

Q&A from the Leigh Day / CORE Training Event on Access to Information

1. INTRODUCTION

The idea of the training session arose during the CORE member's meeting in March where there had been a number of requests regarding access to information.

Barriers to accessing documents have a direct impact on access to justice and it is hoped that the training session will therefore be useful for the policy and advocacy work of attendees.

2. CASE-SPECIFIC QUESTIONS

- a) ***What are the implications of the case of Steinmetz and others v Global Witness for other NGOs who are subject to requests under the Data Protection Act 1998 ("DPA")? Can an NGO be required under the DPA to disclose data held about individuals from mining companies?***

Answer: NGOs can be classified as "data controllers" under the DPA and they therefore need to rely on an exemption in order to withhold personal data. The special-purposes exemption for journalism in section 32 of the DPA is likely to be the most relevant.

This is a helpful [blog post](#) regarding the case of *Steinmetz and others v Global Witness*. In summary, Benny Steinmetz and three others requested access to personal data held by Global Witness due to its report into allegations of bribery and corruption by BSG Resources Ltd at Simandou iron ore mine in Guinea, West Africa.

Global Witness refused to disclose the data and the ICO was requested to determine whether Global Witness was in breach of the DPA.

In March of this year, the ICO sent a [letter](#) to Global Witness which found that they could rely on the special-purposes exemption for journalism in section 32 of the DPA, to withhold personal data.

In order to rely on the exception, Global Witness was required to demonstrate that:

- (1) the personal data was being processed only for journalism, art or literature;
- (2) the processing took place with a view to publication of some material;
- (3) Global Witness had a reasonable belief that publication was in the public interest; and
- (4) such belief extended to access being incompatible with journalism.

The ICO found that Global Witness had met all four of the above elements and this is likely to be a very helpful precedent for other NGOs seeking to rely on the exemption in section 32.

See also the ICO's recent '[Data Protection and journalism: a guide for the media](#)' guidance.

b) Is it possible to obtain notes from a case management conference (“CMC”)?

Answer: If you know the case number (which may be on the existing notes) then it will be possible to make an application to obtain documents which are held on the court file relating to the case. If you know the date on which the CMC took place then it may be possible to obtain a transcript (for a fee) from the RCJ's recording and transcript unit.

3. LITIGATION PROCESS 101

a) *What are the difference between the High Court and the Lower Courts?*

Answer: Please see [here](#) for a helpful explanation of the UK court system.¹

b) *Can academics obtain greater access to court documents?*

Answer: Yes, if specific permissions are obtained. Please see [here](#) for further information regarding academic access to privileged documents and the special permissions which are required.²

Pre-action disclosure

In pre-action disclosure it is important to be careful about the documents you request as you may be overloaded by documents from the Defendants. This can also be used by Defendants as a tactic.

a) *Will there be a judge nominated at the pre-action stage?*

Answer: There will not be a judge assigned to the case but when you make an application e.g. for pre-action disclosure, the Court will nominate a judge or master to hear the application.

b) *In the context of the pre-action protocol providing six months for pre-action correspondence in “international claims”, what is the definition of an international claim?*

Answer: The period will extend to 6 months where a Defendant(s) is out of the jurisdiction and if the facts giving rise to the action occurred overseas.

Specific and standard disclosure

EG of specific disclosure - in a case involving Anglo American, Leigh Day successfully made a specific disclosure application regarding board minutes and internal policies on how decisions were made. The Court ordered the documents be disclosed without the redactions the Defendant initially tried to apply.

a) *In the disclosure process, do you need to make requests for documents all at once?*

Answer: Parties have ongoing obligations in respect of disclosure. If a document has been disclosed which refers to another document which has not been disclosed

¹ <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/>

² <https://www.gov.uk/access-to-courts-and-tribunals-for-academic-researchers>

you can ask the other side to disclose the document and, if they refuse, make an application to the Court.

b) *Can you request that disclosure be provided in a particular format?*

Answer: There is currently a practice of moving towards electronic disclosure and there is a specific practice direction (PD 31B) which deals with this. NB. The requirement to disclose electronic documents also includes meta-data.

c) *How often do companies seek to rely on commercial sensitivity to prevent disclosure of documents?*

Answer: During the disclosure process commercial sensitivity is not a reason not to disclose unless it is also irrelevant to the case. The Court may, however, make orders regarding commercially sensitive documents limiting the way they are reviewed or the way they are referred to e.g. that they will only be disclosed to legal representatives, or will be referred to as “X-document” for the purpose of the proceedings.

d) *Is disclosure only between the parties or can you also access documents from non-parties?*

Answer: If one of the parties makes reference to a third party document e.g. a human rights assessment which is relevant to the case then you can make an application for non-party disclosure under CPR 31.17.

e) *Is it common for companies to purposefully withhold documents during disclosure?*

Answer: It does happen e.g. in one case, the Defendant only disclosed three documents from its subsidiary. However, the Court is likely to look at this very unfavourably. Parties can be held in contempt of court and solicitors also have a duty to inform their client of their disclosure obligations.

4. HOW, WHAT, WHEN? AND WHAT CAN YOU DO WITH THE DOCUMENTS OBTAINED

In relation to access to documents by non-parties, there is a distinction between:

- (i) Statements of case, public judgments or orders: For which permission is not required in order to obtain access (CP 5.4C(1));
- (ii) any other documents filed at court: For which permission is required (CPR 5.4C(2)); and
- (iii) documents which have been read in open court: For which anyone with a legitimate interest should be given access.

Statements of case, public judgments and orders

It is not usually possible to obtain the enclosures to statements of case but sometimes non-parties get lucky e.g. one NGO obtained the statements of case from one of Leigh Day's cases and the NGO was given all the annexures by the Court.

a) Is it possible to obtain access to responses to requests for further information ("RFIs")?

Answer: Ordinarily yes. It is possible that in a particular case, the parties may not have filed them at Court. In those circumstances, you can make an application to the Court for an order that the relevant document be added to the Court file and/or disclosed to the requestor.

b) What timeframe do you have to request statements of case?

Answer: Statements of case will be available as of right if they were filed after 2 October 2006. Prior to that date, the rules only provided for disclosure of the Claim Form. It will therefore be necessary to apply to the Court for access to other statements of case e.g. the Particulars of Claim and Defence.

NB – the Court may only retain the documents in its file for 6 years. As such, the documents may not be available thereafter.

c) Are statements of case from judicial review proceedings also available?

Answer: Yes, in the case of *R (Corner House Research) v Director of the Serious Fraud Office*, the Times, Financial Times and Guardian sought access to a court document during the judicial review of the Serious Fraud Office's decision to abandon its corruption probe into BAE Systems. The government argued that the October 2006 rules did not apply to judicial reviews. However, the judge found that the defendant's documents were "defences" and were therefore covered by the rules.

d) *Where can we obtain copies of Court judgments?*

Answer: This website <http://www.bailii.org/> provides free access to a large number of UK judgments. There are similar websites for other jurisdictions., EG <http://www.austlii.edu.au/> for Australian cases and <http://www.commonlii.org/> for commonwealth cases.

Any other documents on the court file

a) *Is it possible to ask for all documents on a particular court file?*

Answer: No, requests have to be for specific documents. However, you can make requests for the types of documents which you may expect to be on file.

b) *Is it possible to obtain copies of trial bundles?*

Answer: No, in the case of *CIO Personal Investment Services Ltd v Liverpool and London* the Court said that members of the public were not entitled to be provided with copies of trial bundles.

c) *Can state-parties raise matters of national security to prevent non-parties obtaining access to documents?*

Answer: The Government could make an application to the Court to prevent disclosure to any non-parties if, for example, a document contained state secrets. However, there are no general exemptions for national security to disclosure in court proceedings in the same way that there are under the Freedom of Information Act 2000 (“FOIA”) and DPA.

d) *Will there always be a transcript of hearings?*

Answer: Transcription services have been privatised and you will usually have to arrange for a transcript to be made. However, the general rule is that hearings should be recorded. It will usually be possible to obtain these recordings from the court reporting and transcribing unit and to arrange for a transcript to be produced (for a fee).

e) *Can you obtain copies of disclosure lists from the Court file?*

Answer: Disclosure lists are not usually filed at Court so it will only be possible to obtain a copy of these if they are referred to in open court (see below).

f) *How far back in time can you request documents?*

Answer: There is no specific time limit. However, the Court will be more willing to give a non-party access to documents which relate to ongoing litigation than to

documents relating to historic litigation. Note also that the Court may destroy the file after 6 years.

g) *Is it still possible to obtain documents when the case has settled?*

Answer: The other side may seek to argue that there is no longer a legitimate interest in obtaining access to documents once a case has settled. However, in the case of *British Arab Commercial Bank v Alghosaibi*, a party was ordered to provide copies of witness statements to a non-party despite the fact that the case had settled and the witnesses were never called to give evidence.

Documents read in open court

If a document has not been filed but has been read in open court then it should be possible to obtain access to the document, as long as you can show a “legitimate interest”.

Requests for documents which have been read in open court can be made to the parties themselves or an application can be made to the Court.

Unless a hearing is held in private (which will only be in very limited circumstances e.g. settlement hearings involving minors), anyone can attend hearings, take notes, obtain transcripts and then obtain copies of the documents referred to. If you see a reference (e.g. in the media) to a hearing happening on a particular date but are not able to attend, then you are also likely to have enough information to (a) ask the parties; or (b) apply to the Court.

Discussion about creating a list of people who would be willing to come down to Court when there is a hearing where interesting documents are likely to be referred to in order to take notes.

a) *Are there any limits on how you use documents which have been read in open court?*

Answer: Once a document is in the public domain, unless the court has ordered otherwise, you can use it as you like (subject, of course, to the laws of defamation).

However, it is important not to criticise the court while proceedings are ongoing or to publish anything which could be seen as influencing the administration of justice (esp where there is a jury). Otherwise, you may be found in contempt of court.

5. ACCESSING OTHER DATA AND DOCUMENTS – FOIA AND DPA

a) *Are there any limits on the type of information that you can request under the FOIA?*

Under the FOIA you can request any information which is held by a public authority. Requests can take the form of a question, rather than a request for specific documents. However, depending on the type of information requested, public authorities may seek to rely on one of the exemptions set out in sections 21-44 of the FOIA e.g. where disclosure would be likely to prejudice the commercial interests of any person. It is also very important to formulate FOIA requests correctly as public authorities are likely to try to respond as narrowly as possible.

b) *Can public authorities delay in providing documents on the basis that they have not finished reading a document?*

Answer: Under Regulation 12(4)(d) of the Environmental Information Regulations 2004, there is an exemption for material in the course of completion, unfinished documents and incomplete data.

We are not aware of any exemptions under the FOIA which would apply if a public authority had simply not read a finished document.

Nonetheless, public authorities can request further information if it is required to identify or locate the requested information. If further information is requested, the 20 working days will commence the day after the public authority receives the required clarification.

A public authority can also refuse to comply with a request if in doing so it would exceed the specified limits on fees.

c) *What are the current limits on fees?*

Answer: Under section 3 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, the current limit is £600 for Central Government, Parliament and the Armed Forces and £450 for all other public authorities.

d) *Can you request information under the FOIA which has been outsourced to contractors?*

Answer: It is likely to depend on whether the information is said to be “held” by the public authority and whether a relevant exemption e.g. commercial sensitivity applies. Please see the relevant ICO guidance [here](https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf).³ There are currently plans to extend the FOIA to private companies carrying out public contracts.

³ <https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>

e) ***What happens if you request information under the FOIA but it is actually personal data?***

Answer: Under section 40(1), if an individual requests information about themselves, it will automatically be converted into a subject access request under the DPA and the public authority will be required to respond on that basis.