

**Tactically, what is the best way of securing a helpful response to early FOIA/EIR requests before the JR is pleaded? How do you work around the standard response, i.e. "this issue does not arise in your case"?**

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# The problem with pre-action disclosure in JR

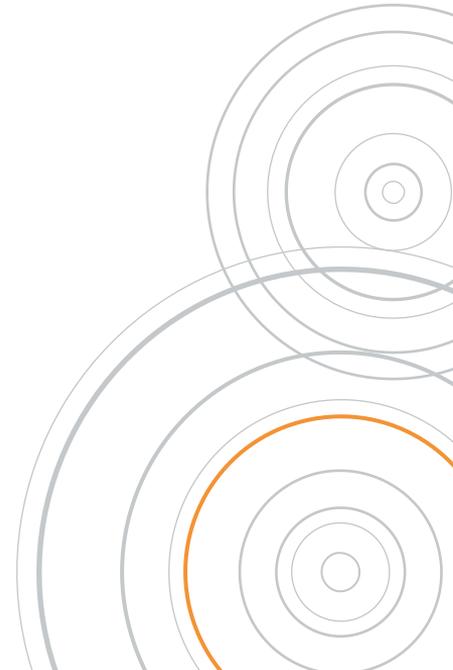
- The “duty of candour”
- Evidence which provides a "true and comprehensive" account of the decision-making process (*Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd (2002)*).
- “the duty...applies as soon as the department is aware that someone is likely to test a decision”



# The Freedom of Information Act 2000

## ***General right of access to information held by public authorities.***

1. Any person making a request for information to a public authority is entitled -
  - a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - b) if that is the case, to have that information communicated to him.



# Environmental Information Regulations 2004

- Includes information about land development, pollution levels, energy production, and waste management
- European Council Directive 2003/4/CE on public access to environmental information in the UK
- Public bodies as defined by the FOIA in Schedule 1 as well as organisations carrying out functions of public administration.
- Public authorities must make the information available whenever possible and respond to requests for information.
- 20 working days to respond which can be extended to 40



# If you know where to look...

FOIA/EIR requests can be very helpful in terms of:

- **Timing**
- **Scope**
- **Cost**



# The Queen on the Application of Greenpeace Limited v Secretary of State for Trade and Industry (2007)

- The Claimant sought to JR the SoS for Trade and Industry for its failure to follow the correct consultation process before coming to a decision to support nuclear rebuild as part of the UK's electricity generating mix.
- An FOI request led to the release of a series of reports which had not formed part of the consultation.



# The Queen on the Application of Greenpeace Limited v Secretary of State for Trade and Industry (2007)

- The court found that the paucity of information provided prior to the consultation was stark when compared to the mass of new material that was subsequently obtained, including that obtained via the FOIA.
- The court found that the consultation had been inadequate, that as a result there had been a breach of the claimant's legitimate expectation to fullest consultation, that the consultation process was procedurally unfair, and that the decision was unlawful.



# Absolute exemptions

## For FOIA:

- Accessible by other means – section 21
- Relates to a body dealing with security matters – section 23
- Document in court record or custody intended for use in an inquiry – section 32
- Parliamentary privilege – section 34



# Absolute exemptions

- Personal data – section 40
- Breach of confidence – section 41
- Disclosure prevented by enactment or EU obligation or punishable by contempt – section 44
- Information held by either the House of Lords or the House of Parliament and where disclosure would inhibit the free and frank provision of advice or exchange of views within the houses, or otherwise prejudice the conduct of public affairs – section 36



# Qualified exemptions

In a nutshell:

- Timing for publication
- National security/international reasons
- Commercial reasons
- Good governance
- Legal or other proceedings
- Personal/individual



# Too costly (s.12 FOIA)

- Capped at £600 for central government, Parliament and the armed forces
- £450 for all other public authorities.
- Based on a £25.00 hourly rate
- Time deciding whether exemptions apply, redacting exempt information, or carrying out the public interest test will not count.



# Vexatious requests (s.14 FOIA)

*A “manifestly unjustified, inappropriate or improper use of a formal procedure”*

Factors which could indicate the request is vexatious:

- Burden imposed in answering the request
- Motive of the requester
- Harassment/distress caused to staff
- Value/serious purpose of the request
- Abusive aggressive language
- Unreasonable persistence
- Unfounded accusations
- Intransigence



# Before making the request

- Who to ask?
- What information has already been published?
- Can you find out what the authority holds?



# The Request

- Clear and specific and realistic
- Polite
- Identify the public interests at play
- Anticipate exemptions
- Be flexible
- Be patient



