



TRIBUNALS
JUDICIARY

PRACTICE NOTE

PROTECTION OF CONFIDENTIAL INFORMATION IN INFORMATION RIGHTS
APPEALS BEFORE THE FIRST-TIER TRIBUNAL IN THE GENERAL
REGULATORY TRIBUNAL ON OR AFTER 18 JANUARY 2010

1. This Practice Note sets out the arrangements for protecting confidential information in First-tier Tribunal (Information Rights) appeals and related matters. In this Practice Note references to Rules are references to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended by the Tribunal Procedure (Amendment No 3) Rules 2010 ('the Rules').

Introduction

2. As with all courts and tribunals, it is of course essential that information which is relevant to proceedings is, as far as is possible, available to all parties to a case.
3. However, the nature of appeals to the First-tier Tribunal (Information Rights) under the Freedom of Information Act 2000 ("FOIA") is such that the Tribunal will often require to see information which must be kept confidential from one or more of the other parties to the appeal. Amongst other things, this can mean that during the hearing the party requesting the information is asked to leave the room
4. For instance, there will be cases where a person who made a request for information under section 1(1) FOIA is a party to an appeal which examines the application of exemptions to the obligation to supply information. In many cases the Tribunal will need to see the information which has been withheld in order to reach its decision. However, in cases where disclosure has been refused, it would in most cases undermine the very object of the exemption if the information in question were to be disclosed, during the Tribunal proceedings, to the person who made the request. The Tribunal will need to ensure that that information is kept confidential. This is in accordance with the overriding objective under Rule 2 of dealing with cases fairly and justly.
5. Considerations of confidentiality can often also apply to other information which the Tribunal requires to see, such as written and oral evidence and submissions. For example, in considering whether exemptions have been applied correctly, the Tribunal may require evidence on why disclosure

would result in prejudice. Such evidence will often also reveal something of the nature of the requested information in a way which would undermine the objectives of the exemption. Equally, it may reveal other information which the Tribunal requires in order to determine the case, but which would be exempt under FOIA, for example, commercially sensitive information that is revealed in documents recording a public authority's consultation with third parties under the Section 45 Code of Practice.

6. The legal basis for the Tribunal dealing with confidential information in proceedings was considered in the Ruling in *Sugar v Information Commissioner and the BBC* dated 12th May 2006. Although this Ruling was applied under the Information Tribunal (Enforcement Appeals) Rules 2005 as amended it is considered that the legal position is the same under the Rules.
7. This Practice Note covers:
 - A. Confidentiality and Redaction
 - B. Joinder
 - C. Witnesses
 - D. Documents
 - E. Decisions

A. Confidentiality and Redaction

8. Where a party to proceedings claims that an exemption under Part II of FOIA has been applied, or would apply to information (such as documentary or oral evidence and submissions) and the Tribunal requires to see the information in order to determine the appeal, the Judge should ensure action is taken to maintain appropriate confidentiality. This applies in particular when the Tribunal is making directions under Rule 5 as to the disclosure of documents, statements of facts and evidence and skeleton arguments.
9. For example, on exchange between the parties of lists of relevant documents, the Judge should consider ensuring that directions provide, as necessary, for some entries to be kept confidential from one or more parties to the proceedings. This may require parties to prepare two versions of such documents – one full version for the Tribunal, and one version to be exchanged with the other parties, which does not include information which needs to be kept confidential. See section D below.
10. Similar considerations apply to evidence and submissions which are prepared and put before the Tribunal. In order for the Tribunal to ensure that it has all the information that it requires, and that the parties provide it with as full oral evidence and submissions as possible, it may be necessary for some information to be kept confidential from one or more of the parties, or redacted if appropriate. See section C below.

11. For example, as the Notice of Appeal and replies to the Notice are required to be sent to all parties to the case, the Judge should consider whether the Tribunal requires further preliminary details of a party's case to be provided on a confidential basis.
12. Factors that should be considered when making directions, to ensure appropriate confidentiality include:
 - The primary objective is to ensure that the Tribunal has all the information that it requires in order to make a just and fair decision in a case. The Judge will want to take necessary steps to ensure that the parties provide it with relevant documents and evidence, and that the parties are able to make full and frank submissions.
 - Where a party claims that documents or evidence need to be kept confidential from one or more of the other parties to the case because they claim the documents or evidence are exempt under FOIA, or would be if a request were received, the Tribunal should consider ensuring appropriate confidentiality.
 - Whether the hearing or part of the hearing should be held in private or a party excluded from part of the hearing as provided for under Rule 35. In relation to the latter the Tribunal must always consider the potential detrimental effect that an order to exclude may have on a party who may be denied the opportunities he would otherwise have in accordance with the overriding objective in particular as identified under Rule 2(2)(c) (ensuring, so far as practicable, that the parties are able to participate fully in the proceedings).
13. Parties should understand that at times the Judge may have to make directions during the hearing to hold part of it in private. This means that those who cannot see what is claimed to be confidential information, or hear evidence presented that needs to refer directly to its contents will be asked to leave the room for the minimum length of time necessary to examine such evidence. For the avoidance of doubt those excluded will be those from whom the information needs to be kept confidential, which normally will mean everyone other than those parties from whom the documents are requested and any related parties and those representing the Information Commissioner.

B. Joinder

14. It is essential that the Tribunal has before it all the information that it requires in order to take a decision on a case. In some cases, the Tribunal will require information from persons who are not automatically parties to an appeal.
15. For example, when the Information Commissioner issues a Decision Notice under section 50 FOIA he is seeking to resolve a complaint

concerning a request for information that was made to a public authority. When a Decision Notice is appealed to the Tribunal, one of the parties to the original complaint (that is, the complainant or the public authority) will not automatically be a party to the appeal – the parties will be the person bringing the appeal, and the Information Commissioner.

16. In particular where the public authority is not a party to the appeal, the Tribunal will very often require information from the public authority in order to determine a case. For example, if there is a dispute of fact over whether or not the public authority held information for the purposes of section 1(1) FOIA, the Tribunal may require evidence from the public authority on this point. In some cases, the Tribunal may need evidence from a public authority who is not the subject of the Information Commissioner's decision. For example, cases involving the National Archives and papers over 30 years old usually require input from the public authority that transferred files to the National Archives. Such considerations often apply if an appeal will potentially determine a person's liability under FOIA but that person is not an existing or original party. Third parties who have provided information to a public authority may also have an interest in an appeal.
17. While the requestor has an interest in the appeal, he or she may not be well placed to assist the Tribunal in its determination of the case.
18. The most straightforward options in this situation are for the Tribunal to invite that party to apply to be joined or for the Tribunal to order that the other person be joined as a party to the appeal. This will enable the Tribunal to give that person an opportunity to be heard or to ensure that the person provides it with all the information, evidence and submissions that it requires to determine the case. The Tribunal also has the power to receive evidence from people who are not parties. It is sometimes appropriate to receive letters from the requestor but not to join him/her as a party. Where the requestor is not a party, the arrangements to ensure confidentiality of documents are less complex and the hearing can be run more efficiently.
19. When making preliminary directions in a case, the Judge should consider whether it is advisable to invite a person to apply to be joined or to order that any person who has an interest in the proceedings, or can provide the Tribunal with information to enable it to determine the case, should be joined to the proceedings under Rule 9. This should be kept under review as the case proceeds.
20. Factors that a Judge might consider when deciding whether to invite to apply or make an order under Rule 9:
 - The need to ensure that the Tribunal has before it all the information that it requires in order to determine the case and whether it can get that information without joining a party;

- Where it appears that an appeal may determine the rights or liabilities of a person who is not a party to an appeal, the desirability of that person having the opportunity to make representations;
- Any evidence or expertise which a person may be able to provide to the Tribunal, which would assist in the determination of the appeal;
- Whether the issues at stake in the appeal may be of significance beyond the facts of the particular case;
- Any representations made by a person who applies to be joined under Rule 9(3).

C. Witnesses

21. The parties can call witnesses to give evidence before the Tribunal, but these witnesses need to be relevant to the case – see ruling in *Keston Ramblers Association v The Information Commissioner (1) and London Borough of Bromley (2)* dated 7th June 2006. The Tribunal usually requires such evidence to be set out in written witness statements which are served on the other parties and filed with the Tribunal before the hearing in accordance with any directions. Where the statement deals with confidential information, two versions of the statement may need to be prepared.
22. In the event that witness statements are to be filed, unless there is good reason, they should comply with the following requirements. Witness statements will not be rejected on the ground that they are not in a satisfactory form, but it is helpful for the Tribunal if the following requirements are adhered to:

- a. The witness statement should be headed with the title of the proceedings for example:

	Case Number EA 200X/XXXX
A.B.	Appellant
Information Commissioner	Respondent
[name of additional parties of joined party, if any]	
	[Joined Party/Additional Party]

- b. At the top right hand corner of the first page there should be clearly written:
- (i) the party on whose behalf the statement has been made, for example “appellant” or the name of the party, for example “Mrs Smith”,

- (ii) if more than one statement has been filed, the number of the statement in relation to that witness, for example "2nd statement".
- c. The witness statement must, if possible, be in the intended witness's own words, the statement should be written in the first person and should also state:
 - (i) the full name of the witness,
 - (ii) their place of residence or, if they are making the statement in a professional, business or other occupational capacity, the address at which they work, the position they hold and the name of their firm or employer,
 - (iii) their occupation or, they have none, their description, and
 - (iv) the fact that they are a party to the proceedings or are employed by a party to the proceedings, if that is the case.
- d. Where a witness refers to an exhibit or exhibits, he/she should state "I refer to the (description of exhibit) marked "..."" or where there is a reference to another document that should include the page number in any bundle.
- e. A witness statement should:
 - (i) be produced in A4 format,
 - (ii) be fully legible,
 - (iii) have the pages numbered consecutively at the bottom of the page in the middle,
 - (iv) be divided into numbered paragraphs.
- f. A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence. The Tribunal may or may not require the witness at any hearing to give evidence on oath but any witness statement must contain a statement from the witness confirming that he or she believes the contents of the statement to be true. Something like: "I believe that the facts stated in this witness statement are true" or "Insofar as the matters to which I refer are within my own knowledge they are true; insofar as they are not within my own knowledge they are true to the best of my knowledge, information and belief".
- g. Where the witness refers to confidential information then either two versions of the statement should be prepared, one with the confidential information and one without it, or there should be a separate closed statement containing only the confidential material. The open statement

or version should be served on all parties and the closed statement or version only on those parties who are entitled to see the confidential information at this stage in the proceedings. Parties must be careful to ensure that a separate closed statement does not contain additional non-confidential evidence which the other party is entitled to see.

h. Any alteration to a witness statement must be initialled by the person making the statement. The completed statement must be signed by the witness.

i. Witness statements should be filed electronically with the Tribunal in MS Word format if possible as well as being provided as part of the hard copy bundle of documents dealt with in section D. below.

23. Depending on the directions, witnesses may be called to appear before the Tribunal at an oral hearing. Usually the witness will not be required to repeat the evidence in their witness statement but will be subject to questioning by the other parties and the Tribunal. The witness may be required to swear an oath to tell the truth on a holy book of the witness' choosing or affirm before giving evidence.

24. After a hearing, or where the case is being decided on the papers, it may in rare cases be necessary for the Tribunal to seek further evidence from the parties. The Tribunal may then seek more information through an additional written witness statement.

D. Documents

25. Where the Tribunal has ordered that a bundle is filed for any hearing or determination on the papers under Rule 13, unless there is good reason, the bundle should include a copy of:

(a) the Notice of Appeal,

(b) the Reply or Replies, including those put in by Additional Parties,

(c) the disputed [Decision] Notice,

(d) the document requesting the information, the public authority's response (i.e. s. 17 letter) and any document from the applicant requesting an internal review of the decision and the public authority's response to that request,

(e) copies of all orders and directions made by the Tribunal

(f) any other necessary and relevant documents,

(g) all witness statements to be relied on,

- (h) an agreed statement of facts, if applicable, and a chronology of events.
26. Parties should always aim to keep the bundle as relevant and compact as possible in order to minimise the size of bundles where possible.
 27. The documents should be in the bundle in the sequence set out in paragraph 25 above and within (6) above any correspondence should be filed chronologically. It is not necessary or desirable for there to be more than one copy of any document in the bundle. For example, there is no need to include a copy of the Decision Notice separately if it has been annexed to the Notice of Appeal. However, any document which refers to another document (which if included in the bundle would otherwise be a duplicate) must be marked with a reference to where the copy of the document may be found within the bundle (for example “see page XX of the bundle”). The bundle should be paginated (continuously) throughout at the bottom right hand corner of the page, or else tabbed dividers should be used, with each section paginated. There should be an index with a description of each document and the page number. Dividers should be used for the different sections, particularly if there is more than one lever arch file of documents.
 28. The bundle should normally be contained in a ring binder or lever arch file. Where more than one bundle is supplied, they should be clearly distinguishable, for example, by different colours, letters or numbers. If there are numerous bundles, a core bundle should be prepared containing the core documents essential to the proceedings, with references to the supplementary documents in the other bundles.
 29. If a document to be included in the bundle is illegible, a typed copy should be included in the bundle next to it, suitably cross-referenced.
 30. Any documents (such as the requested information that is the subject of the appeal) that have been ordered to be disclosed to the Tribunal but not to one or more of the parties (see section A Confidentiality and Redaction) must be included in a separate bundle. This bundle should also contain any closed witness statement(s) or skeleton arguments which concern any confidential information (see section C. Witnesses). The document(s), witness statement(s), skeletons and bundle must be clearly marked as “not to be disclosed to [name of relevant party] or to the public”. This information should not be disclosed to any person except with the consent of the party who provided the information.
 31. The Tribunal may wish to direct that the parties agree the final index to the bundle of documents after any witness statements have been submitted. Once written evidence has been submitted, the parties and the Tribunal are better placed to assess whether further documents are necessary to determine the issues on appeal.

E. Decisions

32. At the end of the hearing the Tribunal will give its decision or retire to consider its decision which will be given later, usually within 3 weeks of the hearing. The Tribunal will also provide any material findings of fact and reasons for the decision. The decision with reasons will be signed by the Judge and then sent to the parties and very soon afterwards will be published on the Tribunal's web site. Under Rule 38(2) the Tribunal must have regard to the desirability of safeguarding the privacy of data subjects, commercially sensitive information and any exempt information. As a result the decision may be part open and part closed. The closed part of a decision is usually contained in a confidential annex. The Tribunal should refer to the existence of a closed decision in its open decision, so that all parties are aware of the existence of a closed decision.
33. To help ensure that no confidential information is released through the Tribunal's decision, it is good practice to send a draft of the decision to the originator of the confidential information, which will usually be the public authority and the Information Commissioner if he has already had sight of the information. It will usually be sent to solicitors, lay clients and their advisors under an embargo¹ so that they have the opportunity to indicate if any confidential information is contained in the decision and at the same time ask them to check for any clerical mistakes or accidental slips or omissions. Usually only a short period of 3 to 5 days is given for the exercise. After having given those parties the opportunity to indicate whether any confidential information is contained in the open part of the decision, the Tribunal will often show the open part of the decision to the other parties for them to check for any clerical mistakes or accidental slips or omissions. Recipients must ensure that neither the draft decision nor its substance is disclosed more widely or used in the public domain before it is finalised and then promulgated (signed by the Judge and published).
34. An example of the wording of an embargoed decision is as follows:
- We enclose the draft decision in the above named appeal, embargoed in order to give counsel, solicitors, lay clients and their advisors only, the opportunity to indicate if any parts of the decision need to be part of a confidential annex and to point out to the Tribunal any clerical mistakes or other accidental slips or omissions by **12 noon on 27th April 2010**. The draft decision must under no circumstances be shown or the contents disclosed to others not covered by the embargo until promulgated. No extensions of time will be permitted.*
35. In relation to the closed part of a decision if the public authority, which has provided the confidential information, desires to provide the closed part of

¹ The CPR (see PD 40(e)) permits the draft decision to be shown to lay clients as well as solicitors. Lay clients are often best placed to check that the decision does not contain confidential information – the person who gave oral evidence can often tell better than the solicitor whether a particular fact was given in open or closed session.

the decision to a 3rd party, such as another public authority who was the source of the information, then the Tribunal is unlikely to object to such disclosure.

1 February 2010