Expert comment

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The last edition of this journal featured an article about the impact of the General Data Protection Regulation ('GDPR') on applying section 40 of the Freedom of Information Act ('FOIA') (*How will the GDPR affect FOI law*?, Volume 13, Issue 5, pages 8-10). The author pointed to the fact that the GDPR prevents public authorities from relying on the equivalent of the 'legitimate interests' condition under the Data Protection Act 1998 (Regulation 6(1)(f) of the GDPR) in order to answer FOI requests involving the personal data of third parties.

The question surrounding how section 40 will now be interpreted in light of the GDPR has hung in the air since the legislation was passed in May 2016, and it was expected that the Commissioner would issue guidance on the subject. However, guidance has yet to emerge and addressing the issue is becoming urgent given that the GDPR comes into effect on 25th May next year.

Clarification could be given through new formal guidance, and probably should given the range of issues to which the issue gives rise. It is possible that the government is intending to account for the impact of the GDPR on section 40 FOIA in the forthcoming Data Protection Bill necessitated by Brexit, expected to be published this Autumn. The latter route would leave the position uncertain right up until the last minute, due to the length of time it usually takes to secure Parliamentary approval to legislation (normally about 7 months for a contentious bill).

The article mentioned in the introduction concluded that "it may prove difficult for public authorities to ever disclose personal data through FOIA". While some might welcome this, such an outcome would obviously be serious, and would likely be considered an unacceptable restriction on FOI disclosure. Questions about salary levels, compensation packages for departing staff, staff disciplinary matters, or standards of medical care, could otherwise all face being ruled-out.

As the article points out, as an alternative, public authorities may need to rely on the condition in Regulation 6(1)(e) of the GDPR — that the processing is necessary for the performance of a task carried out in the public interest. A further alternative that has been suggested is that the processing would be necessary for compliance with a legal obligation under Regulation 6(1)(c)). However, use of either condition would involve different questions for public authorities than those required by disclosure under the legitimate interests condition or its GDPR equivalent in Regulation 6(1)(f).

Managing the delicate balance between legitimate interests in disclosure and an unwarranted intrusion into the privacy interests of data subjects under the present DPA condition will become redundant when disclosure has to take place under a different condition. While the existing jurisprudence on what is 'necessary' can be expected to survive, new tests will need to be evolved for what processing is necessary for the performance of a 'task carried out in the public interest', or in 'the exercise of official authority'. What are the components of such a 'task'? And are they the same as, or can they be related to, a duty to disclose information to which the requester is entitled under FOIA, while withholding personal data whose disclosure would breach the data protection rights of the data subject? Responding to an FOI request does not immediately appear to equate to an 'exercise of official authority'.

Similarly, if relying on the basis in Regulation 6(1)(c) of the GDPR (processing necessary for compliance with a legal obligation), what compliance in any given case is necessary to meet the legal obligation under FOIA? Relying merely on the existence of a duty does no more than restate the issue: guidance is needed on how the duty is to be met in a given situation. Under that condition in particular, the guidance and cases would need to start from the beginning.

Even where it is not specifically confined to interpreting the 'legitimate interests' provision', much of the Commissioner's guidance on fairness, as well as the Tribunals' jurisprudence on the subject, has originated in teasing out the implications of the legitimate interests/privacy balance and then applying them more broadly. These concepts will now need to be applied afresh to the new circumstances – and doubtless face challenge in some cases — without a parallel data processing condition against which to test them.

Section 40 FOIA is generally considered to be the most frequent ground of FOI complaint to the ICO. It is certainly the most elaborate and time-consuming FOI exemption for public authorities. All the more important, then, that those authori-

ties are given adequate warning of how the law will change next May.

There is also the small matter of the GDPR's impact on the Environmental Information Regulations ('EIRs') to be considered. Unless revised Regulations are to be introduced, provision will need to be made at a technical level to read the GDPR into Regulation 13 (which parallels section 40 FOIA). More substantially, there will be a need to keep the two regimes side by side in their interpretation, at least until any fall-out for the EIRs regime from Brexit has been clarified. If the expectation really is that FOI responses would no longer include the personal data of third parties, someone needs to say so, and the issue needs to be debated.

On the other hand, if — as must surely be expected — there is to be a way to adapt this part of the FOI regime to work to the new context, then that work is already overdue. We look to the Commissioner, or the government, for a lead.

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