Expert comment

Robin Hopkins is a barrister specialising in freedom of information law. The views expressed are his own.

If domestic news in 2011 produced an ethical mantra, it was that private communications are sacrosanct; they should not be accessed or published without consent, even if some think there is a public interest in their contents. The former Information Commissioner, one of a cast of high-profile witnesses at the Leveson Inquiry, was excoriated for failing to do enough to enforce that principle. It was somewhat ironic then, that 2011 concluded with the current Commissioner emphasising the converse: communications concerning public authority business are always amenable to public disclosure, even when conducted through private channels.

By his own admission, some elements of the Commissioner's guidance on 'official information held in private email accounts', are trite. Section 3(2)(b) Freedom of Information Act ('FOIA') already tells us that any emails or text messages are within the scope of that Act if they are held 'on behalf of' the public authority. To this extent, FOIA anticipates the mischief at which the guidance is aimed, namely attempts to evade disclosure duties by using 'external' communications channels.

Other aspects of the guidance are less straightforward. For example, we are told that "there is a need to have a clear demarcation between political and departmental work" (the latter is within the scope of FOIA; the former is not). In many cases, this is easier said than done — under the UK's constitution, a Minister's job is to implement his party's will through the machinery of state (within limits). Take the following hypothetical scenario: the Secretary of State and a junior Minister in the same Department use their private email accounts to discuss the political contours of an imminent departmental decision. Would such information be within FOIA's scope?

Arguably, if departmental information is within the scope of FOIA, then so too is information about the party-political implications of departmental work. This kind of broad approach derives some support from the general tenor of the case law on the concept of 'held'. In *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, Lord Hope observed that "this part of the statutory regime should...be construed in as liberal a manner as possible". Similarly, in *University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC), Judge Wikeley cautioned against "over-complicating the simple factual concept of whether information is 'held' by a public authority". Neither of those cases was concerned with construing the phrase 'on behalf of', but both suggest that FOIA's net should be cast widely.

A narrower approach is, however, equally plausible. Political conversations often focus on departmental work, but that does not mean those conversations constitute 'official information'. After all, FOIA is concerned with what public authorities hold, not what Ministers do.

It remains to be seen what approach the Commissioner will take to these sorts of private emails. The prior question is how such emails could come before the Commissioner in the first place. According to his guidance, the occasions on which public authorities will be expected to enquire about 'private' correspondence will be rare. Presumably, this means that the person handling the request will only need to ask employees (or Ministers) to search their email or text message folders when they have reason to believe that those folders "*may* include information which falls within the scope of the request" (Commissioner's wording, emphasis added).

This raises two further thorny questions. First, what would constitute a sufficient reason to make such enquiries? A requester's mere assertion that private emails had been used in this way would probably not do, but leaked correspondence or credible news reports might. Secondly, if a Minister, having searched his email folders upon request, denies that they contain (or contained at the time of the request) relevant information, and that denial comes to be challenged before a Tribunal, who would give evidence? In judicial review applications, Ministers do not give evidence. This is because the applicant challenges the Minister's decision, and others (departmental officials) can attest to how that decision was taken. In contrast, if a FOIA challenge concerns the contents of a Minister's private email folders, the only person who could attest to those contents is the Minister himself.

If a suitable case comes along, the First-Tier Tribunal may yet rival the Leveson Inquiry in terms of the high-profile witnesses from whom it hears.

Robin Hopkins
11KBW
robin.hopkins@11kbw.com