

Recent decisions of the Information Commissioner and Tribunals

John Fitzsimons and Ruchi Parekh, Barristers with Cornerstone Barristers, highlight points of interest from decisions of the Court of Appeal and Upper Tribunal from April and May 2020

Copies of links to the decisions covered in this update:

John Connor and Information Commissioner
www.pdpjournals.com/docs/888055

Tim Crook and the Greater London Authority www.pdpjournals.com/docs/888056

Julian Saunders and Information Commissioner
www.pdpjournals.com/docs/888057

Derek Moss and Information Commissioner
www.pdpjournals.com/docs/888058

John Connor v Information Commissioner (EA/2019/0234), 31st March

Summary

The First-Tier Tribunal ('FTT') dismissed a request made under the Environmental Information Regulations 2004 ('EIRs') as 'manifestly unreasonable', applying the now well-established principles in this area. It confirmed that the request served no public interest purpose and related, instead, to a purely private dispute which had already been extensively litigated and ventilated.

Facts

As the FTT recognised, there was 'a long and complex background' to this appeal. The matter arose out of historic planning applications made by Mr Connor's neighbours and related disputes about the use of the boundary wall between the properties. Mr Connor had previously issued legal proceedings against Gateshead Council ('the Council'), made complaints to the Local Government Ombudsman, and made a complaint to the police, all of which had been unsuccessful.

More to the point, Mr Connor had made 10 previous FOI requests, the most recent of which had also been appealed, and in respect of which both the Commissioner and FTT had concluded it was vexatious. The substance of part of that request was similar in nature to the request made in September 2018, which was the subject of this appeal. In responding to that previous request, the Council had stated it held no information, that it was treating the request as vexatious, and that it would not respond to any further requests for information on this topic.

In September 2018, Mr Connor made a request for a copy of 'all documents' relating to planning and building regulations in respect of 'garage 3 Long Bank' (i.e. the adjacent property). The Council did not respond to the request, nor did it respond to a follow-up email from Mr Connor.

Upon complaint to the Information Commissioner's Office ('ICO'), the Council informed the Commissioner that the

request was being treated as vexatious. In ensuing discussions, the Commissioner noted that the request pertained to environmental information and should have been considered under the EIRs. Thereafter the Council issued a refusal notice under the EIRs and maintained that the request (as previously advised) was being treated as vexatious and therefore 'manifestly unreasonable' (according to Regulation 12(4)(b) of the EIRs).

As part of his request for a review, Mr Connor inquired about previously requested documents which he had since discovered had been removed by the Council from the Public Record Archive. The Council conducted an internal review but upheld its original decision.

The Commissioner agreed, taking into account the long history in this case and noting in particular the two previous decisions of the ICO treating previous requests as vexatious.

The Appeal

The FTT dismissed the appeal, finding that the request was vexatious in the sense of being 'a manifestly unjustified, inappropriate or improper use of the EIRs'. In doing so, it confirmed the approach of the Commissioner, who relied on the Court of Appeal guidance in *Dransfield & Craven v IC* [2015] EWCA Civ 454. As per *Dransfield*, the starting point was whether there was no reasonable foundation for thinking that the information sought was of value to the requester or to the public, and that all relevant circumstances should be considered to reach a balanced conclusion.

The FTT further relied on the Upper Tribunal ('UT') decision in *CP v IC* [2016] UKUT 427 (AAC), which summarises the key principles from *Dransfield*. It restated the four broad issues of relevance when deciding if a request is vexatious: (1) the burden on the public authority; (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) any harassment or distress (of and to staff). While these considerations are not exhaustive nor meant to be a formulaic check-list, they provide a useful guide.

In the present case, the request was purely concerned with the Mr Connor's private dispute and a planning application dating back to 1973. In the context of the complex history, including the 10

previous requests (albeit under FOI, not EIRs), the FTT concluded that there was no significant objective public interest in the information sought.

Points to note

There are two practical considerations worth noting. First, notwithstanding the receipt of repeated and vexatious requests, public bodies are still under a duty to issue a valid refusal notice and offer the right to seek an internal review. In this case, the Council had chosen not to reply, relying instead on its response to a previous request when it had stated it would not respond to any further requests. Such an approach is not however consistent with the obligations under the legislation, as pointed out by the Commissioner during her investigation.

Second, the FTT did not consider whether the further questions asked during the course of the complaint to the Commissioner could be similarly deemed vexatious (those questions not forming part of the original request), which will undoubtedly lead to a fresh request – and quite possibly, further litigation.

Professor Tim Crook v The Information Commissioner and The Greater London Authority (EA2019/0191), 21st April

Summary

While there were several public interest factors in favour of disclosing legal advice relating to a decision to exclude press and the public from two meetings on knife crime organised by the Greater London Assembly and the Mayor's Office, these factors did not outweigh the

factors in favour of maintaining the exemption of material covered by legal professional privilege under section 42 (1) of the Freedom of Information Act ('FOIA').

weighed the public interest in disclosure. The Appellant's internal review and subsequent complaint to the Commissioner were met with the same response.

The Appeal

On appeal to the FTT, the Appellant argued that the Commissioner had wrongly decided that LPP 'trumped' the public interest in releasing the legal justification for excluding the media and public. He explained his view that without knowing what this legal advice was, it was impossible for professional journalists and media news organisations to 'account for a grotesque breach of Article 10 freedom of expression rights' under the European Convention of Human Rights ('ECHR'). He cited the European Court of Human Rights case of *Magyar Helsinki Bizottsag v Hungary* (Application No. 18030/11) as a basis for what he stated was a 'standing right under Article 10 for access to the legal advice'. His view was that this case changed the balancing exercise required by section 42(1) and section 2(2)(b) FOIA.

In response, the Commissioner and GLA both accepted that LPP did not provide for an absolute exemption, but noted that there was a strong inherent public interest in maintaining the section 42 exemption whenever it was engaged. The GLA's view was that there were no weighty or material factors which justified overriding the inherently strong public interest in the maintenance of LPP. The GLA reminded the Tribunal of authority such as *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) which indicates LPP attracts special weight. It further noted that it was particularly important to maintain LPP in the context of a controversial decision, as this was.

Dealing with the Appellant's *Magyar* point, the GLA disputed that the decision establishes a freestanding right of access to state information and drew the Tribunal's attention to *Kennedy v Charity Commission* [2015] AC 455 which says otherwise.

Upon considering the matter, the Tribunal observed that the issue for it to consider was rather narrow given there was an acceptance that section 42(1) was engaged. The question for it to consider was essentially whether the disputed material which would be exempt under section 42(1) FOIA as being subject to

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Facts

The Appellant, a Law Professor, and Vice-President of the Chartered Institute of Journalists, challenged the Commissioner's decision that the Greater London Assembly ('GLA') was entitled to rely upon the section 42(1) FOIA exemption in respect of legal advice it had received.

The legal advice arose in the context of a decision by the GLA and the Mayor's Office to convene two meetings about knife crime in London. Invitees included Assembly Members, local MPs, other Council Leaders, the Metropolitan Police Commissioner and the Home Secretary. The GLA took the decision to exclude the press and public from the meetings as a result of a concern that admitting the press may give rise to reporting of comments made by candidates in the upcoming elections, thus contravening the provisions of 'purdah'.

The decision to exclude the press was the subject of com-

plaints at the time from editors at the BBC, Sky News and ITN. Shortly after the meetings took place the Appellant made his FOIA request seeking 'all emails, minutes and documents relating to' the decision to prevent media representatives, journalists and members of the public attending. The response from the GLA provided various documents, but withheld certain information on the ground that it was exempt from disclosure under section 42 FOIA as it was legal advice subject to legal professional privilege ('LPP'), and the public interest test in protecting LPP material out-

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LPP should nonetheless be disclosed because the public interest test under section 2(2)(a) of FOIA favours disclosure.

The Tribunal accepted that the public interest in applying the exemption of material covered by LPP was 'a very weighty one, requiring countervailing public interest factors of equal or greater weight to tip the scales of public interest in favour of disclosure.' Turning to the Appellant's reliance on *Magyar*, the Tribunal noted that the Article 10 right, interpreted at its highest on the basis of the decision in that case, does not 'trump' the public interest in maintaining LPP, itself a fundamental right under both the ECHR and common law.

Adopting the approach advocated by *Sir Wyn Williams in DBERR v O'Brien v IC* [2009] EWHC 164 QB, the Tribunal summarised its public interest factors as follows.

Factors in favour of disclosure included:

- the need for transparency and openness in public affairs;
- the unusual and controversial nature of the decision to exclude the press and the public from the meetings;
- the considerable and legitimate public interest in the subject matter of the meetings; and
- the qualified Article 10 rights of the press to information held by public authorities.

Factors in favour of maintaining the exemption included:

- the in-built weight to be afforded to the LPP exemption;

- the fact that the advice was given after the decisions to hold the meetings in private had been taken, and was not a reason for the decisions being taken;

- the timing of the request so close to the decision, which was at the time when the decision could have been the subject of legal proceedings in which the public authority would be prejudiced by having to disclose its legal advice;

- the fact that the advice is not necessary for the understanding of the GLA's reasons for taking the decisions that it did, or for any potential legal challenge to that decision; and

- the fact that the issue of what business public authorities may lawfully conduct during a period of pre-election purdah is likely to be a recurrent one, in respect of which legal advice without the risk of disclosure may need to be taken in future.

In light of all of the above reasons, the Tribunal concluded that the factors in favour of maintaining the exemption outweighed those in favour of disclosure and as such, the Commissioner's Decision Notice was confirmed.

Points to note

This case serves as a reminder of the weighty consideration that will be given to LPP under the section 42(1) exemption and continues the line of cases on this issue such as *O'Brien, DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) and *Savic v Information Commissioner, AGO & CO* [2017] UKUT AACR 26 laid down by higher courts.

The Tribunal explained that there are circumstances in which the LPP exemption can be displaced on the public interest test (for example:

Mersey Tunnel Users Association v Merseytravel [2008] 2 WLUK 411). However, *Merseytravel* was a case in which the legal advice was the only explanation given for the public authority's decision, which for many years formed the basis of fiscal policy with significant financial consequences involving millions of pounds of public money. There was no other way to understand the basis of the authority's actions.

By contrast, in the present case, the GLA was able to provide an explanation for its decision very soon after it was made and as such the legal advice was not necessary for understanding the GLA's reasons for its decision or for making any legal challenge to that decision. This was an important factor considered by the Tribunal when carrying out the public interest test.

Julian Saunders v The Information Commissioner and Sandwell Metropolitan Borough Council (EA2019/179/A), 30th April

Summary

The FTT allowed an appeal against reliance on the section 30 FOIA exemption but substituted a decision notice permitting reliance on the exemptions in section 40(2) and sections 31(1)(g) and 31(2)(b) FOIA.

Facts

On 24th January 2018, Sandwell MBC ('the Council') suspended seven secretaries in the Cabinet secretariat of the Council, following concerns that had been raised that there had been a 'leak' in respect of a meeting of the Ethics and Standards Sub-Committee that was to take place that same day. It subsequently came to light that none of the secretaries was responsible for the leak and a decision was made on 31st January 2018 to lift the suspensions. The Appellant is the author of a blog 'the sandwellskiddler', in which he comments upon the actions and conduct of the Council. On the same day that the decision was taken to lift the suspensions of the secretaries, the Appellant made a FOIA request to the Council. The request asked for information in relation to the decision to suspend the seven secretaries, including what of-

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fences they were alleged to have committed, how Council managers became aware of the alleged offences, what information was relied upon to take the suspension decisions, who took the decisions in question, and when were the suspensions lifted and why.

The Council responded to the request on 23rd March 2018. The information requested was withheld on the basis that it was exempt under FOIA by virtue of sections 30(1)(a) and (b), and section 40(2) ('personal data').

Sections 30(1)(a) and (b) provide that information held by a public authority is exempt if it has at any time been held by the authority for the purposes of (1) any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it; or (2) any investigation which is conducted by the authority and in the circumstances may lead to decision by the authority to institute criminal proceedings which the authority has the power to conduct.

An internal review upheld this outcome and in applying the public interest test required by section 30(1), the Council noted that 'whilst there was a requirement for openness and transparency, there remained times when information collected during internal investigations were not placed in the public domain, as by doing so would prejudice future investigations as people would be less willing to provide information if they knew it would be disclosed into a public forum.'

In April 2018, the Appellant complained to the ICO. The Commissioner dismissed his appeal and agreed that, applying the public interest test, section 30(1)(b) was made out. The Commis-

sioner's decision emphasised the need for protection of a safe space to allow internal investigations in relation to matters in which criminal proceedings may be contemplated. She also recognised the need to prevent inhibition of participants in the investigatory process because of fear that their comments may be subsequently made

public via FOIA. As the section 30 exemption was made out, the Commissioner did not consider the section 40(2) exemption.

The Appeal

Mr Saunders appealed to the FTT which heard the case on 30th October 2019 and 30th January 2020. On appeal, the Council relied in the alternative on section 31(1) FOIA ('the law enforcement exemption').

The FTT began its analysis of the case by noting that while all parties had focused on the sections 30 or 31 exemptions, the Tribunal thought it more appropriate to consider the section 40(2) exemption first. This is because 'the Tribunal considers that the employees' private personal data protection rights are as important, if not more so, than the wider, more public, interests that the Council seeks to protect under section 31'.

In analysing the section 40(2) question, the FTT observed that while much of the information was in the public domain, the secretaries in question had indicated that they do not want their personal data to be released. It noted further that there is a difference between the

fact of their suspensions and their identification as the persons who were suspended, and the actual personal data contained in the documentation sought by the Appellant. The Tribunal noted that the Appellant did not seek the consent of the individuals, and that the evidence suggested they would be

distressed and upset if the request were acceded to, as they want to put the matter behind them. In the circumstances, the Tribunal accepted that the section 40(2) exemption applied, despite the fact that this would mean 'the Council is able to shelter behind the interests of the secretaries.'

Turning then to the section 30/31 exemptions, the Tribunal first noted that the provisions of section 30 only apply to criminal investigations. It observed that whilst prosecution was a possibility in this case, it was a remote one, and not in the mind of the Council at the time. There was no reference in any of the open or closed materials to criminal proceedings and as such the section simply was not engaged. Indeed, the Council accepted as much in closing submissions.

Turning finally to section 31, the Tribunal accepted that this was engaged as the Council was exercising its powers and functions as an employer, and one of the functions in section 31(2)(a) is investigations for the purpose of ascertaining whether any person has failed to comply with the law. The law in the context of section 31 will include civil as well as criminal legal obligations, and in this case it was arguable that the investigation was to ascertain whether the secretaries had broken their legal duty of confidentiality. Even if the investigation did not fall within section 31(2)(a), the Tribunal accepted that it clearly would fall under section 31(2)(b), i.e. the investigation was to ascertain if any person was responsible for conduct which was improper, such as leaking confidential information.

Turning to the public interest test under section 31, the Tribunal noted that the balance fell against disclosure in light of the personal data interests of the secretaries, the likely effect upon similar investigations including the manner in which persons involved participate in or carry out such investigations and the fact that the Appellant was not able to demonstrate how the absence of the particular and rather limited pieces of information sought impeded his ability to pursue his legitimate interests.

Points to note

This case is interesting because of the emphasis the Tribunal places on sec-

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tion 40(2) and what it terms ‘the primacy of the individuals’ personal data protection rights’. It also serves as an important reminder to public bodies appearing before the Tribunal that it always makes sense to raise as many potential exemptions as are relevant to the appeal in question. In this case, the exemption that had formed the apparent primary basis for both the Council and Commissioner (section 30) did not pass muster with the Tribunal. Nevertheless, the Tribunal proceeded to substitute the Decision Notice on the different grounds raised both at the time of the decision (section 40(2)) and also later at the time of the hearing (section 31).

The case is also important in respect of its analysis of the application of s30. It appears from the Tribunal’s analysis that it will not be enough for a Respondent to simply cite the technical possibility of criminal proceedings. Instead the Tribunal will consider the evidence in the particular situation as to whether any such criminal proceedings were actually considered at the relevant time before accepting that section 30 is engaged.

Derek Moss v Information Commissioner [2020] EWCA Civ 580, 15th May

Summary

The Court of Appeal has confirmed that the well-established principles of open justice apply with equal force to information rights tribunals. An appeal against the UT’s refusal to grant an anonymity order was accordingly dismissed.

Facts

Mr Moss, described by the Court as ‘engaged in serial litigation about his

privacy’, suffers from physical and mental health conditions. He has been involved in litigation against three public sector bodies. At some stage, Mr Moss made a FOIA request to one of the public sector bodies. While some information was disclosed, the exemptions at sections 1 and 40(2) of FOIA 2000 were relied upon (i.e. that the public sector body did not hold the requested information and/or that it was personal information).

Mr Moss complained to the Commissioner in January 2017 about the handling of that request, but the reliance on the exemptions by the public sector body was upheld.

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“The decision confirms that applicants seeking an anonymity order or any other restraint on publication have a very high threshold to overcome. Nothing short of ‘necessity’ will do, and even then, the FTT will be expected to consider if there is any less restrictive or more acceptable alternative than that which is sought.”
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The Tribunal decisions

During the course of his appeal to the First-Tier Tribunal (‘FTT’), Mr Moss made an interlocutory application requesting anonymity to protect his medical confidentiality. The application was refused on the basis that: (1) the FTT was able to determine the issues without considering Mr Moss’ personal data; (2) the criteria for anonymisation were not met; and (3) there was no reason for the documents sent and relied upon by Mr Moss to be included in a bundle at that stage.

Mr Moss renewed his application seeking anonymity and for any hearings to be held in camera, which was once again refused. Permission was granted to appeal to the UT, while the substantive underlying complaint was

stayed pending the outcome of such appeal.

His appeal to the UT was dismissed on the basis of *D v Information Commissioner* [2018] UKUT 441 (AAC). The arguments focused on an alleged breach of his rights under the Human Rights Act 1998, namely, Article 6(1) (right to a fair trial) and Article 8 (right to private life). They were rejected by the UT, which noted that — on the

facts of this case — only limited weight could be attached to the Article 6(1) and 8 rights, and the ‘principle of open justice prevails’. The UT held that Mr Moss was unable to demonstrate the ‘necessity’ of departing from that principle.

Court of Appeal decision — general principles

The Court of Appeal restated the legal principles to be observed where a claimant seeks an anonymity order or other restraint on the publication of details of a case which are normally in the public domain (as set out in *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645). The Court emphasised that any such order is a derogation from the principles of open justice and an interference with the rights enshrined in both Articles 10 (freedom of expression) and 6 (fair and public hearing). The Court reaffirmed the importance of public scrutiny ‘as a guarantor of the quality of justice’. Any departure from the general rule of openness must therefore turn on ‘necessity’. The Court further noted the relevance of the position of each party. Thus, the person who initiates proceedings may be reasonably regarded as having accepted the normal incidence of the public nature of legal proceedings.

Application to Mr Moss

Applying these general principles to the present case, the Court of Appeal dismissed Mr Moss’ appeal.

One of the grounds of appeal was that the UT had erroneously weighed Mr Moss’ rights against the Articles 6 and 10 rights of others because the latter rights were not engaged, and would only be engaged when someone makes a request for specific information. The Court rejected any such argument, restating that the general public interest in openness subsists whether or not the press or public are also ‘party’ to the litigation — and must therefore be considered in the ultimate balancing exercise.

The Court also emphasised the settled position that a party cannot simply state that they would have to abandon the proceedings in the absence of an anonymity order, as Mr Moss had sought to do in this case. Rather, there has to be some objective basis for

making such a claim.

The judgment of the UT had further been attacked on the basis that it included references to Mr Moss' medical information, which Mr Moss alleged was a breach of his Article 8 rights. The Court of Appeal dismissed that claim, noting that even if anonymization was not granted, the very general references to medical information would amount to a justified and proportionate interference with Mr Moss' private life rights, as opposed to a breach of them.

Points to note

In granting permission to appeal to the UT, the FTT had explicitly noted the 'growing number of requests for anonymization' in the information rights tribunal. Thus, the clear restatement and application of the usual principles by the Court of Appeal will be undoubtedly welcomed by the tribunal.

Most notably, the decision confirms that applicants seeking an anonymity order or any other restraint on publication have a very high threshold to overcome. Nothing short of 'necessity' will do, and even then, the FTT will be expected to consider if there is any less

restrictive or more acceptable alternative than that which is sought.

Another factor worth noting in this particular case is that the FTT had concluded – and the UT had agreed – that there was no need to introduce or rely on Mr Moss' medical evidence in assessing whether or not the Commissioner's decision notice was lawful. Mr Moss did not appeal that finding and the Court of Appeal did not have to engage further with the underlying facts. However, it is an important consideration as there may often be cases in which personal information does not need to be disclosed and assessed, and that will feed into how a request for anonymisation is ultimately determined.

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