

## Public interest test for FoI: It's all in the timing

Last month the Information Tribunal ordered the Office of Government Commerce to release two "Gateway Reviews" of the Government's ID cards programme. It was the latest in a series of cases in which departments have argued that it was in the public interest that information relating to the formulation or development of Government policy should be withheld.

On its facts, the case was probably not a hard one for the Tribunal. Two Select Committees have called for Gateway Reviews of Government projects to be published routinely and the ID cards scheme is both highly controversial and (as the IT noted in an earlier case) "a public sector project of unprecedented scale and complexity".

More significantly however (and provided the position remains the same after the appeal to the High Court which the OGC is reportedly considering) a consistent approach to the "policy" exemption under s.35 of the Freedom of Information Act is emerging. Journalists who use FOIA can now identify with greater certainty when it might be productive to make a request or pursue an appeal.

First, the fact that s.35 concerns "policy" does not give it any special status. The IT has firmly rejected the suggestion that s.35 should be treated as analogous to the absolute exemptions. It is a qualified exemption requiring a balancing of competing public interests.

Second, each case will be decided on its own facts. The IT emphasised, for example, that it was not recommending the blanket disclosure of Gateway Reviews in general. Journalists will therefore always have to make a case for the public interest in the specific information they are seeking.

Third, the Government need not show that disclosure would have immediate or direct adverse consequences; the IT will take into account the wider effects. For example, it may be that disclosure of a particular piece of information about the formulation of a policy could deter civil servants from giving frank advice in the future. But the IT is sceptical about such claims. In the OGC case it appeared incredulous at the suggestion that civil servants would be deterred from taking charge of Government projects for fear of bad publicity when Gateway Reviews were published.

Fourth – and in practice this may become the most important factor –, the Tribunal recognises the need for a "safe space" in which the early stages of policy formulation can be carried out by ministers and officials without the inhibiting threat of premature publicity. It is only once the formulation of a policy is complete that disclosure is likely to be in the public interest. The announcement of the policy in Parliament may well mark that threshold. So journalists need to consider carefully the timing of their requests. The OGC requests succeeded because, by the time they were made, the Government had already decided to go ahead with ID cards and had introduced a bill in Parliament.

To date, the Information Commissioner has ruled in favour of disclosure under s.35 in more than three quarters of the cases in which a public authority has relied on it. No public authority has yet succeeded on appeal. This may reassure the press that FOIA, for the moment at least, really does have teeth when it matters. But journalists should always remember that the key to a successful FOIA request is that it

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should be well-defined and well-timed.

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