

# THE LAW OF FREEDOM OF INFORMATION

FIRST CUMULATIVE  
SUPPLEMENT



OXFORD

# THE LAW OF FREEDOM OF INFORMATION

FIRST CUMULATIVE SUPPLEMENT

*by*

JOHN MACDONALD QC

*With*

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# INTRODUCTION

## Three sets of rules

From 1 January 2005 public authorities became subject to the full effect of the Freedom of Information Act 2000 ('the 2000 Act'). On the same day, they became subject to the Environmental Information Regulations 2004 ('the EIR'), which came into effect on 1 January 2005. They continued to be subject to the Data Protection Act 1998, which had been amended and extended by the 2000 Act.

For the public authority faced with a request for information the first question must be: which set of rules applies? Are we being asked for private information, or environmental information, or public information? This introduction is intended for those who have to answer these questions. It states shortly the definitions of 'personal information' or more accurately 'personal data', and 'environmental information', explains the extent to which the three sets of rules fit together, and indicates the main differences between them.

## Personal data

A person is entitled to receive information relating to himself or herself under the Data Protection Act 1998 ('the 1998 Act'). The applicant is called the *data subject*. 'Data' includes information stored automatically (that is, on a computer), manually processed data stored in a structured form (for example, a handwritten card index system) and, under an amendment introduced by the 2000 Act, processed data in an unstructured form. Data is 'personal' if it enables a living individual to be identified from it, or from it and other information in the hands of the data controller.

One of the exemptions to the right to information under the 2000 Act, in section 40, is for personal information. The purpose of the exemption is not to prevent the release of such information, but to recognize that a regime governing the processing, including the release, of such information already exists under the 1998 Act.

Where the applicant is the data subject, section 40(1) creates an absolute exemption. The effect of this is to remove such applications entirely from the regime of the 2000 Act, leaving them to the existing regime of the 1998 Act. The effects of

that regime, considered in detail in the Main Work in chapter 10, are essentially threefold. First, to give 'data subjects' rights of access to, and certain other rights of control over, personal information which concerns them. These rights are subject to the exceptions contained in the 1998 Act. Second, to regulate the use that is made of information contained in personal data through the application of 'data protection principles'. And third, that there should be impartial supervision of those who hold the data (now undertaken by the Information Commissioner and the Information Tribunal, whose jurisdiction extends across the fields of both freedom of information and data protection).

Where the applicant is not the data subject, but a third party seeking personal information, matters are a little more complicated. Such applications should be dealt with under the 2000 Act, but because the release of personal information to a third party raises issues of data protection, very broad exemptions apply to such requests, and these exemptions are defined by reference to the 1998 Act.

Wherever an application for 'personal data' is made by someone other than the 'data subject', the information to which it relates will be exempt from disclosure under the 2000 Act where either of two conditions is satisfied. Their general effect can be described as follows. Where disclosure by the public authority of the data would contravene any of the 'data protection principles' it is absolutely exempt. Where the data falls within the original form of section 1(1) of the 1998 Act (that is, it is information stored in a computer or is manually processed data stored in a 'structured' rather than an 'unstructured' form) then disclosure is also prevented if it would contravene the data subject's right to prevent processing likely to cause damage or distress (pursuant to section 10 of the 1998 Act). The exemption is not, however, in such a case absolute, but is subject to the public interest test. The same is true if the information in question is exempt from the data subject's own right of access under the 1998 Act: it is again exempt, but the exemption is subject to the public interest test. Further, the duty to confirm or deny under the 2000 Act is excluded where an application is made by someone other than the data subject if compliance would contravene any of the data protection principles, or section 10 of the 1998 Act, or where the data is exempt from disclosure to the data subject under the 1998 Act.

### **Environmental information**

Section 39 of the 2000 Act provides that information is exempt information if an authority is required to make it available in accordance with the EIR (or would be so required but for an exception within the EIR). This is not a true exemption: it means that environmental information is available under the different regime established by the EIR. This regime applies across the European Union.

Under regulation 2(1) of the EIR *environmental information* has the same meaning as in Article 2(1) of Council Directive 2003/4/EC, namely any information in written, visual, aural, electronic, or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;
- (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures and activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost–benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

This is a very broad definition and includes, for example, many of the activities undertaken by local authorities. Requests for information which fall within this definition would have to be dealt with under the EIR.

### Differences between the EIR and the 2000 Act

The definition of *public authorities* in regulation 2(2) is wider than the definition in the 2000 Act and includes bodies such as privatized water authorities and power companies. The main differences between the substance of the two regimes are first, that a public authority is required to apply a presumption in favour of disclosure under the EIR: there is no such presumption under the 2000 Act. Second, the exemptions in the EIR are narrower; there is, for example, no express exemption for information the disclosure of which would be likely to be prejudicial to the economic or financial interests of the United Kingdom. Third, none of the exceptions in the EIR are absolute—they are all subject to the public interest test; and fourth, all the substantial exceptions under the EIR only apply to the extent that disclosure would adversely affect the interest protected; in contrast, prejudice is only required to be shown in about half the qualified exemptions under the 2000 Act. Applicants will therefore be keen to have their requests considered under the EIR rather than under the 2000 Act.

## HOW TO USE THIS SUPPLEMENT

This is the first supplement to the first edition of Macdonald and Jones on *The Law of Freedom of Information*, and has been compiled according to the structure of the main volume.

At the beginning of each chapter of this Supplement is an abbreviated table of contents from the main volume. Where a heading in this table has been marked by the symbol ■, this indicates that there is relevant information in the Supplement to which the reader should refer.

Within each chapter, updating information is referenced to the relevant paragraph in the main volume. Wholly new paragraphs can be identified by a paragraph number followed by a letter, eg 58Y.



## TABLES OF CASES

|                                |       |
|--------------------------------|-------|
| United Kingdom                 | xv    |
| European Court of Human Rights | xvii  |
| Australia                      | xvii  |
| Canada                         | xvii  |
| Ireland                        | xviii |
| United States of America       | xviii |

### United Kingdom

|   |  |
|---|--|
| A v B Plc [2002] EWCA Civ 337, [2003] QB 195, CA (Civ Div) . . . . .  | 21.38  |
| A v Secretary of State for the Home Department [2004] UKHL 56,<br>[2005] 2 AC 68, HL. . . . .                               | 21.19  |
| American Cyanamid Co (No1) v Ethicon Ltd [1975] AC 396, HL. . . . .   | 21.60  |
| Attorney General v Barker (Civil Proceedings Order) [2000] 1 FLR 759 . . . . .  | 5.102  |
| <br>Bowman v Fels [2005] EWCA Civ 226, [2005] 1 WLR 3083, [2005] 2 Cr App R 19,<br>[2005] 2 CMLR 23, CA (Civ Div) . . . . . | <br>14.34A                                       |
| <br>Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 AC 457, HL . . . . .                                    | 10.04,<br>20.93B–20.93E, 21.69A–21.69C           |
| Cream Holdings Ltd v Banerjee [2004] UKHL 44, [2005] 1 AC 253, HL . . . . .   | 21.60  |
| Criminal Proceedings against Lindqvist (C101/01) [2004] QB 1014 . . . . .   | 10.08A   |
| <br>Darnton v University of Surrey [2003] ICR 615, [2003] IRLR 133, EAT . . . . .   | 13.29, 13.37                                     |
| Derbyshire CC v Times Newspapers Ltd [1993] AC 534, HL . . . . .  | 20.89A   |
| Douglas v Hello! Ltd (No1) [2001] QB 967, CA (Civ Div) . . . . .  | 20.89A   |
| Douglas v Hello! Ltd (No 6) [2005] EWCA Civ 595, CA (Civ Div) . . . . .   | 20.99C   |
| Dunnachie v Kingston upon Hull City Council [2004] UKHL 36,<br>[2005] 1 AC 226 . . . . .                                    | 13.67(g)   |
| Durant v Financial Services Authority (Disclosure of Information) [2003]<br>EWCA Civ 1746, [2004] FSR 28 . . . . .          | 6.62C, 10.04, 10.08B–10.08H, 10.09, 10.44, 22.92 |
| <br>Harrow LBC v Knight [2003] IRLR 140, EAT . . . . .  | 13.73  |
| <br>Jagger v News of the World, 10 March 2005, QBD . . . . .  | 20.50, 20.93F                                    |
| Johnson v Medical Defence Union [2004] EWHC 2509, [2005] 1 WLR 750 . . . . .  | 10.35  |
| <br>Kaye v Robertson [1991] FSR 62, CA (Civ Div) . . . . .  | 20.89A   |
| Kraus v Penna plc [2004] IRLR 260 (EAT) . . . . .   | 13.26  |
| <br>Marcic v Thames Water Utilities Ltd [2003] UKHL 66, [2004] 2 AC 42, HL . . . . .  | 21.27  |
| Melia v Magna Kansei Ltd [2005] ICR 874, [2005] IRLR 449, EAT . . . . .   | 13.67(g)   |

|  |  |
|--|--|
| Pinnington <i>v</i> Swansea City Council [2005] EWCA Civ 135,<br>[2005] ICR 685, CA (Civ Div) . . . . .  | 13.20  |
| R (on the application of Alconbury Development Ltd) <i>v</i> Secretary of State for the<br>Environment, Transport and the Regions [2003] 2 AC 295 . . . . .                    | 21.86  |
| R (on the application of Association of British Civilian Internees (Far East Region))<br><i>v</i> Secretary of State for Defence [2003] EWCA Civ 473, [2003] QB 1397 . . . . . | 21.86  |
| R (on the application of Daly) <i>v</i> Secretary of State for the Home<br>Department [2001] UKHL 26, [2001] 2 AC 532, HL . . . . .  | 21.86, 21.91, 21.95  |
| R (on the application of Ellis) <i>v</i> Chief Constable of Essex [2003]<br>EWHC 1321, [2003] 2 FLR 566, QBD (Admin) . . . . .   | 15.81A   |
| R (on the application of Lord) <i>v</i> Secretary of State for the Home Department<br>[2003] EWHC 2073, QBD (Admin) . . . . .  | 10.04, 10.44   |
| R (on the application of Morgan Grenfell & Co Ltd) <i>v</i> Special Commissioners of<br>Income Tax [2002] UKHL 21, [2003] 1 AC 563 . . . . .                                   | 21.12  |
| R (on the application of ProLife Alliance) <i>v</i> BBC [2003] UKHL 23,<br>[2004] 1 AC 185 . . . . .   | 21.12, 21.91   |
| R (on the application of Robertson) <i>v</i> Wakefield MDC [2001]<br>EWHC Admin 915, [2002] QB 1052 . . . . .  | 10.08H, 10.51  |
| R <i>v</i> Derby Magistrates Court Ex p B [1996] AC 487, HL . . . . .  | 6.228K   |
| R <i>v</i> Legal Aid Board Ex p Kaim Todner [1999] QB 966, CA (Civ Div) . . . . .  | 21.69E   |
| R <i>v</i> Shayler (David Michael) [2002] UKHL 11, [2003] 1 AC 247, HL . . . . .   | 21.12  |
| Reynolds <i>v</i> Times Newspapers Ltd [2001] 2 AC 127, HL . . . . .   | 21.69E   |
| S (A Child) (Identification: Restrictions on Publication), Re [2004] UKHL 47,<br>[2005] 1 AC 593, HL . . . . .   | 21.69A, 21.69D–21.69F,<br>21.69H–21.69K  |
| Secretary of State for the Home Department <i>v</i> Rehman [2003] 1 AC 153. . . . .  | 6.143A   |
| Shamoon <i>v</i> Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11,<br>[2003] 2 All ER 26, [2003] NI 174, [2003] ICR 337, HL (NI) . . . . .                      | 13.74  |
| Street <i>v</i> Derbyshire Unemployed Workers Centre [2004] EWCA Civ 964,<br>[2004] 4 All ER 839, [2005] ICR 97, [2004] IRLR 687, CA (Civ Div) . . . .                         | 13.40B–13.40D  |
| Theakston <i>v</i> MGN Ltd [2002] EWHC 137, [2002] EMLR 398, QBD . . . . .   | 20.50, 20.93A  |
| Three Rivers DC <i>v</i> Bank of England (No5) [2003] QB 1556, CA (Civ Div) . . . .  | 18.46B–18.46D  |
| Three Rivers DC <i>v</i> Bank of England (Disclosure) (No6) [2004] UKHL 48,<br>[2005] 1 AC 610, HL . . . . .   | 6.228F, 6.228H, 18.46E–18.46J  |
| USP Strategies Plc <i>v</i> London General Holdings Ltd (No2)<br>[2004] EWHC 373, Ch D . . . . .   | 18.46D   |
| Vento <i>v</i> Chief Constable of West Yorkshire [2002] EWCA Civ 1871,<br>[2003] ICR 318, CA (Civ Div) . . . . .   | 13.77  |
| Virgo Fidelis Senior School <i>v</i> Boyle [2004] ICR 1210, EAT . . . . .  | 13.77  |
| W (Children) (Identification: Restrictions on Publication),<br>Re [2005] EWHC 1564, Fam Div . . . . .  | 21.69H   |
| Wainwright <i>v</i> Home Office [2003] UKHL 53,<br>[2004] 2 AC 406, HL . . . . .   | 20.03, 20.89A–20.89B, 20.99–20.99B, 21.33  |
| Information Commissioner . . . . .   | 5.87L, 5.91, 5.117, 6.13, 6.28,<br>6.57, 6.82, 6.176, 6.212, 6.223, 6.229, 6.239A,<br>7.77B–7.77V, 10.69, 16.73P, 16.73Y |

## European Court of Human Rights

|  |                                 |
|--|---------------------------------|
| Brinks <i>v</i> Netherlands (9940/04) (2005) 41 EHRR SE5, ECHR .....                       | 21.43A                          |
| Hatton <i>v</i> United Kingdom (36022/97) (2003) 37 EHRR 611, ECHR .....                   | 21.27                           |
| Spencer <i>v</i> United Kingdom (1998) 25 EHRR CD 105 .....                                | 20.89A                          |
| Steel <i>v</i> United Kingdom (68416/01) [2005] EMLR 15, (2005)<br>403 EHRR 22, ECHR. .... | 21.69                           |
| Thorgeir Thorgeirson <i>v</i> Iceland (A/239) (1992) 14 EHRR 843, ECHR .....               | 21.69                           |
| Von Hannover <i>v</i> Germany (59320/00) [2004] EMLR 21,<br>(2005) 40 EHRR 1, ECHR .....   | 20.97, 20.99C,<br>21.30, 21.69G |
| X and Y <i>v</i> Netherlands (A/91) (1985) 8 EHRR 235<br>ECHR .....                        | 21.30                           |

## Australia

|   |             |
|---|-------------|
| Bennet <i>v</i> Chief Executive Officer of the Australian Customs Service<br>(2004) 210 ALR 220 ..... | 9.51        |
| Jorgensen <i>v</i> Australian Securities and Investment Commission<br>(2004) 208 ALR 73 .....         | 9.70, 9.112 |
| Kristoffersen and Centrelink, Re (2004) 80 ALD 452 .....  | 9.66A       |
| Secretary, Department of Foreign Affairs and Trade <i>v</i> Whittaker<br>(2005) 214 ALR 696 .....     | 9.46        |

## Canada

|   |       |
|---|-------|
| HJ Heinz Co of Canada Ltd <i>v</i> Canada (Attorney-General)<br>(2004) 241 DLR (4th) 367 .....                        | 9.91  |
| Minister of Public Works and Government Services Canada <i>v</i> Hi-Rise Group Inc<br>(2004) 238 DLR (4th) 44 .....   | 9.73A |
| Richardson and Federal Commissioner of Taxation and Martinek, Re<br>[2004] 55 ATR 1091 .....                          | 9.59  |
| Sherman <i>v</i> Minister of National Revenue (2003) 226 DLR (4 <sup>th</sup> ) 46,<br>(2005) 245 DLR (4th) 758 ..... | 9.36A |
| Yeager <i>v</i> Canada (Correctional Service) (2003) 223 DLR (4 <sup>th</sup> ) 234 .....                             | 9.14  |

## Ireland

|   |        |
|---|--------|
| CW Shipping Co Ltd and others, re [2004] IEHC 1 .....   | 9.116B |
| Deely <i>v</i> Information Commissioner [2001] 3 IR 439 .....   | 9.116C |
| EH <i>v</i> Information Commissioner [2001] IEHC 182 .....  | 10.08D |
| Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd <i>v</i> Office of Public Works [1999] IEIC 12 ..... | 6.239V |
| Holland <i>v</i> Information Commissioner [2004] IEHC 176.....  | 9.116A |
| Sheedy <i>v</i> Information Commissioner [2005] IESC 35 .....   | 9.116C |

## United States of America

|  |                        |
|--|------------------------|
| American Civil Liberties Union <i>et al v</i> Department of Defence <i>et al</i> 339<br>F Supp 2d 501 (2004) ..... | 9.80                   |
| Electronic Privacy Information Center <i>v</i> Department of Homeland Security .....                               | 9.66B                  |
| McDonnell Douglas Corp <i>v</i> US Department of the Air Force 375 F 3d 1182<br>(dc Cir 2004) .....                | 6.239V, 17.63A, 17.63B |
| MCI Worldcom, Inc <i>v</i> General Services Administration 165 F Supp 2d 28<br>(DDC 2001) .....                    | 17.63A                 |
| National Archives and Records Administration <i>v</i> Favish 541 US 157 (2004).....                                | 9.50                   |

## TABLE OF LEGISLATION

|  |  |
|--|--|
| Access to Information Act 1982 [Canada]          | Employment Rights Act 1996                 |
| s 3 . . . . . 9.14                               | s 43B . . . . . 13.26, 13.29, 13.37, 13.40 |
| s 4(3) . . . . . 9.14                            | s 43B(1)(b) . . . . . 13.26                |
| s 13(1) . . . . . 9.36A                          | s 43C . . . . . 13.40B                     |
| s 16 . . . . . 9.36A                             | s 43G . . . . . 13.40B                     |
| s 19 . . . . . 9.91                              | s 43KA . . . . . 13.23                     |
| s 20 . . . . . 9.91                              | s 47B . . . . . 13.20, 13.67g, 13.77       |
| s 20(1)(b) . . . . . 9.73A                       | s 49 . . . . . 13.67g                      |
| s 27 . . . . . 9.91                              | s 103A . . . . . 13.40B                    |
| Anti-terrorism, Crime and Security Act 2001      | Enterprise Act 2002 . . . . . 6.106        |
| s 23 . . . . . 21.19                             |  |
| Banking and Financial                            | Financial Services and                     |
| Services Act 1971 . . . . . 5.91                 | Markets Act 2000 . . . . . 13.11           |
| Births and Deaths Registration Act 1953          | Freedom of Information                     |
| s 33(1) . . . . . 6.16                           | Act 2000 . . 5.00A, 5.27, 5.55, 5.60       |
| Broadcasting Act 1990                            | s 1(1)(a) . . . . . 5.87B                  |
| s 6(1)(a) . . . . . 21.12                        | s 1(1)(b) . . . . . 5.87B                  |
| Children Act 1989                                | s 10 . . . . . 5.91                        |
| s 81 . . . . . 6.31                              | s 10(4) . . . . . 5.91                     |
| Commons Registration Act 1965                    | s 12 . . . . . 5.87A                       |
| s 3 . . . . . 6.16                               | s 12(1) . . . . . 5.87J                    |
| Criminal Justice Act 1987 s 2(1) . . . . . 6.81L | s 13 . . . . . 5.87M                       |
|  | s 13(1) . . . . . 5.87F                    |
|  | s 16 . . . . . 5.87D                       |
|  | s 17 . . . . . 5.117                       |
|  | ss 21–44 . . . . . 6.00B                   |
| Data Protection Act                              | s 21 . . . . . 6.13, 6.16, 7.77V, 8.50     |
| 1998 . . . . . 5.87O, 6.62A, 6.62B,              | s 21(2)(b) . . . . . 6.16                  |
| 6.62E, 6.62M, 10.04                              | s 22 . . . . . 6.136A–6.136F, 8.50C        |
| s 1(1) . . . . . 10.08G, 10.09                   | s 23 . . . . . 6.27A–6.27C, 6.143G         |
| s 4(4) . . . . . 20.93B                          | s 23(5) . . . . . 6.27B                    |
| s 7 . . . . . 10.08G, 10.09, 10.35               | s 24 . . . . . 6.143A–6.143G               |
| s 7(1) . . . . . 10.44, 16.737                   | s 26 . . . . . 6.146A–6.146H               |
| s 7(9) . . . . . 10.44                           | s 27 . . . . . 6.153A, 6.153F              |
| s 9(4)(a) . . . . . 5.87B                        | s 27(1) . . . . . 6.153A                   |
| s 9A . . . . . 5.87A                             | s 27(2) . . . . . 6.153A, 6.153D           |
| s 10 . . . . . 6.62F                             | s 27(3) . . . . . 6.153A                   |
| s 11 . . . . . 10.51                             | s 28 . . . . . 6.156A–6.156G               |
| s 13 . . . . . 10.35                             | s 29 . . . . . 6.161A–6.161E               |
| s 14 . . . . . 10.35                             | s 30 . . . . . 6.175A–6.175M               |
| Sch. 1 . . . . . 16.737                          | s 30(1) . . . . . 6.175B                   |
| Sch. 2 . . . . . 7.77T                           | s 30(2) . . . . . 6.175J, 6.175M           |
| Employment Act 2002                              | s 31 . . . . . 6.176, 6.182A–6.182N,       |
| Pt 3 . . . . . 13.77A                            | 7.77N–7.77O                                |

## Table of Legislation

|   |   |
|---|---|
| Freedom of Information ( <i>cont.</i> ):    | s 20 . . . . . 9.58                           |
| s 31(1) . . . . . 6.182A–6.182M             | s 20(1A) . . . . . 9.58                       |
| s 31(2) . . . . . 6.182L–6.182M             | s 34 . . . . . 9.10                           |
| s 32(2)(c) . . . . . 7.77A                  | s 42 . . . . . 9.116C                         |
| s 32 . . . . . 5.117, 6.28, 6.31, 6.175C    | s 47 . . . . . 9.10                           |
| s 32(1) . . . . . 6.28                      | s 47(6A) . . . . . 9.10                       |
| s 33 . . . . . 6.186, 6.187A–6.187G         | Freedom of Information (Amendment)            |
| s 34 . . . . . 6.46, 6.50–6.51              | Act 2003 [Ireland] . . . . . 9.10             |
| s 35 . . . . . 6.195A–6.195S,               | Freedom of Information (Scotland) Act 2002    |
| 6.208K–6.208M                               | s 12 . . . . . 22.165                         |
| s 35(4) . . . . . 6.195O                    | s 25 . . . . . 22.45                          |
| s 36 . . . . . 6.195L, 6.195M,              | s 30 . . . . . 22.73                          |
| 6.208A–6.208P                               | s 33 . . . . . 22.95                          |
| s 36(5) . . . . . 6.208C                    | s 34 . . . . . 22.92                          |
| s 37 . . . . . 6.211A, 6.211J               | s 35 . . . . . 22.92                          |
| s 38 . . . . . 6.212, 6.217A–6.217G,        | s 36 . . . . . 22.92                          |
| 7.77N, 7.77O                                | s 38 . . . . . 22.46, 22.92                   |
| s 39 . . . . . 6.31, 6.110B, 6.219, 6.221A  | Government Information (Public                |
| s 40 . . . . . 6.57, 6.62A–6.62H,           | Access) Act 1991                              |
| 6.175M, 6.211C, 7.77I                       | [The Netherlands]                             |
| s 40(2) . . . . . 7.77T                     | s 10 . . . . . 21.43A                         |
| s 41 . . . . . 6.31, 6.81A, 6.81H–6.81P,    | Health and Safety at Work Act 1974            |
| 6.153B, 6.175M                              | s 20(2) (j) and (k) . . . . . 6.81L           |
| s 42 . . . . . 6.31, 6.195G, 6.223,         | s 14(2)(b) . . . . . 6.31                     |
| 6.228A, 6.228K–6.228N, 7.77I                | Human Rights Act 1998 . . . . . 15.81A, 21.27 |
| s 43 . . . . . 6.229, 6.239A, 6.239W        | s 6 . . . . . 6.110D, 20.89A,                 |
| s 43(2) . . . . . 6.229                     | 21.19   |
| s 44 . . . . . 6.110A, 6.110D, 7.77I        | s 7 . . . . . 20.89A, 20.99B                  |
| s 44(1)(a) . . . . . 6.110B                 | s 12 . . . . . 20.50                          |
| s 44(1)(b) . . . . . 6.110C                 | s 12(3) . . . . . 21.60                       |
| s 45 . . . . . 5.75–5.79, 5.98–5.99,        | s 12(4) . . . . . 20.93A, 20.93C              |
| 5.145–5.146, 5.151,                         | s 12(4)(a) . . . . . 21.69L                   |
| 5.152–5.153, 6.81I, 8.50C                   | sch.1, Art. 6 . . . . . 6.110D                |
| s 45(2) . . . . . 5.132                     | sch.1, Art. 8 . . . . . 6.110D–20.93E         |
| s 46 . . . . . 5.168C                       | sch.1, Art. 10 . . . . . 20.93A–20.93E        |
| s 63 . . . . . 6.229                        | Local Government Act 2000                     |
| s 69 . . . . . 5.87A                        | s 63 . . . . . 7.77I                          |
| s 75 . . . . . 6.106                        | Merchant Shipping Act 1995                    |
| s 77 . . . . . 16.73AC                      | s 268 . . . . . 6.31                          |
| sch.1, Pt 1 . . . . . 5.87B                 | National Health Service Act 1977              |
| Freedom of Information Act 1982 [Australia] | s 84 . . . . . 6.31                           |
| s 33(1) . . . . . 9.46                      | Pensions Act 1995                             |
| s 36 . . . . . 9.59                         | s 10 . . . . . 13.04–13.05                    |
| s 37(1)(c) . . . . . 9.66A                  | s 48 . . . . . 13.04–13.05                    |
| s 38 . . . . . 9.59                         | Pensions Act 2004                             |
| s 40(1) . . . . . 9.66A                     | s 70 . . . . . 13.04–13.05                    |
| s 41 . . . . . 9.66A                        | Police Act 1996                               |
| s 42 . . . . . 9.51                         | s 49 . . . . . 6.31                           |
| s 45 . . . . . 9.59, 9.70                   |   |
| Freedom of Information Act 1997 [Ireland]   |   |
| s 7 . . . . . 9.10                          |   |
| s 10(1)(a) . . . . . 9.116F                 |   |
| s 14 . . . . . 9.10                         |   |
| s 19 . . . . . 9.58                         |   |

## *Table of Legislation*

---

|   |  |
|---|--|
| <p>Proceeds of Crime Act 2002<br/>             s 328..... 14.34A–14.34C</p> <p>Public Records Act 1958<br/>             s 5 ..... 8.16–8.17</p> <p>Taxes and Management Act 1970<br/>             s 20(1) ..... 21.12</p> <p>Town and Country Planning Act 1990<br/>             s 215..... 7.77A</p> | <p>Tribunals of Inquiry (Evidence)<br/>             Act 1921 ..... 6.31</p> <p>Tribunal and Inquiries Act<br/>             1972..... 6.31</p> <p>Water Industry Act 1991 ..... 21.27</p> <p>Welsh Language Act 1993 ..... 5.65</p> |
|---|--|

# TABLE OF TREATIES AND CONVENTIONS

European Convention on Human Rights and Fundamental Freedoms

|           |   |
|-----------|---|
| Art. 5(1) | 21.19   |
| Art.6(1)  | 21.69   |
| Art.8     | 10.08H, 20.99A–20.99C, 21.69A–21.69J, 21.95       |
| Art.8(2)  | 21.43A  |
| Art.10    | 20.99A–20.99C, 21.12, 21.69, 21.69A–21.69J, 21.95 |
| Art. 14   | 21.19   |
| Art.15    | 21.19   |



## CONTENTS—SUMMARY

|  |       |
|--|-------|
| <i>Introduction</i>                      | ix    |
| <i>How to Use this Supplement</i>        | xiii  |
| <i>Tables of Cases</i>                   | xv    |
| <i>Table of Legislation</i>              | xix   |
| <i>Table of Treaties and Conventions</i> | xxiii |

### B THE PRESENT

|  |   |
|--|---|
| 4. Freedom of Information until January 2005 | 1 |
|--|---|

### C THE STATUTORY SCHEME

|   |     |
|---|-----|
| 5. Access to Information Held By Public Authorities | 15  |
| 6. Exempt Information                               | 33  |
| 7. Enforcement                                      | 103 |
| 8. Historical Records                               | 111 |

### D A COMPARATIVE VIEW

|   |     |
|---|-----|
| 9. A Comparison with Freedom of Information Elsewhere | 115 |
|---|-----|

### E RELATIONSHIP WITH OTHER STATUTES

|  |     |
|--|-----|
| 10. Data Protection                    | 129 |
| 11. Medical Records                    | 135 |
| 13. Whistle-Blowing                    | 139 |
| 14. Money Laundering                   | 147 |
| 15. Local Government                   | 149 |
| 16. The Environment and Other Statutes | 151 |