Recent decisions of the Information Commissioner and Tribunals

John Fitzsimons, Barrister with Cornerstone Barristers, *highlights points of interest from decisions of the Upper Tribunal and First-tier Tribunal from January 2021*

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The Commissioner of the Police of the Metropolis v The Information Commissioner and Mr Martin Rosenbaum (Appeal No. GIA/2230/2019), 7th January 2021

Summary

This case considered the exemption under section 23 FOIA ('information supplied by, or relating to, bodies dealing with security matters'). In a detailed and thorough judgment, Upper Tribunal ('UT') Judge Markus held that the First-Tier Tribunal ('FTT') was mistaken in its approach to section 23 and overturned its decision. The UT also articulated 14 key principles which synthesise the analysis and principles in the case law on section 23, providing a helpful summary of the correct approach in law to section 23(1) and (5) and giving practical guidance to those seeking to apply those provisions.

Facts

The Metropolitan Police Service ('MPS') currently has a policy of neither confirming nor denying the existence of material which would inform the public whether or not Special Branch have had an interest in a particular individual or organisation. A BBC Documentary entitled 'True Spies' contained interviews from ex-Special Branch officers, in which they stated that Special Branch used an MI5 agent to infiltrate the National Front. The Police neither confirmed nor denied what was said by ex-officers in the documentary.

BBC journalist Mr Rosenbaum made an FOI request to the Met Police Commissioner seeking all information held by what was then called Special Branch relating to the National Front in 1974, 1975 and 1983. The MPS refused to confirm or deny that it held the requested information, citing sections 23(5), 24(2), 27(4), 31(3) and 40 (g) FOIA. Mr Rosenbaum complained to the Information Commissioner, who upheld the MPS decision, but only on the grounds of section 23(5).

The FTT's decision

Mr Rosenbaum appealed the Commissioner's decision to the FTT. In a decision on 4th July 2019, the FTT decided that the Met Police was not entitled to refuse to confirm or deny whether it held the requested information. The FTT found that the exemptions in sections 23(5), 24(2), 27, 31(3) and 40(5b) were not engaged.

Section 23 FOIA provides for an absolute exemption in the case of information directly or indirectly supplied to the public authority by, or relating to, various bodies such as the Security Service, Secret Intelligence Service, the Special Forces, etc. Under section 23(5), the duty to confirm or deny does not arise where disclosing the existence of such information would mean the disclosure of information, whether or not already recorded, directly or indirectly supplied to the public authority by any of the various bodies in section 23.

The FTT identified that the information in issue under this section was not the information covered by the request, but was the information that would be disclosed by a confirmation or denial that the requested information was held ('the revealed information'). The question was whether the revealed information fell within section 23(5). Citing *Corderoy v Information Commissioner [*2017] UKUT 495 (AAC), the FTT noted that it had to decide which exemption from the duty to confirm or deny should apply: the absolute exemption in section 23(5) or a qualified exemption.

The FTT observed that it was necessary to ask what information derived from a 'yes' or 'no' answer, and whether it had the impact specified in the relevant provision. In that regard, it was legitimate to consider both information expressly communicated by the public authority and any inferences the public would draw from the information.

The test identified by the FTT under section 23(5) was thus:

- what is the revealed information? This can be made up of any information that is expressly communicated to the public by a 'yes' or 'no' answer, and any other information which would effectively be communicated to the public by a 'yes' or 'no' answer because of the inferences the public would draw from the expressly communicated information;
- is this information already in the public domain;
- if so, what is the relevance of that to section 23(5);
- does the revealed information 'relate to' a section 23(3) body as a matter of ordinary language; and
- if so, did Parliament not intend such information to be covered by the absolute section 23 exemption?

The FTT found that some of the information was already in the public domain, and that it was already known that Special Branch and MI5 were involved with the National Front throughout the relevant period. It then identified the information that would be revealed by a confirmation or denial, which it said would relate to a body as listed in section 23(3).

However, applying the approach in *Corderoy,* the FTT concluded that Parliament did not intend such information to be covered by the absolute exemption. In this regard, it particularly noted that in the list of section 23(3) bodies, Special Branch was not included, and that Parliament thus cannot have intended that all of Special Branch's activities would fall within section 23. It noted that 'relates to' should therefore not be interpreted so widely that it would have this effect.

Instead, the FTT found that the revealed information fell 'obviously' within the qualified exemption in section 30(3) ('investigation and proceedings conducted by public authorities'), but that section 23(5) was not engaged.

The FTT's conclusions in relation to sections 24(2), 27, 30 and 31(3) were substantially based on its finding that it was already in the public domain that the National Front were of interest to Special Branch and the Security Service. Accordingly, disclosure of the information would either not give rise to the prejudice specified in those exemptions, or mean that the public interest favoured confirming or denying that the information was held. The Appeal therefore succeeded.

Grounds of appeal

The MPS appealed on the grounds that:

- having found that the facts fell within the statutory words of section 23(5), the FTT was incorrect in seeking to put a gloss on the statutory wording;
- the FTT was incorrect in finding that the information in question was in the public domain, and the effect of that finding on section 23 and other sections relied on by the MET police; and
- in carrying out the public interest balancing exercise, the FTT placed too much weight on what it found to be in the public domain, and failed to take proper account of the evidence of a senior police officer.

The UT's decision

The first ground of appeal considered by the UT was that in finding that the information 'related to' a section 23(3) body (the Security Services), the FTT then made a mistake by putting an unlawful gloss on the test by asking itself whether Parliament intended that the exemption should apply in this case.

The UT considered the leading case on the meaning of 'relates to' in section 23(2), namely *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2015] UKUT 337 (AAC). There, the UT had rejected a submission that information 'relates to' a section 23 body only if the information has that body as 'its focus, or main focus' or an equivalent connection to that body. This submission was characterised as inconsistent with the ordinary meaning of the language and Parliament's clear intention. The UT in *APPGER* declined to offer a judicial steer or guidance as to the meaning of 'relates to' other than to say that it is 'used in wide sense.'

Following *APPGER*, the UT in *Corderoy* explained that judicial language should not be substituted from the statutory language, and the correct approach is to give effect to the statutory language in its context and having regard to the relevant statutory purpose and other principles of statutory construction. However, the UT went on to note that it was necessary to ascertain which exemptions Parliament intended to apply to the particular information, and consider whether the information was still 'caught' by section 23 or whether it was subject to qualified exemptions. *Corderoy* was considered in *Lownie v Information Commissioner* [2020] UKUT 329. (AAC), where the UT observed that there was some inconsistency in what was said; that the approach in *APPGER* was the correct one; and that any departure from or narrowing of the clear statutory language was impermissible.

However, the UT did not go so far as to state that the passages in *Corderoy* about Parliament's intentions were wrong in law. In this case, the Commissioner invited the UT to depart from Corderoy explicitly and the UT accepted, noting that permitting the error in *Corderoy* risks leading decision-makers and tribunals into error, and creating confusion as to the applicable legal principles.

The UT then went on to articulate some 14 principles to be taken from cases such as *APPGER* and *Lownie* when considering the section 23 exemption. These principles are important, and they are set out in full in the 'points to note' section below. They synthesise the analysis and principles in the case law and provide a helpful summary of the correct approach in law to section 23(1) and (5), providing practical guidance to those seeking to apply those provisions.

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Applying the principles in question, the UT found that the FTT had made an error in taking the *Corderoy* approach in asking whether Parliament had intended the information to be covered by the absolute section 23 exemption, and in that context, to ask whether it had intended to exclude all information relating to the work of Special Branch. In light of the scope of the phrase 'relates to', the FTT should have concluded that section 23(5) applied. The UT also noted various further errors that the FTT made in identifying Parliament's intention.

Turning to the second and third grounds of appeal, the UT considered that the second ground should succeed on the basis that the FTT erred in both law and fact in deciding what information was in the public domain and what additional information would, or would not, be revealed by a confirmation or denial. As a result of this finding, there was no requirement to consider the third ground. Rather than remitting the matter to the FTT, the UT considered it appropriate to remake the decision thus concluding that section 23 (5) was engaged and the duty to confirm or deny did not arise.

Points to note

For all those engaged in considering and applying the section 23 exemption, this will now be the case to refer to as a result of the 14 principles articulated by UT Judge Markus. The principles, introduced by the Commissioner, but broadly agreed to by the other parties, provide much needed clarity on section 23, given the confusing state of the law post *Corderoy*.

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The principles are worth setting out in full:

1. Section 23 FOIA affords the widest protection of any of the exemptions;

2. Its purpose is to preserve the operational secrecy necessary for section 23(3) bodies to function;

3. It is Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all;

4. The legislative choice of Parliament was that the exclusionary principle was so fundamental when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned;

5. Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context;

6. When applying the 'relates to' limb of sections 23(1) and (5), that language is used in 'a wide sense';

7. The first port of call should always be the statutory language without any judicial gloss;

8. With that warning in mind, in the context of 'relates to' in section 23, it may sometimes be helpful to consider the synonyms of 'some connection', or 'that it touches or stands in some relation to' or to consider whether the request is for 'information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions', but the 'relates to' limb must not be read as subject to a test of focus or directness;

9. The scope of the 'relates to' limb is not unlimited, and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence;

10. The assessment of the degree of relationship may be informed by the context of the information;

11. The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24;

12. In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to render it non-exempt and still be provided in an intelligible form;

13. Section 23(5) requires consideration of whether answering 'yes' or 'no' to whether the information requested is held engages any of the limbs of section 23;

14. The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions.

Cabinet Office v Information Commissioner (Appeal EA/2020/0104V), 21st January 2021

Summary

This appeal concerned a request for disclosure of very specific communications from 2003 between Tony Blair and Gordon Brown, and Tony Blair and Alastair Campbell, relating to the possibility of a referendum on joining the Euro. The Cabinet Office resisted the application on grounds of section 35 FOIA, but the Commissioner overturned this decision on the basis that the public interest lay on the side of disclosure. The Cabinet Office successfully appealed to

the FTT, who referred to the Commissioner's public interest grounds as 'flimsy'.

Facts

On 3rd April 2019, an individual wrote to the Cabinet Office seeking very specific information about communications 16 years earlier between the then Prime Minister (Mr Blair) and the Chancellor of the Exchequer (Mr Brown). The information sought included correspondence between the two about the possibility of the UK holding a referendum on joining the Euro. The individual also sought information about communications between Alastair Campbell and Mr Blair about joining the Euro.

The Cabinet Office resisted the request on the basis of section 35(1)(a) and (b) FOIA because it was said to be information relating to the formulation or development of government policy and information concerning ministerial communications. The Cabinet Office recognised that this is a qualified exemption, and explained that it had considered the public interest balance, ultimately coming down on the side of withholding the information.

The requester sought an internal review, explaining that in his view, there were strong public interest grounds for disclosure, further noting that the material was by now historic and therefore posed no threat to current decision making.

The refusal was upheld and the requester complained to the Commissioner. At this stage, the Cabinet Office responded by stating that the policy issues remained live and contentious, and noting that Mr Blair remained a prominent figure in the debate. It argued that the passage of time did not significantly diminish the public interest in withholding the information.

The Commissioner's decision

The Commissioner agreed that the exemptions applied. However, in considering the public interest, the Commissioner explained that on balance, and in the current circumstances of national debate, there was a compelling public interest in the policy making at the time concerning the UK and Europe. She noted that while the withheld information concerned a settled position on the policy of the time, it would advance public understanding of decision making in government. The Cabinet Office appealed.

FTT decision

Before the FTT, the Cabinet Office argued that Ministers had an expectation that their communications and deliberations would remain confidential and that FOIA recognised this. A core principle of Cabinet collective responsibility is that discussions of the Cabinet, as well as Ministerial communications and other documents which form part of the process of Cabinet decision-making ahead of meeting, should remain confidential. It was said that at the time of the exchanges under consideration, Ministers were operating with a well-founded expectation that the records of their discussions with other Cabinet members would remain confidential for at least 30 years under the National Archives rules (now reduced to 20 years).

The Cabinet Office contended that the disclosure of these documents some years before their disclosure was anticipated would affect the thinking of current Ministers. Furthermore, the Cabinet Office explained that if there was less certainty in the confidentiality of communications, Ministers and their advisers would be more circumspect in what was committed to paper, the clarity and frankness of the exchanges would be impeded, more communication would be face to face, and the absence of the written record of policy formulation would make for less effective policy and decision-making.

Turning to its decision, the FTT began by explaining that really the only dispute in this matter was the weight to be given to the public interest on either side of the disclosure question. It began by noting that the positive case for disclosure was that both Mr Blair and Mr Campbell were playing an extremely active role in the campaign for a so called 'Peoples Vote', or second Brexit referendum. It follows that there was a public interest in learning how they viewed referenda and the possibility of a referendum when they were actively campaigning for the UK to join the Euro.

Despite this, the FTT noted that the request was highly specific, and it would be naïve not to think it somewhat strange that 16 years after they were sent and when all had long since left office, such specific highly confidential communications should be sought. It observed that "it is almost as though a well-informed person thought that such communications might be interesting." The FTT also observed that numerous histories of the period have now been written, and that the journalist who made the request clearly wanted to explore what was widely known at all relevant times — namely a difference of view between the Prime Minister and Chancellor about the merits of joining the Euro.

The FTT said it was 'unfortunate' that the implications of this were not fully explored by the Commissioner. The FTT noted that the Commissioner's belief that in the current circumstances of national debate, there was a compelling public interest in the policy making at the time concerning the UK and Europe generates two obvious rejoinders:

- why is 16-year old policy formulation in an entirely different context by individuals who have long since left office of compelling public interest; and
- what new information is in the material which is not already known.

For the FTT, the Commissioner's failure to engage with the detail of the above questions betrayed a fundamental weakness of her case. The evidence from Hansard debates and material already in the public domain suggested that the requested information was reasonably available otherwise than under section 1 and therefore exempt. The FTT took the view that accordingly, the public interest in disclosure was 'very small.'

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By contrast, the FTT was satisfied that disclosure would have some impact on the quality of decision making and communication within government. It described the Commissioner's argument that "the public has a right to expect that government Ministers will fulfil their responsibilities in the proper manner and maintain appropriate records", as an 'Aunt Sally'. For the FTT, the key point was that the system functions to help Ministers, with all their frailties, discharge their duties as well as possible. The FTT concluded that "to disregard a significant constitutional principle on the flimsy public interest grounds advanced by the Information Commissioner and the journalist is an error."

Points to note

This decision was highly critical of the Commissioner's approach, characterising the Commissioner's public interest grounds as 'flimsy'.

The decision serves as an important reminder of the need for those appearing before the Tribunal and arguing about qualified exemptions to make public interest arguments that will withstand scrutiny, and avoid relying too heavily on a public interest in disclosure which is in reality "very small" by virtue of material already in the public domain.

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Lloyd v Information Commissioner (EA/2019/0285P), 11th February

Summary

This case involved a request for information from an NHS Foundation Trust about the numbers of Down Syndrome births at the Trust. The request was resisted on the grounds of section 40(2) FOIA ('third party personal data') and this was upheld by the Commissioner. The requester appealed to the FTT who dismissed the appeal and reiterated the useful framework of cases and guidance for understanding the scope of personal data.

Facts

The Appellant requested information relating to numbers of Down syndrome births from Airedale NHS Foundation Trust. Specifically, she sought information about the total number of live births, the number of prenatal diagnosis of Down syndrome and the number of live births with Down syndrome during the years 2010-2017.

The Trust refused to provide all of this information. While it was content to disclose information about the total number of live births per year, it noted that the actual numbers of births with Down syndrome was under five per year and as such, it relied on the exemption under section 40(2) FOIA ('third party personal data') as a basis for refusing to disclose this information.

The Trust's internal review upheld this decision and the Appellant appealed to the Commissioner. In the interim, the Trust provided the Appellant with the figures for 2011 and 2013 as the values were zero in those years. The Trust also provided the Appellant with the total number of live births with Down syndrome over the whole of the remaining years.

The Commissioner's decision

The Commissioner's investigation concluded that the numbers relate to a number of personal identifiers such as location, medical health, year of birth/age and physical characteristics of the individual(s). Accordingly, she accepted that the withheld data may link with other information or knowledge, such as information from the educational sector, media or social media, to make identification of the data subjects possible. As such, she was satisfied that the disclosure of the figures would be disclosure of information which both relates to and identifies the children and that therefore the information fell within the definition of 'personal data' in section 3(2) of the Data Protection Act.

The next stage of the Commissioner's analysis was to determine whether the disclosure of personal data would contravene any of the data protection principles. Noting that the request would include the provision of special category personal data, the Commissioner explained that disclosing such information would infringe on the lawful, fair and transparent processing principle as no legal basis could be identified for its disclosure.

For completeness, the Commissioner also considered whether there were any legitimate interests in the disclosure of the requested personal data. The Commissioner recognised that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. However, she considered that disclosure in this case was not necessary to meet the legitimate interest in disclosure and so a balancing test was not conducted. The Appellant appealed to the FTT.

The FTT's decision

In considering this Appeal, first, the Tribunal considered whether the requested information constitutes personal data. In doing so, it noted that the case that brings together the caselaw most conveniently is *Information Commissioner v Miller* [2018] UKUT 229 (AAC). In that case, it was confirmed that applying the judgment in *R(Department of Health) v Information Commissioner* [2011] EWHC 1430 (Admin):
"the proper approach to whether anonymised information is personal data within section 1(1)(b), for the purposes of a disclosure request, is to consider whether an individual or individuals could be identified from it and other information which is in the possession of, or likely to come into the possession of a person other than the data controller after disclosure."

Furthermore, in the *Department of Health* case, Cranston J said (at paragraph 66) that the assessment of the likelihood of identification included "assessing a range of every day factors, such as the likelihood that particular groups, such as campaigners, and the press, will seek out information of identify and the types of other information, already in the public domain, which could inform the search."

Moreover, the FTT emphasised the deployment in *Miller* of the 'motivated intruder' test, which relates to '…a person who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so."

> ***"For those seeking an insight into how the FTT is considering and applying the case law on the scope of 'personal data', this case provides a helpful road map in respect of the main cases and guidance, and acts as an important reminder to all those involved in disclosure to consider carefully the 'motivated intruder' test."***

Finally, on the question of personal data, the FTT referred to the Commissioner's Code of Practice on 'Anonymisation: managing data protection risk' which explains the 'motivated intruder' test. This notes: "The approach assumes that the 'motivated intruder' is reasonably competent, has access to resources such as the internet, libraries, and all public documents, and would employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward. The 'motivated intruder' is not assumed to have any specialist knowledge such as computer hacking skills, or to have access to specialist equipment or to resort to criminality such as burglary, to gain access to data that is kept securely."

In light of this body of case law and guidance, the FTT confidently concluded that the information sought did involve personal data. Indeed, the FTT noted the Appellant's own submission that if the information is disclosed she would be able, with minimal additional information, to tell the child "that they were the only, or one of two, three or four babies that were born with Down syndrome at that hospital trust in that year", and indicated that this would constitute re-identification of personal data.

The second question for the FTT to consider was whether the information was also Special Category personal data. On this point, the FTT explained that it seemed clear that on the face of the request the information must 'relate' to lifelong health conditions and a specific genetic profile of the data subjects. Therefore Article 9 GDPR must apply. The Appellant made no contention that any of the exceptions to Article 9 were applicable in this case, and so the FTT did not consider them. It thus concluded that the information cannot be disclosed.

Finally, and for completeness, the FTT noted that had the information only been 'personal data', then the Appellant had a legitimate interest in its disclosure. However, thinking about the test of 'necessity', the FTT's view was that it was difficult to see why disclosure was necessary for the purpose of considering national trends over time or local trends which may assist local service provision.

Referring to the judgment of Lady Hale in *South Lanarkshire Council v Scottish IC* [2013] UKSC 55, the FTT explained that a "measure would not be necessary if the legitimate aim could be achieved by something less." Applying this to the context of this case, in its view the 'legitimate aim' of the Appellant could be met by the information she had already received. As such, disclosure was not necessary to meet the Appellant's legitimate interests and the FTT did not go on to carrying out the balancing test. The appeal was dismissed.

Points to note

This decision is useful for two reasons. First, for those seeking an insight into how the FTT is considering and applying the case law on the scope of 'personal data', it provides a helpful road map in respect of the main cases and guidance, and acts as an important reminder to all those involved in disclosure to consider carefully the 'motivated intruder' test. Second, in the final part of the FTT's decision, it notes that the Appellant had offered to give an undertaking not to disseminate the information further. However, the FTT explained that neither the Commissioner nor the Tribunal have any powers under FOIA to ask for or to enforce such an undertaking.

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It reminded the parties that in *Office of Government Commerce v Information Commissioner* [2010] QB 98 Stanley Burton J said at paragraph 72 that: "disclosure under FOIA is always to the person making the request under section 1. However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it has prior to disclosure. This underlines the need for exemptions from disclosure."

This final paragraph should act as an important reminder to both applicants and those responding to requests that the scope of FOIA means that once information is released into the public domain, it cannot be protected by confidentiality.

John Fitzsimons produced the PDP eLearning training course, 'Data Protection Essential Knowledge Level 2'. Attendance on this course can be used as credit towards obtaining the Practitioner Certificate in Data Protection. See www.pdptraining.com for further information.

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