

Recent decisions of the Commissioner and Tribunals

John Fitzsimons with Cornerstone Barristers highlights points of interest from decisions of the Commissioner and FTT from March 2023. John is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information — see foiqualification.com

London Borough of Lewisham, ICO Enforcement Notice, 17th March 2023, ENF0987655

Summary

In this widely reported and high profile Enforcement Notice, the Information Commissioner considered that Lewisham Council's significant backlog in responding to FOI requests (a number of which were over 12 months old) meant that the Council was in breach of section (1)(1) (response to requests) and section 10 (time for compliance) of the Freedom of Information Act 2000 ('FOIA'). The Commissioner deemed enforcement action necessary, requiring the Council to comply with the legislation and to draft an action plan explaining how it would deal with the backlog. The Council has now drafted such a plan and communicated it to the Commissioner.

Facts

On 17th March 2023, the Information Commissioner issued an Enforcement Notice ('the Notice') under section 52 FOIA against the London Borough of Lewisham ('the Council'). The Notice was in relation to what the Commissioner described as the Council's continuing non-compliance with section 1 (1) FOIA (response to requests) and continuing breach of section 10(1) FOIA (time for compliance).

The Notice set out how section 1(1) FOIA entitles any person making a request for information to a public authority (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.

Section 10(1) FOIA specifies that public authorities must respond to requests promptly and in any event within 20 working days. While the Commissioner noted that there is provision under FOIA for a public authority to claim a reasonable extension to this limit in certain circumstances, in all cases the public authority must give the requestor a written response within the standard time limit for compliance.

The Notice arose after the Commissioner decided to write to the Council regarding delays in responding to FOI requests following a tweet 'mention' by the Campaign for FOI. The tweet was in relation to a blog published by the Council on its website on 26th July 2022 regarding its FOI and Subject Access requests ('SAR') statistics. Given the extent of the delays revealed in the published performance statistics, the Commissioner wrote to the Council on 5th October 2022 regarding its obligations under FOIA and the Data Protection Act 2018. The Council responded to this letter on 1st November 2022, and provided a breakdown of its FOI and SAR performance data, including steps it was taking to address the Commissioner's concerns.

The Commissioner observed that the FOI performance data provided by the Council revealed that from April to September 2022, an average 73% of received requests were responded to within 20 working days. The total number of unanswered or overdue requests in the same period was revealed to be 100, with 67 of these over 12 months old.

The Commissioner wrote to the Council on 1st December 2022 and invited the Council to provide more details regarding the steps that it was taking to address the backlog of old requests, particularly those over 12 months old.

The Council responded to this letter on 18th January 2023 and explained that it had inadvertently provided inaccurate FOI performance data in its original response. The new FOI performance data provided by the Council covered the period April to December 2022. The average percentage of received requests responded to within 20 working days remained at 73%. However, the total number of overdue requests was actually 338, 221 of which were over 12 months old. The oldest unanswered request was submitted to the Council on 3rd December 2020 and had thus been outstanding for two years!

Despite these serious difficulties, the Council did set out in its correspondence with the Commissioner that a new management structure had been put in place since December 2022 to

London Borough of Lewisham
www.pdpjournals.com/docs/888360

Sloan v Information Commissioner and Cabinet Office
www.pdpjournals.com/docs/888361

address FOI and SAR performance. It pointed out that it had also agreed to recruit for an additional post to the FOI team, and that a decision had been taken to focus resources on prioritising new requests made under FOIA and the Environmental Information Regulations 2004, and to improve the rate of responses within statutory timescales.

The decision

The Commissioner accepted that there has recently been an improvement in the Council's rate of responses, noting that this rate of response will need to be sustained and improved further.

However, it was observed that the backlog of FOI requests and their age profile are clearly a matter of considerable concern for the Commissioner. The Commissioner emphasised that the extent of the FOI backlog might not have come to light had the Commissioner not contacted the Council on 5th October 2022, and then requested further information on 1st December 2022.

The Commissioner pointed out that the Council could have proactively contacted the Commissioner to highlight the problems it was facing and what action it planned to take to address this, seeking advice from the Commissioner on whether this was sufficient. Instead, it decided to complete recent requests at the expense of tackling a backlog of older requests, leaving those requestors without a response for significant periods.

For the Commissioner, such actions were "clearly unacceptable". The Commissioner suggested that in-

stead, a plan of action should have been put in place to address both the older and more recent requests, particularly in view of the nature of some of the older requests, which involve requests in significant areas including Adult Social Care and housing.

Taking into account the volume of unanswered FOI requests, their age profile, and the need to sustain and improve FOI response rates, the Commissioner concluded that it was a proportionate regulatory step to issue an Enforcement Notice.

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the Commissioner has produced a range of resources, including a template Action Plan, which should support the Council in complying with this step.

Finally, the Notice reminds the Council that it has a right of appeal but that also the consequence of failing

to comply with the Notice is that the Commissioner may make written certification of this fact to the High Court pursuant to section 54 of FOIA. Upon consideration and inquiry by the High Court, the Council may be dealt with as if it had committed a contempt of court.

Since the Notice was issued, the Council has published correspondence which shows that it has prepared an Action Plan which the Commissioner has seen, and is now working with the Commissioner's team to reduce the backlog as quickly as possible.

The requirements of the Notice

The Notice requires the Council to comply with section 1(1) of FOIA in respect of each FOI request, where the response is outside of 20 working days at the date of the Notice, and where a permitted extension has not been applied.

The Commissioner also considered it a proportionate regulatory step to require the Council to devise and publish an action plan which formalises measures to mitigate delays in responding to the requests it receives, in line with statutory requirements. This action plan should be supported by a 'lessons learned' exercise, which examines the root cause of delays in responding to FOI requests, with mitigations for any recurring problems addressed specifically in the plan.

The Notice states that

Points to note

At the height of the Covid-19 pandemic, the Information Commissioner's Office published guidance (www.pdpjournals.com/docs/888362) which explained that it would continue to adopt an empathetic and pragmatic approach in regulating access to information regulation, recognising the importance of transparency, especially where people have seen their civil liberties impacted, and also the potential impact on public authorities' timeliness in supplying information that the crisis was having.

Essentially, whilst there wasn't a moratorium on enforcement, and the Commissioner could not ignore the statutory requirements of FOIA, there was an indication that the Commissioner would be sensible and forgiving in light of the prevailing difficulties faced by public authorities as a result of the pandemic.

That guidance has since ceased to apply. Last year saw the publication of the ICO's FOI and transparency regulatory manual (www.pdpjournals.com/docs/888357), which sets out three levels of enforcement the Commissioner will take, with Level 3 being the issuing of Enforcement Notices. These will be issued to authorities where there are "repeated and/or significant or systemic issues in compliance with any of the requirements of Part 1 of FOIA" such as when the authority:

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- has a backlog of information requests relative to the volume of information requests it receives, and it is projected that it will take a significant period for them to recover that backlog;
- has outstanding requests that are significantly over the time limit for compliance;
- consistently fails to provide advice and assistance to requestors, when it is reasonable for them to do so; and
- consistently misapplies exemptions.

The action taken against Lewisham Council is an important reminder for all public authorities that the Commissioner will exercise his powers when it deems it appropriate to do so. The exercise of such powers can inevitably have a significant reputational impact for public authorities.

The enforcement action is also notable for the expectation on the part of the Commissioner for authorities to be frank and forthcoming. It is clear that a motivating factor for the issue of the Notice was the fact that the Council could have proactively contacted the Commissioner to highlight the problems it was facing and what action it planned to take to address this, seeking advice from the Commissioner on whether this was sufficient. Instead, the Commissioner had to find out about those difficulties on Twitter.

Other public authorities facing similar difficulties in processing FOIA or EIRs backlogs may therefore wish to consider whether the best course of action for them to mitigate the risk of any enforcement measures would be to approach the Commissioner frank-

ly and openly, to both seek advice from the Commissioner in relation to those difficulties and to formulate and present a clear plan of action setting out how such difficulties will be resolved.

Sloan v Information Commissioner and Cabinet Office [2023] UKFTT 342 (General Regulatory Chamber), 30th March 2023

Summary

In this case before the First-tier Tribunal ('the Tribunal'), the Appellant argued that the Cabinet Office and the Commissioner were wrong to conclude that the information that the Appellant sought in relation to meetings of the Union Policy Implementation Committee ('UPI Committee') of the Cabinet Office was exempt under section 35(1) FOIA (formulation of government policy). He argued in particular that the public interest in disclosure outweighed the public interest in withholding the information. The majority of the Tribunal disagreed and in doing so, provided an interesting analysis of the scope of section 35(1) as well as the application of the public interest test.

Facts

The case concerned a request for information about the UPI Committee which was a committee of the Cabinet under Prime Minister Johnson. Its decisions were subject to the convention of Collective Responsibility. The terms of reference for the Committee were "to support the delivery of the government's priorities in relation to the Union of the United Kingdom."

On 29th June 2020, the appellant wrote to the Cabinet Office, the second respondent, to make a request for information under the Freedom of Information Act 2000 ('FOIA'). He requested:

The dates and persons in attendance (including, but not limited to, Ministers and Special Advisers) at each meeting of the 'Union Policy Implementation' Cabinet Committee for the period 13th December 2019 to 29 June 2020 (inclusive).

The dates of any planned meetings of the 'Union Policy Implementation' Cabinet Committee from 30th June 2020 until 31st December 2020 (inclusive).

The Cabinet Office responded on 16th July 2020 directing the Appellant to the published list of membership on the gov.uk website and relied on sections 21 (personal information) and 35(1)(a) and (b) FOIA (formulation of government policy) in refusing to provide further information.

There was then an internal review and the Cabinet Office agreed that it was not appropriate to apply section 21 to the request but maintained its reliance on sections 35(1)(a) and (b) FOIA to withhold the information.

The Appellant complained to the Information Commissioner. He accepted that sections 35(1)(a) and (b) FOIA were engaged, but did not accept that the public interest in maintaining the exemptions outweighed the public interest in disclosure. In that regard, he described the information he was requesting as 'benign', even though the policy area with which the UPI Committee was concerned was a sensitive one given that it concerned the union between Scotland and the rest of the UK.

The Commissioner decided that sections 35(1)(a) and (b) FOIA were engaged in relation to the requested material and, "by a very narrow margin", the public interest favoured maintaining the exemption.

“Other public authorities facing similar difficulties in processing FOIA or EIRs backlogs may therefore wish to consider whether the best course of action for them to mitigate the risk of any enforcement would be to approach the Commissioner frankly and openly...”

The Appeal

The appellant appealed on the grounds that:

- the Commissioner wrongly concluded that the exemption under section 35(1)(a) FOIA was engaged because the UPI Committee was concerned with policy implementation rather than policy formulation or development; and
- the Commissioner wrongly concluded that the public interest in maintaining the exemption under section 35 FOIA outweighed the public interest in disclosure.

The Tribunal considered the relevant case law in relation to section 35, noting that in considering the weight to be given to suggestions that disclosure would disincentivise candour from civil servants — sometimes referred to as a ‘safe space’ or ‘chilling effect’ argument — the words of Charles J in *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC) are helpful. Paragraph 27 of that judgment featured an exhortation to note that any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest:

“The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure).

As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed.”

The Tribunal also recalled that in *Department for Education v Information Commissioner &*

Whitney [2018] UKUT 348 (AAC), the Upper Tribunal said in paragraph 12 onwards that the public interest balance in relation to information that has engaged section 35(1)(b) should be approached with common sense, recognising that in some cases there is a danger of triggering unwarranted speculation by the release of limited information.

The Tribunal concluded from that caselaw that the outcome of the public interest balance in each case turns on the Tribunal’s assessment of the facts it has found in the individual case under consideration.

Turning to the evidence, the Tribunal heard and accepted evidence from the Deputy Director for the Operation of Cabinet Government Team in the Central Secretariat of the Cabinet Office. This led it to reach particular factual findings in relation to the procedures and operations in the Cabinet Office which would feed into the question of whether section 35(1) was engaged and the extent of the prejudice that would be suffered were the information to be disclosed.

Relying on those factual findings, the Tribunal considered that while the real focus of the case is where the balance of the public interests lies, it must deal first with whether section 35(1)(a) is engaged in relation to the material. In doing so, the Tribunal considered that the information requested concerned the work of a Committee of Cabinet whose work centred on an issue that affects every person in the United Kingdom: whether Scotland should become an independent country or should remain a part of the Union.

It noted that it was not the task of the Tribunal to resolve the issues that surround those questions but acknowledged the significant and continuing public discourse in this area in all parts of the United Kingdom.

The Tribunal further noted the title of the Committee at the heart of the appeal which was the ‘Union Policy Implementation Committee’, observing that this could be read to suggest that the Committee was concerned with implementation of the policy in respect of the Union, rather than its

formulation or development. However, the Tribunal caveated this by noting that the way a thing is described is not conclusive of its nature.

In concluding that the exemption provided for in section 35(1)(a) FOIA was engaged in relation to the withheld material, the Tribunal explained that this was because:

- paragraph 2.2 of the Ministerial Code describes the business of Cabinet Committees as primarily concerning “(a) questions which significantly engage the collective responsibility of the government because they raise major issues of policy or because they are of critical importance to the public; and (b) questions on which there is an unresolved argument between departments”;
- the nature of the UPI Committee’s activities as explained in evidence suggests its work falls within the scope of section 35;
- there is no one single defining characteristic of a ‘government policy’. A policy could be the promises made to the electorate in a manifesto, a decision made in response to a particular situation, a detailed plan to deliver a project commitment or a declared aim to be accomplished. Policy may be formulated and developed over time in response to changing circumstances; it may shift in response to those altered circumstances or after consideration remains the same. Policies will serve the aims and objectives of the government of the day. Policy serves the priorities of the government which may be stated as part of the policy as the objective to be achieved, but the delivery of that overarching objective may only be accomplished by the formulation and development of policies to underpin it; and
- determining how the government’s objective to support the Union is best met is the subject of continual policy formulation, development and renewal. The Committee furthered and assisted in that policy process.

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Having found section 35 to be engaged, the Tribunal then turned to the balance of the public interests.

It determined that both categories of information raise the same primary public interests. It listed the public interests in favour of disclosure as being:

- the general public interest in transparency and accountability relating to government decision making; and
- the government’s policy on the Union is a matter of public interest and concern.

By contrast, the public interests in maintaining the exemption were listed as:

- the public interest in maintaining the confidentiality of Cabinet and Cabinet committee discussions;
- the public interest in maintaining the confidentiality of Cabinet collective responsibility;
- the public interest in the maintenance of a safe space in which civil servants can give advice candidly; and
- the public interest in sound policy development and good government.

The Tribunal further considered that disclosure would result in prejudice because it would:

- place ministers under pressure to (i) schedule meetings when they are not required; and (ii) attend meetings where such attendance is not required under the ministerial code or be necessary in the circumstances;
- adversely impact the maintenance of a safe space in which

civil servants can give advice candidly and therefore sound policy development and good government;

- allow the information disclosed to be combined with material already in the public domain about what decisions were taken at which meeting in order to draw conclusions about those who had taken the decisions; and

- result in speculation by the public.

In light of the above matters, the majority of the Tribunal concluded that the balance of the public interest fell in favour of maintaining the exemption from disclosure.

The Tribunal explained that transparency and accountability are important public interests but not pre-eminent in the balancing exercise. Given the nature of the material in issue, disclosure would not materially increase government transparency and accountability, improve public debate or result in any other significant public benefit.

The Tribunal also emphasised that if a safe space for debate and policy formulation is to function, there has to be a working assumption that the advice given, and discussions and

ministerial communications will remain confidential. Such a working assumption does not have to be an assumption of absolute confidentiality in all circumstances.

However, there is a strong public interest in the maintenance of collective Cabinet responsibility and thus ministers are correct to work on the basis that discussions in the course of policy formulation will remain confidential unless there is a countervailing public interest that outweighs it. The Tribunal emphasised that this is how Parliament intended FOIA to

operate.

The Tribunal did also consider whether the dates of meetings could at least be disaggregated. It concluded the dates of previous meetings of the UPI Committee, and proposed dates of future meetings, are not themselves information of any significant public interest. This is because the date of any given meeting does not reveal what was discussed during that meeting and would not therefore contribute in any significant way to informed public debate on topics relevant to the Union.

However, if the date were to be matched with other information, it would be likely to lead to inferences and speculation about the content of the meetings and about who made the decisions. The Tribunal considered that such speculation would be conjecture, rather than informed debate and would be contrary to the public interest.

As for details of who attended a given meeting of the UPI Committee without disclosure of the content of the meeting, the Tribunal considered that this information would not hold any significant public interest because such disclosure would likely lead to speculation as to the topics discussed and the input of individuals, rather than informed debate. Given that ministers and others may participate in policy discussions on the Union in a number of different ways, partial disclosure of this kind would therefore be contrary to the public interest as it would tend to be misleading.

Accordingly, the Tribunal rejected the suggestion that the material requested in either part of the request was ‘anodyne’ in the sense of being innocuous. Instead, the Tribunal considered that such information forms one of the building blocks of collective responsibility which is a convention of constitutional importance. Removal of part of the foundation upon which that doctrine rests will, the Tribunal considered, weaken its integrity and undermine it.

For completeness, the Tribunal observed that one of its members dissented from the majority view and

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“In indicating the existence of a dissenting view on the public interest balance but failing to set out the substance of that view or engage with the reasons supporting it, it might be argued on an appeal that the Tribunal failed to provide sufficient reasons and/or gave inadequate reasons for its decision”.
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decided that although it was a finely balanced decision, on balance the public interest in disclosure outweighed the public interest in maintaining the exemption. There was no further explanation provided setting out the details or reasoning of the minority's position.

The Tribunal therefore found that section 35(1)(a) and section 35(1)(b) were engaged in relation to the requested material and that the public interest balance fell in favour of the maintenance of the exemption from disclosure.

The appeal was dismissed.

Points to note

The decision is particularly interesting because of the way in which it considers the engagement of section 35 FOIA. Taken at face value, it might have been argued that the UPI Committee fell outside the scope of section 35 simply because of how it was described.

However, as the Tribunal explained, the way in which something is described is not conclusive of its nature. Considering the actual facts of the matter as explained in evidence, the nature of how Cabinet functions and the way in which government policy is formulated, the Tribunal reached a conclusion that section 35 was engaged. That decision, which avoided giving section 35 an unduly narrow scope, will no doubt be welcomed by public authorities more generally.

The decision is also interesting because of the fact that only a majority of the Tribunal found in favour of the Respondents. It is noted in the decision that one member of the Tribunal dissented and found that although the matter was finely balanced, overall the public interest in disclosure outweighed the public interest in maintaining the exemption. It is unfortunate that no further reasons or explanation was given as to why the minority reached an opposing conclusion to the majority of the Tribunal.

In indicating the existence of a dissenting view on the public interest balance but failing to set out the substance of that view or engage with the reasons supporting it, it might be argued on an appeal that the Tribunal failed to provide sufficient reasons and/or gave inadequate reasons for its decision. The Appellant, in this case a litigant in person, has been given no clear explanation as to what the minority view is and why the majority view should have prevailed over it. In cases in which the Tribunal members disagree, as a matter of fairness to all parties concerned, the better approach to delivering a written decision may be to ensure that both the majority and the minority reasoning is set out in full, just as it would be in any court proceedings before a panel of Judges.

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