

Recent decisions of the Commissioner and Tribunal

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London Unemployed Strategies v ICO and Department of Work and Pensions

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Ben Lotz v ICO and Department of Work and Pensions

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Malnick v ICO and ACOBA, EA/2016/0055

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Webber v ICO and Cabinet Office, EA/2015/0194

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London Unemployed Strategies v ICO and Department of Work and Pensions, EA/2018/0076, 31st October

Summary

This is the first of a series of three First-Tier Tribunal ('FTT') decisions under section 36 of the Freedom of Information Act ('FOIA'). Section 36 establishes a qualified exemption for information likely to cause prejudice to the effective conduct of public affairs. These FTT decisions follow the decision of the Upper Tribunal in *ICO v Malnick and ACOBA* ([2018] UKUT 72 (AAC)) earlier this year, clarifying the framework in which the section 36 assessment must be made.

The first two, related cases (*London Unemployed Strategies* and *Ben Lotz*) show the FTT taking a relatively robust view, declining to criticise the Qualified Person's opinion despite some obvious question marks, and finding against the requester on the public interest balance.

The third case is the case of *Malnick* itself, remitted to the FTT following the UT's determination. In this case, the FTT explains how it proposes to approach the public interest balance and the role of the Qualified Person's opinion at that stage. It found against the Information Commissioner's Office ('ICO') and ruled that the information should be disclosed.

Relevant facts

London Unemployed Strategies ('LUS') requested that the Department for Work & Pensions ('DWP') disclose email addresses for all of its directors and ministers. The Department disclosed generic correspondence addresses but declined to disclose direct addresses. It relied on section 36(2), which provides a qualified exemption for information if — in the reasonable opinion of a 'qualified person' ('QP') — disclosure of the information would be likely to cause certain types of prejudice listed in section 36. The list includes prejudicing the effective conduct of public affairs.

A qualified person means an officer or employee of the public authority who has been authorised to give an opinion by a Minister. As this is a 'qualified exemption', a balance has to be struck between the public interest in disclosure and the public interest in maintaining the exemption.

In this case, the QP was Baroness Buscombe, who opined that section 36 was 'fully satisfied'. Although this was not a reasoned opinion, the advice that she received had stated that disclosure was likely to lead to: (i) 'clogging up' of the internal email system; (ii) confusion of the correct routes for DWP to assist when dealing with the public; and (iii) the risk of electronic disruption and threats through malware and spam. The advice also assessed that the public interest in withholding the information outweighed the interest in disclosing it.

The ICO upheld the decision of the DWP, and LUS appealed to the FTT. The FTT described the correct approach under section 36(2) as explained by the Upper Tribunal in *ICO v Malnick and ACOBA* [2018] UKUT 72 (AAC). In summary, the analysis involves two separate stages.

The first stage is to consider whether the relevant type of prejudice would or would be likely to occur. At this stage the responsibilities are as follows:

- the QP is entrusted with the task of deciding the question;
- the public body/ICO/FTT is not required to determine the question again — it is required to determine only whether the opinion of the QP is reasonable;
- in deciding whether the QP's opinion is reasonable, the public body/ICO/FTT should consider substantive, not procedural reasonableness;
- also in deciding whether the QP's opinion is reasonable, the public body/ICO/FTT must afford the QP's opinion a measure of respect; and
- matters of public interest are not relevant at this stage.

If the first stage threshold is crossed, the second stage is to consider the

public interest balance. This is a matter solely for the public body/ICO/FTT, and the QP has no role.

In the present case, the FTT decided (with relatively little consideration) that the QP's opinion had been reasonable despite having no reasoning, and despite the advice on which it was based including an assessment of the public interest balance, which was not a matter for the QP.

At the second stage, the FTT recognised that LUS was seeking to make DWP more accessible to service users, given its (LUS's) view that it could be very difficult for service users to gain access to decision-makers. The FTT did not express a view on these issues, but concluded that: "it is difficult to see how the disclosure of the personal work emails of directors and ministers, who do not deal with claims or queries on a day to day basis... could improve access for service users, rather than making it more difficult for the DWP to operate effectively". It decided that the public interest was strongly in favour of withholding the information.

Ben Lotz v ICO and Department of Work and Pensions, 31st October 2018, involved a very similar set of facts. The appeal in that case was dismissed by the same Tribunal on very similar grounds as in *London Unemployed Strategies*.

Points to note

The reiteration of the framework established by the Upper Tribunal in *Malnick* is helpful, reminding public bodies of the need for a two stage analysis and the roles of the QP and public body respectively.

The FTT's willingness to accept the reasonableness of the QP's opinion is notable, especially given that: (i) the opinion itself was entirely unreasoned; and (ii) the underlying advice appears to have addressed the public interest balance, which it was not entitled to do. The FTT has, implicitly, attributed the DWP's analysis to the QP, and satisfied itself that the assessment of the public interest balance did not influence the way that the DWP approached the prejudice question.

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Malnick v ICO and ACOBA, EA/2016/0055, 4th November 2018

Summary

The disputed information in this case consisted of correspondence with Tony Blair and the Advisory Committee on Business Appointments ('ACOBA'), relating to Mr Blair's activities since leaving the office of prime minister.

This case was a rehearing of an appeal, the FTT's previous decision having been set aside by the Upper Tribunal in *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) on the basis that it contained errors of law.

In this case, the FTT determined that the information should be disclosed.

First, the public interest favoured disclosure, even though the Chair of ACOBA (who was the 'qualified person' for the purpose of section 36 FOIA) had formed a reasonable opinion that prejudice would be likely to occur. Second, section 40(2) FOIA (concerning third party personal data) did not prevent disclosure, as disclosure was necessary in order to meet the legitimate interests of the Appellant.

Relevant facts

The Ministerial Code provides that, upon leaving office, Ministers must seek advice from the ACOBA about any appointments or employment they wish to take up within two years of leaving office, and that they must abide by that advice. The Code is characterised as a code of honour, as ACOBA has no power to compel former Ministers either to seek advice, or to accept its advice.

Mr Malnick, a journalist, wrote to ACOBA in 2015 requesting 'copies of all correspondence, or records of oral conversations, between ACOBA and Tony Blair/Mr Blair's representatives, in the period from July 2005 to July 2009.' ACOBA refused to disclose the information, relying on the exemptions in sections 36(2)(b), 36(2)(c) and 40(2) FOIA.

So far as relevant here, sections 36(2)(b) and 36(2)(c) FOIA provide a qualified exemption for information if, in the reasonable opinion of a QP, disclosure of the information would be likely to cause certain types of prejudice listed in section 36. The list includes inhibiting the free and frank provision of advice or exchange of views, or otherwise prejudicing the effective conduct of public affairs. A QP means an officer or employee of the public authority who has been authorised to give an opinion by a Minister. As this is a 'qualified exemption', a balance has to be struck between the public interest in disclosure and the public interest in maintaining the exemption.

The QP's opinion stated that prejudice would be likely to occur if the information were disclosed. It stated that ACOBA needs a safe space in which to discuss prospective appointments before any public announcement, and pointed to the likely chilling effect on the provision of information and advice to ACOBA, and on co-operation with ACOBA, if the information were disclosed.

Section 40(2) FOIA concerns the personal information of third parties. Under section 40(2)(b), third party personal data are exempt if disclosure

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would contravene any of the Data Protection Principles of the Data Protection Act 2018.

The First Data Protection Principle requires that personal data are processed fairly. Under the previous Data Protection Act 1998 (still presiding a the date of this case), disclosure is permitted if it is necessary to meet the legitimate interests of the parties to whom the data are disclosed, except where the disclosure is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Mr Malnick complained to the Information Commissioner about ACOBA's refusal to disclose the information under sections 36 and 40 FOIA. The Commissioner concluded that the information was exempt from disclosure under section 36, and did not go on to consider section 40(2).

The FTT (in its 2016 decision) allowed Mr Malnick's appeal against the Commissioner's decision. The Upper Tribunal allowed the Commissioner's appeal against the FTT's first decision, and set it aside. The Upper Tribunal found that the first FTT decision had erred in law by taking into account matters of public interest when deciding if the QP's opinion was reasonable. Moreover, the FTT's decision that the QP's opinion was not reasonable but irrational, and failed to give appropriate weight to the QP's opinion. The Upper Tribunal remitted the case to the FTT for a rehearing by a different panel, whose decision is the focus of this summary.

Section 36 — prejudice to conduct of ACOBA's affairs

First, bound by the Upper Tribunal on this issue, the FTT accepted that the QP's opinion as to the likely prejudice was reasonable in public law terms. This meant that the threshold test for the exemptions in section 36 to apply was passed.

The FTT then proceeded to the public interest part of the analysis.

The Commissioner's approach to the public interest test had been to ask whether the public interest in disclosure was equal to, or outweighed, the concerns identified in the QP's opinion. This was not the correct test in light of the Upper Tribunal's decision that it is not the QP's task to consider the public interest in the opinion.

The FTT noted the need, explained in the Upper Tribunal's decision, to take account of the QP's opinion regarding prejudice when considering the public interest test. The FTT considered a sensible approach was first to consider, absent the QP's opinion, whether the public interest balance favoured disclosure, and then to take account of the QP's opinion to see if that changed the FTT's provisional view.

The FTT's provisional view was that the public interest favoured disclosure. There was significant weight in favour of disclosure, due to the controversy surrounding Mr Blair's work since leaving office. The FTT was 'far less convinced' about the safe space and chilling effect arguments. Future applicants would recognise this as a special case, and would also recognise the time-lapse between the information sought and the request for information. Further, it is unlikely that Ministers would not comply with the Ministerial Code simply due to this case. Every ex-minister would be aware of the risk of information being disclosed under FOIA. Finally, the public interest in disclosure was not diminished by reason of the fact that some of the material was no longer available.

The FTT then took account of the QP's opinion to see if it tipped the balance in favour of non-disclosure. Whilst the QP's decision was not unreasonable, the FTT would not have reached the same conclusion that the prejudice was likely to occur. The FTT therefore maintained its provisional view that the public interest was in favour of disclosure.

Section 40(2) — third party personal data

The Tribunal found Mr Blair's reasonable expectation in relation to disclosure of information to ACOBA was at the lower end of the scale of expectation. At the relevant time, Mr Blair was one of the most likely candidates for disclosure under FOIA if a request for information was made. Mr Blair was not a private citizen at the time he approached ACOBA, but was (at best) in the transitional stage between public figure and private citizen.

On balance, there was an overriding public interest in breaching any expectation that Mr Blair would have that information provided to ACOBA would not be disclosed. Any prejudice caused to the privacy rights of Mr Blair did not override the legitimate interests of the Appellant in disclosure, given the strong public interest reasons in favour of disclosure.

Points to note

The FTT decision reiterates some important points from the Upper Tribunal's decision, including that it is not task of the QP's opinion to consider the public interest, and that when considering the public interest test in relation to section 36 FOIA, the Tribunal must give appropriate weight to the QP's reasonable opinion on the likelihood of prejudice. In addition, the FTT clarified at what stage in the public interest analysis it should address the QP's opinion.

The FTT said that it will first consider the public interest test without taking account of the QP's opinion, and form a provisional view. It will then take account of the QP's opinion to see if it changes that view. The FTT considered that concerns about the prejudice likely to be caused by disclosure (i.e. the chilling effect and the safe space concerns) had been overstated in this case. However, the FTT emphasised that this was a very particular case, and that its decision did not mean that disclosure of correspondence with ACOBA by other former ministers would be routinely expected. The FTT placed

considerable weight on the status of Mr Blair as a former prime minister, and the controversy around his activities after leaving office.

Webber v ICO and Cabinet Office, EA/2015/0194, 30th November 2018

Summary

The FTT concluded that the Cabinet Office was entitled to refuse a request for information relating to the expenses of former Prime Ministers. This was on the basis that the information was exempt as having been provided to the Cabinet Office in confidence.

Relevant facts

Former Prime Ministers ('PMs') are entitled to claim a Public Duty Cost Allowance ('PDCA') for office and secretarial expenses incurred in connection with their public duties. The PDCA is currently set at a maximum of £115,000 a year for each previous PM, and the Cabinet Office publishes the total annual PDCA paid to each former PM.

Mr Webber, a freelance journalist, contacted the Cabinet Office requesting more detailed information about the sums paid under the PDCA to John Major, Tony Blair, Gordon Brown and the late Lady Thatcher. In particular, Mr Webber requested copies of the former PMs' receipts and other supporting documentation submitted in respect of the PDCA since January 2012. Mr Webber also requested disclosure of the total amounts claimed by each former PM in each calendar year between 2005-2013 inclusive.

The Cabinet Office refused the request for receipts and other support-

ing information on the basis that it was third party personal information and therefore exempt from disclosure. The Cabinet Office also declined to disclose the total amounts claimed, stating that the information was accessible by other means and intended to be published.

Mr Webber appealed to the Commissioner against the Cabinet Office's refusal to disclose the receipts. The Cabinet Office continued to rely on the personal information exemption, but also put forward the alternative argument that the receipts and other documents were exempt because they had been provided to it in confidence.

The Commissioner upheld the Cabinet Office's decision, agreeing that the receipts and supporting documents fell within the confidentiality exemption. Having determined the appeal in the Cabinet Office's favour, the Commissioner did not go on to finally decide whether the third-party information exemption

also applied. Mr Webber appealed to the FTT.

Exemption for confidential information

Under section 41(1) FOIA, information will be exempt if it is obtained by a public authority from another person, and the disclosure of that information would constitute an actionable breach of confidence (i.e. a claim that such information had been disclosed in breach of confidence would be likely to succeed). The FTT considered that three criteria must be fulfilled for disclosure of information to constitute an actionable breach of confidence.

First, the information must have the necessary quality of confidence. Second, it must be imparted in circumstances importing an obligation

of confidence. Third, the unauthorised use of the information must be of detriment to the person who provided it to the public authority.

As Mr Webber accepted that the requested information had the necessary quality of confidence, the FTT was only required to consider the second two conditions.

The FTT also had to consider the public interest in disclosing the requested information. Section 41 FOIA is an absolute exemption, meaning that the legislation itself does not require the public interest in maintaining the exemption to be balanced against the public interest in disclosure. However, it is a defence to an action for breach of confidence that disclosure was in the public interest. Consideration of whether a particular disclosure constitutes an 'actionable' breach of confidence therefore requires consideration of whether that disclosure would be in the public interest.

The FTT held that the second two conditions were fulfilled, and that the Cabinet Office would not have a public interest defence to an action for breach of confidence if it disclosed the receipts and supporting documents. It therefore upheld the Commissioner's decision that the information was exempt under section 41 FOIA.

Circumstances importing an obligation of confidence

The Head of Propriety and Ethics ('HPE') at the Cabinet Office gave hearsay evidence that she had spoken to the offices of the former PMs, who had told her that they had provided the requested information in the expectation of confidence.

The FTT relied on the HPE's evidence as demonstrating that the requested information had been provided in circumstances importing an obligation of confidence. This was despite the fact that the HPE had not asked the offices' views until many years after the information was ini-

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tially provided to the Cabinet Office, and for nearly four years after Mr Webber's request.

The FTT recognised that the HPE's evidence carried less weight than documentary evidence showing that the issues had been considered at the time. However, the FTT considered that the HPE's evidence made sense given that the requested information contained details of the salaries paid to individuals. In those circumstances, the offices of the former PMs could not realistically have expected that the Cabinet Office would have been free to disclose the requested information. The first condition for an actionable breach of confidence was therefore fulfilled.

Detriment

The FTT also accepted the HPE's evidence that disclosure of individual salary levels could have detrimental effects on relationships between staff members. It further considered that there was an obvious detriment to an individual in having confidential information disclosed in circumstances in which there is a reasonable expectation of maintaining confidentiality of private information. The FTT therefore agreed with the Commissioner that the second condition for an actionable breach of confidence was fulfilled.

Public interest defence

Relying on a summary of the law from a leading textbook, the FTT considered that respect for confidentiality is itself a matter of public interest. For the defence to be made out,

the importance of the information requested must therefore be such as to justify overriding that public interest. Examples include information relating to serious actual or contemplated misconduct, or which is important for safeguarding the public welfare in matters of health and safety, or is of comparable public importance. Even if that test is met, the Tribunal is still required to balance the harm which could be caused (or avoided) by permitting disclosure against that which could arise (or not) if disclosure were refused. Ultimately, whether it is conscionable or not to disclose the requested information is an issue which must be evaluated by the Tribunal.

Applying these principles to the case, the FTT found that the Cabinet Office would not be able to rely on the public interest in order to justify disclosure. The FTT accepted that there was a public interest in knowing that former PMs receive public funds in respect of their ongoing public functions. It also acknowledged that there may be some public interest in knowing the nature of those functions. However, the requested information was not of sufficient importance to override the public interest in the respect for confidentiality. Moreover, disclosing salary and payment figures made to individuals would actually constitute a detriment to the public interest.

Third party information

The FTT noted that the Commissioner had not considered it necessary to decide the issue of whether the Cabi-

net Office would also be entitled to refuse disclosure on the basis of the (separate) exemption relating to third party personal information. Given that it had upheld the Commissioner's finding that the information was exempt under section 41 FOIA in any case, the FTT did not think it was necessary to finally decide whether the personal information exemption applied. However, it indicated its view that it was likely to apply.

Points to note

The decision is an example of the potential strength of the confidentiality exemption where individuals' private data is concerned. The FTT concluded without difficulty that the exemption was made out, given that the requested information contained data on individuals' salaries. It spent very little time discussing the two conditions, relying on evidence that was both hearsay and obtained many years after the information was provided in confidence.

The FTT's approach to the public interest defence also demonstrates that once confidentiality has been made out, requesters may have to demonstrate a convincing public interest in order to defeat the interest in maintaining that confidentiality.

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