

FOI/EIR FOI / EIR
Section/Regulation s35, s36

12(4)(e) Issue Public Interest Test for "raw notes" and "aide memoire notes"

Line to take:

N.B. As part of the guidance review some of the content of this line to take is now covered in external guidance. In some instances new policy positions will be reflected in the guidance and where this is the case this will be highlighted in the existing line. All other sections of this line to take remain effective. The remainder of the line will be incorporated into guidance or caseworker advice notes in due course at which point this line will be withdrawn.

There is no in-built weight in favour of maintaining the exemptions at section 35 and section 36 simply because the document in question is a "raw note" or an "aide memoire note".

General arguments that there is a higher public interest in maintaining the exemptions at s35 and s36 in relation to "raw notes" or information recorded to act as a personal "aide memoire" should be treated with some caution. There are counter-arguments to this view, and any decision must take into account the particular circumstances of the case. A blanket approach to this type of information should not be adopted.

Further Information:

Evans v the ICO and the Ministry of Defence – the Tribunal's comments

In Evans v the Information Commissioner and Ministry of Defence the Tribunal considered the application of s36(2)(b)(ii) - inhibition to the free and frank exchange of views for the purposes of deliberation - to the hand written notes taken of a ministerial meeting. It had been envisaged that more formal minutes would be produced from these "rough notes", but in the event no formal minute of the meeting was ever produced.

Although this case considered the public interest in relation to withholding the hand written notes of a meeting under s36(2)(b)(ii), similar arguments about such information could be put forward under the other limbs of s36, and under s35. They could also potentially be made in relation to other exemptions.*

In considering the public interest test the Tribunal made the following comments about the form of the recorded information which they regarded as "a significant inhibition"

“There is a considerable public interest in seeing a formal record of the meeting. But the Private Secretary’s contemporaneous, handwritten, illegible and incomplete note is not such a record.....Read by the Secretary who made the record, the single word may trigger a recollection of the context and substance of the discussion; Literally, an aide memoir : the note assists the Secretary to produce from memory a full and formal record. Read by anyone else, the single word is at best meaningless, and at worst misleading” (para 37)

“The public interest from disclosure of the raw data is greatly reduced by the lack of intelligibility of much of the recorded information, at least to a reader who was not present at the meeting; and by the significant inhibitory effect on those attending the meeting of publication of raw notes” (para 39)

“The question of timing of the request is also affected by the raw nature of the data. The public interest in not disclosing information in a raw, unfinished format is less likely to diminish quickly with the passage of time, since the potential to mislead would remain undiminished. Moreover the public interest in disclosing the information would remain less powerful, because the information is not in a fair or accessible format, than if the information were in a final considered form. We endorsed the proposition from Brooke above [EA/ 2006/001 & 013] that “as a general rule, the public interest in maintaining an exemption diminishes over time”. We add a rider: “where the information is in a raw, unconsidered form the, the public interest in maintaining the exemption is likely to diminish more slowly than where the information is in a finished, considered form. ” (para 41)

The ICO considers that whilst there is some merit in the Tribunals comments there are also relevant counter-arguments, that need to taken into account when considering the public interest test in the particular circumstances of any case. A blanket approach to aide memoir type information should not be adopted.

“Aide memoire” notes

Before considering the arguments and counter arguments arising from the Evans case, it may be useful to think about what is meant by the term “aide memoire”, the different types of notes that may be covered by this term, and the purposes for which such notes may be made. It should be

noted that whilst the Evans case provided the starting point for the following consideration, the types of notes considered here go beyond those that were the subject of the Evans case (the following list should not be considered to be exhaustive – other types of notes that may be covered by the term may become evident through casework)

- Notes made for personal use only - For example where a meeting attendee makes their own note of a meeting to act as their own personal reminder of the salient points, or to prompt or assist them in any actions they may need to take as a result of the meeting. Here the purpose of the note is solely to act a personal reminder / prompt. There is no suggestion that the notes are being taken for any other purpose (such as to facilitate the production of a formal minute, or to act as a wider record that other people may refer to). Similarly an aide memoire note may be made in advance of a meeting or telephone call to act as a reminder to the author only of points to raise during the course of the proposed meeting / call. Further (non-exhaustive) examples of aide memoire notes made only for the author's personal use could be; notes made at the start of a piece of work to remind the author what they want to cover, and "to do" lists made at the start or end of the day.

- Notes made for wider use - For example where a note of a meeting or telephone conversation is made and placed on a case file, or personnel file, or where informal agenda notes are circulated to attendees prior to a meeting. Here the note may act partly as an aide memoir to the note taker, but is also made to provide an audit trail, or to act as a record that may be referred to by others.

- Notes made for the sole purpose of producing a separate more formal record – For example the contemporaneous, hand-written note of a meeting that a "minute taker" may take, and from which formal minutes are then produced. Here there is no suggestion that the note needs to be retained once the formal minutes have been produced and agreed. The note serves a temporary business need, to assist in the production of the formal minutes, once this need has passed then the note may be destroyed or, if it is retained, is retained only for the personal use of the author.

- Notes made to serve the dual purposes of producing a separate formal record, and acting as a distinct or more complete record in their own right – For example, sometimes a note of a meeting may be made partly to assist in the production of a formal minute, but also with the intention of retaining the note to act as a separate record in its own right. This note might be retained because it provides a fuller version of events than is provided in the official minutes, and there is a perceived need to retain a fuller version for future reference. Alternatively it may be retained because it is considered likely to be of historical interest, or because retention schedules require this. Here, although the temporary business

need of producing the formal minutes will pass once the minutes have been produced and agreed, there will be a separate reason, beyond retention for the personal use of the author, for retaining the note.

- Typed (rather than hand written) notes – Although in many cases aide memoire notes will be hand written notes, this doesn't have to be the case. For example, contemporaneous notes could be made straight onto a laptop, or aide memoir notes could be typed up from memory immediately after a meeting or conversation. The fact that a note is typed doesn't necessary make it more formal than a hand-written note. A typed note could be made just for the personal use of the author, and a hand-written note could be made to act as a formal record.

Evans v the ICO and the Ministry of Defence – the counter arguments

The ICO has considered the various arguments made in the Evans case, bearing in mind the above discussion on the nature of "aide memoire" notes, and has the following comments. Again it should be noted that although the Evans case provided the starting point for these considerations, the discussion below goes beyond the type of notes that were the subject of the Evans case.

- "Aide memoire" notes are an incomplete record and disclosure might mislead the public – The counter-argument to this would be that FOIA provides a right of access to all "recorded information" not just to accurate or complete information and that although there may be a public interest in not misleading the public this effect could be mitigated by providing an explanation or putting the information into context. (see proposed LTTxx for wider consideration of this issue)
Where the information is meaningless rather than misleading, whilst this might reduce the public interest in disclosure it would also mean that there is unlikely to be any adverse effect from disclosure.

Also, whilst an "aide memoire" note is unlikely to ever be a fully complete record, how complete it is will vary from case to case depending upon the individual note taker (styles may vary from recording odd words here and there to attempting to record everything verbatim).

In light of the above the ICO considers that a public authority would need to provide strong arguments about why the effect of misleading the public could not be effectively mitigated against in any particular case for this argument to have much weight. Factors that might have some weight in this respect in the case of very sparse aide memoir notes, are the extent to which context or explanation could only be provided by the original author of the notes, and whether the amount of work required to provide

the mitigating context would be proportional in the circumstances of the case.

UPDATE: this point is now covered in the following external guidance: The public interest test

- The public interest may be met by publication of the official record of the meeting provided in the formal minutes –The ICO response to arguments about information already in the public domain will generally be to consider whether the actual information in question, rather than other similar or related information, is already in the public domain, and whether the public would be further informed by the proposed disclosure (see LTT43 and proposed LTTxx for more detailed discussion on this point)

Specifically in relation to “aide memoire” type information a number of issues are relevant. In situations where the only record of a meeting, discussion or similar is the “note” then it could be argued that the public interest in disclosure increases because no official record exists. Even where a formal record is produced from the “aide memoire”, not all formal records are published, so it may be that, as at the date of a request, the public interest in disclosure has not already been met by the prior publication of a formal record. Where a formal record has been produced and made available to the public, there may still be a public interest in disclosure of “aide memoire” type notes if the hand written notes reveal something that is not in the formal record (although depending on what is revealed this may also increase the public interest in maintaining the exemption). Finally even if the notes don’t reveal any new content, there may still be a public interest in disclosure in order to demonstrate that fact (see also comments in LTT61 about removal of “suspicion of spin”).

UPDATE: this point is now covered in the following external guidance: Information in the public domain

- The public interest in maintaining the exemption for information in a raw form diminishes more slowly than for information in a finished form because the potential to mislead would remain undiminished - Firstly the comments above about mitigating the effect of misleading the public will be relevant here. Secondly, whilst in many cases the potential to mislead might remain undiminished with time this may not always be the case. Where the potential to mislead relates to problems with misunderstanding abbreviations or shorthand terms used within the notes, then it may well be that the potential to mislead in this way remains

undiminished over time. However, where concerns about misleading relate more to the public being misled because they won't fully understand the complexity of the issues at stake from the "raw notes" that have been made, then the passage of time may actually act to reduce the potential for misunderstanding, because it brings with it the benefit of hindsight. For example the general public arguably knows more about time limits for retention of suspects without charge now than it did 4 years ago. In other words the potential for the public to be misled by the release of "unconsidered" information may be reduced because the public is inherently, with the benefit of hindsight, more able to put the information into some sort context itself. This will need to be considered in the context of the individual case.

- There would be a significant inhibitory effect on meeting attendees if it were known that hand written notes might be disclosed. The Tribunal wasn't explicit here about whether it was referring to an inhibitory effect on the frankness of debate, or an inhibitory effect on the quality of the note taking, or on both (both had been argued by the MOD) . In terms of the effect on the frankness of debate, case officers should first consider LTT130 on the "chilling effect". Whilst the Tribunal's comments in Evans suggest some acceptance of an inhibitory effect simply because of the "raw notes" form of the information, the Commissioner would generally be cautious about arguments which only consider the form, without giving due consideration to the content of the information. The pure "raw notes" argument would be that a chilling effect would occur just because raw notes have been released, rather than because of the individual content of any disclosures. The Commissioners view (in line with LTT130) is that the wider or more general the effect being argued the more difficult the argument will be to sustain, and that a likely chilling effect from the disclosure of the particular information in question would need to be demonstrated. (see also comments below on Cabinet Office v the Information Commissioner & Lamb)

UPDATE: this point is now covered in the following external guidance: Government policy (section 35), Prejudice to the effective conduct of public affairs (section 36), and Internal communications (regulation 12(4)(e))

In terms of any inhibitory effect on note keeping, the Commissioner general position is as set out in LTT61 - that record keeping is a staff management matter, and that arguments of this nature should be given little weight in the public interest test. What may be particularly relevant to "aide memoire" notes is not just whether any inhibitory effect would occur, but also, taking into account the type of note in question, whether such inhibition would actually impact on the interest being protected by the exemption claimed.

For example, where notes have been made solely to act as an "aide memoire" for the author, and do not feed into any policy making deliberations, or policy formulation work (such as drafting a new policy), then any inhibitory effect on the author might have little or no impact on the effective formulation and development of government policy or the effective conduct of public affairs (s35 could still be engaged here because although there might be minimal impact on the formulation and development process the information could still "relate to" it) However, if it could be demonstrated that less complete notes of meeting would be made, resulting in inadequate formal minutes, or agreed actions not being followed up, then a likely prejudice to the effective conduct of public affairs might be said to have been shown. Similarly, if one reason for taking hand written notes is so that they can act as a fuller version of events (maybe attributing comment to individuals) that may be needed for a future business need, then there may be a prejudice to the effective conduct of public affairs if that future business need cannot be met because of the inadequacy of the note taking. These will be considerations to be taken into account in the circumstances of the case, and always bearing in mind whether it is reasonable to expect staff to take adequate notes as part of their job, (and in line with the authority's records management policies and the s46 code) regardless of any prospect of future disclosure **

Cabinet Office v the Information Commissioner & Lamb

In Lamb v the Information Commissioner and the Cabinet Office the appeal concerned both the official minutes and the hand written notes of Cabinet Minutes at which the decision to go to war in Iraq was discussed. The hand written notes were referred to as the "Additional Material" and comprised the Cabinet Secretaries' notebooks .

The Commissioner accepted that disclosure of the Cabinet Secretaries' notebooks "would be likely to have a greater impact on debates within Cabinet, and the manner in which a record of them was maintained than in the case of the minutes themselves" and the Tribunal agreed. However, it should be noted that the Commissioner's submissions closely related these effects to the specific content of the information in question rather than just relying on general arguments about the notes being in a raw form.

In particular the Commissioner's open submissions (which are not set out in full in the Tribunal's decision) took account of the extent to which the notes might attribute comments to individual attendees and reveal

something about the language and mood of the meeting which might not be evident in the formal minutes and how revealing such matters might affect the frankness of debate and note taking and might undermine collective Cabinet responsibility (see also LTT132) . In this case, he considered that the overall balance of all the public interest factors lay in favour of maintaining the exemption for the hand written notes.

It should be noted that it is such information specific reasons that the Commissioner considers to be relevant, rather than the more general point of the Tribunal that "the manner in which an individual takes contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight and importance that should be attributed to a particular part of the debate or the tone in which points were expressed" The Commissioner does not accept that an idiosyncratic style of note-taking is in itself an argument for maintaining s35 or s36, and refers back to the comments above about the ability to mitigate against creating a false impression by providing explanation or context.

Ultimately, the Tribunal upheld the Commissioner decision that the Cabinet Secretaries' notebooks should not be released and commented that "this is not to say that circumstances will never arise when it may be appropriate to disclose informal notes, but we are unanimous in our conclusion that this is not such a case and the no disclosure of the Additional Material should be made"

The Commissioner acknowledges the principle that Cabinet Secretaries' notebooks have been closed for longer than Cabinet minutes (40 years rather than 30 years) but considers that this should not be determinative in any decision.***

EIR

Whilst the arguments in this LTT may have some relevance to particular EIR cases, it cannot just be assumed that the line equally applies to regulation 12(4)(e).

Regulation 12(4)(e) covers internal communications, and our line (as per LTT104) is that where information is recorded simply to be used by its author, for example as an aide memoire then it will not be an internal communication, but that where the record is communicated to others, or placed on file to be referred to by others it will be. This regulation will not

therefore necessarily even be engaged for some "aide memoire" type information. N.B. This point has been developed. The new position is now covered in the following external guidance - Internal communications (regulation 12(4)(e)).

Footnotes

*This LTT concentrates on the s35 and s36 exemptions, and information that, if it were not environmental, would fall under s35 or s36.

** The recent "review of the 30 year rule" discusses the issue of record keeping and makes the following recommendations (amongst others). "We recommend that the government revisit the Civil Service Code to see whether it needs an amendment to include an explicit injunction to keep full, accurate and impartial records of government business" (para 8.4). "We recommend that the government confirm that special advisers' non-political records are not exempt from the Public Records Act and the FOI Act; that as temporary civil servants they, too, are under a duty to keep a full record of their deeds and doings; and that any misunderstanding about these matters on the part of ministers departments or special advisers is removed" (Para 8.10)

*** Useful background on how the position in relation to Cabinet Secretaries' notebooks has changed, generally in favour of earlier disclosure, can be found on the national archives website.

PREVIOUS / NEXT

Source Details

IT

Evans / MOD (26 October 2007)

Lamb / Cabinet Office (27 January 2009)

Guardian & Brooke /BBC (8 January 2007)

Related Lines to Take

LTT43, LTT66, LTT104, LTT130, LTT131, LTT132, LTT229

Related Documents

EA/2006/0064 (Evans), EA/2006/0011& 0013 (Guardian Brooke),
EA/2008/0024 & 0029 (Lamb), review of 30 year rule, Questions about
Cabinet Secretaries notebooks – national archives
Contact LS
Date 11/04/2013 Policy Reference LTT146