Divining the public interest

Referencing a number of key cases on the subject, Estelle Dehon, Barrister at Cornerstone Barristers, examines some important factors to be considered in applying the public interest balancing test

Many of the exemptions under the Freedom of Information Act 2000 ('FOIA') — and all exemptions under the Environmental Information Regulations 2004 ('EIRs') — require consideration of the public interest, and in particular whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

As Lord Wilberforce reminded us in the *Science Research Council* case ([1980] AC 1028), the well-worn legal image of performing 'a balancing process' is little more than a 'rough metaphor'. In reality, applying the public interest test is an exercise in judgment that entails looking at both law and fact, and is not simply a matter of discretion. This article examines some elements of this exercise in judgment, including the questions of aggregation of the public interest, taking into account new elements in the public interest, the timing of the public interest and evidencing that interest.

The public interest in disclosure — what is It?

The Tribunal in *Hogan & Oxford City Council v IC* (EA/2005/0026) considered the public interest test in detail, emphasising that the wording of section 2(2)(b) FOIA is important. The public interest in disclosure has to be outweighed; if the competing interests are equally balanced, then the information should be disclosed (indeed, the default position is disclosure). The Tribunal also highlighted that the factors relevant to the public interest in disclosure are broad-ranging and generalised, whereas the public interest considerations against disclosure are narrowly conceived, and specific to each exemption and the particular facts of the case. There can be no blanket approach, no general policy that some types of information will always be withheld.

So what exactly is the 'public interest in disclosure'? A review of the case law reveals that it includes such factors as promoting accountability and understanding; fostering and enabling debate; promoting meaningful participation in the democratic process; correcting misinformation (particularly where the source of the misinformation is the public authority); protecting the interests of individuals and companies by ensuring reasons are given for decisions; improving policy-making and decision-taking by extending access to the facts and analyses which provide the basis for consideration; testing whether assessments are robust; exposing corruption or illegality and ensuring proper use of public funds. The fact that such considerations may regularly be relied upon in support of the public interest in disclosure does not in any way diminish their importance, or the requirement to given them full and serious assessment.

Aggregation of the public interest

In a series of cases concerning Ofcom, the question arose under the EIRs of whether each exemption should be considered singly in relation to each item of information, or whether the exemptions could be aggregated. Also, if the exemptions were aggregated, the question arose as to whether the public interest in disclosure should also be aggregated. Theoretically it could be the case that a number of exemptions when considered individually may not outweigh the public interest in disclosure, but may do so if aggregated.

The Court of Appeal held in *R(Office of Communications) v IC* [2009] EWCA Civ 90 that the public interest in all exemptions applicable to a particular item of information should be aggregated, and that aggregated interest weighed against the aggregated public interest in disclosure. This was upheld by the Court of Justice of the EU ('CJEU') in *Ofcom v IC* (C-71/10), although the court emphasised that there is no duty to aggregate; it is a 'permissive' exercise.

When the matter returned to the First-tier Tribunal in *Ofcom v IC and Everything Everywhere Ltd* (EA/2006/0078, 12th December 2012), the Tribunal observed that the two exemptions central to the appeal (public safety and intellectual property rights) were like 'apples and pears' — there was no sensible or logical link between them, or any sensible

way of extracting or recognising (let alone applying) a common content as to the public interest. The Tribunal declined to aggregate them.

The First-tier Tribunal also disavowed taking a 'simplistic mathematical approach' to the task of aggregation. It emphasised that it is not possible to ascribe an artificial or numerical value to the public interest in disclosure, and then ascribe a numerical value to the different interests against disclosure, and compare the two.

In the wake of the Ofcom cases, the question arose as to whether the same approach applies to FOIA as to the EIRs in relation to aggregation. The ICO's view was that aggregation was not possible under FOIA. The First-tier Tribunal disagreed in the case of *Department of Health v IC* (EA/2-13/0087, 17th March 2014), finding that aggregation is possible under FOIA where the particular interests served by the different exemptions overlap. In the Tribunal's view, this is in fact the proper understanding of the approach taken by the Ofcom litigation in relation to aggregation under the EIRs. So the position under both regimes has essentially been harmonised.

What has been the practical effect of the ability to aggregate exemptions under FOIA? In short, not much. No recent decisions have turned on the aggregation of exemptions, and only one has even mentioned it as an issue: *Cabinet Office v IC* (EA/2014/0223, 22nd July 2015), which considered the various exemptions under section 35 FOIA.

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Late reliance on exemptions

As a result of a flurry of decisions by the Court of Appeal and the Upper Tribunal, the position on late reliance on exemptions is clear: under both the EIRs and FOIA, late reliance is permissible (see *Birkett v DEFRA* [2011] EWCA Civ 1606). The position under FOIA is that late reliance is not a matter of discretion; it is subject only to the Tribunal's case management powers to limit evidence and submissions, strike out cases, bar participation and make costs awards (see *IC v Home Office* [2011] UKUT 17 (AAC). The Upper Tribunal in *McInerney v IC* [2015] UKUT 0047 (AAC) has now found that the same is true of late reliance on sections 12 and 14 FOIA.

Timing of the public interest

The public interest is not something that is static; the factors which are relevant to the public interest in disclosure may strengthen or weaken over time. And, given that the elements relevant to the public interest in maintaining an exemption are fact and circumstance specific, it is clear that they may be significantly different depending on when they are applied.

When a public authority takes a decision, it may consider the circumstances of the public interest at the date of the request or when it actually deals with the request, provided this is within the statutory time limit.

The Information Commissioner's guidance strongly suggests that it is in the authority's own interests to consider the circumstances of the public interest at the date of the decision, particularly if the circumstances have changed since the request was made. Where a decision is subject to internal review, then the public interest factors and the weight to be attributed to them should be considered as at the date of the review, so that any relevant change in circumstance is taken into account.

The Information Commissioner follows the same approach, and considers the circumstances of the public interest either at the time of the request or the time of the response. In rare cases where the circumstances have changed considerably between those dates and the date of the Commissioner's decision, the case of *IC v HMRC & Gaskell* [2011] UKUT 296 (AAC) confirmed that the Commissioner has a discretion as to what he orders the authority to do.

What, then, should be the approach thereafter if the decision is the subject of an appeal to the First-tier Tribunal? The Tribunal conducts its own fact-finding inquiry and is undertaking an appeal rather than a review. It can consider exemptions not previously considered. Despite this (and, in my view, entirely contrary to normal public law principles relevant to appeals), it has long been the practice of the Tribunal that the public interest factors existing at the time of the public authority's decision should be the basis of its consideration. That 'practice' was endorsed by the Upper Tribunal in *APPGER v IC & FCO* [2015] UKUT 0377 (ACC).

This was the subject of consideration by the Supreme Court in *R(Evans) v AG* [2015] UKSC 21, which strikes an interesting middle way as to the timing of consideration of the public interest. *Evans* concerned the 'black spider memos': the communications passing between the Prince of Wales and various government departments. The Supreme Court noted that it was common ground that the Tribunal should assess the correctness of the public authority's refusal to disclose as at the date of the refusal.

However, the Supreme Court emphasised that 'facts and matters and even grounds of exemption may, subject to

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the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal'.

It is therefore open to the parties before the Commissioner and the First-tier Tribunal to rely on factual evidence, expert evidence, or assessments of possible risks, which may not have been known to or in the mind of the person who was responsible for the original decision to refuse. The upshot is plain: this evidence may throw so much light on the grounds for refusal that, in effect, the Commissioner or the Tribunal is considering the public interest factors at the time of its decision.

Evidencing the public interest

The First-tier Tribunal will often receive evidence from public officials, requestors and experts as to the facts relevant to the public interest, the weight to be given to those facts and the assessment which should be made in light of those facts. The Tribunal clarified in *Department of Health v IC* [EA/2013/0087, 17th March 2014) that oral evidence and cross-examination on these matters can be of great assistance, particularly where there is closed evidence, but cautioned against unnecessary cross-examination.

The receipt and hearing of evidence, sometimes from high ranking public officials, does not mean, however, that the Tribunal should defer to the views of the public authority: this was emphasised by the *High Court in Home Office & MoJ v IC* [2009] EWHC 1611 (Admin). In the *Department of Health* case referred to above, the Tribunal considered the question of deference again, and rejected the contention that the evidence of expert government witnesses should be accepted unless it lacked any rational basis or was given in bad faith.

Although proper weight must be given to the expertise of witnesses, the Tribunal must assess the evidence and draw its own conclusions applying common sense. It will reject the evidence of public authorities where it thinks it appropriate to do so, notwithstanding the absence of witness evidence taking a contrary view.

Given the necessary limitations of hearing and considering closed evidence, this approach is, in my view, essential to ensure fairness.

Conclusion

It is a misnomer to describe the process of identifying and assessing the public interest as 'divining'. There is now a rich framework of tribunal and court decisions within which decision-makers can operate to discern and evaluate the factors relevant to the public interest in disclosure and the public interest in maintaining the various exemptions. So, while the actual exercise of judgment may remain challenging, it is a task at which decision-makers, and their advisers, should become increasingly adept.

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