



Freedom of information update

This briefing considers some recent trends regarding freedom of information and information privacy issues generally, and outlines some of the key commitments made by the new coalition government in the UK to promote transparency. Some of these commitments, which have yet to be fleshed out, may affect the operation of the freedom of information regime. In particular, the coalition looks set to extend the regime to cover new entities.

Introduction

The UK freedom of information regime has been in force for over five years now and in that time it has become an established part of the political and legal landscape. It looks set to stay that way and indications that the new coalition government will strengthen the regime suggest that it may in fact become increasingly important.

Under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR), any individual or organisation has a right to access any information held by over 100,000 public authorities in the UK, subject to important exemptions and exceptions. This includes information given to public authorities by third parties. All information requests must be responded to, usually within 20 working days, and there is no obligation for public authorities to consult with potentially affected third parties before disclosing any information they hold.

Information access and information privacy

The right to access information held by UK public authorities has given rise to a number of high-profile cases since the introduction of the regime – for example, relating to the Iraq war and MPs' expenses. It has also had a significant impact on the way in which organisations interact with public bodies – for example, in the context of procurement exercises, during which bidders may be expected to provide sensitive information to contracting authorities subject to the regime.

At the same time, laws on information privacy, which are intended to protect data rather than give access to it, have also been subject to increasing public scrutiny. This has been fuelled in part by examples of serious breaches of data security, such as the government's loss of child benefit records for millions of people in 2007, and by media coverage of issues such as the privacy settings on internet networking sites.

Recently, the law of privacy has become something of a 'hot topic' in the courts, too, as evidenced by a number of high-profile cases involving attempts to curb the press on human rights grounds (such as the Max Mosley case against the UK, which is currently before the European Court of Human Rights). These cases and commentary on them have prompted reviews into privacy law and the use of 'super-injunctions' in the UK.

In light of these developments, information access and information privacy have become important political topics, not least because of the impact they are perceived to have on the relationship between the individual and the state. This is clearly evidenced by the new coalition's 'programme for government', published on 20 May 2010 (the programme), which places civil liberties at the centre of the government agenda. In particular, the programme focuses on increasing government transparency on the one hand and scaling back the extent to which the state amasses private information on the other.

Extending the scope of freedom of information

One aspect of this is the commitment made in the programme to extend the scope of the FOIA 'to provide greater transparency'. The Ministry of Justice (MOJ) recently announced that the coalition intends to amend the FOIA to cover more organisations and that it expects to achieve this by November 2011 (MOJ draft structural reform plan, July 2010).

This latest announcement does not indicate which additional organisations may be covered by the extended regime. One possibility is that the coalition may implement the previous government's proposals to extend the FOIA to the Association of Chief Police Officers, the Financial Ombudsman Service, the Universities and Colleges Admissions Service and academies. A pre-election announcement indicated that these four bodies would be brought within the scope of the FOIA by October 2011 and that further consultation with bodies such as Network Rail and utility companies would be taken forward in the meantime, with a view to also making them subject to the regime. The coalition has not announced plans to shelve these proposals and schools minister Lord Hill recently agreed to bring academies within the scope of the FOIA – suggesting that the coalition may adopt the previous government's proposals in full. However, the possibility that the coalition may extend the regime to an even wider range of organisations cannot be ruled out.

It is also important to bear in mind that the EIR can already extend to private bodies not covered by the FOIA – for example, if they are in a contractual relationship with a public authority and they conduct certain activities relating to the environment. Given that the EIR implement EU law (Directive 2003/4/EC), this risk is not restricted to the UK. Also, proposals to alter the scope of general freedom of information laws are not exclusive to the UK – the German government, for example, is looking at plans to consolidate a number of information access laws, including the Consumer Information Act (Verbraucherinformationsgesetz), by merging them into one comprehensive law.

Increasing transparency

The programme also includes a section dedicated to 'government transparency', which sets out a series of commitments intended to 'throw open the doors of public bodies'. These include promises to publish various categories of information routinely, especially in the context of public procurement. Prime Minister Cameron has now announced the following timetable for the key data transparency commitments:

- all new central government information and communication technology contracts to be published online from July 2010;
- all new central government tender documents for contracts over £10,000 to be published on a single website from September 2010;
- new items of central government spending over £25,000 to be published online from November 2010;
- all new central government contracts to be published in full from January 2011; and
- new local government contracts and tender documents for expenditure over £500 to be published in full from January 2011.

The coalition intends to make any published data available in an open standardised format, so that it can be re-used by third parties. The prime minister has indicated that limited exemptions on national security and personal privacy grounds will be permitted, but we await further details about how these will work. Also, if these proposals extend to information provided by bidders (which is not yet clear), they will need to be consistent with existing constraints on disclosure under the EU procurement regime (such as the confidentiality provisions in the UK Public Contracts Regulations 2006).

Many questions about these transparency proposals still remain. For instance, they also include a commitment to create a new 'right to data', 'so that government-held datasets can be requested and used by the public, and then published on a regular basis'. The coalition has already started to publish some datasets on the website <http://data.gov.uk>. This commitment seems designed to promote the commercial exploitation of public sector information. However, it is not yet clear whether this right to data will affect the operation of the existing rights to access under the freedom of information regime.

Our advice

Over the past year we have advised a range of commercial bodies and public authorities on freedom of information issues. This has included:

- advising a client in Germany on a reference to the European Court of Justice regarding the interpretation of the European directive on public access to environmental information;
- advising businesses on protecting their information when dealing with public authorities and on the risk of becoming directly subject to the regime;
- advising public authorities on their freedom of information obligations; and
- drafting confidentiality agreements to deal with the effects of the regime.

For further information please contact

Jonathan Isted
T +44 20 7832 7320
E jonathan.isted@freshfields.com

James Thorne
T +44 20 7716 4705
E jim.thorne@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2010
www.freshfields.com