

Recent decisions of the Commissioner and Tribunal

Azeem Suterwalla and Alison Berridge, public law barristers at Monckton Chambers, highlight the points of interest from decisions of the tribunals and Information Commissioner, from November 2017 to January 2018

This update covers the period November 2017 to January 2018, during which there have been numerous decisions by the Information Commissioner, First-tier and Upper Tribunal. This update focuses on two sets of cases.

The first two concern matters of inherent significant public interest (a drone strike in Raqqa, and the ongoing case of Julian Assange). In the Raqqa case, the Upper Tribunal carefully considered the section 23 exemption (national security) and decided it did not apply, although other exemptions did and therefore disclosure would not take place.

In the Assange case, the First-Tier Tribunal ruled that the relationship between the Crown Prosecution Service ('CPS') and other prosecuting authorities was akin to a lawyer-client relationship, and therefore a key reason why the section 30 exemption (information held by an authority concerned for the purposes of criminal investigations or proceedings) applied and disclosure should not be made.

The four other cases more broadly deal with how FOIA cases should be properly brought before the Tribunal and the essential obligation on an Appellant to 'make out their case'. As seen below, they raise important points of principle which will be applicable in future cases.

(1) Corderoy and (2) Ahmed v The Information Commissioner, (2) Attorney-General and (3) The Cabinet Office, [2017] UKUT 495 (AAC), 14th December 2017

Summary: The Upper Tribunal upheld the Information Commissioner's decision not to provide information held by the Attorney General's office and the Cabinet Office, relating to a precision airstrike carried out by an RAF drone in Syria. However, in doing so, it disagreed with the Commissioner that the exemption under section 23 FOIA (national security) applied.

The Tribunal also criticised the manner in which the Commissioner had

dealt with the request of the Appellants not to disclose the information sought.

Relevant facts

In September 2015, Ms Corderoy, a journalist, made a request to the Attorney-General's Office ('AGO') for correspondence and communications between the AGO and the Ministry of Defence relating to the approval of an RAF drone attack which killed two Britons, Reyaad Khan and Ruhul Amin.

Separately and at around the same time, Ms Ahmed, on behalf of Rights Watch UK, made requests of the AGO and the Cabinet Office for the 'legal advice to which the Prime Minister referred' when making his announcement to Parliament, on 7th September 2015, that action had been taken against Reyaad Khan and Rahul Amin. In his announcement, the Prime Minister had referred to legal advice being given by the Attorney General as to the basis for the airstrike, and that the action was an act of self-defence by the United Kingdom.

The AGO and Cabinet Office refused to provide the information requested by the Appellants. The Information Commissioner then considered the requests, and concluded that the exemptions under section 23 FOIA (security matters), 35(1)(c) (law officers' advice) and section 42 (legal professional privilege) applied. It concluded, therefore, that the 2nd and 3rd Respondents did not have to provide any of the requested information under FOIA. The Appellants appealed and the matter came before the Upper Tribunal.

In considering the matter, the Tribunal first analysed the nature of the information sought by both Appellants. It did so against the background of the Prime Minister's explanation of how and why the strike had been carried out and a Report of the Joint Committee on Human Rights, May 2016, on the strike. The Tribunal identified that the 'policy decision' — that if certain circumstances existed, a drone strike would be lawful and so could be authorised — was a separate issue to the actual decision authorising the Raqqa strike which took place and

the operational decisions as to how it took place.

The Tribunal noted that what the Appellants sought was the legal analysis underlying, and so the legal basis for, the government's conclusion and assertion that its policy on targeted drone strikes. Therefore the policy decision which the Prime Minister had referred to in his statement of 7th September 2015 was lawful.

The Tribunal first considered the section 23 exemption. Relying upon the decision in *APPGER v IC and FCO* [2015] UKUT 0377 (AAC), it reminded itself that the requests were for information and not documents, and therefore that the information could be given by extracting it from documents and other records (a process referred to by the Tribunal as 'disaggregation').

The Tribunal then asked whether the disaggregated information was 'caught' by section 23. The Tribunal decided that there should be a wide approach to section 23 and that Parliament did not intend information to be obtained through the back door.

However, the Tribunal concluded that whilst the disaggregated information was of interest to security bodies for their statutory purposes, and it related to them, Parliament did not intend such information to be covered by the absolute exemption under section 23. The reasons for this were that: (i) the interest of the security bodies in such information was shared by Parliament and the public because it related to and was confined to the legality of government policy; and (ii) such information obvi-

ously fell within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of government policy.

The Tribunal went on to consider the qualified exemptions under sections 35(1)(c) and 42 FOIA. Whilst it acknowledged powerful public interest arguments in favour of disclosure, it came down in favour of the

exemptions applying, because:

- anyone could advance arguments on the lawfulness of the government's policy (and therefore the Raqqa Strike, or any other strike) from the Parliamentary announcement and the information contained in the Joint Committee Report;
- it was not necessary for disclosure of the disaggregated information in order for there to be public debate on this issue; and
- disclosure would undermine the core of the public interest against disclosure given by Law Officers and legal professional privilege generally.

The Tribunal also criticised the Information Commissioner's reliance upon an assurance on behalf the AGO/Cabinet Office that the advice was exempt under section 23(1) FOIA. The Information Commissioner had accepted that assurance without asking for more detail and without looking at the documents in question. The Tribunal held that if a relevant public au-

thority wished to avoid a consideration of the relevant documents, there were no circumstances in which it could rely on an assurance rather than a certificate given pursuant to section 23(2),

which could then be appealed under section 60 FOIA.

Points of interest

Beside the obviously interesting and important subject matter of this decision, three points arise which are worthy of note.

Firstly, the Tribunal provided guidance on how section 23 FOIA is to be interpreted. Whilst it accepted that it was a wide and important exemption, and that the information in question in this case would have been of interest to bodies which fell within the exemption, it was not prepared to accept that the information in question was intended to be covered by the exemption. The overriding reason for this conclusion was that the information did not reveal anything 'about the activities of security bodies.' It remains to be seen whether this interpretation of section 23 will be used by other applicants in the future, and will lead to an increase in requests for information.

Secondly, despite the acknowledged strong public interest in disclosure of the AG's legal advice (in a disaggregated form), the Tribunal decided that this did not displace the qualified exemptions relating to the giving of legal advice in government and the protection of legal professional privilege. This once again highlights the difficulty for applicants establishing strong enough public interest arguments to justify disclosure under sections 35 and/or 42 FOIA.

And thirdly, the Tribunal's reasoning on the ICO's procedural failings was a clear reminder that the Commissioner stands apart from government (and public bodies generally) and should not have accepted assurances in lieu of correctly carrying out its functions.

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Maurizi v The Information Commissioner and Crown Prosecution Service EA/2017/0041, 11th December 2017

Summary: The First-Tier Tribunal upheld the decision of the ICO not to require the Crown Prosecution Service (i) to confirm or deny the existence of or (ii) to disclose correspondence with foreign prosecuting authorities in relation to Julian Assange. The Tribunal however declined to apply the exemption under section 27 (international relations), on the basis that the evidence for any impact was 'thin to non-existent', and instead relied on section 30 (criminal investigations or proceedings). It also considered that a blanket policy of never confirming or denying the existence of correspondence, for fear or tipping off the subjects of extradition requests, was unjustified, and that it was necessary instead to apply the public interest balance to the individual circumstances of the case.

Relevant facts

The case concerned the case of Julian Assange, founder of WikiLeaks, and the extradition proceedings which caused him to enter the Ecuadorian Embassy in London in 2012, where he remains.

The sequence of events is familiar:

WikiLeaks had published a variety of leaked materials since its establishment in 2006, notably in 2010 confidential US military materials supplied to it by Chelsea Manning.

Following that publication, it was reported that Mr Assange and WikiLeaks were the subject of criminal investigation by the US authorities. Later in 2010, the Swedish Prosecution Authority ('SPA') sought extradition of Mr Assange from the UK to Sweden in relation to alleged sexual offences in Sweden.

Mr Assange challenged the Swedish extradition proceedings in the UK

courts. His challenge failed in 2012, when he entered the Ecuadorian Embassy to avoid arrest.

It is reported that throughout all of these proceedings and to date, Mr Assange's main concern has been that either the Swedish or UK authorities will accede to an extradition request from the US, and that he will face criminal charges there in relation to leaks of US materials.

The CPS plays a key role in relation to extradition proceedings. Under the Extradition Act 2003, the CPS holds the functions of:

- advising foreign judicial authorities on proposed extradition proceedings; and
- when a request is made, conducting the extradition proceedings on behalf of the requesting authority.

In 2015, Stefania Maurizi, an investigative journalist with an interest in the case of Mr Assange, made a request to the CPS pursuant to FOIA, seeking its correspondence with foreign prosecuting authorities in relation to Mr Assange. Specifically she sought the CPS's correspondence with:

- the Swedish Prosecution Authority;
- Ecuador;
- the US Department of Justice; and
- the US State Department.

The CPS refused her request, both initially and on an internal review. The ICO, after considering the matter for over a year, upheld the refusal in early 2017. Ms Maurizi appealed to the First-Tier Tribunal.

The CPS/Sweden correspondence

The Tribunal rejected an argument that the information was exempt under section 27 (international relations), commenting that: "The evidence of likely prejudice to international relations in regard to [the Sweden correspondence] is in our view thin to non-existent. Mr Cheema could not speak to what impact disclosure might have, if any at all, on international relations at the government to government level."

Under section 30 (criminal investigations or proceedings), the Tribunal noted evidence from the CPS that when conducting extradition proceedings, the relationship between the CPS and a foreign authority such as the SPA is akin to the relationship between lawyer and client — a relationship of confidence. It concluded that the public interest in maintaining such confidence was strong, because the confidence was still owed to the SPA, and because of the potential wider impact on extradition proceedings, both outward and inward, if it were seen that the CPS did not respect the confidences reposed in it by foreign authorities.

The Tribunal acknowledged that the case raised issues about human rights and press freedom which were the subject of legitimate public debate, but considered that the requested information would add little to information already disclosed by the SPA (under Swedish freedom of information legislation), and that the public interest balance therefore lay in favour of non-disclosure.

The CPS/Ecuador/US correspondence

In relation to the Ecuador and US requests, there was no information in the public domain, and Ms Maurizi argued that the CPS was required to confirm or deny whether it held any correspondence within the scope of the request. The Tribunal determined that the section 30 exemption was engaged, reasoning that if such correspondence did exist, it was likely, on the balance of probabilities, to be correspondence related to an extradition request.

In relation to the public interest balance, the CPS gave evidence that as a matter of longstanding policy and practice, the UK will neither confirm nor deny that an extradition request has been received until the person concerned is arrested. This policy is designed to prevent the person concerned learning about the request and seeking to evade justice.

The CPS also gave evidence that it was necessary to apply the policy consistently in order to have the

desired effect, which the Tribunal accepted. However, the Tribunal did not accept the CPS's further argument that it was necessary to apply the policy in every case, preferring Ms Maurizi's view that the maintenance of a generally consistent policy was not undermined by making an occasional exception in appropriate circumstances. It therefore proceeded to apply the public interest balance to specific circumstances of the case.

The Tribunal considered that there was no more than marginal benefit to the public in knowing whether the CPS had received enquiries about extradition from countries other than Sweden, while there was a strong public interest in not 'tipping off' an individual in this way. It concluded that the balance lay in favour of maintaining the exemption in this case.

Points of interest

The decision has been widely reported, representing as it does another chapter in the remarkable story of Mr Assange.

From a specifically legal perspective, it is interesting to note firstly the Tribunal's rejection of a blanket 'neither confirm nor deny' policy in relation to extradition requests, requiring authorities and the ICO to carry out a public interest balancing exercise in the individual circumstances of each case. This reasoning is likely to be applicable to such policies generally, and provides helpful clarification to the ICO guidance on this point.

Secondly, in applying the public interest balance under section 30, the Tribunal relied entirely on the maintenance of good relations with foreign prosecuting authorities generally, and not on any considerations related to the integrity of the proceedings against Mr Assange. It is not the first time that the Tribunal has taken a wide approach of the public interest considerations relevant under section 30, but provides a useful reminder of the broad scope of that exemption.

Thirdly, it is notable that the Tribunal rejected arguments under section 27 due to a lack of evidence of potential prejudice at 'government to government' level. Section 27 refers to 'relations between the United Kingdom and any other State', defining 'State' as including governments and organs of governments. By implication, the Tribunal did not regard the SPA as an organ of the Swedish government.

Grant Workman v (1) The Information Commissioner and (2) The Home Office EA/2017/ 0127, 21st November 2017

Summary: The Home Office was entitled, on the basis of the exemptions provided by sections 36 (prejudice to effective conduct of public affairs) and section 40 (disclosure contrary to the data protection principles) to refuse a request for information about

the workload of a Home Office registered forensic pathologist ('HORFP').

Relevant facts

In 2016, the Appellant sought information from the Home Office as to the number of times during the previous ten years that a particular HORFP ('Dr A') had been instructed by the police to perform an autopsy.

The Home Office denied the request initially relying upon section 36, and latter referring to section 40 too. On 1st June 2017 the Information Commissioner, having investigated the Home Office's refusal, decided that disclosure of the requested information would breach the first data protection principle of the Data Protection Act 1998 (personal data shall be processed fairly and lawfully) and that it was therefore exempt from disclosure under section 40(2). Having reached that decision, she decided not to consider whether the information would also have been exempt under section 36. The Appellant appealed that decision to the First-tier Tribunal.

The Appellant's case before the Tribunal was that HORFPs were paid very substantial fees, which encouraged them to accept work only for the prosecution side in criminal cases. This loss of independence led to a risk to the public. The work of the HORFP was, in any event, public in nature and he or should therefore be accountable to the public. Disclosure was desirable even if it showed that there was nothing untoward about Dr A's workload.

The Home Office's case was that HORFPs were not employees, but private individuals who had agreed to the disclosure of workload statistics on the terms recorded in a membership Protocol, which they had signed up to when making themselves available to the police. They had therefore accepted the need for disclosure, but to a limited number of organisations and not the world at large. It was difficult to see any benefit from disclosure because

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without a great deal more information to put the workload statistics in context the statistics sought were largely meaningless. There was a general public interest in transparency and openness but this did not outweigh Dr. A's reasonable expectation of confidence.

In respect of section 40, the Tribunal indicated that the Commissioner had taken the wrong approach when making its decision. Applying the approach in *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council* [2015] UKUT 449 (AAC), the Tribunal first looked at whether disclosure (data processing) was necessary for the purposes of legitimate interests pursued by a third party to whom the data would be disclosed. The Tribunal found that it was entitled to take the public interest into account and that such an interest existed with respect to the competence and independence of HORFPs. However, it also had to be shown that disclosure was 'necessary'. It would not be necessary if the identified aim of disclosure could be achieved in some other way, involving less intrusion.

The Information Commissioner had been correct in its Decision Notice that disclosure of the workload statistics of an individual HORFP was not necessary as there was another, less intrusive, means of serving the identified public interest. HORFPs workloads were subject to oversight and the Forensic Science Regulator.

However, even if the Tribunal was wrong about this first stage test, the request for information would not succeed because disclosure would constitute an unwarranted intrusion

with Dr A's private life. The exemption under section 40(2) therefore applied to the withheld information.

Although not strictly necessary, the Tribunal also considered whether section 36 (prejudice to the effective conduct of public affairs) also applied. The Home Office had argued that the disclosure of the withheld information was at least likely to prejudice the effective conduct of public affairs by causing a number of HORFPs, possibly a majority, to refuse to submit relevant data in the future. The Tribunal accepted this evidence. Furthermore, there was no evidence that Dr A's performance was regarded as inadequate, or what the result of any alleged bias by Dr A — to work for the prosecution as opposed to the defence in criminal cases — would be. In these circumstances the public interest in disclosure would not equal, 'or even come close to equalling', the public interest in maintaining the exemption.

Therefore, the Home Office would also have been entitled to refuse disclosure by relying on section 36(2)(c).

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The Tribunal's decision also raises an important point about the extent to which it could, of its own motion, consider the potential public interest raised by a request for information, when considering the application of section 40. The Tribunal expressly disagreed with an Upper Tribunal decision — *DH v Information Commissioner and Bolton Council* [2016] UKUT 0139 — in which Judge Jacob had held that it was not public interests that should be taken into account, when considering the claimed legitimate interests under section 40, but the interests of the person seeking the information. The Tribunal in the instant case held that the approach in *DH* was at variance with that adopted by the Court of Appeal in *Corporate Officer of the House of Commons v The Information Commissioner, Brooke and Others* [2008] EWHC 1084. That case proceeded on the basis that the First-tier Tribunal had been right to take into account the public interest in the expense claims of Members of Parliament being disclosed and without apparent regard to any private interest that the original requesters had in disclosure.

Finally, this case is a useful reminder that: (a) if a valid and identified aim in seeking information can be achieved by other means, then this will serve to prevent disclosure of the material sought; and (b) it is necessary for a requester to make good their case with appropriate evidence. On the latter, although interesting arguments had been raised by the Appellant, no evidence had been put forward to support these.

Points of interest

This case provides a useful reminder by the Tribunal as to how section 40 FOIA should be applied. As the Tribunal explained, the Information Commissioner's decision to consider the issue of 'fairness' first, may have led to confusion and a possible risk that 'the analysis acquires too narrow a focus.' The Tribunal therefore reiterated the correct test, as provided for in its earlier *CF and Nursing and Midwifery Council* decision.

Ellis v The Information Commissioner and Ryedale District Council, [2017] UKUT 503 (AAC)
Bryce v The Information Commissioner and University of Cambridge, [2017] UKUT 457 (AAC)
Kirkham v The Information Commissioner, [2018] UKUT 6 (AAC), 20th December, 23rd November, and 9th January

During the period covered by this update, the Upper Tribunal considered a series of three cases concerning the duties of authorities, the Commissioner and the Tribunals when applicants present badly formulated requests, complaints and appeals. What follows is a brief summary of the points of significance.

In *Ellis*, the decisions of the ICO and the FTT had failed to address a part of the applicant's original request. The Upper Tribunal noted that the grounds of appeal before the FTT had been confusing, but commented: "the confusing nature of the grounds ought to have been the catalyst for the tribunal to identify for itself what the grounds of appeal were exactly, as that is ultimately the tribunal's responsibility". It held that the failure constituted an error of law and remitted the case back to the FTT.

The case of *Bryce* concerned similar facts: a failure by the ICO and FTT to address part of a complaint, in this case relating to the issue of vexatiousness. The Tribunal, analysing the papers, considered it "arguable" that the ICO and FTT had been put on notice that the applicant challenged the determination that the request was vexatious. It determined that the failure was an error of law and remitted the case back to the First Tier Tribunal.

The third case, *Kirkham*, illustrates that there are limits to how far the Tribunal can go to assist, specifically where the applicant has failed to make a valid request. In that case the request had been addressed to the Senior President of Tribunals, the

holder of a senior judicial office, who was not a public authority subject to FOIA.

The Upper Tribunal rejected the applicant's argument that the request should have been read as having been made to HMCTS (which is a public authority). It cited *Lord Reed in Glasgow City Council v Scottish Information Commissioner* ([2009] CSIH 73), who said: "The importance of giving appropriate assistance to persons who have difficulty describing the information which they desire is not however inconsistent with the necessity of identifying precisely what that information is". It went on to apply a similar principle to the present case, stating: "In the same way, a benign construction and application of FOIA is not inconsistent with a requirement that the requester start the process by identifying a public authority as the recipient of the request".

Cases covered in this update:

(1) *Corderoy* and (2) *Ahmed v The Information Commissioner*, (2) *Attorney-General* and (3) *The Cabinet Office* [2017] UKUT 495 (AAC), www.pdpjournals.com/docs/887871

Maurizi v The Information Commissioner and Crown Prosecution Service EA/2017/0041, www.pdpjournals.com/docs/887872

Grant Workman v (1) *The Information Commissioner* and (2) *The Home Office* EA/2017/ 0127, www.pdpjournals.com/docs/887873

Ellis v The Information Commissioner and Ryedale District Council, [2017] UKUT 503 (AAC), www.pdpjournals.com/docs/88784

Bryce v The Information Commissioner and University of Cambridge, www.pdpjournals.com/docs/887875

Kirkham v The Information Commissioner, [2018] UKUT 6 (AAC), www.pdpjournals.com/docs/887876

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