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Human Rights, Freedom of Information and Data Protection

Human Rights

It is important to be aware of the European (not EU) background to this legislation.

The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. The Convention is a treaty of the Council of Europe which is based, along with the European Court of Human Rights, in Strasbourg. Neither body is part of the EU. The Convention guarantees a number of rights and freedoms, including:

- the right to a fair and public trial within a reasonable time (this applies to any case involving civil rights and obligations, and not just criminal trials),
- the right to respect for private and family life, home and correspondence, and
- the right to peaceful enjoyment of possessions and protection of property.

The Convention is intended, amongst other things, to promote the ideals and values of a democratic society. It is therefore to be given a broad and generous interpretation, and the courts will look at the substance and reality of what is involved, and not just the form. The Convention is also a dynamic document which must be interpreted in the light of present-day conditions. Societies and values change and these changes are taken into account.

The Convention incorporates two important concepts. The first is proportionality – any interference with a Convention right must be in proportion to the aim being pursued. The second concept is legal certainty. Any action impinging on a human right must be authorised by a specific legal rule or regime and not, for instance, by non-statutory guidance.

The Strasbourg Court looks to see whether there are common European standards but on the other hand it is reluctant to substitute its own views for those of domestic authorities in those cases where it is necessary to strike a balance between competing considerations. This applies, for instance, where there is a balance to be struck between the demands of the community or society and individual property rights. Nevertheless, the Court has, for instance, been very reluctant to permit the deprivation of property without compensation.

Turning to the UK legislation, it is already clear that the Human Rights Act has fundamentally altered the way in which the British courts approach the interpretation of statutory provisions. In particular, they now strive to find a

meaning which is compatible with the Convention, even if this involves finding a meaning which the words of the statute would not ordinarily bear. In doing so, the Courts can quash or ignore secondary legislation, but they cannot override the clear meaning of primary legislation, even though it may be equally clear that the legislation is incompatible with the Convention. The Courts will in these circumstances issue a declaration of incompatibility whereupon Parliament must decide whether it agrees with the Courts, and change the law, or whether it disagrees with the Courts and risk having the aggrieved citizen take the case to the European Court of Human Rights.

Most civil servants outside the Home office etc. will never have to concern themselves with the majority of the provisions of the Act. We are seldom in the business of removing the right to life, or to marry. But we do need to bear in mind that the right to a fair trial applies just as much to civil proceedings and tribunals as to the criminal law. Great care nowadays needs therefore to be taken to ensure that:

- tribunals are genuinely independent and impartial - not political appointees and not on short term appointments,
- hearings are arranged reasonably quickly, and held in public either initially or on appeal, and
- there is are effective appeal provisions throughout the legislation for which we are responsible.

As ever, take advice if you are unsure, or are challenged.

Freedom of Information ("FoI")

Civil servants working on the development of particular policies are not directly accountable to the public. However, the public are our ultimate paymaster and we should therefore be open with them, unless there is a very good reason not to be. After all, we deal with complex issues and have no monopoly of wisdom or knowledge. It therefore makes sense to explain the way in which the Government's policies are developing, before they are set in concrete, so that we can be told if we are getting anything wrong, and in particular if our assumptions are incorrect. We should also explain the way in which we administer our schemes and make decisions, and we should make available the internal guidance and rules which govern our procedures.

There have always been two important limits to the above approach. First, we have respected the needs of those who have provided us with information in confidence, or with commercially sensitive information. We should not disclose such information without the permission of the person who provided it. Second, we have not disclosed our advice to Ministers, for this weakens their position if they decide that they will not accept our advice. Open Government in this area

would thus tend to increase the power of officials as compared with Ministers, and this is hardly in the interests of democracy. Similarly, there is a strict prohibition against revealing that the Law Officers have been consulted, let alone what they have advised.

In the past, if I have not been sure whether to provide information, I have asked myself whether we would provide it in response to a Parliamentary Question. If we would, then we should be prepared to give it without such a stimulus. But if we would refuse information to an MP, we should prima facie refuse to give it to the public.

The Freedom of Information Act generally follows the approach described above, and establishes a general right of access to information held by public bodies, subject to certain qualified exemptions, including:

- personal information:- see “data protection” below
- information relating to the formulation or development of government policy;
- Ministerial communications;
- advice from the Law Officers – and requests for such advice;
- information whose disclosure would be likely to prejudice collective responsibility;
- information whose disclosure would constitute a breach of confidence, and
- information whose disclosure would be likely to prejudice commercial interests.

Most of the exemptions are far from absolute and are “qualified” – that is subject to a balancing “public interest” test in which the public interest in secrecy needs to be balanced against the public interest in disclosure arising from benefits related to :

- accountability and transparency,
- greater understanding and public debate, and
- allowing individuals to understand and challenge decisions.

Appeals against your decisions can be made to the Information Commissioner who seems to be taking a pretty sensible line. Perhaps his most interesting decision to date, at least for civil servants, was when, in April 2007, he forced the publication of advice to (then Chancellor) Gordon Brown on the likely consequences of changing the taxation of pension funds. The Commissioner recognised the “chilling effect” associated with the publication of civil service advice, but also recognised that this effect should decline over time and thought that, as the advice had been given 10 years earlier, the balance had swung in favour of disclosure. There will clearly be plenty more appeals in this area, but it does begin to look as though the Commissioner will generally protect the confidentiality of officials’ advice for some years, but there will need to be very good reasons if he is to be persuaded that this period should exceed 10 years.

More generally, however, if your default approach is to be open, and to respond positively to informal requests, then you will seldom if ever find yourself corresponding with the Information Commissioner. But if it begins to look as though you might be getting into a dispute in this area then make sure that you read the Act and the guidance material very carefully, and also consult experienced colleagues, including your department's Freedom of Information officer. There is also some very helpful advice on the website of the Information Commissioner (http://www.ico.gov.uk). But do bear in mind that, if you assert the need for confidentiality and are overruled, the public are more likely to see conspiracy than cock up.

Data protection

Like human rights law, data protection legislation is firmly based on a European law, but this time it is based on a very old and poorly drafted (or at least very dated and highly bureaucratic) EU Directive, which was itself based on 1950s German legislation, reacting to the excesses of the period of Nazi government. The Directive and hence our legislation accordingly seeks to protect people, rather than protect data, and so is hard to enforce in these days of electronic data etc.

There are accordingly two aspects to this legislation. The first is the accessibility of personal data to those interested in knowing what has been said and written about them. This applies particularly to employees, including fellow civil servants. The second is the protection of personal data in general, and by extension the data held on IT systems.

The first and primary aspect of the data protection regime is the more troublesome, given our natural tendency to be less than wholly frank with the public and our staff. The law is complex, but it is best to work on the basis that the public and our staff are entitled to know what has been written about them. References provided "in confidence", for instance, need not be disclosed to the subject by the writer, but the subject can approach the person who received the reference, who then needs to judge whether "it is reasonable in all the circumstances" to disclose it. As with FoI, therefore, the best approach is to be prepared to disclose information and honest views about individuals to those individuals (but to no-one else) – but take advice if you believe that this would be unwise. Also, as with FoI, you might do a lot worse than to start by reading the very helpful *good practice notes* on the website of the Information Commissioner (http://www.ico.gov.uk).

Following the events of early 2008, when HMRC lost two discs containing detailed information about all child benefit claimants, there can hardly be anyone in government who is not acutely aware of the second aspect of the legislation, and the need to put a lot of effort into protecting personal data. Put crudely, it

needs to be protected just as well as we protect money. Just as you need to learn and comply with the rules which limit the scope for financial fraud (see "Managing Money at http://www.civilservant.org.uk/c31.pdf) so you need to learn and comply with your department's rules which require the encryption, safe transmission etc. of personal data. If you are handling any form of such data, and don't understand the rules, then you must ask.

Finally, two general points:-

Data protection legislation trumps FoI legislation, so that you cannot, for instance, provide personal information about an individual, including an employee, in response to an FoI request.

But the legislation does not stop you providing personal information to another authority when it is clearly in the person's or public interest to do so – for instance if their life or health is in serious danger. Police forces may therefore exchange information about those likely to commit serious offences, and energy utilities can alert the authorities if power or gas is about to be disconnected – unless the householder has explicitly forbidden such a disclosure. So, if faced with an apparent conflict, just apply common sense, and if necessary consult the Information Commissioner's office.

Help Please!

These notes are intended to do no more than provide a general introduction - "what every civil servant needs to know" – about these three pieces of legislation. But please email the author (martin.stanley@civilservant.org.uk) if you think I have got anything wrong, or have advice or further information which could usefully be added.