

Freedom of Information and Data Protection:

Case Law Update 2014

1. This paper covers key information rights cases in 2014. The breadth of issues covered below, from legal professional privilege, human rights to vexatious requests, demonstrates the overlap between information law and many other areas of public law. This paper is intended to provide guidance, even for those who are not steeped, day-to-day, in the workings of the Freedom of Information Act 2000 (“FOIA”) and the Data Protection Act 1998 (the “DPA”), on the practical implications of these developments.

Human Rights

2. In a March 2014 ruling in *Kennedy v Charity Commissioner*,¹ the Supreme Court rejected a claim that Article 10 of the European Convention on Human Rights had any role to play in construing the exemption provided by s 23 FOIA (access to court records).
3. There were two key questions before the Supreme Court. First, the Court considered whether the absolute exemption in s 32(2) for court records continued after the end of an inquiry. The Court said it did. Next, the Court considered if Article 10 led to a different construction. Mr Kennedy argued that if he was not entitled to the information under s 32(2), then that was incompatible with his rights under Article 10, and s 32(2) should be read down under the HRA so as to provide him access. The majority of the Court disagreed. First, there was no basis for concluding that s 32(2) was inconsistent with Article 10; s 32(2) put Mr Kennedy in no less favourable a position than he was under general statute (here the Charity Commission’s power to disclose the information to the public) and common law (open justice). Second, Article 10 was not engaged because it did not impose a freestanding positive general duty of disclosure on public authorities. This is a point of wider significance.

¹ [2014] UKSC 20.

4. Setting aside the question of human rights, however, *Kennedy* is a useful reminder that FOIA is only one way to obtain information from public authorities. Statutory provisions should not be overlooked. Further, the principles of open justice forming part of the common law, as developed in Lord Toulson's judgment, will no doubt form the basis of some interesting case law in the near future.²

Personal Data

5. The concept of "personal data" is fundamental to understanding the requirements of the DPA.
6. The leading case on what constitutes personal data is *Durant v Financial Services Authority*.³ There, the Court of Appeal considered a subject access request for information about Mr Durant's dispute with his bank which was held by the Financial Services Authority ("FSA"). Mr Durant essentially asked for all documents which mentioned him by name. Lord Justice Auld held that not all the information received from a computer search against an individual's name or unique identifier would be personal data about that individual. Rather, that data had to affect the individual's privacy. To describe when personal data might do so, Auld LJ set out two "notions", data which has biological significance and which has the individual as its focus.
7. The meaning of personal data was recently reconsidered by the Court of Appeal in *Edem v IC & Financial Services Authority*.⁴ Despite also involving the FSA, the context differed to *Durant*; Mr Edem wished to know the name of the FSA staff members who had dealt with his complaint. The First-tier Tribunal ("FTT") held that the information did not constitute personal data because the way in which it was used did not satisfy the biological significance or focus notions. The Court of Appeal disagreed. It considered that the FSA staff members' names were quite

² For one example of this, see *R (Privacy International) v HMRC* [2014] EWHC 1475 (Admin) (Green J).

³ [2003] EWCA Civ 1746.

⁴ [2014] EWCA Civ 92.

clearly personal data as given the context (their course of employment) that data was sufficient to identify them (at ¶20).

8. *Edem* does not overrule *Durant*; rather, the Court in *Edem* quite clearly considered that the analysis, and outcome, were correct on the facts of *Durant*. However, the Court of Appeal confirmed that application of Auld LJ's biographical significance and focus notions should be confined to scenarios like *Durant* where the information requested is not obviously about an individual. Those tests were not needed here – rather it was straightforward that the names of the FSA staff members were personal data.
9. Going forward, context will be everything. The broader approach adopted by the Court of Appeal may mean that fewer applications under FOIA will be successful. In those that are, it will be important to demonstrate that the requested information is not personal data by reference to the context in which it appears. Conversely, courts are less likely to accept a broad application of the *Durant* approach to personal data as a means of narrowing a response to a subject access request.⁵
10. Employers are often faced with difficult questions regarding the release of personal data about their current and former employees. One point in the employer/employee relationship at which that issue can arise is around the giving of references to a prospective employer. Recently, the question of what an employer should say by way of reference when an employee resigns before a scheduled disciplinary hearing was considered. In *AB v A Chief Constable*⁶ a senior police officer (AB) resigned, and took a job with a regulator, 13 days before his scheduled hearing for gross misconduct. In addition to a standard reference, his Chief Constable provided a second reference, which set out the context to the resignation to the regulator. Cranston J held that, by reference to public law

⁵ One useful source of guidance in terms of determining what is personal data will be the Information Commissioner's Technical Guidance on the definition of personal data, which the Court of Appeal in *Edem* cited with approval <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

⁶ [2014] EWHC 1965 (QB) (Cranston J).

principles, the Chief Constable was obliged to provide the second reference, however that duty would be displaced if the provision of the second reference would breach the DPA. To decide whether or not that was the case, a decision-maker should take into account if sensitive personal data was involved, and if the disclosure of the information was both lawful and fair, taking into account the interests of the data subject as well as the public interest. Here, the fairness balance tipped in AB's favour, as the employer's policy was only to provide a standard reference, and therefore AB had resigned without knowing that the second reference would be sent.⁷

11. The Upper Tribunal has also considered when data relating to a child is exempt from disclosure as personal data. In *Surrey Heath Borough Council v IC and Morley*⁸, Mr Morley asked for information about members of the local authority's Youth Council who had provided input into a planning application. The FTT had held, in a majority decision, that some of those names be disclosed on the basis that they appeared on the Youth Council's (now closed) Facebook page. The Upper Tribunal, however, agreed with the dissenting member, holding that there was no sufficient interest in the disclosure of the names of the Youth Councillors. UT Judge Jacobs also rejected the argument that, by putting their names on the Youth Council's Facebook page, the data subjects had consented to the public disclosure of their identities in response to a FOIA request. UT Judge Jacobs went on to consider when the personal data of minors might be disclosable under FOIA, noting that questions of maturity and autonomy were more relevant than age alone.

Legal Professional Privilege

⁷ In another decision on personal data in the employment context, the FTT held that a university was entitled to withhold information as to the job titles of those employees of the College earning over £100,000 under s 40 (2) of FOIA (personal data) who were not on the Principal's Central Team. The FTT agreed with the university that the disclosure would not be fair, as it would not have been in the reasonable expectation of the individuals concerned that their salary information would be disclosed. *Kings's College London v ICO* (EA/2014/0054).

⁸ [2014] UKUT 0330 (AAC).

12. Legal professional privilege enjoys robust protection under FOIA. By way of background, s 42 of FOIA provides a qualified exemption for information in respect of which a claim to legal professional privilege (“LPP”) could be made. In *GW v IC, Local Government Ombudsman and Sandwell MBC*,⁹ the Upper Tribunal specifically considered the position under the Environment Information Regulations, which do not contain a specific LPP exemption. It had been assumed that LPP materials would be protected under EIR reg 12(5)(b) (information the disclosure of which would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of public authority to conduct an inquiry of a criminal or disciplinary nature). However, in *GW*, Upper Tribunal Judge Turnbull held that LPP would not automatically engage reg 12(5)(b): “In my judgment that requires attention to be focused on all the circumstances of the particular case, and there is no room for an absolute rule that disclosure of legally privileged information will necessarily adversely affect the course of justice.” (¶44). Whilst reg 12(5)(b) was engaged here, it was only engaged weekly, by the reason of the potential unfairness to the Council in having to disclose the precise terms of its legal advice, and not by reason of any weakening the doctrine of LPP generally. (¶56) Applying the public interest test to this exemption, the interest in disclosure outweighed the interest in maintaining the exemption. Here, however, the material was exempt from disclosure under reg 12(5)(d) of the EIR (confidentiality of proceedings), in that the advice had been provided to the LGO on a confidential basis for its investigation, and if disclosed, might impact, in the future, on the ability of the LGO to conduct future investigations on a fully informed basis.

Form over Function

13. Two cases considered the form of the requested information.
14. In *IPSA v Information Commissioner*, the requester sought disclosure of copies of the original documents produced by MPs in support of their expenses claim. The Upper Tribunal ordered production of those copies, on the basis that the receipts would have “visual context.”

⁹ [2014] UKUT 0130 (AAC).

15. In *Innes v Information Commissioner*,¹⁰ Mr Innes had requested school admissions information and had, by way of a further email, asked for that information to be supplied to him in an Excel format pursuant to s 11 of FOIA, pursuant to which an applicant can express a preference for communication of the information in “permanent form or in another form.” The local authority, the ICO and the FTT had all denied that request. The Court of Appeal, however, granted it. In his judgment, Lord Justice Underhill noted that once it was accepted that an applicant could require provision of information in electronic form (as under s 1A), it was only a small step to hold that he could choose the format in which that electronic information was provided (at ¶38). This approached fit with the philosophy of FOIA, which was to allow citizens to access information held by government in order to make use of it.

Motive Blindness

16. In *Hepple v IC and Durham County Council*,¹¹ the FTT acknowledged the oft-repeated mantra that FOIA is “motive blind”, i.e. the reason the information is sought is not relevant, and then went on to disregard that mantra. In an unusual case, the FTT considered the motive of the requester in deciding to uphold the reliance by the local authority on the exemption provided by s 38 of FOIA (where disclosure would endanger the physical or mental health, or safety, of any individual). In *Hepple*, a pupil referral unit in County Durham had been the subject of complaints; nearly 20% of its staff had been suspended. The requester sought a copy of the investigators’ report. At that time, disciplinary proceedings were pending against the suspended staff. Here, s 38 was engaged because, at the time of the request, there was a real risk of disclosure exacerbating a pre-existing condition to the stage where real psychological harm was likely to occur. The FTT accepted the Council’s invitation to take into account, as evidence in support of its claim, three text messages sent by the Appellant to one of the individuals involved in the handling of the disciplinary report and the Council’s appeal. The FTT

¹⁰ [2014] EWCA Civ 1086.

¹¹ EA/2013/0168.

agreed that it was appropriate to do so, noting that the texts disclosed “an attitude of mind that justifies our concluding that disclosure would have created a risk to the safety of those mentioned in the text messages.” (¶37)

Public Affairs

17. So far as material s 36 of FOIA provides:

- (1) This section applies to
 - (a) Information which is held by a government department ... and is not exempt information by virtue of s.35 ...
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this act
 - (b) Would or would be likely to inhibit
 - (i) The free and frank provision of advice, or
 - (ii) The free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice or would be likely otherwise to prejudice, the effective conduct of public affairs.

18. This section gives rise to the “safe space” argument, namely of a need for a delay in publicity whilst free discussion of the options can take place; however, that argument has by no means provided much shelter for authorities seeking protection from the disclosure obligations of FOIA. In *DWP v IC*, the FTT again expressed scepticism that the threat of later disclosure truly inhibited the discussions held by governmental officials and, ultimately, policy development. That case concerned requests for information as to risks arising from the implementation of the Universal Credit Programme¹² by the Department of Work and Pensions (the “DWP”). The DWP asserted that requested information fell within the “safe space” which should be allowed to officials to development policy away from public criticism. The FTT held then whilst the “safe space” arguments may extend to implementation of policy (¶59) here, given the timing of the request, that did not apply. Turning to DWP’s primary argument, the discouragement of candour, imagination and innovation, the FTT stated that they simply were not persuaded that disclosure would have the chilling effect claimed based on the evidence before it. The FTT went on to state, as have a number of

¹² The 2012 Welfare Reform Act introduced the framework of Universal Credit to replace working age benefits and tax credits.

tribunals have considering this point, that the public is entitled to expect a “large measure of courage, frankness and independence in [government official’s] assessment of risk and provision of advice” (¶63) – in sum that senior officials should carry out their duties as they best see fit without being influenced by the potential slings and arrows of adverse publicity.

19. This view is idealistic, but is it also unrealistic? The FTT emphasised the lack of evidence presented by the DWP, and even went so far as to suggest that the evidence could be compiled by a “simple comparison of documents before and after disclosure demonstrating the change”. (¶62) It is not clear to me that evidencing this change, which would inevitably be subtle, would be at all straightforward. Given this, the prospect of successful reliance on the “safe space” or “chilling effect” arguments in the future will continue to be difficult.

20. Similar arguments arise in the context of the exemption provided by s 35(1)(a) (formulation or development of government policy). In *Department of Health v IC*¹³, the FTT considered a journalist’s request for the Ministerial diary of the Rt Hon Andrew Lansley MP over a period when the Minister’s primary focus was the Departments’ NHS reform programme. There, the FTT scrutinised the DOH’s evidence, given by senior governmental officials, and ultimately found that the factors in favour of disclosure outweighed those in favour of maintaining the exemption. This case again emphasises that the FTT will look for objective evidence of likely prejudice rather than subjective judgments, even where those judgments are offered by senior, experienced officials.

“Held” Information

21. Only information which is “held” by a public authority is subject to FOIA.¹⁴ In *Geraldine Hackett v IC and United Learning Trust*¹⁵ the FTT considered whether or not an academy “held” information. The proprietor of an Academy is a “public authority” for FOIA purposes under Schedule 1, para 2A of that act, but only in

¹³ EA/2013/0087

¹⁴ FOIA, s3(2).

¹⁵ EA/2012/0265.

respect of “information held for the purposes of the proprietor’s functions under Academy arrangements.” Ms Hackett asked for information about the employment package of the chief executive of United Learning Trust, a trust which ran 20 academies (the “Trust”). However, the Trust said it was held by an umbrella organisation which, additionally ran private schools (under a different trust). The FTT took a pragmatic view, and after noting that those with responsibility for the requested information exercised both private school and academy functions, held that the Trust did hold the requested information for FOIA purposes. This case emphasises the importance of evidencing, in cases concerning whether or not documents are “held”, the day-to-day arrangements and responsibilities with respect to the information at issue.

Vexatious Litigants

22. Two recent Upper Tribunal cases concern when requests can be labelled vexatious under s 14 of FOIA.

23. Section 14 of FOIA provides:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.”

24. In determining if a request is vexatious, UT Judge Wikely stated that the starting point is the question of “whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause”(¶26). He noted four broad themes to be considered: (1) the burden (including the number, breadth, pattern and duration of requests); (2) the motive; (3) the value or serious purpose of the request; (4) does the request cause harassment of, or distress to, staff. (¶¶28-39). In this case, the FTT had applied an overly narrow approach to the interpretation of vexatious by focusing only on the instant request, rather than the entire course

of dealings between the requester and the public authority. Having regard to that course of dealings, the request was vexatious.

25. Permission to appeal has been given by the Court of Appeal; the case will be heard this month.¹⁶
26. The Information Commissioner's published guidance on dealing with vexatious requests is available here: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>.

Procedural Points

27. If the FTT is of the view that the ICO's decision notice is wrong, can the FTT remit the matter to the ICO for reconsideration? In *IC v Bell*,¹⁷ the Upper Tribunal (Judge Jacobs) found that it can not. Rather, it must, generally speaking, dispose of the appeal itself (¶8).
28. In *IC & MOD v Bell*¹⁸ (same day, same Bell, different authority), Upper Tribunal Judge Jacobs held that if there is a decisive and new decision which appears between the date of a hearing and the date of the Tribunal's final deliberations, justice requires that the parties be given an opportunity to make submissions on the application of that judgement (¶3).
29. Finally, in *Department for Education v Information Commissioner & McInerey*¹⁹ Chamber President Judge Warren held that the public authority could belatedly (i.e. after the Decision Notice and in the course of proceedings before the FTT) on ss 12 (cost of compliance) and 14 (vexatious litigants) of FOIA as a basis for non-disclosure.

Damages

30. Section 13 of the DPA provides:

¹⁶ The case is linked to another decision on s 14 (*Craven*).

¹⁷ [2014] UKUT 0106 (AAC).

¹⁸ GIA/1384/2013.

¹⁹ EA/2013/0270

- (1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.
 - (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if (a) the individual also suffers damage by reason of the contravention or (b) the contravention relates to the processing of personal data for the special purposes.”
31. Thus, in order to be compensated for distress under s 13 of the DPA, a claimant needs to prove he has suffered financial loss.²⁰ In *Halliday v Creation Consumer Finance Limited*, it was conceded that nominal damage sufficed as “damage” for s 13(1) purposes. However, there is little case law about what level of damages might be awarded for “distress” under s 13(2) of the DPA. Mr Halliday received £750. In *AB v Mo*²¹ [2014] EWHC 1847 (QB), Mr Justice Jeremy Baker, in the absence of any medical evidence, awarded £2,250 for distress caused as a result of delays in providing the requested information (sensitive information in connection with the deaf of the requester’s wife). Thus, in a case where the distress suffered is of an “average” variety, awards are likely to be low. However, the same can not be said of cases where there is evidence that the distress causes medical harm. In *CR19 v Chief Constable of the Police Service of Northern Ireland*²², an award of £20,000 for negligence in failing to adequately protect CR19’s records (which were stolen in a burglary) was upheld. The claimant had adduced expert evidence of the way in which the knowledge that his personal data and records had fallen into the hands of terrorists had caused him to sustain an exacerbation of both his post-traumatic stress disorder condition and alcohol dependence. While the court held that the s 13 DPA claim added nothing to the award here, the case does usefully demonstrate what evidence of distress arising from data disclosure, as well as an award based on that evidence, might look like.

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²⁰ In *Johnson v Medical Defence Union* [2007] EWCA Civ 262, the Court of Appeal held that damages means damages means pecuniary damages only.

²¹ [2014] EWHC 1847 (QB) (Jeremy Baker, J).

²² [2014] NICA 54.

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