Recent decisions of the Commissioner and Tribunals

PDP is delighted to welcome Verity Bell with Cornerstone Barristers as author of this regular case digest series (replacing John Fitzsimmons of Cornerstone Barristers). In this edition, Verity highlights points of interest from decisions of the tribunals from December 2023 — February 2024

Forstater v Information Commissioner, Ministry of Justice and Judicial College [2023] UKUT 303 (AAC), 14th December 2023

Summary

This Upper Tribunal ('UT') decision concerned the fundamental question of whether an information request had been made to a 'public authority' for the purpose of the general obligation under section 1 of the Freedom of Information Act 2000 ('FOIA'). In dismissing the appeal against the conclusion of the First-Tier Tribunal ('FTT') that the Judicial College (a constituent part of the Judicial Office, an arms-length-body of the Ministry of Justice) was not listed in Schedule 1 to FOIA, nor designated as a public authority under section 5 of FOIA and was therefore not a public authority, the UT confirmed that the fact that the earlier Judicial Studies Board had appeared in Schedule 1 at the time of Ms Forstater's request was immaterial. The FTT had been entitled to conclude that the Judicial College was not the same public body as the Judicial Studies Board simply 'renamed', but that they were distinct entities, established separately for the purpose of section 4 FOIA.

Factual background

The appeal arose from Ms Forstater's request for information in 2020 concerning training she understood to have been delivered to judges of the employment and asylum and immigration tribunals to what was then Her Majesty's Courts and Tribunals Service. The response from the Ministry of Justice, signed by an individual on behalf of the Judicial College, explained that the information was not held by the Ministry of Justice. The response further elaborated that following the Constitutional Reform Act 2005, responsibility for training the judiciary rests with the Lord (or Lady) Chief Justice and Senior President of Tribunals (i.e. members of the judiciary).

Ms Forstater sought an internal review of the decision on the basis that the Judicial Studies Board was listed in Schedule 1 and had not been removed at the time of the request.

Ms Forstater subsequently appealed to the FTT. The FTT concluded that the Judicial College is not a public authority for the purposes of FOIA. It made detailed factual findings on the basis of witness evidence about the history and operational scope of both the Judicial Studies Board and Judicial College. On 1st April 2011, following the transfer of the Lord Chancellor's judiciary-related functions to the Lord Chief Justice by the Constitutional Reform Act 2005, the Judicial College came into being and the Judicial Studies Board came to an end. While the functions and operation of the Judicial Studies Board were virtually identical to the function and operation of the Judicial College, the two bodies were not the same. Further, the fact that the Judicial Studies Board continued to be listed in Schedule 1 FOIA until 2022 was not indicative of the Judicial College being the same body as the Judicial Studies Board.

Decision of the UT

The UT set out the definition of 'public authority' in section 3(1) and Schedule 1 FOIA, and the provisions for the Secretary of State or Minister for the Cabinet Office to amend Schedule 1 by Order in section 4 FOIA. Sections 4(2) and 4(3) make clear that once a body ceases to be established either by Royal Prerogative, enactment or subordinate legislation, or by a Minister of the Crown, it is no longer a public authority, whether or not it remains listed in Schedule 1. The power contained in section 4(5) for a Minister to amend Schedule 1 by order where a body has ceased to exist contains no obligation on the Minister to do so. It was common ground that the Judicial College has never appeared in Schedule 1, nor had it ever been designated as a public authority under section 5.

The UT found that there was no merit in either the argument that the Judicial College was the same body as the Judicial Studies Board, nor the argument that the Judicial Studies Board had simply changed its name to the Judicial College, but was otherwise the same body exercising the same

functions. The fact that the Judicial Studies Board remained listed in Schedule 1 to FOIA for some eleven years after it had ceased to exist was not probative: mere inaction on the part of the Minister fell far short of any suggestion that 'Judicial Studies Board' was to be read as meaning 'Judicial College' in Schedule 1 to FOIA.

Additionally, the FTT had correctly concluded on the evidence before it that the creation of the Judicial College was not one of a mere change of name. It would have been necessary to show that the Judicial College remained the same body established by Royal Prerogative, enactment or subordinate legislation, or established or appointed by a Minister. The FTT had referred to the evidence before it of the nature of the change taking place on 1st April 2011 when the Judicial College came into being, and no evidence had been put before it to the contrary.

Points to note

The decision is a stark reminder that the starting point for the scope of Schedule 1 FOIA is the requirement for legal certainty: the potential for arguing any 'purposive' construction of Schedule 1 is narrow to non-existent, and almost certainly bound to fail. As Lord Hope reflected in *Sugar v BBC* [2009] UKHL 9 over a decade ago, the value of Schedule 1 is to reduce "to the minimum the scope for dispute about whether a particular body or office-holder is, or is not, a public authority".

Kanter-Webber v Information Commissioner and Hampshire Constabulary [2024] UKFTT 90 (GRC), 30th January 2024

Summary

The FTT dismissed an appeal against a decision to refuse to disclose the transcript or audio recording of a police misconduct hearing. The case is of note because it contains consideration of whether a police misconduct panel is a 'court' for the purpose of the exemption contained in section 32 FOIA. The FTT found that when a police misconduct panel is constituted with a legal chair, it is a court for the purpose of section 32 FOIA and the absolute exemption for information contained any document filed with a court for the purpose of proceedings applies.

Factual background

A lengthy police misconduct hearing took place between October 2020 and January 2021 involving allegations of gross misconduct of six police officers within the Hampshire Constabulary Serious and Organised Crime Unit. The allegations were based on covert recordings of covert homophobic, racist and sexist remarks, and led to the dismissal of three of the six police officers. The hearing was reported in the media and held in public via a live video link allowing members of the public to attend.

Shortly after the conclusion of the misconduct hearing, the appellant requested an electronic copy of the written outcome, the decision on sanction and "the transcript or, if there is no transcript, the audio recording of the disciplinary proceedings reported". Hampshire Constabulary replied sending a link to a summary of the written outcome and decision on sanction, but refused to disclose the transcript or audio recording on the basis of sections 31 (1)(g) (prejudice to the exercise of public functions and purposes) and 31(2)(a) (ascertaining whether any person has failed to comply with the law) and (b) (ascertaining whether any person is responsible for any conduct which is improper) FOIA. This decision was upheld on internal review.

The appellant subsequently contacted the ICO and Hampshire Constabulary issued a revised response, additionally relying on the exemptions contained in sections 32 (information contained in documents held by virtue of being filed by a court or inquiry) and 40 (personal information) FOIA.

Decision of the FTT

Section 32(4)(a) provides that ''court' includes any tribunal or body exercising the judicial power of the State'. In contending that the police misconduct panel was not a court, the appellant relied upon case law in which the court had been required to consider whether disciplinary panels were courts for the purpose of section 19 of the Contempt of Court Act 1981, such as *General Medical Council* ('GMC') *v BBC* [1998] 1 WLR 1573. The FTT considered the recent decision of the Divisional Court in *R(Bailey) v Secretary of State for Justice* [2023] EWHC 821, which drew a distinction between a body exercising the judicial power of the State and bodies exercising merely administrative functions, in the context of determining whether the Parole Board for England and Wales was a 'court' for the purposes of the law of contempt.

The FTT noted that unlike the GMC, a police misconduct panel must sit in public and must be chaired by a legally qualified chair. Further, such panels have clearly laid out rules of procedure providing for examination and cross-

(Continued on page 14)

"The decision is a stark reminder that the starting point for the scope of Schedule 1 FOIA is the requirement for legal certainty: the potential for arguing any 'purposive' construction of Schedule 1 is narrow to non-existent, and almost certainly bound to fail."

(Continued from page 13)

examination, and the FTT concluded that there was "no meaningful or substantive difference between those and many First-tier Tribunals".

The FTT accepted that police misconduct panels were distinct from other professional regulators in that they had the power to decide who is or is not entitled to be a 'constable' (an office holder under the Crown entitled to exercise the coercive powers of the state as opposed to an employee). In light of these factors, the functions of a police misconduct panel were considered to be 'judicial' rather than 'administrative' Accordingly, the FTT found that such a panel was a 'court' for the purposes of section 32 FOIA.

Points to note

The decision of the FTT that police misconduct panels exercise the judicial power of the State arguably misapplies the conclusions of the Divisional Court in *Bailey* to a novel context beyond the scope of a 'judicial' power. The FTT focused on the procedural and compositional similarities between a police misconduct panel and a tribunal, rather than asking itself whether the power being exercised, namely, trying and sanctioning the conduct of the police, was judicial in nature. The Divisional Court in *Bailey* was concerned with the Parole Board for England and Wales, which adjudicates upon matters of individual liberty: the 'paradigm' example of a judicial function. The fact that constables are officers of the Crown is arguably no answer to the question of whether the adjudication and sanction of the conduct of constables necessarily involves the exercise of a judicial power.

For practitioners advising public authorities deciding whether to rely on the exemption for 'court' documents in section 32 FOIA, it is important to interrogate whether the relevant adjudicative body is performing a 'judicial function'. Is there a requirement that the relevant decision-maker is legally qualified? Are there clearly defined rules of procedure? Are there rights of appeal from the decision-maker? Above all, what are the legal consequences of the decisions of the body, and what are its powers of enforcement?

"The decision of the FTT that police misconduct panels exercise the judicial power of the State arguably misapplies the conclusions of the Divisional Court in Bailey to a novel context beyond the scope of a 'judicial' power."

O'Connor v Information Commissioner and Ministry of Defence [2024] UKFTT 153 (GRC), 26th February 2024

Summary

Allowing the appeal against the decision of the Information Commissioner, the FTT concluded that the Ministry of Justice was not entitled to rely on section 41 FOIA to withhold the appellant's late father's medical records following nuclear testing on Christmas Island between 1957 and 1958.

Factual background

Between 1957 and 1958, the UK carried out testing of the hydrogen bomb on Christmas Island. The appellant's late father had been employed by the RAF to collect information about radioactivity in the mushroom cloud formed after the detonation of the bomb. The Ministry of Defence confirmed in a factsheet that approximately 20% of individuals who had been present during this operation had carried personal dosemeters which monitored the doses of radiation to which the individuals were exposed. After the appellant's father's death, his daughters discovered evidence of his wish to ask for an autopsy to determine whether his illnesses were linked to his exposure. The daughters were appointed under his will as executors and trustees of his estate.

One daughter, the appellant, made a request for her late father's medical notes in 2022. She and her sister later gave undertakings not to pursue any claim, either individually or on behalf of the late father's estate, for breach of confidence in respect of the information disclosed.

The Ministry of Defence subsequently responded to confirm that it held information within the scope of the request, but was withholding it pursuant to section 41 FOIA, i.e. that the disclosure of the information to the public would constitute an actionable breach of confidence. This decision was upheld on internal review.

The Information Commissioner similarly concluded that the exemption in section 41 FOIA was engaged. The information had the necessary quality of confidence, as the appellant's father would not have expected his medical records to be disclosed to the world at large and they constituted information of a personal nature. Further, while acknowledging the wider issue relating to the impact of nuclear testing on service personnel, the Commissioner ultimately concluded that there was a particularly strong public interest in ensuring that patient confidentiality was not undermined. Accordingly, the Commissioner concluded that no compelling public interest defence against any potential action for breach of confidence existed in favour of disclosure.

Decision of the FTT

Section 41 FOIA provides that information is exempt if it was obtained by the public authority from any other person and the disclosure of the information to the public (otherwise than under FOIA) would constitute an actionable breach of confidence against the public authority.

The FTT considered that the starting point for assessing whether there

was an actionable breach of confidence was the three-stage test set out in *Coco v AN Clark* (Engineers) Ltd [1969] RPC 41, read in view of later case law on the qualified right to privacy. First, did the information have the necessary quality of confidence? Second, was it imparted in circumstances importing an obligation of confidence? Third, is there an unauthorised use to the detriment of the party communicating the information?

Finally, in view of Articles 8 and 10 of the European Convention on Human Rights, does the right of the individual to privacy outweigh the public interest in the right to freedom of expression?

The FTT accepted that the first and second questions were satisfied: that the medical records of the appellant's father had the necessary quality of confidence and would have been imparted to the Ministry of Defence in circumstances importing an obligation of confidence. Further, the FTT held that if persons to whom confidence was owed were consulted and consented to the disclosure, and no other person could maintain a claim to confidentiality in respect of the information, then a public authority could not rely on the exemption to resist disclosure. In other words, where the relevant person consents to the disclosure, there can be no 'unauthorised' use of the information. In the present case, the relevant person to whom a duty of confidence was owed — the appellant's father — had died.

Reviewing the UT case of *Webber v Information Commissioner and Nottingham Health Care NHS Trust* [2013] UKUT 648 (AAC), which concerned an appellant seeking information about her deceased son where no personal representative of the deceased estate had been appointed, the FTT held that the UT had "assumed, without deciding, that an executor or personal representative could bring an action for breach of confidentiality". Noting that privilege may also survive death in favour of a deceased estate, the FTT considered that the same principle applied to the duty of confidence. Accordingly, the duty of confidence would be owed by the doctor to the estate of the appellant's deceased father. As a consequence, just as an executor or personal representative may waive privilege following the death of the person owed that privilege, so too could an executor or personal representative in relation to the disclosure of confidential information.

It follows that the fact that the appellant and her sister had agreed to waive any right to sue for any actionable breach of confidence during the FTT proceedings meant that the Ministry of Defence could not rely on the exemption contained in section 41 FOIA.

The FTT specifically commented that it did not consider that *Webber* prevents a tribunal from reaching the conclusion "that there is no actionable duty of confidence where there is evidence that those to whom the duty of confidence is owed consent to disclosure".

Points to note

This decision illustrates the extent to which the stage of the administration of a deceased estate can affect the approach of first-instance decision-makers when determining whether there is an actionable breach of confidence capable of permitting public authorities to rely on the exemption in section 41 FOIA. The FTT appeared to treat the fact that only the executors of the deceased's estate — the appellant and her sister — had waived any claim to breach of confidence on behalf of the deceased estate as determinative of the question.

However, this approach creates an artificial distinction between cases involving deceased patients depending on the administration of their estate (i.e. whether they have appointed executors or, for example, died intestate). Many public authorities such as NHS Trusts, local authorities and educational institutions hold deceased patient information but are highly unlikely to have been made aware of the steps taken to administer the deceased's estate, and therefore, whether all those who could bring an actionable claim for breach of confidence in fact consent to the disclosure.

When considering relying on the exemption in section 41 FOIA to refuse the release of the confidential information of a person who has died, public authorities should consider whether any claim for breach of confidence could be defeated by the consent of the deceased estate.

Verity Bell
Cornerstone Chambers
VBell@cornerstonebarristers.com