Recent decisions of the Information Commissioner and Tribunals

John Fitzsimons and Ruchi Parekh, with Cornerstone Barristers,

highlight points of interest from decisions of the Court of Appeal and Upper Tribunal in December 2019

Copies of links to the decisions covered in this update (Court of Appeal case not available):

Westminster City Council v ICO and Gavin Chait
www.pdpjournals.com/docs/888026

Sheffield City Council v ICO and Gavin Chait
www.pdpjournals.com/docs/888027

Molly Scott Cato MEP v IC and Department of Health and Social Care EA/2019/0035
www.pdpjournals.com/docs/888028

Department for Transport v Information Commissioner and Christopher Hastings, [2019] EWCA Civ 2241, 12th December 2019

Summary

The Court of Appeal allowed the Department for Transport's ('DfT') appeal against an order requiring the disclosure of certain information relating to a meeting between a minister and HRH The Prince of Wales. In determining whether information was 'environmental information' within the definition of the Environmental Information Regulations 2004 ('EIRs'), and therefore exempt from disclosure under FOIA, the Court endorsed and applied its previous decision in *Department for Business, Energy and Industrial Strategy v IC and Henney* [2017] EWCA Civ 844.

Facts

Mr Hastings, a journalist, had made a request to DfT under the EIRs regarding a September 2014 meeting between DfT ministers and HRH The Prince of Wales. In response, DfT said it did not hold some of the requested information; it disclosed the name of the minister in attendance, but declined to identify any others present and refused the remainder of the material on the basis that it was not environmental information. Given that the remainder fell within the FOIA framework, DfT relied on the absolute exemption relating to communications with the heir to, or the person who is second in line of succession to, the throne (section 37(1)(a) FOIA). There is no comparable exemption under the EIRs.

The Commissioner upheld Mr Hasting's complaint on the basis that the disputed information was environmental, which was challenged by DfT.

The Tribunal decisions

By the time of the FTT appeal, DfT conceded that substantial parts of the held information were environmental for the purposes of the EIRs and disclosed those parts. The categorisation of the remaining disputed information was treated as a preliminary issue.

The FTT determined the issue in favour of DfT, applying a four-stage approach to so-called 'mixed' information i.e. containing both environmental and other non-EIRs information. However, at this stage the FTT did not have the benefit of the Court of Appeal decision in *Henney* and it focused therefore on the 'predominant purpose' test.

On appeal, and with the benefit of *Henney*, the UT reversed the FTT decision, concluding that the FTT had failed to apply the contextualised approach to environmental information set out in *Henney*. It found that the disputed information was 'produced for the express purpose of providing the framework for the discussion' of the policies (which themselves were clearly environmental information) and was therefore 'more than merely connected to' such environmental information. The UT went on to set out its own three-stage guidance on documents involving 'mixed' information.

Court of Appeal decision

The Court endorsed and applied the decision in *Henney*, from which this Court distilled the following six 'overriding' principles:

- the EIRs must be interpreted as far as possible in light of the wording and purpose of EU Directive 2003/4/EC on public access to environmental information, giving effect to international obligations under the Aarhus Convention;
- the term 'environmental information' is to be given a wide meaning;
- however, a 'broad meaning' approach does not equate to a general and unlimited right of access to all information held by public bodies which has only a minimal connection to one of the environmental factors in regulation 2(1) EIRs;

(Continued on page 12)

(Continued from page 11)

- the focus should remain on statutory definitions. The definition of 'information' in section 1(1) FOIA focuses on the information itself, while the definition of 'environmental information' in regulation 2(1)(c) EIRs focuses on the relevant measure rather than solely on the nature of the information itself. It is therefore first necessary to identify the relevant measure;
- a tribunal is not restricted by what the information is directly or immediately about; neither does the EU Directive require the relevant measure to be that which the information is 'primarily' 'on' for the purposes of the EIRs; and
- it follows that identifying the measure that the disputed information is 'on' may require consideration of the 'wider context', and is not strictly limited to the precise issue with which the information is concerned.

Applying these principles, the Court noted that the relevant 'measure' was government housing policy and accepted DfT's argument that the released information contained the material elements on that measure. The Court concluded that the disputed information (including the names of those attending) did not help one better understand the 'measure' in question; it said nothing about the relevant policies themselves and therefore did not constitute information 'on' the policies.

"On the facts of this case, the Court of Appeal held that 'context' (which the UT had focussed upon in its decision) added nothing in identifying the relevant measure and determining if the material was environmental information. While Henney was clear that an analysis of the wider context may be determinative in some cases, this decision confirms that it will not be required in all cases involving 'mixed' information."

Points to note

On the facts of this case, the Court of Appeal held that 'context' (which the UT had focussed upon in its decision) added nothing in identifying the relevant measure and determining if the material was environmental information. While *Henney* was clear that an analysis of the wider context may be determinative in some cases, this decision confirms that it will not be required in all cases involving 'mixed' information.

Separately, the Court signalled that future tribunals and courts would be "wise to exercise caution" when dealing with information which may lie on the borderline of information disclosable under the EIRs, and that which may attract an absolute exemption under the FOIA. However, the Court chose not to expand on the *Henney* principles or provide any further guidance. As things stand, when faced with 'mixed information', the six overriding principles from *Henney* will need to be applied to the information as a whole, in order to see whether the disputed elements of the information are 'on' the measure in question.

Westminster City Council v ICO and Gavin Chait, EA/2018/0033, 2nd December and Sheffield City Council v ICO and Gavin Chait, EA/2018/0055, 16th December

Summary

In two appeals heard together but with separate decisions, the FTT concluded that Westminster City Council and Sheffield City Council ('the Councils') were entitled to refuse the Complainant's requests for information about National Non-domestic Rates ('NNDRs') charged to businesses in the Councils' areas on the basis that the requested information was exempt from disclosure under section 31(1)(a) FOIA (prejudice to the prevention or detection of crime), section 41 (information provided in confidence), and in relation to the information concerning sole traders or partnerships, section 40(2) (personal information). Westminster also successfully argued that the request was vexatious for costs reasons.

Relevant facts

Mr Chait, an economic development researcher at an open data research, training and consulting company, Whythawk, made identical requests to the Councils on 30th March 2017. The requests sought a variety of information in respect of NNDRs, including billing authority reference codes, firm's trading names, full property addresses, whether buildings were occupied or vacant, date of occupation/vacancy and actual annual rates charged.

Both Councils refused the requests on the basis of section 31(1)(a) FOIA, and Sheffield also refused it on the basis of sections 21 (information accessible to the applicant by other means), 22 (information intended for future publication), 31(1)(d) (prejudice to the assessment or collection of any tax or duty) and 40 (personal information) FOIA.

Mr Chait did not seek an internal review, and instead complained to the Commissioner about the refusals. In early 2018, the Commissioner issued decision notices in both cases. In each decision, the Commissioner's view was that although section 31(1)(a) was engaged, the balance of public interest rested in the disclosure of the information. Sheffield also sought to argue before the Commissioner, inter alia, that section 41 (information provided in confidence) applied to the information, but the Commissioner disagreed.

The Councils appealed the Commissioner's decisions and the appeals were heard together by the FTT in October 2019.

Exemption for information whose release would prejudice or would be likely to prejudice the prevention of crime

The nature of the prejudice claimed by the Councils concerned the risk of different types of crime such as (i) fraud; (ii) property crime; and in the case of Westminster, (iii) terrorism. Although there was some debate before the Tribunal about whether there was sufficient up to date evidence to support the claimed prejudice, the FTT ultimately found that section 31(1)(a) was engaged. It did so on the basis that in its view, there was a real and significant risk that fraud would be made easier by the release of the list; that in the case of Westminster, the release of details of vacant properties would potentially provide terrorists with vulnerable key locations from which to conduct or focus their activities; and the provision of a ready-made list of empty properties makes it easier for criminals to identify targets for the crimes grouped under the heading 'property crimes.'

The FTT acknowledged that in a case where an activity or interest which would be likely to be prejudiced is a public interest, like the prevention of crime, there is an obvious overlap between the question of whether the section is engaged and any subsequent public interest test. Nevertheless, the FTT emphasised that although the relevant factors for both questions may overlap, the questions to be answered are different.

> ***"These cases are particularly interesting for local authorities, many of whom often receive requests in respect of NNDRs. They are worth reading in full to see how the FTT analyses the lengthy amounts of evidence provided in respect of the public interest tests, and the evidence the FTT considers concerning the vexatious request question."***

Turning then to the public interest test, Mr Chait argued that there is a strong public interest in the release of the information for the purposes of research relating to current concerns about empty commercial properties, claims that business failures are due to business rates, and the impact or potential impact of steps to tackle this including potentially discounting business rates. The FTT did not agree.

The FTT's view was that while there was some public interest in disclosure, the interest was limited for reasons primarily to do with the fact that much of the data or equivalent information can be obtained through other channels without the risks attendant on publication worldwide. Furthermore, the FTT's view was that there was a very significant public interest in maintaining the exemption and that therefore this outweighed the limited public interest in disclosure.

Exemption for information provided in confidence

The Councils sought to argue, and the FTT accepted, that there is a general common law principle of tax payer confidentiality: see *R (Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] UKSC 54 at paragraph 17. The FTT also accepted that the fact that there is a statutory bar that applies to the Valuation Office Agency (the executive agency of HMRC charged with compiling and maintaining lists of rateable values of each non-domestic rateable property in England and Wales) on disclosure of the disputed information assisted it in assessing whether the information is protected by the law of confidence.

Having accepted that section 41 is engaged, the FTT then turned to the public interest test in respect of that exemption. As the FTT had already reached the conclusion that there was only a limited public interest in disclosure of the information, it concluded that there was insufficient public interest in disclosure to outweigh the importance of the general common law principle of taxpayer confidentiality. As such, the FTT concluded that section 41 applied to the whole request and this exemption was upheld.

Third party information

The FTT also concluded that the disputed information relating to sole traders and/or partnerships amounted to personal data. When considering whether disclosure of the information would breach the First Data Protection Principle (under the Data Protection Act 1998, as this case was decided under the old legislation), the FTT concluded that the processing was not necessary for the purposes of Mr Chait's legitimate interests, bearing in mind the limited public interest in disclosure. It added that in any event, the processing was unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. exposing individuals to the various risks of crime identified in the FTT's section 31 analysis).

Vexatious request

Finally, it should also be noted that Westminster argued that the request was vexatious by reason of costs. Balancing the significant resource implications for the public authority against the limited public interest in the release of the information, the FTT concluded that it was and its analysis includes a useful look at what a local authority will need to show in order to make out that such a request is vexatious.

(Continued on page 14)

(Continued from page 13)

Points to note

These cases are particularly interesting for local authorities, many of whom often receive requests in respect of NNDRs. They are worth reading in full to see how the FTT analyses the lengthy amounts of evidence provided in respect of the public interest tests, and the evidence the FTT considers concerning the vexatious request question.

As well as this, there are some other important points to take away from this case. Information relating to NNDRs is likely to attract the protection of section 41 subject to a public interest test being conducted. NNDR related requests may also attract the protection of section 31(1)(a) subject to the public interest test.

However, the FTT noted that section 31(1)(d) (relied upon by Sheffield) was not engaged. Sheffield had suggested the release of the information would lead to an increase in lawful avoidance schemes causing it to collect less tax, depriving public funds of money. Departing from the FTT decision in *Doherty v Information Commissioner and HMRC,* the FTT said that section 31(1)(d) was interpreted too broadly in that case. The FTT explained that it did not think that the assessment or collection of tax would be, or would be likely to be, prejudiced simply by dint of the fact that there would be, for whatever reason, less tax to collect or assess; this would be too nebulous.

> ***"Based on this ruling, at least, it would seem that where NCND is being maintained, the Commissioner or Tribunal will need to have access to the underlying information in order to carry out a thorough public interest balancing exercise. In the absence of such scrutiny, it may be possible for complainants to successfully argue that the competing public interest arguments have simply not been adequately considered."***

One aspect of the Appellant's and Commissioner's arguments in respect of the public interest tests was that many other local authorities disclose this NNDR information. The FTT accepted that it was appropriate to infer that those local authorities concluded that there was no prejudice in doing so, or that any negative consequences were outweighed by disclosure.

However, the FTT did not accept that the conclusions of other local authorities, made on the basis of facts and reasoning unknown to it, could assist in deciding whether or not prejudice would be likely to arise from disclosure by the Councils in this case. This analysis will give succour to local authorities who are often faced with claims by Appellants that a neighbouring or similar local authority has disclosed the information and that therefore they should do so as well.

Molly Scott Cato MEP v IC and Department of Health and Social Care EA/2019/0035, 11th December

Summary

The FTT upheld the Commissioner's decision that the Department of Health and Social Care ('DHSC') was correct neither to confirm nor deny whether it held a document analysing the impact of Brexit upon the National Health Service. The FTT was satisfied that to confirm or deny would reveal information about the development or formulation of government policy, and that public interest supports that decision.

Relevant facts

The Appellant is an MEP who, following an article published in a health journal, wrote to DHSC in August 2017 requesting 'a copy of the document that analyses the impact of Brexit upon the National Health Service, that was subject to a leak in April'. She also asked if the report was commissioned by the Department of Health or the Department for Exiting the EU.

The DHSC refused to confirm or deny if the information was held, relying upon section 35(3) FOIA and on the basis that it relates to 'the formulation or development of government policy'. The Commissioner upheld the NCND.

Exemption engaged?

The FTT examined the article which reported the 'leak' to determine what the nature of the 'underlying information' would be — if it existed. The article was headlined 'Leak reveals worst case scenario for nursing after Brexit' and contained, among other statistics, a graph showing nurse supply modelling over time across different scenarios.

The FTT accepted the Appellant's suggested definition of government policy — "a course or principle of action adopted or proposed by an organisation or individual". However, it noted that section 35(1) captured both 'formulation' as well as 'development' of government policy, so as to cover situations where policy or aspects of it need to be responded to, refined, reconsidered or altered. The FTT was satisfied that Brexit negotiations were at an early stage and the issues were 'live' such that government policy was not fixed, notwithstanding (as the Appellant argued) that the NHS had already published a 5-year plan.

Public interest test

The public interest in promoting transparency and openness in the way public bodies operate was agreed between the parties. Following evidence in closed ses-

sion, the FTT was satisfied that the public interest arguments in favour of disclosure were diminished because there was no evidence of a 'smoking gun' (such as improper conduct, negligent planning or deliberate misrepresentation) and the fact of a looming shortfall was already in the public domain.

In assessing the public interest in maintaining NCND, a significant factor in this case was that it would involve confirming or denying a leak. The FTT accepted that the DHSC's general policy not to confirm or deny leaked information had to be applied consistently if it was to work in practice. It also acknowledged the DHSC's concern that to confirm or validate leaked information may encourage the publication of leaked information in the future. Further, on the facts before it, the FTT was satisfied that the government had been consistent in not prejudicing negotiations with the EU, and confirming or denying leaked information may create a false impression with the public and weaken the government's position on Brexit.

Accordingly, the FTT concluded that the public interest in a consistent application of NCND to allegedly leaked material outweighed any public interest in validating or refuting such material.

Points to note

The FTT did depart from the Commissioner in the approach it took to the 'underlying information' i.e. whether the information was held and if so to see a copy of it. This was carried out in closed session.

The Commissioner had originally requested the underlying information but had ultimately agreed with the DHSC that it was not necessary to examine it. By contrast, the FTT held that a failure to scrutinise the underlying information on the facts of this case risked the NCND provision being treated as an absolute exemption; the Tribunal would be unable to factor in any 'smoking gun' argument into the public interest balance.

Based on this ruling, at least, it would seem that where NCND is being maintained, the Commissioner or Tribunal will need to have access to the underlying information in order to carry out a thorough public interest balancing exercise. In the absence of such scrutiny, it may be possible for complainants to successfully argue that the competing public interest arguments have simply not been adequately considered.

John Fitzsimons and Ruchi Parekh
Cornerstone Barristers
johnf@cornerstonebarristers.com
ruchip@cornerstonebarristers.com