

Freedom of
Information: an
introduction for
competition and IP
lawyers

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Why do I need to know about FOI?

- Is the information I provide secure against FOI requests?
 - Commercially sensitive information
 - Lobbying
 - Leniency statements
- What can I get to help my cause?
 - Internal discussions
 - Leniency statements

The legislation

- UK

- Freedom of Information Act 2000 (FOIA)
- Freedom of Information (Scotland) Act 2002
- Environmental Information Regulations 2004 (implementing Directive 2003/4/EC and Aarhus Convention)

- EU

- Art 15 TFEU
- Council Regulation 1049/2001 (“the Access Regulation”)

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The EU Regime

- Art. 15(3) TFEU
- Council Regulation 1049/2001

Council Reg 1049/2001

- Right of access
- By EU citizens/businesses
- To documents
- Held by EU institutions
- Exceptions (disclosure prohibited)
 - Absolute
 - Qualified

Exceptions

- **Absolute: undermine**
 - Public security, defence, international relations, financial monetary or economic policy
- **Qualified: undermine**
 - Commercial interests including IP
 - Court proceedings and legal advice
 - Purpose of inspections and investigations
 - (internal documents) “seriously” undermine decision making

Third parties

- Art 4(4): Third-party documents: institution must consult third party
- Art 4(5): documents emanating from Member State: no disclosure without its prior agreement
 - BUT: Case C-64/05P *Sweden v Commission*:

Application in competition law field: (1) lobbying

- Case T-194/04 *Bavarian Lager Co*
 - Minutes of meeting between Commission, UK and EU beer trade association
 - Commission wrong to refuse to disclose names of attendees

(2) State aid

- C-139/07P *Technische Glaswerk Ilmenau*
 - ECJ overturned GC
 - No cure for State aid regime limited access

(3) Documents on file in Art.101/102 cases

- Commission must conduct a concrete and specific examination of each document (*Verein für Konsumenten*)
- Ombudsman (complaint 3699/2006)

(4) Merger cases: *MyTravel*

- Case T-403/05 *MyTravel*, on appeal C-506/08P *Sweden v Commission* (AG Kokott opinion 3/3/11)
 - Internal documents relating to the Commission's *Airtours* decision
 - Documents relating to the post-*Airtours* working group to consider an appeal and implications

Other merger file cases

- T-111/07 *Agrofert and Sweden*
(no appeal on merits)
- T-237/05 *Editions Jacob*
(ongoing merits appeal)

(5) Access to GC/ECJ pleadings

- Joined Cases C-514/07P and C-528/07P *Sweden and API v Commission*
- Request for disclosure of Commission pleadings in (then) ongoing appeals

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The UK

The right to information: s.1 FOIA 2000

- Anyone
- Making a request
- For information
- To a public authority (PA)
- Has a right: -
 - To be informed whether the PA holds that information
 - To have the information disclosed to him

Absolute/Qualified exemption

- 1st question – is exemption engaged?
 - Absolute – that is only question – if engaged, no disclosure
- Qualified – 2nd question - balancing exercise:

Types of request that might be made

- Case-specific material
- General policy information
- UK/EU material

Case-specific material

- S.30
- S.32
- SS.40-44

s.30 –

investigations/proceedings

- Qualified
- NDCD
- No prejudice test
- OFT has used this to refuse e.g. information on number of whistleblowers (13.1.11)

s.31 – other law enforcement

- Qualified
- NDCD
- Likely prejudice to prevention/detection of crime etc.

s.32: court records

- Absolute
- NDCD

s.42: legal advice

- Qualified
- NDCD
- Any material subject to lawyer/client privilege

“Third party” exemptions

- S.40 – contravention of Data Protection Act (personal information) – absolute (mostly)
- S.41 – information provided in confidence and disclosure would be a breach of confidence – absolute
- S.43 – prejudice third party’s (or PA’s) commercial interests – qualified
- NB no right to be consulted before disclosure made

Otherwise prohibited

- S.44 Absolute exemption where disclosure prohibited
- S.238 EA02
 - Information that came to PA in exercise of function under (e.g. EA, CA98)
 - And relates to the affairs of an individual or a business of an undertaking
 - Gateways include s.237(6) “duty to disclose apart from” EA and s.241(1) “performance of functions”

Dey v OFT EA/2007/0057

- Request for information on number of complaints about a company
- OFT – s.44 (also s.43 but not considered)
- Dey – pointed to *Reid v Dumfries* (Scottish IT)
- UK IT – disagreed and agreed with OFT

Policy debates: s.35 – formulation of Government policy

- Qualified
- NDCD
- “relates to”
 - Formulation or development of UK Government (or Welsh Government) policy (OFT – advice on minimum alcohol prices 2.9.09)
 - Ministerial communications
 - UK Law Officers’ advice
 - Ministers’ private offices

s.36 – other disclosure prejudicial to effective conduct of public affairs

- Qualified (save for application to Parliament)
- NDCD
- Not limited to “Government policy”
- Likely prejudice to:
 - Collective cabinet responsibility
 - Free and frank provision of advice/exchange of views
 - Other prejudice to effective conduct of public affairs
- Need qualified person certificate

UK/EU material

- E.g. communications between Commission and OFT; ECJ papers held by UK
- Other exemptions may apply but also ...

s.27 – international relations (including EU)

- Qualified
- NDCD
- 27(1) includes “prejudice ... to relations between United Kingdom and any international organisation or international court”
- 27(2) Information obtained from international organisation, international court or State in circumstances where entity supplying the information was reasonably entitled to expect it would be held in confidence

Miscellaneous other exemptions to note

- s.23 – information supplied by/relating to security bodies (absolute)
- S.24 – other cases where exemption required to safeguard national security
- S.26: prejudice to defence
- S.28: prejudice to relations between UK/devolved administrations
- S.33: prejudice to PA's audit functions
- S.34: Parliamentary privilege
- S.37: communications with members of the Royal Family (communications with Queen/Prince of Wales absolute exemption); communications about honours
- S.38: endanger health and safety
- S.39: environmental information (governed by EIRs)

Summary

- Most information held by regulator likely to be covered by an exemption
- General information about budgets/general policy-making – more likely to be obtainable
- Case-specific information – more difficult: s.238 EA02; confidential information

Procedure

- Request – 20 working days to decide (+reasonable extension to decide if exemption applies)
- May charge fee but usually don't
- Cost limit (but not include costs of considering exemption)
- Internal Review
- Appeal to Information Commissioner (IC)

Information Commissioner

- Powers to obtain documents, inspect
- Powers to require PA to disclose (by decision notice or enforcement notice)
- S.53 – minister can veto decision notice

Appeals from IC

- Appeal to First Tier Tribunal
- On merits – i.e. rehearing
- Balance of interests a question of law anyway
- PA can appeal a decision that it disclose (can rely on new exemption)
- Requester can appeal a non-disclosure decision

Practical points on appeal to FTT

- General rule – no orders for costs
- Hearings can be dispensed with and dealt with on paper
- Witnesses heard

Further appeals

- On point of law – to Upper Tribunal and then to Court of Appeal/Supreme Court