

**PRINCIPLES AROUND DISCLOSURE OF AUDIT REPORTS
AND OTHER SENSITIVE INFORMATION**

Background

The provision of local government information was changed by the Freedom of Information Act 2000. Until then the overarching principle was that disclosure only took place where there was a statutory power enable or requiring it.

However, since 2002, the presumption is that information is disclosed unless there is an exemption in the Act which allows it to be withheld. The Act allows for disclosure on request, however, this does not preclude information being made available proactively, although in a recent survey of Local authorities with one exception only summary information is routinely made available.

Historically, Bromley has not published or made full audit reports available. However summaries of priority one findings are routinely published with audit sub-committee papers

In disclosing information, either in response to a specific request or proactively, it is prudent to have regard to the exemptions to disclosure in the act. The key exemptions which would be relevant to audit reports are:

- Section 30 – investigations and proceedings conducted by public authorities
- Section 36 – prejudicial to the effective conduct of public affairs
- Section 40 – personal information
- Section 41 – information provided in confidence
- Section 42 – legal professional privilege
- Section 43 – commercial interests

Personal data, which can include an individual's name, should not routinely be disclosed unless it is already in the public domain or unless there is an empowering provision. Where an exemption is applied, the disclosing authority must be prepared to defend its position to the Information Commissioner and, ultimately, to the Courts.

Even where certain information which could be detrimental to an individual is in the public domain, local authorities can still face sanctions for keeping that information available, for example on their website, for what is deemed to be too long a period of time.

We must ensure that any information we disclose does not conflict with any other legal provision, for example expose us to risk of actions of defamation or breach of a compromise agreement. Unlike Parliamentary bodies which have absolute privilege for an variety of matters, a local authority only benefits from qualified privilege. This means that it will usually be protected unless an individual can show a degree of malice or recklessness in the information disclosed. This does not apply to all Council disclosures. For example there will be an element of protection for Committee reports and minutes but that will not extend to press releases or subsequent disclosures.

Potentially the safest approach to follow for disclosure is to consider publication of full audit reports on a case by case basis whilst, to considering whether the practice of publication of summary information can be enhanced. This could include the Council proactively advising residents of critical issues and how they have been addressed.

Where we look at publication then: in addition to the points mentioned above

- 1) the report should not be disclosed if it could prejudice any future criminal or civil proceedings;
- 2) the report should not be published if it could damage the commercial interests of the Council. For example, disclosing information which would assist others to perpetrate fraud or creating a disproportionate perspective of the merits of “doing business” with the Council;
- 3) where necessary deletions to confidential data contained within audit reports could lead to the flow not being understood.

Publishing of Audit Reports

	Reports made public?		What is made public?
	Yes	No	
<u>London Boroughs</u>			
Barking & Dagenham		√	Summary of all Limited/No assurance reports in committee reports
Bexley		√	Summary of all Limited/No assurance reports in committee reports
Bromley		√	Nothing
City of London		√	Summary of issues from Limited/No assurance audits in committee report
Ealing		√	Summary of issues from Limited/No assurance audits in committee report
Enfield		√	Summary of all reports in committee reports
Hackney		√	Summary of issues from Limited/No assurance audits in committee report
Hammersmith & Fulham		√	Nothing
Haringey		√	Summary of all Limited/No assurance reports in committee reports
Kensington & Chelsea		√	Summary of all Limited/No assurance reports in committee reports
Lambeth		√	Summary of all reports in committee reports
Newham	√		Limited/No assurance reports in full and summaries of others form part of the audit committee papers.
Richmond		√	Summary of issues from Limited/No assurance audits in committee report
Southwark		√	Nothing
<u>Other Councils</u>			
Huntingdon		√	Nothing
Woking		√	Summary of all Limited/No assurance reports in committee reports
West Sussex CC		√	Nothing

Appendix B The personal data exemption

Under the FOIA, the personal data exemption (which is absolute) provides that a public body will not be required to disclose requested information if it constitutes personal data as defined under the Data Protection Act 1998 (DPA).

The legal tests are complex but, put simply, when read together with the FOIA and the DPA provide that disclosure of personnel-related data (which is 'personal data' and therefore falls under the protection of the DPA) will only be permitted if each of the following criteria is met:

- disclosure of the information would be 'fair and lawful';
- there is a legitimate public interest in disclosing the information and the disclosure is necessary to meet that public interest; and
- the disclosure of the information will not cause unwarranted interference with the rights, freedoms and legitimate interests of the individual the information concerns (the 'data subject').

Essentially, the task for the public body is to consider: (i) whether disclosure would cause any unnecessary or unjustified damage or distress to the data subject; (ii) the data subject's reasonable expectations of what would happen to the information; and (iii) balancing their rights and freedoms with the legitimate public interests that would be served by public disclosure.

Compromise Agreements.

Gibson v The Information Commissioner and another

In this case, Mr Gibson requested a copy of a compromise agreement that had been given to the departing Chief Executive of Craven District Council. The Information Commissioner upheld the council's refusal to disclose the information. However, on appeal, the FTT overturned the Information Commissioner's decision and held that the agreement should be disclosed.

In reaching its judgment, the FTT summarised the following factors as being relevant to the personal data exemption balancing exercise:

1. The privacy concerns of the individual to whom the requested information relates.

Importantly, there is no suggestion that the FTT will give any weight to the relevant authority's concerns about privacy. As public institutions, public bodies should expect scrutiny from the public domain.

2. The seniority of the individual to whom the requested information relates.

The more senior the person involved, the more willing the FTT is likely to be to order disclosure. The rationale is that there is likely to be a more pressing social need to disclose information about senior decision makers than about more junior staff (who are unlikely to be able to exert any influence on the actions of the body in question).

3. The wider social context.

The FTT has shown that it will look at the circumstances behind the FOIA individual request. So, in the *Gibson* case, it was willing to award disclosure of a confidential compromise agreement between the council and its former Chief Executive because the Chief Executive had left office with the council's finances in "disarray". This created a legitimate public interest and it was unreasonable for the former Chief Executive to expect that she should be granted privacy in such circumstances.

4. The potential impact of the disclosure on the individual concerned.

The FTT will consider the wishes of the individual to whom the requested information relates. However, it seems that, where there is a public interest in disclosure, the impact on the individual concerned will not be determinative. Indeed, in *Gibson*, the FTT gave short shrift to arguments that disclosure of the compromise agreement would be deleterious to the former Chief Executive's emotional well-being and career, saying that disclosure of the information might cause "a level of mischief" but not to a significant degree.

5. Confidentiality clauses.

The Information Commissioner's guidance says that while public authorities cannot simply contract out of their FOIA obligations, disclosure may be prevented where the compromise agreement contains an "enforceable" confidentiality clause. No further guidance has been provided on what an 'enforceable' confidentiality clause actually looks like. The Information Commissioner has, however, issued guidance on the application of the FOIA exemption for information provided in confidence (which only applies where there is an 'actionable' breach of confidence.)