

2005 No. 13

FREEDOM OF INFORMATION

DATA PROTECTION

**The Information Tribunal (National Security Appeals) Rules
2005**

<i>Made</i> - - - -	<i>7th January 2005</i>
<i>Laid before Parliament</i>	<i>10th January 2005</i>
<i>Coming into force</i> - -	<i>1st February 2005</i>

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The Secretary of State, in exercise of the powers conferred(a) upon him by section 67(2) of, and paragraph 7 of Schedule 6 to, the Data Protection Act 1998(b) hereby makes the following Rules:

Citation and commencement

1. These Rules may be cited as the Information Tribunal (National Security Appeals) Rules 2005 and shall come into force on 1st February 2005.

Revocation

2. The Data Protection Tribunal (National Security Appeals) Rules 2000(c) are revoked.

Application and interpretation

3.—(1) These Rules apply to appeals under section 28 of the 1998 Act, section 60 of the 2000 Act and regulation 18(7) of the 2004 Regulations.

(2) In these Rules—

“the 1998 Act” means the Data Protection Act 1998;

“the 2000 Act” means the Freedom of Information Act 2000(d);

“the 2004 Regulations” means the Environmental Information Regulations 2004(e);

“appeal” means an appeal under—

(a) section 28 of the 1998 Act,

(b) section 60 of the 2000 Act, or

(c) section 60 as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations,

as the case may be;

“appellant” means—

(a) a person who brings or intends to bring an appeal under section 28 of the 1998 Act, or

(a) The functions of the Secretary of State under section 67(2) of, and paragraph 7 of Schedule 6 to, the Data Protection Act 1998 were transferred to the Lord Chancellor by the Transfer of Functions (Miscellaneous) Order 2001 (S.I. 2001/3500), which Order amended section 67(2) and Schedule 6 accordingly. The functions of the Lord Chancellor under section 67(2) and paragraph 7 of Schedule 6 as amended were transferred back to the Secretary of State by the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887), which Order amended section 67(2) and Schedule 6 accordingly.

(b) 1998 c. 29. Paragraph 7 of Schedule 6 to the Data Protection Act 1998 has been amended by paragraph 4 of Schedule 4 to the Freedom of Information Act 2000 (2000 c. 36).

(c) S.I. 2000/206. The Data Protection Tribunal was renamed the Information Tribunal by section 18(2) of the Freedom of Information Act 2000, which provision came into force on 14th May 2001 (S.I. 2001/1637). By paragraph 1(2) of Schedule 2 to that Act, any reference in any enactment, instrument or document to the Data Protection Tribunal is to be construed, in relation to any time after the commencement of section 18(2), as a reference to the Information Tribunal.

(d) 2000 c. 36.

(e) S.I. 2004/3391. Regulation 18(1) applies section 60 of the 2000 Act to certificates issued under regulation 15 of the 2004 Regulations, with the modifications made by regulation 18(7).

- (b) the Commissioner or an applicant who brings or intends to bring an appeal under section 60 of the 2000 Act or section 60 as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations,
as the case may be;

“costs”–

- (a) except in Scotland, includes fees, charges, disbursements, expenses and remuneration;
- (b) in Scotland means expenses, and includes fees, charges, disbursements and remuneration;

“disputed certification” means–

- (a) in relation to an appeal under section 28(4) of the 1998 Act, section 60(1) of the 2000 Act or section 60(1) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, the certificate against which the appeal is brought or intended to be brought;
- (b) in relation to an appeal under section 28(6) of the 1998 Act, the claim by a data controller, against which the appeal is brought or intended to be brought, that a certificate applies to any personal data;
- (c) in relation to an appeal under section 60(4) of the 2000 Act or section 60(4) as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, the claim by a public authority against which the appeal is brought or intended to be brought, that a certificate applies to any information,

as the case may be;

“hearing” means a sitting of the Tribunal for the purposes of enabling the Tribunal to take a decision on an appeal, or on any matter raised in relation to an appeal, at which the parties are entitled to attend and be heard;

“party” has the meaning given in paragraph (3) below;

“president” means the person designated by the Lord Chancellor under paragraph 3 of Schedule 6 to the 1998 Act to preside when the Tribunal is constituted under that paragraph;

“proper officer” in relation to a rule means an officer or member of staff provided to the Tribunal under paragraph 14 of Schedule 5 to the 1998 Act and appointed by the chairman to perform the duties of a proper officer under that rule;

“relevant Minister” means the Minister of the Crown who is responsible for the signing of the certificate under section 28(2) of the 1998 Act, section 23(2) or 24(3) of the 2000 Act, or regulation 15(1) of the 2004 Regulations to which the appeal relates as the case may be, and except where the context otherwise requires, references in these Rules to the relevant Minister include a person appointed under rule 22 below to represent his interests or a person designated under regulation 15(2) of the 2004 Regulations; and

“respondent data controller” means, in relation to an appeal under section 28(6) of the 1998 Act, the data controller making the claim which constitutes the disputed certification.

- (3) In these Rules, except where the context otherwise requires, “party” means the appellant or–
 - (a) in relation to an appeal under either section 28(4) of the 1998 Act, section 60 of the 2000 Act or section 60 of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, the relevant Minister,
 - (b) in relation to an appeal under section 28(6) of the 1998 Act, the respondent data controller,

and, except where the context otherwise requires, references in these Rules to a party or to any such party include a person appointed under rule 22 below to represent his interests.

(4) In relation to proceedings before the Tribunal in Scotland, for the words “on the trial of an action in rules 16(7) and 27(2) below, there is substituted “in a proof”.

(5) Appeals brought before 1st January 2005 shall be determined in accordance with the Data Protection Tribunal (National Security Appeals) Rules 2000.

Constitution and general duty of the Tribunal

4.—(1) When exercising its function under these Rules, the Tribunal shall secure that information is not disclosed contrary to the interests of national security.

(2) Subject to paragraph (3) below, the Tribunal's jurisdiction may be exercised ex parte by one or more of the persons designated under paragraph 2(1) of Schedule 6 to the 1998 Act.

(3) The Tribunal's jurisdiction may only be exercised ex parte in accordance with rule 12, in respect of appeals under either section 28 of the 1998 Act, section 60 of the 2000 Act or section 60 as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations.

(4) For the purposes of paragraph (1) above, but without prejudice to the application of that paragraph, the disclosure of information is to be regarded as contrary to the interests of national security if it would indicate the existence or otherwise of any material, where that indication would itself be contrary to the interests of national security.

Method of appealing – notice of appeal

5.—(1) An appeal must be brought by written notice of appeal served on the Tribunal.

(2) The notice of appeal shall—

- (a) identify the disputed certification; and
- (b) state—
 - (i) the name and address of the appellant;
 - (ii) the grounds of the appeal;
 - (iii) the name and address of the public authority from which the disputed certification was received;
 - (iv) the name and address of the appellant's representative, if he has appointed one; and
 - (v) an address for the service of notices and other documents on the appellant, and
- (c) be signed by or on behalf of the appellant.

(3) In the case of an appeal under section 28(6) of the 1998 Act, the notice of appeal shall also state—

- (a) the date on which the respondent data controller made the claim constituting the disputed certification;
- (b) an address for service of notices and other documents on the respondent data controller; and
- (c) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 6(3) below.

(4) In the case of an appeal under section 60(4) of the 2000 Act or section 60(4) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, the notice of appeal shall also state—

- (a) the date on which the public authority made the claim constituting the disputed certification;
- (b) an address for service of notices and other documents on the public authority; and
- (c) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 6(3) below.

(5) A notice of appeal may include a request for an early determination of the appeal and the reasons for that request.

Time limit for appealing

6.—(1) In the case of an appeal under section 28(4) of the 1998 Act, section 60(1) of the 2000 Act or section 60(1) of the 2000 Act as applied by regulation 18(1), as modified by regulation

18(7) of the 2004 Regulations, a notice of appeal may be served on the Tribunal at any time during the currency of the disputed certification to which it relates.

(2) In the case of an appeal under section 28(6) of the 1998 Act, section 60(4) of the 2000 Act or section 60(4) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, subject to paragraph (3) below, a notice of appeal must be served on the Tribunal within 28 days of the date on which the claim constituting the disputed certification was made.

(3) The Tribunal may accept a notice of appeal served after the expiry of the period permitted by paragraph (2) above if it is of the opinion that, by reason of special circumstances, it is just and right to do so.

(4) A notice of appeal shall, if sent by post in accordance with rule 31(2) below, be treated as having been served on the date on which it is received for dispatch by the Post Office.

Acknowledgement of notice of appeal and notification by the Tribunal

7.—(1) Upon receipt of a notice of appeal, the proper officer shall send—

- (a) an acknowledgement of the service of a notice of appeal to the appellant, and
- (b) a copy of the notice of appeal to—
 - (i) the relevant Minister,
 - (ii) the Commissioner, where he is not the appellant, and
 - (iii) in the case of appeal under section 28(6) of the 1998 Act, the respondent data controller.

(2) An acknowledgement of service under paragraph (1)(a) above shall be accompanied by a statement of the Tribunal's powers to award costs against the appellant under rule 29 below.

Relevant Minister's notice in reply

8.—(1) No later than 42 days after receipt of a copy of a notice of appeal under rule 7(1)(b) above, the relevant Minister shall send to the Tribunal—

- (a) a copy of the certificate to which the appeal relates, and
- (b) a written notice in accordance with paragraph (2) below;

(2) The notice shall state—

- (a) with regard to an appeal under section 28(4) of the 1998 Act, section 60(1) of the 2000 Act or section 60(1) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, whether or not he intends to oppose the appeal and, if so—
 - (i) a summary of the circumstances relating to the issue of the certificate, and the reason for the issue of the certificate;
 - (ii) the grounds upon which he relies in opposing the appeal; and
 - (iii) a statement of the evidence upon which he relies in support of those grounds; and
- (b) with regard to an appeal under section 28(6) of the 1998 Act, section 60(4) of the 2000 Act or section 60(4) as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations, whether or not he wishes to make representations in relation to the appeal and, if so—
 - (i) the extent to which he intends to support or oppose the appeal;
 - (ii) the grounds upon which he relies in supporting or opposing the appeal; and
 - (iii) a statement of the evidence upon which he relies in support of those grounds.

(3) Except where the Tribunal proposes to determine the appeal in accordance with rule 12 below, and subject to rule 13 below, the proper office shall send a copy of the notice to—

- (a) the appellant;

- (b) the Commissioner; and
- (c) in the case of an appeal under section 28(6) of the 1998 Act, the respondent data controller.

(4) A notice under this rule may include a request for an early determination of the appeal and the reasons for that request

Reply by respondent data controller

9.—(1) A respondent data controller shall, within 42 days of the date on which he receives a copy of a notice of appeal under rule 7(1)(b) above, send to the Tribunal a written reply acknowledging service upon him of the notice of appeal, and stating—

- (a) whether or not he intends to oppose the appeal and, if so,
- (b) the grounds upon which he relies in opposing the appeal.

(2) Before the expiry of the period referred to in paragraph (1) above, the respondent data controller may apply to the Tribunal for an extension of that period, showing cause why, by reason of special circumstances, it would be just and right to do so, and the Tribunal may grant such extension as it considers appropriate.

(3) Except where the Tribunal proposes to determine the appeal in accordance with rule 12 below, the proper officer shall send a copy of the reply to—

- (a) the relevant Minister; and
- (b) subject to paragraph (4) and rule 13 below, the appellant, the Commissioner and any other party to the proceedings.

(4) No copy may be sent under paragraph (3)(b) above before the period of 42 days referred to in rule 13(2)(b) below has expired unless the relevant Minister has indicated that he does not object.

(5) A reply under this rule may include a request for an early determination of the appeal and the reasons for that request.

Amendment and supplementary grounds

10.—(1) With leave of the Tribunal, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal.

(2) Rule 7(1) above and rule 12 below apply to an amended notice of appeal and to supplementary grounds of appeal provided under paragraph (1) above as they apply to a notice of appeal.

(3) Upon receipt of a copy of an amended notice of appeal or supplementary grounds of appeal under rule 7(1) above;

- (a) the relevant Minister may amend his notice in reply, and
- (b) in the case of an appeal under section 28(6) of the 1998 Act, the respondent data controller may amend his reply to the notice of appeal.

(4) An amended notice or reply under paragraph (3) above must be served on the Tribunal within 28 days of the date on which the copy referred to in that paragraph is received by

- (a) the relevant Minister, or
- (b) the respondent data controller,

as the case may be.

(5) Without prejudice to paragraph (3) above, and with the leave of the Tribunal—

- (a) the relevant Minister may amend a notice in reply, and
- (b) the respondent data controller,

may amend a reply to the notice of appeal.

(6) Rule 8(3) above and rules 12(1)(b) and 13(1)(a) below apply to an amended notice in reply by the relevant Minister provided under paragraph (3) or (5) above as they do to a reply.

(7) Rule 9(3) and (4) above and rules 12(1)(c) and 13(1)(b) below apply to an amended reply by the respondent data controller provided under paragraph (3) or (5) above as they do to a reply.

Application for striking out

11.—(1) Where the relevant Minister or, in the case of an appeal under section 28(6) of the Act, the respondent data controller is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his notice under rule 8 or, as the case may be, his reply under rule 9 above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the hearing of the substantive appeal.

Summary disposal of appeals

12.—(1) Where, having considered—

- (a) the notice of appeal,
- (b) the relevant Minister's notice in reply, and
- (c) in the case of an appeal under section 28(6) of the 1998 Act, the respondent data controller's reply,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith, it may, subject to the provisions of this rule, so determine the appeal.

(2) Where the Tribunal proposes to determine an appeal under paragraph (1) above, it must first notify the appellant and the relevant Minister of the proposal.

(3) A notification to the appellant under paragraph (2) above must contain particulars of the appellant's entitlements set out in paragraph (4) below.

(4) An appellant notified in accordance with paragraph (2) above is entitled, within such time as the Tribunal may reasonably allow—

- (a) to make written representations, and
- (b) to request the Tribunal to hear oral representations

against the proposal to determine the appeal under paragraph (1) above.

(5) Where an appellant requests a hearing under paragraph (4)(b) above, the Tribunal shall, as soon as practicable and with due regard to the convenience of the appellant, appoint a time and place for a hearing accordingly.

(6) The proper officer shall send to the appellant a notice informing him of—

- (a) the time and place of any hearing under paragraph (5) above which, unless the appellant otherwise agrees, shall not be earlier than 14 days after the date on which the notice is sent, and
- (b) the effect of rule 23 below .

(7) The Tribunal must, as soon as practicable, notify the appellant and the relevant Minister if, having given a notification under paragraph (2) above, it ceases to propose to determine the appeal under paragraph (1) above.

Relevant Minister's objection to disclosure

13.—(1) Where a Minister objects, on grounds of the need to secure that information is not disclosed contrary to the interests of national security, to the disclosure of—

- (a) his notice in reply to the appellant, to the Commissioner or, in the case of an appeal under section 28(6) of the 1998 Act, to the respondent data controller; or
- (b) the reply of a respondent data controller, to the appellant or the Commissioner,

he may send a notice of objection to the Tribunal.

- (2) A notice of objection under paragraph (1) above must be sent—
 - (a) where paragraph (1)(a) above applies, with the notice in reply; and
 - (b) where paragraph (1)(b) above applies, within 42 days of the date on which he receives the copy mentioned in rule 9(3) above.
- (3) A notice of objection under paragraph (1) above shall be in writing and shall—
 - (a) state the reasons for the objection; and
 - (b) where paragraph (1)(a) above applies, if and to the extent that it is possible to do so without disclosing information contrary to the interests of national security, be accompanied by a version of the relevant Minister’s notice in a form which can be shown to the appellant, the Commissioner or, as the case may be, the respondent data controller.
- (4) Where the relevant Minister sends a notice of objection under paragraph (1) above, the Tribunal must not disclose the material in question otherwise than in accordance with rule 18 below.

Withdrawal of appeal

- 14.—**(1) The appellant may at any time before a determination is made withdraw his appeal by sending to the Tribunal a notice of withdrawal in writing and signed by him or on his behalf.
- (2) Upon receipt of a notice under paragraph (1) above, the proper officer shall send a copy of that notice to—
- (a) the relevant Minister,
 - (b) the Commissioner, and
 - (c) in the case of an appeal under section 28(6) of the 1998 Act, the respondent data controller.
- (3) A notice of withdrawal shall, if sent by post in accordance with rule 31(2) below, have effect on the date on which it is received for dispatch by the Post Office.
- (4) Where an appeal is withdrawn under this rule, a fresh appeal may not be brought by the same appellant in relation to the same disputed certification except with the leave of the Tribunal.

Consolidation of appeals

- 15.—**(1) Subject to paragraph (2) below, where in the case of two or more appeals to which these Rules apply it appears to the Tribunal—
- (a) that some common questions of law or fact arise in both or all of them, or
 - (b) that for some other reason it is desirable to proceed with the appeals under this rule,
- the Tribunal may order that the appeals be consolidated or heard together.
- (2) The Tribunal shall not make an order under this rule without giving the parties and the relevant Minister an opportunity to show cause why such an order should not be made.

Directions

- 16.—**(1) This rule is subject to rule 17 below.
- (2) In this rule, references to a “party” include the relevant Minister notwithstanding that he may not be a party to an appeal under section 28(6) of the 1998 Act.

(3) Subject to paragraphs (7) and (8) below, the Tribunal may at any time of its own motion or on the application of any party give such direction as it thinks proper to enable the parties to prepare for the hearing of the appeal or to assist the Tribunal to determine the issues.

(4) Such directions may in particular–

- (a) provide for a particular matter to be dealt with as a preliminary issue and for a pre-hearing review to be held;
- (b) provide for–
 - (i) the exchange between the parties of lists of documents held by them which are relevant to the appeal,
 - (ii) the inspection by the parties of the documents so listed,
 - (iii) the exchange between the parties of statements of evidence, and
 - (iv) the provision by the parties to the Tribunal of statements or lists of agreed matters;
- (c) require any party to send to the Tribunal and to the other parties–
 - (i) statements of facts and statements of the evidence which will be adduced, including such statements provided in modified or edited form;
 - (ii) a skeleton argument which summarises the submissions which will be made and cites the authorities which will be relied upon, identifying any particular passages to be relied upon;
 - (iii) a chronology of events;
 - (iv) any other particulars or supplementary statements which may reasonably be required for the determination of the appeal;
 - (v) any document or other material which the Tribunal may require and which it is in the power of that party to deliver;
 - (vi) an estimate of the time which will be needed for any hearing;
 - (vii) by a specified date, any written submissions on which the party intends to rely at a hearing that he does not intend to attend or at which he does not intend to be represented; and
 - (viii) a list of the witnesses he intends to call to give evidence at any hearing;
- (d) limit the length of oral submissions and the time allowed for the examination and cross-examination of witnesses; and
- (e) limit the number of expert witnesses to be heard on either side.

(5) If, following the determination of any matter at a pre-hearing review directed in accordance with paragraph (4)(a) above, the Tribunal is of the opinion that its decision as to that matter substantially disposes of the whole appeal, the Tribunal may treat the pre-hearing review as the hearing of the appeal and may give such direction as it thinks fit to dispose of the appeal.

(6) The Tribunal may, subject to any specific provision in these Rules, specify time limits for steps to be taken in the proceedings and may extend any time limit.

(7) Nothing in this rule may require the production of any document or other material which the party could not be compelled to produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined.

(8) It shall be a condition of the supply of any information or material provided under this rule that any recipient of that information or material may use it only for the purposes of the appeal.

(9) The power to give directions may be exercised in the absence of the parties.

(10) Notice of any directions given under this rule shall be served on all the parties, and the Tribunal may, on the application of any party, set aside or vary such direction.

(11) If a party does not comply with any direction given under these Rules, the Tribunal may–

- (a) dismiss the whole or part of the appeal or application; or

- (b) strike out the whole or part of a Minister's or a respondent data controller's reply or notice in reply and, where appropriate, direct that a Minister or a respondent data controller shall not contest the appeal.

(12) But the Tribunal must not dismiss, strike out or give a direction unless it has sent a notice to the party who has not complied giving that party the opportunity to comply within such period as the Tribunal may specify in the notice or to show cause why the Tribunal should not dismiss, strike out or give such a direction.

Applications by relevant Minister

17.—(1) This rule applies in any case where the Tribunal proposes to—

- (a) give or vary any direction under rule 16 above or rule 19(2) below,
- (b) issue a summons under rule 21 below, or
- (c) certify or publish a determination under rule 28 below.

(2) Before the Tribunal proceeds as proposed in any case to which this rule applies, it must first notify the relevant Minister of the proposal.

(3) If the relevant Minister considers that proceeding as proposed by the Tribunal would cause information that is or would be exempt by virtue of a provision in Part II of the 2000 Act to be disclosed, he may make an application to the Tribunal requesting it to reconsider the proposal or reconsider it to any extent.

(4) An application by the relevant Minister under paragraph (3) above must be made within 14 days of receipt of notification under paragraph (2) above, and the Tribunal must not proceed as proposed in any case to which this rule applies before that period has expired, otherwise than in accordance with rule 18 below, unless the Minister has indicated that he does not object.

(5) Where the relevant Minister makes an application under this rule, the Tribunal must not proceed as proposed otherwise than in accordance with rule 18 below.

Determination on relevant Minister's objections and applications

18.—(1) Except where rule 12 above applies, the Tribunal shall determine whether to uphold any objection of the relevant Minister under rule 13 above, and any application under rule 17 above, in accordance with this rule.

(2) Subject to paragraph (3) below, proceedings under this rule shall take place in the absence of the parties.

(3) The relevant Minister may attend any proceedings under this rule, whether or not he is a party to the appeal in question.

(4) An objection under rule 13 above must be considered under this rule as a preliminary issue, and an application under rule 17 above may be considered as a preliminary issue or at the hearing of the substantive appeal.

(5) Where, in the case of an objection under rule 13 above, the Tribunal is minded to overrule the relevant Minister's objection, or to require him to provide a version of his notice in a form other than that which he provided it under rule 13(3)(b) above, the Tribunal must invite the relevant Minister to make oral representations.

(6) Where the Tribunal under paragraph (5) above overrules an objection by the relevant Minister under rule 13 above, or requires him to provide a version of his notice in a form other than that in which he provided it under rule 13(3)(b) above, the Tribunal shall not disclose, and the relevant Minister shall not be required to disclose, any material which was the subject of the unsuccessful objection if the relevant Minister chooses not to rely upon it in opposing the appeal.

(7) Where, in the case of an objection under rule 13 above, the Tribunal upholds the relevant Minister's objection and either—

- (a) approves the version of his notice provided under rule 13(3)(b), or

- (b) requires him to provide a version of his notice in a form other than that in which he provided it under rule 13(3)(b),

rule 8(3) above applies to that version of the notice.

Power to determine without a hearing

19.—(1) Without prejudice to rule 12 above, where either—

- (a) the parties so agree in writing, or
- (b) it appears to the Tribunal that the issues raised on the appeal have been determined on a previous appeal brought by the appellant on the basis of facts which did not materially differ from those to which the appeal relates and the Tribunal has given the parties an opportunity of making representations to the effect that the appeal ought not to be determined without a hearing,

the Tribunal may determine an appeal, or any particular issue, without a hearing.

(2) Before determining any matter under this rule the Tribunal may, subject to rule 17 above, if it thinks fit direct any party to provide in writing further information about any matter relevant to the appeal within such time as the Tribunal may allow.

Time and place of hearings

20.—(1) Subject to rules 12 and 19 above, where the Tribunal has directed that a hearing shall take place the Tribunal shall appoint a time and place for a hearing of the appeal as soon as practicable, with due regard to the convenience of the parties and to any request for an early hearing under any of rules 5(5), 8(4) or 9(5) above.

(2) Except in relation to a hearing under rule 12(5) above, the proper officer shall send to each party, the Commissioner and the relevant Minister a notice informing him of the time and place of any hearing, which, unless the parties otherwise agree, shall not be earlier than 14 days after the date on which the notice is sent.

(3) A notice to a party under this rule shall inform him of the effect of rule 23 below.

(4) The Tribunal may—

- (a) postpone the time appointed for any hearing;
- (b) adjourn a hearing to such time as the Tribunal may determine; or
- (c) alter the place appointed for any hearing;

and, if it exercises any of the powers above, it shall notify each person previously notified of that hearing under this rule or rule 12(6) above, and any person summoned under rule 21 below to attend as a witness at that hearing, of the revised arrangements.

Summoning of witnesses

21.—(1) This rule is subject to rule 17 above.

(2) Subject to paragraph (3) below, the Tribunal may by summons require any person in the United Kingdom to attend as a witness at a hearing of an appeal at such time and place as may be specified in the summons and, subject to rule 27(2) and (3) below, at the hearing to answer any questions or produce any documents in his custody or under his control which relate to any matter in question in the appeal.

(3) No person shall be required to attend in obedience to a summons under paragraph (2) above unless he has been given at least 7 days' notice of the hearing or, if less than 7 days, he has informed the Tribunal that he accepts such notice as he has been given.

(4) The Tribunal may, upon the application of a person summoned under this rule, set the summons aside.

(5) A person who has attended a hearing as a witness in obedience to a summons shall be entitled to such sum as the Tribunal may consider reasonable in respect of his attendance at, and his travelling to and from, the hearing; and where the summons was issued at the request of a party, such sum shall be paid or tendered to him by that party.

(6) In relation to proceedings before the Tribunal in Scotland, in this rule “summons” means citation and the provisions of this rule are to be construed accordingly.

Representation at a hearing

22.—(1) At any hearing by the Tribunal, other than a hearing under rule 12 above—

- (a) a party may, subject to rules 18(2) above and 24(3) below, conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose, and
- (b) the relevant Minister may appear and be represented by any person whom he may appoint for the purpose.

(2) At any hearing by the Tribunal under rule 12(5) above, the appellant may conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose.

(3) If the appellant or the relevant Minister does not intend to attend or be represented at a hearing, he must inform the Tribunal of his intention, and in such a case may send to the Tribunal additional written representations in support of his appeal.

Default of appearance at hearing

23. If, without furnishing the Tribunal with sufficient reason for his absence, a party fails to appear at a hearing, having been duly notified of the hearing, the Tribunal may, if that party is the appellant, dismiss the appeal or, in any case, hear and determine the appeal, or any particular issue, in the party’s absence and may make such order as to costs as it thinks fit.

Hearings to be in private

24.—(1) All hearings by the Tribunal (including preliminary hearings) shall be in private unless the Tribunal, with the consent of the parties and the relevant Minister, directs that the hearing or any part of the hearing shall take place in public.

(2) Where the Tribunal sits in private it may, with the consent of the parties and the relevant Minister, admit to a hearing such persons on such terms and conditions as it considers appropriate.

(3) Where the Tribunal considers it necessary for any party who is not the relevant Minister to be excluded from the proceedings or any part of them to secure that information is not disclosed contrary to the interests of national security, it must—

- (a) direct accordingly,
- (b) inform the person excluded of its reasons, to the extent that it is possible to do so without disclosing information contrary to the interests of national security, and record those reasons in writing, and
- (c) inform the relevant Minister.

(4) The relevant Minister, or a person authorised to act on his behalf, may attend any hearing, other than a hearing under rule 12 above, notwithstanding that it is in private.

Conduct of proceedings at hearing

25.—(1) Subject to rules 23 and 24(3) above, the Tribunal shall at the hearing of an appeal give to each party and the relevant Minister an opportunity—

- (a) to address the Tribunal and to amplify orally written statements previously furnished under these Rules, to give evidence and to call witnesses, and to put questions to any person giving evidence before the Tribunal, and

- (b) to make representations on the evidence (if any) and on the subject matter of the appeal generally but, where evidence is taken, such opportunity shall not be given before the completion of the taking of evidence.

(2) Except as provided by these Rules, the Tribunal shall conduct the proceedings in such a manner as it considers appropriate in the circumstances for discharging its functions and shall so far as appears to it to be appropriate seek to avoid formality in its proceedings.

Preliminary and incidental matters

26. As regards matters preliminary or incidental to an appeal, the president may act for the Tribunal under rules 6(3), 9(2), 10, 14 to 16, 20(1) and (4)(a) and (c), 21 and 25.

Evidence

27.—(1) The Tribunal may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law.

(2) No person shall be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined.

(3) The Tribunal may require oral evidence of a witness (including a party) to be given on oath or affirmation and for that purpose the president or the proper officer shall have the power to administer oaths or take affirmations.

Determination of appeal

28.—(1) As soon as practicable after the Tribunal has determined an appeal, the president shall certify in writing that determination and sign and date the certificate.

(2) If and to the extent that it is possible to do so without disclosing information which is or would be exempt by virtue of a provision in Part II of the 2000 Act, and subject to rule 17 above, the certificate shall include—

- (a) any material finding of fact, and
- (b) the reasons for the decision.

(3) The proper officer shall send a copy of the certificate to—

- (a) the parties,
- (b) the relevant Minister, and
- (c) the Commissioner.

(4) Subject to rule 17 above, the Tribunal shall make arrangements for the publication of its determination but in doing so shall have regard to—

- (a) the desirability of safeguarding—
 - (i) the privacy of data subjects,
 - (ii) commercially sensitive material,
 - (iii) any information which is or would be exempt by virtue of any provision in Part II of the 2000 Act, and
- (b) the need to secure that information is not disclosed contrary to the interests of national security.

and for those purposes may make any necessary amendments to the text of the certificate.

(5) For the purposes of this rule (but without prejudice to its generality), the disclosure of information is to be regarded as contrary to the interests of national security if it would indicate the existence or otherwise of any material, where that indication would itself be contrary to the interests of national security.

Costs

29.—(1) In any appeal before the Tribunal, including one withdrawn under rule 14 above, the Tribunal may make an order awarding costs—

- (a) in the case of an appeal under section 28(4) of the 1998 Act, section 60(1) of the 2000 Act or section 60(1) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations—
 - (i) against the appellant and in favour of the relevant Minister where it considers that the appeal was manifestly unreasonable;
 - (ii) against the relevant Minister and in favour of the appellant where it allows the appeal and quashes the disputed certificate, or does so to any extent;
 - (iii) against the relevant Minister and in favour of the appellant where, before the Tribunal has made a determination, the relevant Minister withdraws the certificate to which the appeal relates
- (b) in the case of an appeal under section 28(6) of the 1998 Act, section 60(4) of the 2000 Act or section 60(4) of the 2000 Act as applied by regulation 18(1), as modified by regulation 18(7) of the 2004 Regulations—
 - (i) against the appellant and in favour of any other party where it dismisses the appeal, or dismisses it to any extent;
 - (ii) in favour of the appellant and against any other party where it allows the appeal, or allows it to any extent; and
- (c) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of the other or others.

(2) The Tribunal shall not make an order under paragraph (1) above awarding costs against a party without first giving that party an opportunity of making representations against the making of the order.

(3) An order under paragraph (1) above may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed).

(4) Any costs required by an order under this rule to be taxed must be taxed in the county court according to such of the scales prescribed by the county court rules for proceedings in the county court as shall be directed by the order.

(5) In relation to proceedings before the Tribunal in Scotland, for the purposes of the application of paragraph (4) above, for the reference to the county court and the county court rules there shall be substituted reference to the sheriff court and the sheriff court rules and for the reference to proceedings there shall be substituted a reference to civil proceedings.

Irregularities

30.—(1) Any irregularity resulting from failure to comply with any provision of these Rules or of any direction of the Tribunal before the Tribunal has reached its decision shall not of itself render the proceedings void, but the Tribunal may, and shall if it considers that any person may have been prejudiced by that irregularity, give such directions or take such steps as it thinks fit before reaching its decision to cure or waive the irregularity, whether by amendment of any document, the giving of notice or otherwise.

(2) Clerical mistakes in any document recording or certifying a direction, decision or determination of the Tribunal or president, or errors arising in such document from an accidental slip or omission, may at any time be corrected by the president by certificate signed by him.

Notices, etc

31.—(1) Any notice or document required or authorised by these Rules to be served on or sent to any person or authority may be—

- (a) sent by post in a registered letter or by the recorded delivery service, or delivered by hand in accordance with paragraph (2) below,
- (b) sent by means of electronic communication in accordance with paragraph (3) below.

(2) A notice or other document required or authorised by these Rules to be served on or sent to any person or authority that is sent by post in a registered letter or by the recorded delivery service, or delivered by hand, must be sent or delivered—

- (a) in the case of the Tribunal, to the proper officer of the Tribunal;
- (b) in the case of the Commissioner or the relevant Minister, to him at his office;
- (c) in the case of any other party, to him or his representative at the address for service under these Rules.

(3) Any notice or other document required or authorised by these Rules to be served on or sent to any person or authority that is to be sent by means of electronic communication, must be sent—

- (a) in the case of the Tribunal, by such means and to such address as the proper officer may specify;
- (b) in the case of the Commissioner or the relevant Minister, by such means and to such address as he may specify;
- (c) in the case of any other party, by such means and to such address as he or his appointed representative may specify.

(4) Without prejudice to paragraph (3) above, no person shall be required to accept service of documents sent by electronic means unless they have indicated that they are prepared to accept such service.

(5) An appellant or respondent data controller may at any time by notice to the Tribunal change his address for service, or the manner in which he wishes to have service effected on him, under these Rules.

Signed

Date 7th January 2005

Cathy Ashton
Parliamentary Under Secretary of State
Department for Constitutional Affairs

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules regulate the exercise of the rights of appeal conferred by section 28 of the Data Protection Act 1998 (“the 1998 Act”), section 60 of the Freedom of Information Act 2000 (“the 2000 Act”) and the rights of appeal conferred by section 60 of the 2000 Act, as applied by regulation 18(1), as modified by regulation 18(7) of the Environmental Information Regulations 2004 (S.I. 2004/3391) (“the 2004 Regulations”) in relation to appeals against certificates issued under regulation 15 of those Regulations certifying that disclosure of information under regulation 12 would adversely affect national security and would not be in the public interest.

Section 28(2) of the 1998 Act provides for a Minister to certify that exemption from certain provisions of that Act is or at any time was required for the purpose of safeguarding national security. Section 28(4) allows any person directly affected by the issue of such a certificate to appeal against it to the Tribunal. Section 28(6) provides that where, in any proceedings under or by virtue of the 1998 Act, a data controller claims that a certificate issued under section 28(2) applies to any personal data, any other party to the proceedings may appeal to the Tribunal on the grounds that the certificate does not apply to that personal data.

Section 60 of the 2000 Act creates a right of appeal against Ministerial certificates issued under section 23(2) or 24(3) of that Act. Certificates issued under these sections certify that exemption from the provisions of the Acts is or was required for the purpose of safeguarding national security, or that exemption from the provisions of the Freedom of Information Act 2000 is required as the information to which the certificate relates was directly or indirectly supplied by, or relates to, any of the bodies specified in section 23(3).

The 2004 Regulations place a duty on public authorities to make available environmental information on request. Regulation 18 of the 2004 Regulations applies the enforcement and appeals provisions of the 2000 Act for the purposes of the 2004 Regulations. The enforcement provisions are those contained in Part IV of the 2000 Act (including Schedule 3). The appeals provisions are those contained in Part V of the 2000 Act.

The Rules also make provision for the practice and procedure of the Information Tribunal in such cases.

Rule 2 revokes the Data Protection Tribunal (National Security Appeals) Rules 2000 (S.I. 2000/206).

Rule 4 places a general duty on the Tribunal to secure that information is not disclosed contrary to the interests of national security, and limits the ex parte jurisdiction of the Tribunal to matters concerning the summary disposal of appeals under rule 12.

Rule 5 requires an appeal to be made by notice of appeal served on the Tribunal, stating the grounds of appeal and other specified particulars, and rule 6 makes provision as to the time limits for appealing. Rule 7 provides for acknowledgement of the notice of appeal, and for service of copies. Rule 8 provides for a notice in reply by the Minister who signed the certificate, and rule 9 for a reply by a data controller in section 28(6) cases who is claiming the application of a certificate. Rule 10 allows the parties to amend their pleadings, in some cases with leave only. Rule 11 allows the Minister or the data controller to apply for an appeal to be struck out in limited circumstances.

Rule 12 allows the Tribunal to dismiss an appeal on the basis of consideration of the notice of appeal, the Minister’s notice, and any reply by the data controller, where it considers it proper to do so, but must first allow the appellant to make representations, written and oral, against a proposal to deal with the appeal under this procedure.

Rule 13 permits the Minister to object, on the grounds that disclosure of the information would be contrary to the interests of national security, to the disclosure of his notice in reply, or any data controller’s reply, to a party (or the Information Commissioner). Where he does so, he must give

reasons and if possible supply a version of the notice which can be disclosed, and the procedure set out in rule 18 applies to the objection.

Rules 14 and 15 make provision in respect of the withdrawal of an appeal and the consolidation of appeals. Rule 16 provides for the giving of directions by the Tribunal, of its own motion or on the application of a party; this power may be exercised in the absence of the parties, and any party may apply to set aside or vary directions. Where the Tribunal determines a matter at a pre-hearing review pursuant to any directions given, and it is of the opinion that its decision as to that matter substantially disposes of the whole appeal, the Tribunal may treat the pre-hearing review as the hearing of the appeal and give such direction as it thinks fit as to the disposal of the appeal.

Rule 17 provides for the Minister to be able to apply, on the grounds that to do so would be contrary to the interests of national security, for the Tribunal to reconsider proposals to exercise certain of its powers (including giving directions, issuing a witness summons or publishing a determination).

Rule 18 sets out the procedure for determining whether to uphold a relevant Minister's objection under rule 13 and any application under rule 17.

Rule 19 provides that the Tribunal may determine appeals without a hearing.

Provision is made as to the time and place of a hearing (rule 20), summoning of a witness to attend a hearing (rule 21), representation at a hearing (rule 22) and default of appearance at a hearing (rule 23).

Hearings by the Tribunal must generally be in private, but provision is made for public hearings, and the admission of other persons, in limited circumstances (rule 24). The Rules include provision as to the conduct of proceedings at a hearing (rule 25), powers of the president to act for the Tribunal (rule 26), evidence (rule 27), the determination of appeals (rule 28) and costs (rule 29).

Notices and other documents may be served by post and by electronic means (rule 31).

These Rules contribute to the implementation of Council Directive 2003/4/EC on public access to environmental information.

STATUTORY INSTRUMENTS

2005 No. 13

FREEDOM OF INFORMATION

DATA PROTECTION

The Information Tribunal (National Security Appeals) Rules
2005

£3.50

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Printed and published in the UK by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of Her Majesty's
Stationery Office and Queen's Printer of Acts of Parliament.

E0010 01/2005 150010T 19585

ISBN 0-11-051523-4



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