LSG FOI Update - February 2010

By Ibrahim Hasan (IBA Solicitors and Act Now Training)

The tax status of the conservative party's major donor and deputy chairman, Lord Ashcroft, has been the subject of much controversy and media headlines over the past few years. Lord Ashcroft gave an undertaking to the Government in March 2000 to end his status as a tax exile (or 'non-dom') when he was awarded a life peerage. This undertaking was the subject of a recent Freedom of Information Act (FOI) request to the Cabinet Office by a labour MP.

Gordon Prentice requested disclosure of the form in which the undertaking by Lord Ashcroft was given and identity of the person to whom it was given. The Cabinet Office confirmed that it held the information but determined that it should be withheld in reliance of the exemptions contained in sections 37(1)(b) (the conferring of honours), 40(2) (personal data) and 41 (Breach of Confidence). All these exemptions require consideration of the public interest in disclosure.

The Commissioner (Cabinet Office Ref: FS50197952 28/01/2010) decided that the Cabinet Office was wrong to rely on the exemptions. He ruled that there was a legitimate public interest in knowing whether Lord Ashcroft has actually fulfilled the undertaking. In the Commissioner's view the public interest in transparency in the honours system outweighed the Cabinet Office's claim that disclosure would be 'unwarranted and prejudicial to the rights and legitimate interests' of Lord Ashcroft.

This is an interesting case, not just because of its political angle in the year of an election but, because the Commissioner has ruled that personal data is disclosable under FOI to a third party, even though it could not be requested by Lord Ashcroft himself by making a subject access request (under section 7 of the Data Protection Act 1998 (DPA). This is due to the exemption in the DPA for personal data processed for the purpose of "the conferring by the Crown of any honour"(DPA schedule 7).

On Monday 18 January 2010, the Information Tribunal ceased to exist. All its work has been transferred to the new General Regulatory Chamber. The transfer is to be effected in accordance with the Transfer of Functions Order 2010 (SI 2010/22) . From 18 January, all FOI appeals will be heard either in the First-tier Tribunal (Information Rights) or in the Upper Tribunal. The question as to where each particular appeal will be heard will be determined by two new sets of tribunal rules as well as practice directions. These will apply to all new appeals, which are commenced on or after 18 January. In respect of appeals commenced prior to this date, the Tribunal will have discretion as to whether to apply the old rules or the new rules; or a combination of the two.

Section 35 allows information to be withheld if relates to, amongst other things, the formulation or development of government policy. It is a class based exemption which means that the public authority (usually a government department) does not have to show that there would be any prejudice to the formulation or development of government policy if the information is disclosed. However, prejudice is relevant when applying the public interest test. Section 35 has been the subject of two decisions which have gone onto be vetoed by the Government using its powers

under section 53 of the Act.

In Cabinet Office and Dr Christopher Lamb v IC (EA/2008/0024 & 0029 27th January 2009) the Tribunal decided to uphold the ruling by the Information Commissioner that minutes of cabinet meetings from 2003 should be released. These refer to meetings that discussed the Attorney-General's legal advice about the Iraq war. On 24th February 2009 the Lord Chancellor (Jack Straw) issued the first ever ministerial veto under section 53 of the Act.

The Information Commissioner said at the time:

"Anything other than exceptional use of the veto would threaten to undermine much of the progress towards greater openness and transparency in government since the FOI Act came into force."

Unfortunately these words seem to have fallen on deaf ears as on 10th December 2009, Mr Straw announced that he was exercising his powers of veto for a second time. The new veto has been issued in respect of a decision of the Commissioner (Cabinet Office FS50100665 23/6/09) requiring disclosure of minutes of the Cabinet Ministerial Committee on devolution to Scotland and Wales and the English Regions in 1997. Explaining his action, Mr Straw stated that disclosure of the information would have put the convention of collective cabinet responsibility at serious risk of harm. He also stated that he considered the circumstances of the case to be exceptional. Interestlingly these are the same reasons given by him when excercising the veto for the first time.

The effect of the veto is that the original decision notice ceases to have effect. The Commissioner has expressed concern that the veto was issued even before allowing the Tribunal to rule on the Cabinet Office's appeal. This is in stark contrast to the Iraq minutes case (discussed above) where the veto was issued after the Tribunal's decision.

In a recent decision, the Information Tribunal considered the question of whether FOI can be used to gain access to university course materials. In University of Lancashire v IC (EA/2009/0034 18th December 2009) it had to balance the commercial interests of the university with important matters of public interest in knowing what is being taught at a publically funded institution. The university had earlier refused a request for disclosure of course materials relating to a BSc degree course in homeopathy. As well as section 36, the university had claimed the section 43 exemption; that disclosure of the course materials would damage its commercial interests.

At first instance, the Information Commissioner held that the university should have disclosed the course materials, except certain elements, and particularly empirical case studies, which could be withheld under the section 41 exemption (where disclosure would lead to an actionable breach of confidence). The Tribunal agreed with the Commissioner and dismissed the university's appeal. It had argued before the Tribunal that the course materials were exempt from disclosure because they contained a significant amount of third party copyrighted information and disclosure of that material would discourage third parties from contributing to course materials in the future. The Tribunal rejected these arguments stating that disclosure of

information under FOI would not in any way have diluted any copyright enjoyed by the third parties and there was, in any event, no sufficient evidence before the Tribunal to substantiate the university's case that disclosure of the copyrighted material would have had an alienating effect on third party contributors.

The Tribunal also found that there were strong public interests in members of the public being able to test the educational value of publicly funded degree courses and in accessing information relating to a homeopathy degree course which was a controversial subject. This is an important case which will have a big impact on universities seeking to restrict access to educational resources for various reasons. It also emphasises that copyright in itself cannot be used to withhold information under FOI. An earlier decision by the Information Commissioner involving the Student Loans Company Ltd (Case Ref: FS50217416 04/02/2009) came to the same conclusion.

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