

Identity of FOI requesters (who wants to know?)



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Paul Dacam, Partner, and Jamie Potter, Associate, at Hogan Lovells International LLP, discuss how far a recent decision on the identity of applicants represents an erosion of one of the fundamental principles of FOI law

The new coalition government Programme promises an extension of the scope of the Freedom of Information Act 2000 ('FOIA') to provide greater transparency. Already we have seen the disclosure of the contents of the Combined Online Information System exposing details of the accounts of the whole of central government.

However, the recent decision of the Court of Session in *Glasgow City Council v the Scottish Information Commissioner* marks a small, but significant, shift in the opposite direction, calling into question a fundamental principle which many FOI practitioners had understood to underpin the FOIA regime: namely that it is both identity and purpose blind.

SECTION 8 FOIA - THE RIGHT TO REQUEST INFORMATION

The principle referred to above is reflected in section 8(1) FOIA. This requires only that a request for information:

- is in writing;
- states the name of the applicant and an address for correspondence; and
- describes the information requested.

The Environmental Information Regulations 2004 ('EIRs') do not even include such basic requirements, obliging public authorities within their scope to make information available on 'request'.

The principle has also been emphasised by the First-tier Tribunal (Information Rights) ('the Tribunal'), which stated in *S v the Information Commissioner* [2007] UKIT EA/2006/0030 (at paragraph 19) that:

"FOIA is, however, applicant and motive blind. It is about disclosure to the public and public interests. It is not about specified individuals or private interests."

And further (at paragraph 80):

"In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used."

As a result, it has always been considered that requests can be made by third parties (including professional advisors) either explicitly or indirectly on behalf of the 'true applicant'. Indeed, there are any number of reasons why an applicant may understandably not wish to reveal their identity to a public authority, particularly in a litigation context. For example, they may believe a FOIA request will be deemed an 'aggressive step' and may not wish to jeopardise otherwise good relationships with the authority. They may also consider that revealing their identity will inevitably influence how the public authority responds to the request.

Following the decision in *Glasgow City*, the question of whether the practice of routing a FOI request through a third party remains a valid option for 'shy' applicants is now a matter of some uncertainty.

THE COURT OF SESSION DECISION

In short, the case concerned a request under the Freedom of Information (Scotland) Act 2002 ('FOISA') for certain property records held by local councils from an agent on behalf of a private property search business. Such documents were otherwise available, but would have cost £18.6 million to obtain outside of the Scottish FOI regime. The agent therefore made the FOISA request 'on behalf of a client', without naming the client in question.

In considering the validity of the request, the Court of Session held that the request was invalid because the identity of the 'true applicant' had not been provided in the request. In summing up their position, the Court said (at paragraph 77) that:

"in our opinion, the true applicant in that situation was the client, who should therefore have been named in accordance with section 8(1)(b). In view of the potential importance of the identity of the applicant to the operation of [FOISA].

"Compliance with section 8(1)(b) must, in our view, be regarded as an essential requirement of a valid request under the Act."

The SIC quickly published guidance on the application of the decision in Scotland in January 2010 which, in accordance with the ratio of the *Glasgow City* decision, advised that, where a request for information explicitly makes clear that it is being made on behalf of an unidentified third party, it should be deemed invalid, and can be refused. A summary of the guidance produced by the Scottish Information Commissioner ('SIC') as a result of the decision in *Glasgow City and the Scottish Information Commissioner's* ('SIC') is set out in an article by Christine O'Neill and Charles Livingstone ('Requests for 'copies' and the 'true identity' of applicants - does it matter?', *Freedom of Information*, Volume 6, Issue 4, pages 11-13).

However, where agency is not explicit, a situation not directly considered by the Scottish Court, things became a little less clear.

First, the SIC suggests that the public authority should consider providing the information anyway. However, his guidance goes on to state that, if the public authority is unwilling to take this step, then the public authority can request the identity of the 'true' applicant. This is where the first difficulty arises: the applicant is under no obligation to respond to the public authority at all, let alone to answer its question. This step, therefore, seems unlikely to resolve the impasse.

"The case has...provided another reason for public authorities to refuse requests, or at least delay providing a substantive response. If a public authority maintains a refusal on identity validity grounds, then it may not be until a decision from either the Information Commissioner's Office ("ICO") or the Tribunal threat the substantive aspects of a request are considered."

If the request was made by a third party, presumably for a good (or at least some) reason, it is unlikely to be abandoned. If not, no consideration is given by the SIC as to quite how an applicant might prove a negative (i.e. that there is no other requestor) in circumstances where a public authority is convinced that there is.

Presuming that the public authority maintains its position (as would seem likely) the SIC advises that the public authority may refuse the request, provided there are reasonable grounds (that can be demonstrated to the Commissioner) for believing that the request is made on behalf of another person. However, whether the simple fact that the requestor is a professional advisor will constitute sufficient 'reasonable grounds' in these circumstances is not clear.

CAN THE DECISION BE JUSTIFIED?

The case has resulted in a further erosion of the ideals of the FOI regime, undermining the identity (and motive) blind nature of FOIA, and providing another reason for public authorities to refuse requests, or at least delay providing a substantive response. If a public authority maintains a refusal on identity validity grounds, then it may not be until a decision from either the Information Commissioner's Office ('ICO') or the Tribunal that the substantive aspects of a request are considered.

Recent experience suggests that public authorities in England are already seeking to rely on the *Glasgow City* decision to refuse requests made by professional advisors (which do not even specify whether the request is made on behalf of a client or not). It is, therefore, worth considering whether such a substantial erosion of a fundamental principle of the FOI regime can properly be justified.

SECTION 12 ('COSTS LIMIT')

It has been argued that the disclosure of the true identity of an applicant is necessary to assess the appropriate costs threshold under section 12 FOIA in England (and section 12 FOISA in Scotland). However, that section (and the Fees Regulations made under it) expressly permit a public authority to aggregate costs where they suspect similar requests made by different persons have been made in concert in pursuance of a campaign. Indeed, this very provision seems expressly to recognise, and account for, the possibility of third parties making requests on behalf of others.

SECTION 14 ('VEXATIOUS REQUESTS')

The right to refuse vexatious or repeated requests (under section 14 FOIA) has also been suggested (by both the Scottish Court in *Glasgow City* and in guidance from the ICO) as a provision requiring knowledge of 'true identity'. However, section 14(1) (which concerns vexatious requests) does not refer to the applicant, instead focussing on the nature of the request. While the previous behaviour of the applicant may be relevant, there is no reason why the public authority cannot invoke this exception in the same way it can aggregate costs of requests made by different people. Indeed, the

ICO guidance on vexatious requests confirms that it is the request rather than the requester that must be vexatious. The right to refuse identical or similar requests under section 14(2) does require that such requests are made by the same person. However, it is time-limited (to a reasonable interval) and, in any event, it seems likely that a same or similar request made by a third party (acting in concert with the original requestor) shortly after the original request could and should be deemed vexatious.

SECTION 21 ('REASONABLY ACCESSIBLE')

In relation to section 21(1) FOIA, which exempts (absolutely) information which is already reasonably accessible to the applicant otherwise than under section 1 the Scottish Court and the ICO both recognise that the identity of the applicant may become relevant where, because of the applicant's own individual circumstances, they are either in some way incapacitated and therefore unable to access otherwise publicly available information or they have some particular right 'of access that renders otherwise private information available to them.

However, in the first case the application of the exemption seems intended to protect the applicant's own interests, and they should, therefore, be permitted to choose whether or not to disclose their incapacity to the public authority.

In the second case, the applicant's choice not to exercise their alternative (greater) right to the information is only likely to be to their disadvantage. If it is not, then disclosure to someone else under FOIA (and therefore to the public at large) is almost inevitable in any event.

SECTION 40 ('PERSONAL DATA')

Similarly, the Scottish Court suggests that the personal data exemption (section 38 FOISA and section 40 FOIA) "can only operate effectively" if the true applicant is known. However, if the third party is the data subject, then they may have the right to the information under the Data Protection Act 1998 ('DPA') (for whatever reason they are requesting it). If they are not, then the information will be otherwise protected in accordance with the principles of the DPA. As stated in the ICO guidance:

"Section 40(2) in relation to third party personal data must be considered on the basis of whether it would be contrary to the data protection principles to release the information to the general public and not whether it would be contrary to the data protection principles to release it to the particular applicant."

SECTION 38 ('HEALTH AND SAFETY')

Finally, there is mention in both the *Glasgow City* decision and the ICO guidance, of the relevance of an applicant's identity to the exemption for information which would endanger the health or safety of any individual (section 38 FOIA) if disclosed. However, it is once again difficult to see

how the identity of the applicant is of any substantial relevance to the application of this exception, as disclosure is to be presumed to be disclosure at large, and therefore all individuals must be considered.

CONCLUSION

The above analysis demonstrates that there are very few circumstances where it will genuinely be necessary for a public authority to know the true identity of a person requesting information under FOIA in order to deal properly with that request. It is, therefore, very difficult to see how - these can justify the broad right to refuse a FOIA request on this basis. Instead it would seem preferable to maintain the advice of the Information Commissioner in his Good Practice guidance No.6 (in which the same matters are considered as were raised by the Scottish Court in *Glasgow City*), which concludes:

"As a general summary, the correct approach in considering requests for information and the application of the exemptions should be on the basis that the application could have been made by anyone, anywhere in the world, for any (non-vexatious) reason."

Whether this remains the position in England is presently uncertain, and the Information Commissioner is yet to announce his view. To date, no complaint has ever been made to the ICO regarding the validity of a request based on the identity of the applicant - perhaps the first is just around the corner.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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