

one step ahead

winter 2004

PENGILLYS

SOLICITORS
& MEDIATORS

Freedom of Information Act - countdown to January



On 1st January 2005 a whole new world opens when public sector information becomes accessible under the Freedom of Information Act 2000.

You will be able to ask Government bodies for information in all kinds of areas, ie: where you fail a health and safety examination, cannot obtain a product licence for your new product or you lose a tender for a contract to supply a government body. In all those cases

you could make a request for information from the public sector body concerned.

Another issue under the Act relates to tendering. It is very important when responding to invitations to tender in contracts with public bodies to ensure that it is clear they are confidential and will not be disclosed to an unsuccessful tenderer who makes a FOIA request.

The Act:

- places an obligation on public authorities to adopt and maintain a publication scheme. The term "public authority" has a broad definition and includes central and local government, non-departmental public bodies, the police, the health service, schools, colleges and universities, and the public functions of named private companies.
- with effect from January 2005, provides a general right of access to all types of recorded information held by public authorities and

sets out exemptions from that right.

- places a number of obligations on public authorities about the way in which they provide information. Subject to the exemptions, anyone making a request for information must be informed whether the public authority holds the information and, if so, be supplied with it - generally within 20 working days.
- creates a duty to provide advice or assistance to anyone seeking information (for example in order to explain what is readily available or to clarify what is wanted).
- creates the role of the Information Commissioner with responsibility for overseeing the operation of the Act.

All in all the Act should have a considerable impact and help achieve more open Government.

Massive investigation of public procurement contracting

On 11th October it was announced that the Office of Fair Trading was investigating nine sectors where it had identified fears of significant competition distortion. The OFT is concerned that procurement practices by the government which has annual buying power of £117bn are blocking smaller suppliers from lucrative public contracts.

A preliminary report, produced by external consultants DotEcon, does not single out particular companies that are thought to benefit from limited competition. The sectors identified include manufacture of office machinery and computers. The OFT said: "The consultants' initial research identifies a number of ways in which competition might be limited by public sector buyer power for example, if it imposes very long-term contracts, overly restricts the number of participants in a tender process or bundles too many contracts into one tender."

The European Commission also launched an investigation into public tendering procedures in France, Netherlands, Sweden and Finland as they specified Intel chips, whereas tenders should be trade mark neutral under public procurement rules. Examples included Swedish police authority specifying computers must have Intel Centrino chips.

Many of our clients either respond to invitations to tender which are caught by the public procurement rules or else are public bodies such as local authorities who are caught by the rules. New public procurement rules are due to come into force when the UK implements the new procurement directives which were agreed earlier this year so now is a good time to review your standard practices. If you have any private or public sector procurement practices about which you have concerns then contact us for further information.

assignment of contracts

When you sell the assets of your business you will often find you have to have contracts checked to see if they too can be transferred (assigned) to the buyer of the assets.

to someone else without the prior permission of the other party.

This is an issue which often arises on contracts and the case confirms the existing law.

If the contract says nothing about this then the benefit of that contract can be "assigned" as long as notice is served on the other party.

In practice make sure that your contracts contain a clause saying if the agreement can be assigned or not. Some clauses will specify that assignments within a group of companies or as part of a bona fide reconstruction or amalgamation are allowed. In other cases assignment will be allowed if the other party to the agreement consents, such consent not to be unreasonably withheld or delayed.

In *Explora Group plc v Hesco Bastion Ltd and The Trading Force Ltd*, the court said that where a contract did not restrict assignment of its terms then the benefit of it could be assigned

e-conveyancing

Property transactions may no longer need parchment and quill pens but they still require pieces of paper. However plans are afoot for electronic conveyancing.

In October it was announced that the Law Registry is going to pilot a full e-conveyancing system in 2006. In addition they hope to have registered all land on the public register by 2014. Land registration has been a very slow process for a long time and even now some land is still unregistered.

anti-social behaviour orders

It is now possible to obtain an anti-social behaviour order in appropriate cases.

In a recent decision *R (Stanley & Others) v Commissioner of Police of the Metropolis*, the court looked at a case where anti-social behaviour orders had been made against the defendants. A leaflet publicising the orders was then circulated in most of the area where the persons subject to the order were prohibited from travelling - the exclusion zone.

The local authority which had obtained the orders also put details about them on its community web site and published a report of the proceedings in its newsletter. Was this lawful? It included photographs of the people and their names, ages and details of the orders against them.

The people concerned applied for judicial review that this publicity was unlawful and a breach of the Human Rights Act 1998. The court did not agree. It said an anti-social behaviour order had to be published in order to make it effective and what the local authority had done was legal.

price fixing of football shirts



JJB alone was fined £8.37m. Manchester United FC, Umbro, the Football Association and others were also found guilty, but all sports and JJB appealed their case to the Competition Appeals Tribunal

This Autumn the Competition Appeals Tribunal upheld a finding of breach of the Competition Act 1998 when football companies including the Football Association and Manchester United and JJB Sports had fixed the price of the shirts.

A business diary of one of the participants of the illegal secret meetings was analysed by the Office of Fair Trading for the appeal. Some crossed out entries that were not then readable could be read after they were forensically treated.

Do your documents contain hidden data?

Anyone who sends documents by email should be careful they send the correct version.

Information such as the author of the document is given in parts of document files. This information is known as 'metadata'. Corrections, comments and deletions are other examples of metadata. Some readers will remember the trouble last year when metadata showed that a Government Iraq document was written by a university student.

A new web site has been set up to deal with this. Those running it say, "The dangers of metadata are a growing concern as businesses continually rely on electronic communications," stated Joe Fantuzzi, president and CEO of Workshare, sponsor of the new web site. The numbers of people affected by an accidental slip of sensitive metadata are rapidly increasing, making content security a growing priority for content creators and IT teams alike. Metadatarisk.org will help identify the risks for today's workers, allowing them to do their job efficiently and keep their content secure without having to worry about the hidden information they may be sending out to co-workers, competitors or clients.

If you do run into problems in this area contact us for advice.

(CAT). Details of the diary kept by one man emerged during the appeal. In an entry scored out in three colours of biro, it said: "Agree Man United and England prices with everybody."

In another, scored out with marker pen but revealed by forensic examination, it said: "Phone Mike Ashley to review Man United [kit] launch and other issues."

If you want advice on EU or UK competition law then contact us for further information.

email marketing lists and the ASA: Moviechoices.com case

The Advertising Standards Authority has held that an on-line DVD rental company that sent marketing emails to addresses on a list that it had bought thinking the individuals had consented, had breached the rules.

Moviechoices.com bought a database of 216,000 customer email addresses from a liquidated company. The people on the list had consented to receiving email from the list seller and Moviechoices.com thought that they had also opted in to receiving email marketing from third parties. It had a contractual term saying this.

According to the ASA, the contract for the sale of

the database "stated that the customers whose e-mail addresses were being sold had given opt-in consent to receive electronic communications from third parties". The contract also included declarations from partners of the liquidated company: "I confirm that the customer database comprises a list of e-mail addresses of former customers of the company all of whom, to the best of my knowledge and belief, have agreed to receive electronic communications from third parties". The ASA said Moviechoices.com should have asked for evidence that the individuals had consented. Moviechoices.com was told to acquire the explicit consent of consumers before sending them commercial e-mails in future.

In practice this means when buying mailing lists it is not enough to rely on promises from the provider, but instead ask to see copies of the consents they were given.

husbands, wives and dividends



Some readers may be likely to suffer higher tax bills because a married couple lost a tax case at the end of September.

Geoff and Diana Jones jointly run Arctic Systems. They were issued with a £42,000 back tax bill by

the Inland Revenue under section 660a of the legislation under some rules created in 1936. These rules prevent spouses going into business with each other and paying dividends to them in order that the income of the husband or wife falls in a lower tax bracket.

The case was heard by the Special Commissioners of Income Tax in June this year and supported by Professional Contractors Group (PCG).

It was only recently that the Revenue began to enforce this 1936 rule by targeting married couples who have equal shareholdings in a company and split dividend payments evenly; but where one of the pair does most of the day-to-day work. If the dividends exceed the value of work done by the person, the Revenue will require the money to be refunded.

most expensive fax mistake in history?

Five German banks narrowly escaped a £69m fine from the European Commission which was recently lifted. The fine was imposed 3 years ago because they had engaged in anti-competitive practices.

However a European Commission lawyer sending the Commission's case to the Court sent 100 pages of legal argument the wrong way up so only the blank side of the fax showed. Thus no argument was put so the banks won. The young lawyer had been on paternity leave but been recalled to assist with the case.

Human error was blamed. Whether lack of sleep because of a new baby in the house led to the error is not said. The banks had formed a cartel which fixed exchange fees for foreign currencies in the run up to the euro. It was the second highest fine ever annulled by the court. The Commission however has a month in which to ask the Court to re-open the case. It is not yet clear if it will but the case does illustrate the importance of checking faxes carefully and in particular sending terms and conditions on the back of forms or purchase orders where they are faxed.

tax and the small business IR 35

Ensuring you stay on the right side of lawful tax avoidance but ensuring you do not engage in illegal tax evasion is hard for many companies.

It is lawful for example to ensure both husband and wife work so they each have a single person tax allowance. They reduce the tax compared with if only one of them worked but that would not be illegal tax evasion. However in more complex cases the rules are not as clear.

There are special tax rules to catch one-man businesses operating through a limited company with only a very few clients. Where most of the income is drawn as dividends this will be treated as if it were earned income from employment of the individual concerned. Many IT consultants for example had set themselves up as limited companies. In a recent case *Usetech Ltd v Young* the court looked at these tax rules called 'IR35'. Here a man provided his services through his own limited company which in turn offered its services to a recruitment agency. An earlier case *R (Professional Contractors Group Ltd) v Inland Revenue* had confirmed this principle.

Anyone who operates in this way with few clients is at risk of the IR35 rules applying. They can be avoided if a large number of contractors have shares in a limited company but this would have to be over twenty people before the regulations could be avoided.

in cash?



Not all local businesses are aware that they may need under money laundering legislation to be careful about accepting payment in cash.

Some garage chains for example, now prohibit

purchase of expensive cars in cash because the implication of someone presenting £50,000 in used notes to buy a new vehicle is that they must be laundering the money.

There remains a general right to pay for goods by any means but of course there is no legal obligation in most cases on anyone to sell, thus conditions for the means of payment can be imposed - e.g. by bank transfer only or direct debit or cash even.

Solicitors, accountants and others have duties to report money laundering without telling their client. In October 2004, the Law Society began a challenge to the relevant parts of the Proceeds of Crime Act 2002 which imposed that duty because in many cases it places the solicitor in a difficult position - of on the one hand having duties of confidentiality to the client and on the other being obliged by law to

make the disclosure.

Currently 80% of consent requests received by the National Criminal Information Service (the body to whom notifications of suspicions are made) are from solicitors.

**Pengillys Solicitors
Post Office Chambers
67 St Thomas Street
Weymouth
Dorset
DT4 8HB**

**Tel: 01305 768888
Fax: 01305 768777**

**Email:
info@pengillys.co.uk
www.pengillys.co.uk**

Partners
J J Lane
C F Lousley MA (OXON)
T Guppy
C M Berry LLB
G P Meakins LLM
E J Lilley LLB
S Jones LLB
T J Glover LLB
J T Walkington LLB
M J Edmonds LLB
Consultant
R A S Taylor LLB
Assistant Solicitors
I Bennett LLB
C D Mitchell LLB
S J Peck LLB
J K Sanders BA

intellectual property protection for clothing and designs

In a recent case Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd the court looked at protection for designs.

Unlike patent protection which protects inventions and trade marks which protect names and logos, design law protects shapes.

In this case the court held that unregistered design right was not available for the juxtaposition of colours on a standard garment.

Two dimensional designs can only be protected by registration as registered design right which, following changes made by the Registered Designs Rules, allows even computer icons to be protected by registered design

right. However if no registration has been sought the lesser "unregistered design right" sometimes applies but not in this case. Here the defendants said even if they did not have design right protection they would therefore have artistic copyright in the same way if they made a painting or drawing. The judge did not agree and saw no reason why there should not be a "gap" in the legislative coverage between copyright and designs law.

The lesson for readers is to ensure they register any designs which are important to their business. Sometimes it is sensible to consider a mini-intellectual property audit, whereby your contract terms protecting IP rights and the rights you register and protect are examined to see how your rights could be better managed or organised to achieve best protection.

waste disposal

There has been huge controversy over EU laws for disposal of waste. Legislation relating to disposing of used fridges is already in place causing problems for businesses and councils all over the country. The Government issued the final consultation paper on draft regulations and guidance to bring into effect the provisions of the Waste Electrical and Electronic (WEEE) and Restriction of Certain Hazardous Substances (ROHS) Directives.

Both Directives aim to reduce the adverse environmental impacts of electrical and electronic equipment, particularly when it becomes waste. The Consultation on the WEEE Directive sets out the regulatory framework for implementation of 'producer responsibility', effective from August 2005.

Retailers will also be required to offer consumers free take back of WEEE from August 2005.

This is a huge change in the law less than a year away now.

The consultation also confirms the Government's aim to continue to work with business to establish the National Clearing House (NCH) for WEEE. The NCH which is widely supported by stakeholders, will co-ordinate the collection of WEEE from central sites and administer the allocation of obligations to producers.

From July 2006, the ROHS Directive will restrict the inclusion of certain hazardous substances, including some heavy metals in electrical equipment.

Contact us for further information on waste disposal and other related issues.