

## Data Protection and FOI/EIR requests – coming out of lockdown

Webinar: 9<sup>th</sup> September 2020

### Note of part of section by Damien Welfare

This note covers a part of the above webinar, towards the end of the presentation by Damien Welfare, where there was a problem with the sound quality. It picks up at a point shortly before the problem occurred, and continues until the end of that section.

[55 minutes, 54 seconds]

*Slide headed: 'Requests for correspondence with third parties on commercial matters.*

*Which exemptions might apply?*

On the other half of the question, about the rent negotiations, just briefly: I think section 43(2) would be likely to apply to that sort of example - and that would include information that the applicant might have volunteered. And questions, or harm that would be demonstrable, might be things like: any benefit to competitors from the disclosure of some or all of the emails (if there were such); harm to the council's own economic interests (if it weakened its bargaining position with the company, [eg] if it is in the middle of a rent review with it); or, perhaps, harm to trust, if it has got a partnership arrangement with the company.

The test is 'likely' rather than necessarily 'would', harm; so it is a real and significant risk of harm.

And the public interest factors, on one side, might be: (in favour of disclosure) in terms of maximising income from public assets; (against disclosure) again whether it would reduce the company's ability to compete with others; perhaps, in the current circumstances, reputational damage ([eg] if it is trying to drive the rent down); the ability of a public authority to generate income, if that would be harmed; or, any impact on other negotiations.

And there might be some personal data to consider [under the FOI request] as well, on the same basis as in the first part.

*(Slide headed: Could any exemptions apply to a request for information (including personal data) collected in a public consultation exercise on a transport issue?)*

Moving on to the next slide, and I will keep this brief: could any exemptions apply to a request for information (including personal data) collected for a public consultation exercise?

I have had some dealings with a case of this kind. The first thing to do, it seems to me, is to separate the types of information: personal data; environmental information; and then the residue, which would be FOI.

The 'predominant purpose' test still applies, under the EIRs. In other words, you can treat a document as EIR if its predominant purpose covers environmental information – complicated a little by a case called *Hastings* ([2018] UKUT 184), where FOI information will be treated as falling under EIR unless it is sufficiently 'distinct', and not inextricable from environmental information.

But you need also to be looking at any express or implied terms that you set out when you ran the consultation exercise. So you should take a wide view of personal data, and then apply the same legitimate interests test: look at people's reasonable expectations; the circumstances in which you gathered the information and existing policy; to what extent their responses (as individuals) touch on private life, rather than public; any harm or distress that might be caused to them from disclosure; or, indeed, whether [some] people could identify them and learn more, from the responses, about them.

In terms of the non-personal data: section 41 [could apply], if any of it is confidential (if it is imparted to you on confidential terms, expressly or implicitly, and they could sue you). Perhaps, if any of it is commercial, section 43 again [could apply]. And then others that might be relevant: future publications (section 22 under FOI); inhibition to advice, or the exchange of views (s 36); or Reg 12(4)(d) under the EIR. (It is transport information, as the question suggested). There is a useful case called *Manisty* ([2018] UKUT 423) which sets out the distinction between the process and the information that may fall, or not, under Reg 12(4)(d) (material in the course of completion).

There may also be an exception in Reg 12(5)(f) for volunteers, which I mentioned.

*(Slide: Conclusion)*

That is what I had to say about those three questions. We come now to our Conclusion. Just before we go to that, I was going to hand over to Estelle to see if there was anything – she has been handling questions on the Questions button – whether there was anything else that needs to be dealt with by any of us, before we conclude.

[59 minutes, 37 seconds]