

Recent decisions of the Commissioner and Tribunal

Alison Berridge, public law barrister at Monckton Chambers, highlights the points of interest from decisions of the First Tier and Upper Tribunals published between September and November 2018

Cruelty Free International v ICO and Home Office
www.pdpjournals.com/docs/887952

Department for Education v ICO and Christopher Whitmey
www.pdpjournals.com/docs/887953

Crothers v ICO EA/2018/0074
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Cruelty Free International v ICO and Home Office, EA/2017/0105, 12th October 2018

Summary

The FTT determined that the Home Office was not entitled to refuse an information request on the grounds of cost because its cost estimate was unreasonable, because it had not assisted the requester to refine its request, and because the information requested may have had considerable value.

Relevant facts

In its 2014 Annual Report, the Animals in Science Regulation Unit of the Home Office stated that it had referred two cases relating to experimentation on animals to the Crown Prosecution Service, but that in both cases the CPS had decided that prosecution was not in the public interest. Cruelty Free International ('CFI') contacted the Home Office requesting the information that it held in relation to the two cases. The Home Office explained that compliance would be excessively burdensome and invited CFI to refine its request, but did not offer any guidance as to how this might be achieved. CFI explained what it wished to understand about the case, but said it did not know which documents would contain this information, and it was therefore unable to refine the request further.

The Home Office refused the request, stating that it held an estimated 6,000 pages of relevant documents which would have to be reviewed to identify and redact exempt information. It considered the burden of this task to be sufficiently serious as to make the request vexatious under section 14 FOIA.

The Home Office's decision was upheld by the Commissioner, and CFI appealed to the FTT.

The relevance of cost in an assessment of vexatiousness under section 12 FOIA allows authorities to refuse

requests where the costs exceed a specified limit. This limit applies only to certain activities, such as retrieval, and not, for example, to redactions required to be made under other exemptions. As the Home Office relied on the burden of redacting the relevant documents, it put its case under section 14, which is an exemption for 'vexatious' requests.

The FTT acknowledged that cost alone could be a sufficient ground for a finding of vexatiousness, even where the information requester's conduct was not otherwise open to criticism. It therefore went on to consider whether the Home Office's cost estimate was reasonable, how those costs could have been reduced, and the value of the information sought.

Accuracy of the Home Office's cost estimate

The 6,000 page estimate was produced as a result of searches carried out on the email records of relevant staff. The Home Office gave no explanation as to why it had chosen this route when a document management system was available. The FTT considered that the Home Office could have searched for the requested information in a much more straightforward manner with a consequential reduction in the quantity of material needing to be reviewed. It therefore had 'serious reservations' about the reasonableness and accuracy of the Home Office's cost estimate.

Duty to provide advice and assistance

Under section 16 FOIA, public authorities have a duty to provide advice and assistance to requesters. As noted by the FTT in this case, section 16 'acts as a counterweight' to the right of a public authority to rely on excessive costs to refuse an information request, and any investigation of a public authority's cost burden should include the possible application of section 16.

The FTT described the duty as follows: "The [Freedom of Information Code of Practice] clearly anticipates

that the obligation to provide advice and assistance extends beyond simply informing a requester that he or she may reformulate an information request to see if this reduces the cost of compliance to an acceptable level. Individuals, with no knowledge of how the public authority in question maintains its records and what facilities exist for searching them, are at a very considerable disadvantage. They should be provided with that information in sufficient detail to enable them to see how their original request might be refined.”

In the present case, the Home Office should have provided basic information as to the way in which its investigation records were maintained (including the availability of a document management system), which would have enabled a search to be conducted that focussed on the information sought. The FTT concluded that compliance with this duty would have enabled the Home Office to handle the request at modest cost.

The importance of the information

Finally, the FTT considered the value of the information that might have emerged. As well as a general interest in understanding how the regulation of animal experiments operates, it emphasised the fact that the CPS had contradicted the Home Office’s account of events, saying that while it had been contacted, it had not, as the Home Office had reported, been requested to consider bringing a prosecution.

In light of all the above considerations, the FTT determined that the Home Office was not entitled to rely on section 14.

Points to note

The case emphasises the close relationship between provisions allowing public authorities to refuse requests on the ground of cost, and their duty to provide advice and assistance to requesters. The FTT suggests that the two issues must always be considered together. Any authority wishing to rely on excessive costs to refuse a request must therefore give careful thought to how it can assist the requester in achieving its aims more cheaply.

The case also demonstrates that correcting potentially inaccurate statements made by the public authority can operate as a powerful factor in favour of disclosure.

Department for Education v ICO and Christopher Whitmey, [2018] UKUT 348 (AAC), 22nd October 2018

Summary

The case concerned a request for Ministerial communications, resisted by the Department for Education on the grounds that disclosure would erode collective ministerial responsibility.

The Upper Tribunal reiterated that FOIA required a balancing of public interests in relation to the specific item of information requested, and that a single disclosure might have limited impact on a general convention like collective responsibility.

Relevant facts

The background to the case was the so-called Trojan Horse affair, an attempt to introduce an intolerant form of Islam into certain schools in Birmingham.

Among the then coalition government’s responses were changes to the Independent Schools Standards framework, requiring schools to actively promote a range of ‘British’ values, including tolerance towards those of different faiths and beliefs. These changes were controversial, as was the approach to consulting on them. In particular, the consultation period was relatively short (eight weeks), a significant proportion of which fell during the school summer holidays.

The information request which came before the Upper Tribunal was for a copy of a letter from Lord Nash to Nick Clegg and Vince Cable regarding the proposed launch date for the consultation.

The Department for Education refused to disclose the letter. The Information Commissioner ordered that it be disclosed, and the Commissioner’s decision was upheld by the FTT. The DofE appealed to the UT. The DofE resisted disclosure under section 35(b) FOIA, which provides a qualified exemption for Ministerial communications. It argued in particular that disclosure would undermine collective ministerial responsibility, because it would erode the ‘safe space’ within which ministers can discuss policy without fear that disagreements will be made public.

Confidentiality of Ministerial communications

The application of a qualified exemption requires balancing the public interest in disclosure against the public interest in maintaining the exemption. The Tribunal addressed the specific issues that arise when the public interest in non-disclosure is framed in terms of maintaining a general convention. In such a situation, it is necessary: (i) to understand the nature and purpose of that convention, (ii) to assess the effect that disclosure of the particular information requested will have on that convention, and (iii) to balance that effect against the public interest in disclosure.

As regards the convention relating

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to Ministerial communications, the Tribunal stated that: “[a]ny assessment of the significance of confidentiality in Ministerial communications must be realistic”, commenting that: “There is surely no one who believes that all ministers agree with all government policy...”.

It also stated: “[t]he scope of the convention of confidentiality of Ministerial communications — and of collective responsibility for that matter — changed when FOIA came into force. From then on it was qualified by the possibility that information might have to be disclosed. It no longer represented an absolute ideal...”.

Adequacy of reasons

The Upper Tribunal then turned to the question of whether the FTT had given adequate reasons for its decision, making a number of points about how this should be assessed.

In applying the public interest balance under section 2 FOIA, the ‘key’ to providing adequate reasons is a clear statement of the positive case for each of the competing public interests. The clearer this statement, the easier it is to explain the judgment made between them.

In some cases, this statement of the competing interests may ‘speak for itself’, while in others it may be necessary to articulate how the balance between them was struck, pointing to one or more factors which were particularly significant. It is not necessary to set out everything that was taken into account.

It is also not necessary that the

articulation of the competing interests and the balance between them are kept distinct — the test for error of law is one of substance, not form. The Upper Tribunal decided that the FTT had given clear and adequate reasons, and dismissed the appeal.

Points to note

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While the FTT must give adequate reasons for its decisions, it does not have to spell out everything that was taken into account, or place its reasoning within a particular framework. This is likely to make appeals alleging inadequate reasoning difficult to bring successfully, save in more extreme cases.

Crothers v ICO EA/2018/0074, 24th October 2018

Summary

The FTT considered a request for disclosure of legal advice which was protected by legal professional privilege. While acknowledging the strong public interest in maintaining that privilege, the FTT considered that in the present case there were strong, clear, compelling and specific justifications capable of outweighing that interest, and ordered that the advice be disclosed.

Relevant facts

The case arose out of care provided to the Appellant’s mother in 2015, shortly before she died. Care was being provided by a private company called Home Care Independent Living (‘HICL’), under contract to the Northern Health and Social Care Trust. During February 2015, the Appellant’s mother suffered two falls while being moved by HICL staff. The Trust carried out a Serious Adverse Incident Level 2 Investigation into those falls.

In discussions with the Trust, the Appellant queried why it had not interviewed HICL staff as part of the Investigation. The Trust explained that it had ‘clear’ legal advice that it was unable to interview HICL staff as it did not manage them directly.

In October 2016, the Appellant made a number of information requests relating to the SAI Investigation, including a request for all legal advice received by the Trust in relation to the interviewing of HICL staff.

The Trust declined to provide the advice, relying on section 42 FOIA, and its decision was upheld by the Information Commissioner. The Appellant appealed to the FTT.

Section 42 provides a qualified exemption for information protected by legal professional privilege. Like any qualified exemption, section 42 requires a balance between the public interest in disclosure and the public interest in maintaining the exemption. However in the case of legal professional privilege, the courts have recognised that the public interest in favour of maintaining the privilege carries ‘significant weight’, and disclosures are relatively rare.

In *Crothers*, the FTT acknowledged the ‘strong inherent public interest’ in maintaining LPP, but held that this was ‘one of the rare cases’ where the public interest favoured disclosure. It relied on two factors in support of its decision:

First, the advice had wide public impact. It was not limited to the situation of the Appellant, but applied to any SAI where the Trust might wish to interview any of the 700 HICL staff

who were then providing care to some 1,800 service users. The Tribunal considered that the advice therefore had 'huge importance for the public'.

Second, the Trust had misrepresented the content of the advice to the Appellant. Having seen the advice, the Tribunal considered it had been misleading to say that it was clear that the trust could not interview HCIL staff.

This misleading information could be passed on to the public generally, creating a strong public interest in disclosing the actual advice received.

The FTT considered that these amounted to 'strong, clear, compelling and specific justifications' which outweighed the strong public interest in maintaining the privilege.

Points to note

The decision is of interest as a rare example of the disclosure of legal advice under FOIA, and helps to build up an understanding of the kinds of exceptional circumstances which will justify such disclosure.

The first reason given by the FTT is particularly interesting. Commentators have suggested that advice that is still 'live' is less likely to be disclosed, whereas in this case the FTT used its currency as a reason in favour of transparency. It may be that the case turns on its unusual facts: in this case the advice is of interest not because of its assessment of the strengths and weaknesses of a particular case or position taken by the public authority, but because it sheds light on what appears to be a flawed structure, whereby those with responsibility for investigating incidents do not have the necessary powers.

Like *Cruelty Free International* above, this case shows that correct-

ing potentially inaccurate statements made by the public authority can operate as a powerful factor in favour of disclosing requested information.

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