once the ICO has a clearer idea of how the Information Tribunal approaches FIA 2000, s 40 (and the equivalent exception SI 2004/3391) in the post-GDPR era.

Some ICO guidance was reissued in May 2018 in conjunction with the GDPR, but with further substantive amendments to follow. The ICO guidance on FIA 2000, s 36 (prejudice to the effective conduct of public affairs), guidance on FIA 2000, s 41 (information provided in confidence) and guidance on FIA 2000, s 43 (commercial interests) have all been updated in the last year or so, and so practitioners should ensure they refer to the up-to-date versions maintained on the ICO's website.

What are the key provisions of the new FOI Code of Practice? How does it differ from the previous code? Are there any potential traps for authorities to be aware of?

July 2018. The code sets out guidance and best practice on how public authorities should comply with FIA 2000. Non-compliance with the code can be taken into account by the ICO.

Important changes are contained in sections 7, 8 and 9 of the new code.

Section 7—vexatious requests

Section 7 of the code sets out updated guidance on FIA 2000, s14, under which a public authority is not obliged to respond to a request if it is vexatious. Perhaps unsurprisingly, requests where FIA 2000, s 14 may be relevant can be among the hardest for practitioners to deal with, because the concept of vexatiousness is not defined in FIA 2000, and because labelling a request as being vexatious tends to automatically lead to tension and conflict between the requester and the public authority. As such, some public authorities are reluctant to use FIA 2000, s 14.

The new code goes some way to reassuring public authorities that they should not unduly avoid applying FIA 2000, s 14. It says that FIA 2000, s 14 'should not be considered as something to be applied as a last resort or in exceptional circumstances' (at para 7.2).

Separately, the new code endorses the Upper Tribunal's guidance (in *CP v Information Commissioner* [2016] UKUT 0427 (AAC)) that the public interest in the requested information should not act as a 'trump card' which overrides vexatiousness and requires the public authority to respond to the requester. This is important, because aspects of an earlier Court of Appeal judgment (*Dransfield v Information Commission and another; Craven v Information Commissioner and another* [2015] EWCA Civ 454, [2015] All ER (D) 132 (May)) had suggested that, no matter how vexatious or vengeful the request, if the request was aimed at information which ought to be made public, the public authority should respond.

Section 8—publication schemes

Section 8 of the code is important because it sets out the information the government expects public authorities to proactively publish as part of their publication schemes. FIA 2000 contains a positive duty to publish, and isn't just about responding to requests which have been received. The code says that public authorities with more than 100 employees should publish their own FIA 2000 compliance statistics, including on the number of requests received, figures on how often requests were responded to within 20 working days, and the number of requests which were refused. At present, many public authorities do not routinely collect (let alone publish) these compliance statistics.

More significantly, the new code recommends that public authorities regularly publish information on senior executive pay and benefits, including the names, job titles and pay of senior staff on the public authority's 'senior management team', their expenses, benefits in kind, and gifts and hospitality offered or received. The code is more nuanced and less prescriptive about this than the approach indicated in the draft code which was put out for consultation. But the key point is that senior staff in public authorities of all shapes and sizes will need to expect that information about their pay and benefits will be publicly available and it will be very difficult to argue that this information is exempt, whether under FIA 2000, s 40 (personal data—due to privacy concerns of the staff involved) or FIA 2000, s 43 (commercial interests—with public authorities competing to attract top talent).

Section 9—Transparency and confidentiality obligations in contracts and outsourced services

Finally, section 9 of the code sets out some useful guidance as to what contractual arrangements between public authorities and outsourcing providers should be put in place to cover the fact that the public authority is subject to FIA 2000. The guidance and suggested arrangements set out in the code is a useful benchmark against which public authorities can check their contracts are up-to-date in this regard.

Are there any key omissions in the new FOI Code of Practice?

For two reasons, some will feel that the new code is somewhat of a missed opportunity.

First, the government has avoided calls for more directive, unequivocal and guidance on some of the trickier issues that public authorities encounter in handling difficult requests and challenging requesters. This will be particularly frustrating for smaller public authorities who do not have dedicated information compliance teams, and may therefore find the nuanced approach unduly complicated and confusing.

Second, the government has revised the code as part of its response to the Burns Commission (which examined how FIA 2000 was working and published its report in 2016). The Burns Commission recommended a series of legislative

changes to FIA 2000. Instead of introducing new legislation to strengthen FIA 2000, many will be frustrated that the opportunity to update the legislation has not been taken up and that instead the issues have been addressed through updates to statutory guidance, which therefore has less 'teeth'.

Have there been any additions or amendments to the listed public bodies under FIA 2000 during 2018? What are the key changes?

Yes, 15 new public authorities were added to FIA 2000, Sch 1, in February 2018 under the Freedom of Information (Additional Public Authorities) Order 2018, SI 2018/173, including the British Film Institute and the Committee for the Protection of Animals Used for Scientific Purposes. A similar number of public authorities were removed under the Freedom of Information (Removal of References to Public Authorities) Order 2018, SI 2018/185, reflecting changes to the 'machinery of government' and to the comings and goings of non-departmental public bodies.

Is there any FIA 2000 legislation that practitioners should monitor? Is it likely to progress among preparations for Brexit?

I do not expect any significant changes to FIA 2000 in the forthcoming Parliamentary session, though the government has included amendments to the FIA 2000 in its domestic legislative preparation for Brexit, see: Freedom of Information Act 2000 (Amendment) (EU Exit) Regulations 2018. but Practitioners should also continue to monitor the draft bill sponsored by Andy Slaughter MP which would extend FIA 2000 to contractors delivering services on behalf of the public sector, housing associations and local safeguarding children boards. The Freedom of Information (Extension) Bill 2017–19 is scheduled for its second reading in October 2018.

Jeremy Corbyn, leader of the Labour Party, has supported extending FIA 2000 to cover public service contractors, and recently called for the abolition of the ministerial veto under which a minister can overrule both the ICO and the courts to prevent disclosure. This would probably be a largely academic and symbolic change, given that the ministerial veto is used very rarely and, in any event, since the Supreme Court case of *R (on the application of Evans) and another v Attorney General* [2015] UKSC 21, [2015] All ER (D) 289 (Mar), the veto cannot be used to overrule the courts.

There is a sense among practitioners that FIA 2000 has had a quiet couple of years, as GDPR preparations dominated the workload of information compliance teams. Some feel disappointed that the ICO has also focused on GDPR compliance at the expense of FIA 2000, and there is particular frustration at the excessive delays requesters face in accessing information under FIA 2000 with apparent impunity. The ICO appears extremely reluctant to use its formal enforcement powers to take action against public authorities who are continually late in responding to requests. Some form of 'showdown' around this issue is possible, with the ICO perhaps using its enforcement powers to make an example of one or two public authorities.

Interviewed by Alex Heshmaty.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.