Expert comment

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The publication of the Data Protection Bill has answered, at least provisionally, a question that had been left unanswered since the General Data Protection Regulation ('GDPR') was finalised, and which was raised in my last column: which data processing condition should be used to answer information requests involving a third party's personal data? The answer is surprising: the same one as before.

Article 6(1)(f) of the GDPR prevents public authorities who are carrying out processing 'in the performance of their tasks' from using what has been known as the 'legitimate interests' condition in its slightly revised form. This was interpreted by everyone, including the Information Commissioner, to mean that the condition in its revised form would not be available to public authorities disclosing personal data in response to requests made under the Freedom of Information Act 2000 ('FOIA') or the Environmental Information Regulations 2004 ('EIRs'). This raised a difficulty, since legitimate interests has been the basis for most or all of such disclosures.

Schedule 18 of the new Data Protection Bill addresses the issue by providing for an exception to the general disapplication of the condition for public authorities when they are disclosing personal data under FOI/EIRs requests (paragraphs 6(8) and 16(7) respectively).

It will be interesting to hear, perhaps in the Committee Stage of the Bill in the House of Lords (where it is being taken first), how this outcome has been achieved, and made consistent with the GDPR. The position will not be finally confirmed, of course, until the Bill receives Royal Assent; possibly early next Spring.

Scope of the EIRs

Another long-standing challenge for FOI practitioners (and which this column has dealt with before) is knowing the correct boundary between FOIA and the EIRs. The Court of Appeal decision in *Department for Business, Energy and industrial Strategy v Information Commissioner and Alex Henney* [2017] EWCA Civ 844, which has become the leading case, has taken the matter forward. In all but one respect, the decision confirms the decision of the Upper Tribunal in *DECC v IC and Henney* [2015] UKUT 0671 (AAC) (the same case by a different name).

Mr Henney had requested a copy of the Project Assessment Review ('PAR') which formed part of the data and communications component of the government's Smart Meter Programme ('SMP'). It was not contested that the SMP was a measure affecting the environment, since one of its aims was to reduce CO2 emissions. (It might also be suggested, at a more prosaic level, that installing smart meters would also affect the state of the ground concerned). However, it was assumed that the PAR (and the data and communications component) did not affect the environment. The question was whether, and if so when, one could look beyond the matter with which the information was most directly concerned, where that matter did not 'of itself' affect the state of the environment, to another measure which did affect the environment; and find that the information in issue still fell within the definition in Regulation 2(1)(c), and therefore the scope of the request.

The Upper Tribunal found that public authorities should have regard to 'the bigger picture' in deciding whether information was 'on' some wider measures, provided there was a 'sufficient connection' between the information and the wider measures. The Court of Appeal disagreed with that point, but said that information could be information 'on' more than one measure (paragraph 42). Where the Upper Tribunal had considered the SMP to be the measure involved, the Court of Appeal considered that both the SMP and the PAR were measures.

The Court noted that nothing in the Regulations requires the relevant measure to be that which the information is 'primarily' on (paragraph 39). Since information can be on more than one measure, deciding what it is 'on' may require consideration of the wider context, beyond the precise issue with which the information is concerned (paragraph 43). This could include the purpose of the information, or whether access would enable the public to be better informed about decision-making. A purposive interpretation was required, given the legislation's international and European origins.

On the facts, the Court agreed with the Upper Tribunal that the PAR was information 'on' the SMP, as a measure. The PAR was also about the wider SMP because the communications element was 'integral' to the programme as a whole (paragraph 53).

The court recognised, though, the need for limits. It took into account *Glawischnig v Bundesministerium for Sicherheit und Generationen*, Case C-316/01, which gave rise to the principle of 'remoteness'. The Court rejected the 'big picture' approach in this case, because it could lead to including information under the EIRs that had only a minimal connection to environmental factors. This would be contrary to the decision in *Glawischnig* (paragraph 35).

In drawing the boundary of the EIRs, it appears that checking whether disclosure would assist the purposes of the Aarhus Convention is relevant to establishing whether there is a sufficient connection between the information and the environmental measure (paragraph 48). Also, a helpful formulation emerges from this case: information is 'on' a measure if it is 'about, relates to or concerns' the measure (paragraph 37).

The case moves the question forward, and confirms the broad approach and priority to be given to the EIRs as the law stands. Whether that stays the same in future remains to be seen.

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