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Information law update, April / May 2013

1. Whilst April was a relatively quiet month on the Tribunal front, with no relevant decisions from the Upper-tier Tribunal (UT), and a limited number from the First-tier Tribunal (FTT), the pace picked up in May. Given this, we have considered both months together in this edition of the Information Law Update. As ever, we seek to highlight those which have some general interest.

CA citation.

2. We reported in March on the Court of Appeal case, *Halliday v Creation Consumer Finance Ltd*, which was unreported at the time. The official citation is now [2013] EWCA Civ 333. The reported judgment makes clear that the "nominal damages" point was in fact a concession by the defendant, rather than a determination by the CA. The analysis of the nature of the distress giving rise to those damages remains, however, relevant.

Procedure – Access to disputed information by a requestor's legal representative and closed proceedings.

3. Two cases considered when a legal representative is entitled to access closed material and proceedings.

4. The FTT in *Home Office v ICO and others; John O v ICO* (EA/2011/0265/022/0280) was asked to consider three conjoined and complex appeals, concerning immigration control and the application of s27(1) FOIA (damage to international relations). The FTT upheld the Home Office's case, that the release of the names of States on various 'authorisation' lists, governing the way in which application to enter the UK by their nationals would be processed, would be damaging to the UK's international relations. Whilst the factual background is complex, the FTT's decision represents an orthodox application of existing caselaw on s27, FOIA. The decision is of further interest, however, as a result of the Tribunal's "Annex A", which contains a robust rejection of Mr O's application for his leading Counsel to be given access to the FTT's closed sessions. Counsel offered an undertaking that he would not disclose the material accessed, to his client or other third parties.

5. The Tribunal was plainly unimpressed with this application, and saw no reason to agree to it. Its reasons re-state the special functions and expertise of both the Tribunal and the Commissioner, in analysing the public interests engaged when disclosing or withholding confidential information. Furthermore, it added, the request disclosed a lack of "consistent principle": why should a requester who was legally represented have access to such closed material, whilst one who acted in person would not?

6. Meanwhile, the UT was considering this same point in In *Browning v ICO* [2013] UKUT 0236 (AAC), (Charles, J, Mitting, J and UT Judge Andrew Bartlett QC). Mr Browning appealed from the FTT's decision upholding a refusal by the Department for Business, Innovation and Skills to disclose information regarding companies applying for export control licenses to Iran. In reaching that decision, the FTT considered closed material (including not only the disputed information but DBIS' evidence supporting its refusal) and part of the hearing was closed. Mr Browning appealed to the Upper Tribunal on seven grounds. However it is only the Upper Tribunal's consideration of his first ground of appeal, that the FTT erred in law in refusing his application that his legal representatives be allowed to represent him at the closed hearing on the basis of undertakings relating to disclosure, that is of real significance.

7. Mr Browning argued that the principles of open and natural justice, and of fairness, should, in the context of adversarial civil litigation, be departed from to the least extent possible. Allowing legal representatives access to closed material, including the material in support of DBIS' reliance on the exemption, as well as to attend the closed hearing, would be a way to minimise this departure. The UT rejected this argument. It noted that the function of the FTT is investigatory and that non-disclosure is the baseline in the FOIA process, in that information is withheld from the requestor until it has been determined that it may be revealed. From this, it concluded that the exercise by the FTT of its discretion to consider closed materials and hold a closed hearing is not governed directly, or by analogy, by the approach taken by the civil courts. Further, disclosure to representatives alone created a number of problems, reflected in the case law. The UT upheld the FTT's decision to refuse the application. The UT stated that the FTT should direct that a representative of an excluded party see closed material or attend a closed hearing only where it cannot carry out its investigatory function of considering and testing the closed material, and give appropriate reasons for its decision. Following these decisions, it is difficult to imagine a situation where such an application would be met with success.

8. The rulings follow established precedent, but it will relieve public authorities concerned that release to a party's representative could, even inadvertently, lead to the 'leaking' of sensitive material that had properly been withheld from disclosure.

9. While the UT in *Browning* did not issue further, formal guidance on closed proceedings, it made a number of important points which should be considered by parties involved in FOIA litigation where closed material and hearings are at issue. The Upper Tribunal noted that the First-tier Tribunal has issued a Practice Note entitled "Closed Material in Information Rights Cases" and expressed the view that closed hearings should only proceed on its terms. The UT stated that the need to avoid disclosure of the requested information is a good reason for there being closed material and a closed hearing, but not the only valid reason to do so. Finally, the UT stated that the FTT should give detailed directions and reasons when ordering the use of closed material and hearings.

Information "held" and independent reviews or inquiries.

10. *David Holland v ICO and the University of East Anglia* (EA/2012/0098) contains an up-to-date summary of the caselaw on when information is "held", both under FOIA and the EIRs. The dispute arose out of the "Climategate" scandal at the UEA, in which members of the UEA's Climate Research Group were accused of manipulating data on climate change to support their views on global warning. The UEA had set up an inquiry to investigate the scandal, and the Appellant sought, from UEA, the working papers of that inquiry. The University maintained that it had no control over the workings of thereview, which was independent of it, and argued that the papers were therefore not "held" by it within the meaning of the EIRs.

11. The debate over the control – or lack of it – which the University had over the inquiry's papers would plainly have been assisted by a contract between those two parties covering the issue of data retention and storage; or, failing that, at least some prior discussion of the issue. But this had not taken place. The Tribunal expressed its surprise that experienced public servants had not, it seemed, thought to discuss what the arrangements for storage and archiving of the inquiry's documents would be, as part of the process of setting up the review.

12. Whilst in the event the FTT nevertheless accepted that the review was genuinely independent of the UEA and that the University did not "hold" its papers, the litigation is a useful reminder to discuss and agree arrangements for data retention and storage, when setting up any form of independent review of aspects of public administration. The National Archives publish detailed guidance on the information management of public inquiries, and the Archives preserve inquiry records; but there are many small reviews and inquiries which are not established under the Inquiries Act 2005 and which are not governed by these arrangements.

Personal Data.

13. The vexed subject of salary details continues to generate cases. In *Dicker v ICO* (EA/2012/0250[1]), the Information Commissioner found his approach overruled by the FTT. The ICO generally considers it sufficient to publish information about salaries by disclosing the 'bands' into which even senior civil servants fall, and, when dealing with a request for details of the salary, pensions and benefits paid to the CEO of NHS Surrey (a Primary Care Trust), issued a Decision Notice reflecting this approach. It was overturned by the FTT. The FTT was influenced by the fact that the arrangements for payment were not "as transparent as might be wished"; it was not clear whether national pay guidance had been followed. Of note is their finding that the release of precise pay details (as opposed to 'banded' figures) was highly unlikely to cause any distress or prejudice to a senior public servant.

Section 36 and Parish Politics.

14. Robust determinations upon the importance of public scrutiny were delivered by the FTT in the linked cases of *James Scott v ICO*EA/2012/0219 and *Frohnsdorff v ICO* (EA/2012/0213). Both cases concerned a parish council in turmoil, following an election in 2011, in which six individuals who opposed a planned development on green land adjoining the village of Great Chart, Kent, were elected as parish councillors. They did not take up their seats after being informed by the Parish Clerk that their manifesto commitments would restrict their ability to vote on this planned development, and they might be fined if they voted when they ought not to. (Students of local democracy may be permitted a wry smile, at this point). An information request was subsequently made, for any correspondence between the Borough Council, and the Parish Council's Clerk and Chairman, in relation to these events. It was rejected, on the basis of s36, FOIA. The Information Commissioner accepted that disclosure would 'be likely to inhibit the free and frank provision of advice' (s36(2)(b)) and that the public interest favoured withholding the information.

15. The FTT reversed that decision. They rejected, first, an argument that officials of the Parish Council and the Borough Council could reasonably have expected their correspondence to be private and confidential, given that they were acting in their official roles, and that they should have known of the legal obligations of transparency and that s36 was not an absolute exemption. The FTT gave short shrift to arguments that disclosure of such informal communications would invite speculation and heighten tensions. Even if the contents of the emails were ill-expressed or ambiguous, the public should be able to judge the issues for themselves. The purpose of s36 was not to prevent embarrassment. Overall, the public interest lay in enabling a better understanding of the actions of officials during a time of controversy.

Vexatious Requests.

16. The Information Commissioner has published detailed guidance on vexatious requests. Pursuant to s14(1) of FOIA, public authorities do not have to comply with vexatious requests. The guidance confirms that s 14(1) is not for use only in extreme circumstances. Rather, a request can be categorised as vexatious in generally two circumstances: (1) those that are so patently unreasonable or objectionable that they are obviously vexatious; and (2) those that are likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This should be determined by weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. Wider background factors, including the history and context of the request, can be taken into account. Whilst there is no traditional public interest test under s 14(1), the wider public interest should be taken into account when considering the purpose and value of a request. Finally, s14(1) can only be applied to the request itself and not the individual who submitted it.

[1] http://www.informationtribunal.gov.uk/DBFiles/Decision/i994/20130429%20Decision%20EA20120250.pdf

17. Other "hot topics" considered are requests that are particularly costly in terms of the amount of time required to review and prepare the information for disclosure, round robin requests and random request ("fishing expeditions"). The guidance is peppered with helpful examples and arather longer list of indicative characteristics of potentially vexatious requests. Any authority considering whether or not a request may fall within s14(1) should consider this guidance early on in their decision-making process.

Unpublished University

18. Draft scientific research has been the subject of two recent cases, as well as proposed legislation.

19. In Stephen McIntyre v ICO, EA/2012/0156,UEA and Climategate featured again. A request was made to the UEA under the EIRs for a draft academic paper written by climate change experts, in the wake of the Climategate scandal. One of the co-authors objected to the release of the draft paper on the basis that "it is not helpful, and may be misleading or confusing to release versions of non-finalised documents". The UEA therefore refused to disclose the document, a decision which was upheld by the IC on the basis that the paper fell within the scope of exceptions to the duty to disclose environmental information, namely that disclosure would adversely affect the interests of the authors (regulation 12(5)(f)) and the request related to material still in the course of completion (regulation 12(4)(d)).

20. The FTT found that regulation 12(5)(f) was not engaged, rejecting the University's argument that disclosure of draft papers could be damaging to the reputation of academics or publication of the draft paper would undermine the final published position. However, the FTT found that the exception under regulation 12(4)(d) was engaged, it being clear that requested document was in draft form and not the finished article. It went on to find that the public interest in maintaining the exception outweighed the public interest in disclosing the information given the value in allowing a safe space for work to be developed and completed.

21. The FTT's reasoning, in particular its dismissal of a range of arguments in favour of nondisclosure of draft academic papers, suggests that there may be cases where a public interest in disclosure of a draft academic paper could be identified. However, in this case the FTT found that the Appellant had failed to demonstrate any value in publishing the requested information, given that all the material contained in the requested document was in the public domain by way of the final published article. There was therefore no public interest in favour of disclosure to weigh against the public interest in favour of nondisclosure.

22. In Queen Mary University of London v ICO EA/2012/0229, Mr Courtney sought disclosure of unpublished research data. The University refused the request, relying upon s22 FOIA (information intended for future publication). The ICO decided that whilst s22 FOIA was engaged, the public interest lay in disclosing the withheld information. The University appealed. The questions which fell to be decided were if it was reasonable for the information to be withheld until the date of intended publication, and whether the public interest in maintaining the exemption outweighed the public interest in disclosure. As to the former, the Tribunal found that there was a clear plan for publication of the data in the future, and that therefore it was reasonable to withhold the information until the date of publication. Turning to the public interest, the FTT noted that much value in research data comes from the contextualisation of that data as well as the rigour of the peer review progress. Given this, the Tribunal found that the disclosure of this data, in advance of that process, would not be in the public interest, and that s22 FOIA was properly applied.

23. The Commissioner initially resisted the appeal. However, his position changed after receiving full argument from the University regarding the basis for their reliance on s22; at that point he accepted that the public interest lay in maintaining the exemption. At the end of the decision, the FTT reminded authorities that the burden of showing that an exemption is properly applied rests on the public authority. The Tribunal went on to caution authorities that not providing sufficient information to the ICO at the early stages of a contested request, as a means of allocating scarce resources, is often a false economy.

24. An Intellectual Property Bill,[2] introducing a new FOIA exemption, has been introduced in the House of Lords. Clause 19 of the Bill would exempt continuing programmes of research, like that at issue in Queen Mary University of London, intended for future publication (specifically information obtained in the course of a programme of research if the programme is continuing with a view to publication of that research and early disclosure would be likely to prejudice the programme or related interests).

CommercialInterests.

25. The Tribunal considered the meaning of commercial interests (s43(2)), as well as public affairs (s36(2(c)) in *DWP v ICO*, EA/2012/0207, 0232 & 0233. The matter involved three consolidated appeals arising out of various employment programmes run by the DWP, whereby jobseekers undertake placements, without additional remuneration, as a means of gaining work experience (often referred to as "workfare"). These workfare programmes have been controversial and the subject of critical press commentary. Here, the requesters sought the names of the companies participating in the programmes. DWP resisted, arguing either that s43(2) (commercial interests) or s 36(2)(c) (effective conduct of public affairs) were engaged. Essentially, DWP argued that disclosure of placement hosts would be likely to result in those hosts being targeted by campaign groups and many of them withdrawing from the workfare programmes, as a result of real or perceived public pressure. The IC required the DWP to provide the requested information and DWP appealed.

26. The FTT found that s43(2) was not engaged on the facts; DWP had not satisfied the burden of demonstrating that disclosure would lead to the requisite "degree of prejudice". To assess that prejudice, the FTT considered what had happened when placement hosts' had been disclosed in the past, and whether that disclosure had led to any withdrawals from the workfare schemes. The Tribunal found that there was little persuasive evidence that the mere naming of placement hosts in the past. From this, the Tribunal held that there was insufficient evidence to establish that the mere naming of placement hosts was likely to cause them sufficient risk of commercial prejudice to engage s43(2). Section 43(2) was not engaged in relation to DWP because any risk to the DWP (having to pay more in welfare payments) was financial, not commercial and thusirrelevant to the exemption.

27. The FTT found that while s 36(2) was engaged, the public interest balance militated strongly in favour of disclosure. As to section 36(2), the Tribunal considered the time of the relevant requests and held that the relevant public interest was the one reflected in or exhibited by the specific exemption in question, which did not include private interests (here the contractors' and placement hosts' interests were private). In ordering disclosure, the Tribunal considered, again, the little concrete evidence that disclosure would result in a loss of providers against the fact that the workfare programmes involved a considerable amount of public money and consequent need for the public to be able to make informed decisions about those schemes.

28. This case reflects the FTT's insistence on firm evidence to support reliance on s43(2). Here, a DWP survey of the attitude towards disclosure of the contractors, sub-contractors and organisations involved in the workfare schemes was considered to be of little weight; rather the FTT focused on what had actually been happened, in the past, when placement hosts had been named. Those hoping to rely on 43(2) in the future must bear this in mind and ensure that there is sufficient concrete evidence to support their position.

EU Data Protection Reforms.

29. The ICO recent report on the proposed European data protection reforms[3] has found that there is a clear lack of understanding across business of those proposals and their potential implications. Based on a survey

[2]The bill can be found here: http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0005/lbill_2013-20140005_en_1.htm.

[3]http://www.ico.org.uk/news/latest_news/2013/report-highlights-uncertainty-on-cost-of-eu-data-protection-reform-14052013

of 506 businesses, the report concluded that a large majority of respondents were unable to quantify future additional compliance costs as a result of the proposals, although most agree that there will be additional costs. Respondents were uncertain about the scope of the proposals, as well as implications on current data protection practice and compliance. The key sectors identified as needing to be targeted with information about the plans were the service sector (specifically health and social work), financial and insurance services and public administration.

Investigations.

30. The Tribunal's decision in *Dudgeon v IC* (EA/2012/0113) illustrates the breadth of the exception under s30 FOIA, in relation to information held by a public body for the purpose of investigations. The appeal arose out of a request made to the Police Service of Northern Ireland ('PSNI') for information concerning the terms of reference of a panel appointed to oversee Operation Stafford (formerly known as Operation Ballast), an investigation into murders and other crimes committed by the Ulster Volunteer Force in North Belfast. The appellant had expressed particular concerns about the appointment to the panel. The PSNI refused to disclose information in reliance on s 30 FOIA 2000 and refused to confirm or deny whether it held any other relevant information in reliance on ss 23(5) and 24(2) FOIA, decisions upheld by the IC.

31. The appellant argued that he had not requested information gathered as part of the investigation, but rather information relating to the remit and powers of the oversight panel. The FTT recognised the genuine nature of the request was to establish the transparency and accountability in the appointments made to the panel in question. It concluded, however, that the oversight panel was an integral part of the investigation and that s30 was therefore engaged. The public interest weighed overwhelmingly in favour of nondisclosure: it could undermine the current investigation, would impede the building of confidence and trust with the families of victims and could create a chilling factor inhibiting the use of similar panels in the future.

32. This decision is a clear illustration of the potential breadth of the exception under section 30 in relation to investigations. The Tribunal held that it encompassed not only operational matters but also the remit of oversight panel. Nondisclosure of information about the panel was justified not only on the basis that it could undermine the current investigation, but also on the ground that it could inhibit the use of similar panels in the future if members of the panels would be discouraged from participation. The Tribunal's approach might appear surprisingly broadbrush, particularly given the narrow scope of the appellant's request. However, the particular context of the case is important. The panel was principally appointed in order to address concerns of the victims' families. It played no part in carrying out investigations and their appointment was made for the purpose of ensuring the families of victims had confidence in the investigation.

Health and Social Care Act.

33. Data breach complaints against organisations that have been dismantled under the UK Health and Social Care Act will be transferred to new NHS organisations. The Health and Social Care Act came into force on 1st April 2013. The ICO has said that investigation and enforcement actions will be continued against, and that fines may be imposed on, new NHS bodies if they had taken over data responsibilities from disbanded organisations.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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