Recent decisions of the Commissioner and Tribunal

Alison Berridge and Imogen Proud, public law barristers at Monckton Chambers, ***highlight the points of interest from decisions of the tribunals and Information Commissioner from the end of January 2018 to March 2018***

This update highlights two cases of the First-Tier Tribunal, both dealing with the capacity in which the authority 'held' the requested information, and in both cases finding the Commissioner's decision that the Freedom of Information Act 2000 ('FOIA') or the Environmental Information Regulations 2004 ('EIRs') did not apply to be incorrect. Unusually, it also covers one High Court decision, concerning the relationship between FOIA and freedom of information at common law and under the European Convention on Human Rights.

Ian Hutchinson v (1) Information Commissioner and (2) Kirklees Metropolitan Council, EA/2017/0194, 23rd January 2018

Summary

The First-Tier Tribunal allowed the Applicant's appeal against a decision of the Information Commissioner's Office ('ICO') that Kirklees Metropolitan Council (the 'Council') was permitted to refuse to provide the Applicant with information contained within a report. The Council argued that it did not 'hold' the information because it had received it not as a local authority but as a corporate trustee of a charitable trust. The Tribunal found that the Council did hold the requested information since in exercising its functions as trustee, the Council was also exercising its functions as a local authority. The Council was ordered to respond to the Applicant's request on the basis that it held the information.

Relevant facts

The appeal arose from a request by Mr Hutchinson to be provided by the Council with a report relating to a swimming pool called the Clayton Baths. The Baths were owned and run by a registered charitable trust (the 'Trust'), of which the Council is the sole trustee. The Council had refused Mr Hutchinson's request on the grounds that it had received the disputed report, not as a local authority but as a corporate trustee of the Trust. The Council's position was that this meant that it was permitted, pursuant to Regulation 12(4)(a) of the Environmental Information Regulations 2004 ('EIRs'), to refuse to disclose the information in the report.

Regulation 12(4)(a) of the EIRs permits a public authority to refuse to disclose information "to the extent that — (a) it does not hold that information when the applicant's request is received". Regulation 3(2)(a) provides that "environmental information is held by a public authority if the information – (a) is in the authority's possession and has been produced or received by the authority". The case turned on whether the report was 'received' by the Council, it not being disputed that the report was in its possession.

The First-Tier Tribunal considered what the position would have been under the Freedom of Information Act 2000 ('FOIA'). It reasoned that the issue of whether the Council 'received' the report under the EIRs to be "probably the same question a arises under FOIA section 3(2)(a)". This subsection provides that "information is held by a public authority if it is held by the authority otherwise than on behalf of another person". Under FOIA, the issue in this case would become whether the Council held the report on behalf of the corporate trustee, namely the Council.

The Council relied upon the ICO's FOIA Guidance to public authorities acting as trustees of a charity. The Guidance acknowledges that local authorities can be charitable trustees and states that "as trustees must act only in the best interests of the charity, and not in their own interest, this means that any information held by an authority only in its capacity as a trustee is not held by it for the purposes of FOIA (in accordance with section 3(2)(a) it is held on behalf of the trust)". The Tribunal considered this to be a non sequitur: the duty of a trustee to act only in the best interest of the trust when dealing with the affairs of the trust does NOT mean that the local authority as trustee is performing functions distinct from the functions of a local authority.

The Tribunal concluded that in

exercising its functions as trustee, the Council was also exercising its functions as a local authority. It reasoned that if a local authority chooses to act as trustee of a charitable trust, the performance of its duties as trustee is one of its many functions as a local authority arising from the exercise of statutory powers. The Tribunal considered that this was demonstrated by section 139 of the Local Government Act 1972, which expressly confirms the power of a local authority to receive assets and act as a charitable trustee.

Points of interest

The First-Tier Tribunal found it instructive to view the issue through the lens of FOIA, applying FOIA principles even though all parties agreed that the EIRs were the applicable statutory regime. Its decision thus has application to future FOIA as well as EIRs cases. It suggests parties in future EIRs cases should be prepared to consider their arguments from a FOIA perspective too.

The ICO's FOIA Guidance was criticised by the Tribunal on the grounds that it contains a 'non sequitur' and "assumed what [the Council] needs to prove". Public bodies should take heed that they are not entitled to assume that their arguments for withholding information will succeed just because they seem to fall within the protection of ICO Guidance.

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Edward Williams v Information Commissioner, EA/2017/0099, 4th February 2018

Summary

In a majority decision, the First-Tier Tribunal allowed an appeal against a decision of the ICO which had accepted that London Councils did not hold the information which the Applicant sought for the purposes of section 3 (2) FOIA. London Councils argued that the information sought was held on behalf of individuals who are not public authorities and not subject to FOIA. The Tribunal found that London Councils did hold the requested information and ordered that it must either disclose the information or, if it claims that section 2(2) FOIA applies, provide a response accordingly.

Relevant facts

This case centrally concerned the relationship, for FOIA purposes, between London Councils (to whom the request for information was addressed), London Tribunals and 'Adjudicators'. London Councils is a public authority representing the Greater London Boroughs, and is subject to FOIA by virtue of Schedule 1. Motorists who receive civil penalty charges for traffic contraventions have a right of appeal to an Environment and Traffic Adjudicator (an 'Adjudicator'). Adjudicators are not public bodies and are not subject to FOIA. Adjudicators are appointed by a joint committee formed by London Councils and Transport for London. The majority decision of the Tribunal accepted that London Tribunals is "in effect, a department of" London Councils: it is the collective name for two tribunals which hear motorists' appeals and an administrative support service provided to the joint committee.

The Applicant requested that London Councils provide him with the training manuals and guidance issued to Adjudicators (the 'Guidance'). London Councils argued that it did not hold the Guidance for the purposes of section 3(2) FOIA, since it held it on behalf of the Adjudicators. The Applicant argued that London Councils held the information and was a public authority for the purposes of Schedule 1 FOIA, and should therefore provide the Guidance.

The majority held that the fact that Adjudicators enjoy judicial status is irrelevant, as their judicial independence is in no way threatened by the disclosure of the general guidance requested. The Tribunal's reasoning begins by observing that if London Councils were correct, the public would have no right of access to the Guidance, since the only public authority which holds the documents, holds them on behalf of individuals who are not public authorities. It notes that "such an immunity from disclosure would be very odd". It later added that this would also mean that the Adjudicators could require all Guidance to be delivered up to them with back-up copies deleted, a position which the Tribunal describes as "unsustainable".

London Councils accepted that London Tribunals controls copies of the Guidance (it distributes them to Adjudicators). The Tribunal reasoned that whilst London Tribunals is not itself a public authority, it is "part of" London Councils, which is a public authority and subject to FOIA. When London Tribunals holds information, it does so on behalf of London Councils.

The appeal succeeded because at least one of the purposes for which London Tribunals holds the Guidance is in the performance of its delegated functions (including giving out copies and explanations of the Guidance). London Tribunals therefore holds the information "otherwise than on behalf of another person" since it holds it on its own behalf.

Points of interest

This case is interesting to consider alongside *Hutchinson* (discussed above) since in both cases the authority to whom the request for information was made argued that it did not hold the requested information for the purposes of the relevant statutory regime. In both cases, the Tribunal decided that the Respondent public body did hold the information in the requisite sense.

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There was a dissenting view from one Tribunal member. His concern was that whilst the reasoning above would apply to external guidance, there were different considerations in relation to any internal guidance (guidance produced by one Adjudicator and given to another). It should be for Adjudicators to control the release of the latter type of guidance. This is because in that case, the preservation of judicial independence would become highly relevant, as would section 32 FOIA which provides an absolute exemption for court documents held by court staff (both of which had been irrelevant in the majority view).

The dissenting member also doubted whether London Tribunals, as staff supporting the Adjudicators, could be regarded as merely a department of London Councils, as this "slides over" a "distinct" separation of functions. He reasoned that London Tribunals do not support the Adjudicators as agents of London Councils.

"Practitioners should note that in some cases, FOIA operates as an exclusive regime for determining disputes about information requests, and precludes reliance on common law rights and procedures such as judicial review."

R. (on the application of Good Law Project Ltd) v Secretary of State for Exiting the European Union and Her Majesty's Treasury, Queen's Bench Division (Administrative Court), 6th March 2018, unreported

Summary

The High Court refused permission for judicial review of a decision not to disclose documents relating to the potential impact of Brexit, finding that FOIA provided a suitable alternative remedy. In doing so, it rejected arguments that the claimants were entitled to rely on the common law as an alternative to FOIA, and that the FOIA appeals process was unable to produce a resolution quickly enough to meet the urgency of the matter.

Relevant facts

The case concerned documents prepared by the Department for Exiting the EU and HM Treasury analysing the potential impact of Brexit.

The Good Law Project ('GLP') had requested disclosure of the documents under common law and Article 10 of the European Convention on Human Rights (the right to freedom of expression and information), and were refused. GLP brought a crowdfunded application for permission to challenge the decision by way of judicial review.

Permission was initially refused on the papers, then renewed before Supperstone J, who considered the question of whether the statutory machinery of FOIA constituted a suitable alternative remedy to judicial review.

In a short judgment, he decided firstly that "The claimants cannot by framing their requests [under the common law and Article 10] avoid the legal regime established by Parliament to deal with disputes arising from information requests [i.e. FOIA]".

The judge decided secondly that the decision of the Supreme Court in *Kennedy v Charity Commissioners* ([2014] UKSC 20) did not assist the claimants. That case had also concerned the relationship between FOIA and the common law/Article 10. The Supreme Court held that the absolute exemption in section 32 FOIA did not mean that such information was protected absolutely, only that only that disclosure should be addressed outside FOIA, under other statute or the common law.

According to Supperstone J, the present case was different because FOIA did in fact provide an available route for disclosure of the requested information.

Thirdly, the judge decided that the timescale for a resolution under FOIA did not make it an unsuitable alternative to judicial review.

GLP had argued that the case was exceptional: the documents needed to be disclosed well in advance of the conclusion of Brexit negotiations, scheduled for October. FOIA would be unable to deliver this outcome: GLP quoted evidence suggesting that the average time taken for the first two stages (internal review and Information Commissioner's decision) was 48 weeks.

Mr Pitt-Payne QC, the Barrister representing GLP, put the point as follows: "My clients are not historians interested in recording the events leading up to Brexit. My clients are interested in educating public debate on the terms on which the country is leaving the EU."

Supperstone J's response was brief: "I am not persuaded that the alleged urgency amounts to an exceptional circumstance which justifies departure from the prescribed statutory appeal mechanism. I do not accept that the FOIA mechanism is not capable of dealing with cases that require expedition."

Permission was therefore refused.

Points of interest

Given the disclosure of summarised content from the requested documents on 8th March, GLP is not pursuing the case further. This short judgment therefore remains the only analysis of these important issues.

Practitioners should note that in some cases, FOIA operates as an exclusive regime for determining

disputes about information requests, and precludes reliance on common law rights and procedures such as judicial review. This approach is in contrast with *Kennedy*, where Lord Mance specifically referred to the possibility of pursuing a request for disclosure by way of judicial review.

It will not always be easy to draw the line between the two types of case – Supperstone J suggests the difference lies in whether FOIA is an "available route" (in contrast to *Kennedy* where an absolute exemption applied). It will of course not always be clear if FOIA is available until after the FOIA procedure is completed.

It is likely to be very difficult, if not impossible, to argue that a FOIA procedure is likely to be too slow to offer an effective remedy following this judgment.

On the other hand, the references in the judgment to the potential for expedition may be useful in encouraging speedier decision making by the various bodies involved.

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Copies of the decisions of this update:

Ian Hutchinson v (1) Information Commissioner and (2) Kirklees Metropolitan Council www.pdpjournals.com/docs/8878892

Edward Williams v Information Commissioner www.pdpjournals.com/docs/8878893