

# 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 published from June to September 2018**

Cabinet Office v Information Commissioner and Ashton  
[www.pdpjournals.com/docs/887943](http://www.pdpjournals.com/docs/887943)

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## Cabinet Office v Information Commissioner and Ashton [2018] UKUT 208 (AAC), 21st June 2018

### Summary

This case concerned a request for information of clear public interest, but which would also impose a significant burden on the authority in terms of redactions to protect national security. The Upper Tribunal held that it was always necessary to balance these against each other in a broad, holistic assessment.

### Relevant facts

Professor Ashton, chair in International History at the London School of Economics, requested a number of the Prime Minister's Office files relating to relations between Libya and the UK. The period covered events such as Lockerbie and the Arab Spring. The files comprised 1,053 pages, and the Cabinet Office was concerned about the resource burden involved in disclosing them.

Section 12 of the Freedom of Information Act 2000 ('FOIA') allows authorities to refuse requests on the grounds of cost, but subject to a specified limit which covers only activities such as location and retrieval, and not redactions required to be made to protect national security. The Cabinet Office estimated that the job of redaction would take over 68 hours in this case.

The Cabinet Office therefore refused the request on the basis that it was 'vexatious', falling within section 14 FOIA. The refusal was upheld by the Information Commissioner, who acknowledged that the motive for the request was "very much in the public interest", but held that in this case the burden of compliance outweighed the public interest in disclosure.

The First-Tier Tribunal allowed Professor Ashton's appeal, directing the Cabinet Office to disclose or issue a

fresh response not relying on section 14.

The Cabinet Office appealed, arguing that the FTT had erred in law by reasoning that once a substantial public interest had been established in the information sought, section 14 could not be invoked, regardless of the resource implications of the request. The Upper Tribunal referred to the key cases on vexatiousness under FOIA, and in particular Dransfield in the Upper Tribunal ([2012] UKUT 440 AAC) and later in the Court of Appeal ([2015] EWCA Civ 454).

Those cases established four broad issues or themes relevant to vexatiousness: the burden, the motive of the requester, the value or serious purpose of the request and any harassment or distress (of and to staff). These themes needed to be considered as part of a 'broad, holistic' approach.

Accordingly, it would be incorrect to apply any bright line rules, such as that the burden of a request could never on its own outweigh a substantial public interest. However, the Upper Tribunal decided that the FTT had not applied any such rules, and had instead taken just the kind of holistic approach required, balancing the public interest against the burden involved, and had therefore made no error.

### Points to note

The case makes clear that it is not possible to establish bright line rules for analysing vexatiousness. In terms of the cost of complying with requests, this means there is now a real contrast between (i) location and retrieval costs, where the limit is clearly set out under section 12, and (ii) redaction costs, where no limit can be identified. This may cause some uncertainty in designing and considering requests. On the other hand, it means that ambitious requests, such as Professor Ashton's, need not necessarily fail.

## Information Commissioner v Miller [2018] UKUT 229 (AAC), 12th July 2018

### Summary

The case concerned statistical information about homelessness, and the question whether in some cases (where there were few people in a relevant group) that information could lead to identification of individuals. The Upper Tribunal reiterated the relevant legal principles, and also the need for the Upper Tribunal to exercise restraint in reviewing decisions of the FTT.

### Relevant facts

The Department for Communities and Local Government regularly collects data on homelessness from local authorities in England. It published the data for 2012/13, but not previous years, on its website. Ms Miller requested data for the three previous years.

The DCLG refused the request, and the refusal was upheld by the Information Commissioner. However, on appeal the First-Tier Tribunal ordered disclosure. The Information Commissioner appealed.

By the time the case reached the Upper Tribunal, the question in issue was whether certain information, i.e. data regarding five or fewer individuals or households, constituted 'personal data' under section 40(2). Personal data are data which relate to a living individual who can be identified either from those data, or from those data along with other information which is in the possession of, or likely to come into the possession of, a person (Data Protection Act 1998, section 1(1) and R (Department of Health) v Information Commission-

er [2011] EWHC 1430 (Admin)). The assessment should take account of all means 'likely reasonably to be used' by any person to identify the individual concerned (Directive 95/46 EC Recital 26).

In *Department of Health, Cranston J* stated that this assessment included: "assessing a range of every day factors, such as the likelihood that particular groups, such as campaigners, and the press, will seek out information of identity and the types of other information, already in the public domain, which could inform the search."

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**"In future, potential appellants will need to assess carefully whether the decision they want to appeal contains sufficient reasoning to support its conclusion, even if the legal framework is not fully or accurately set out."**  
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The Upper Tribunal approved the 'motivated intruder' test put forward by the Commissioner. "The approach assumes that the 'motivated intruder' is reasonably competent, has access to resources such as the internet, libraries and all public documents, and would employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward. The 'motivated intruder' is not assumed to have any specialist knowledge such as computer hacking skills, or to have access to specialist equipment or to resort to criminality such as burglary, to gain access to data that is kept securely." (Anonymisation Code of Practice, pp 22-23).

The relevant law had not always been addressed in terms by the parties or the First-Tier Tribunal, and the Commissioner argued that the First-Tier Tribunal had misdirected itself. The Upper Tribunal (UTJ K Markus QC), however, went to some lengths to identify the relevant reasoning of the FTT and draw it together within the correct legal framework. In doing so, it referred to the degree of restraint to be exercised by it: "The Upper Tribunal should not subject the reasons of

the FTT to narrow textual analysis. The question it should ask is 'whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision.'" It concluded that the FTT had done so, and dismissed the appeal.

### Points to note

The Upper Tribunal took great care to avoid allowing the appeal on what might have appeared to be a 'technicality'. In future, potential appellants will need to assess carefully whether the decision they want to appeal contains sufficient reasoning to support its conclusion, even if the legal framework is not fully or accurately set out.

Particularly when read alongside *Morton*, below, the case provides a useful summary of the principles applicable when deciding whether requested information includes personal data enabling a living individual to be identified.

At no stage in the proceedings was there any real consideration of modern data matching and analytical techniques and how these might be used to unpick apparently anonymous data. However, the legal tests are flexible enough to take these techniques into account as they grow more widespread, and this is something authorities and requesters need to bear in mind in future cases of this type.

## Department of Health and Information Commissioner, EA/2016/0282, 19th July 2018

**Summary:** The First-Tier Tribunal ordered the Department of Health to disclose sections of the Secretary of State's Ministerial diary. It reiterated key principles established by the Court of Appeal in *Lewis* in 2017 (*Department of Health v Information Commissioner and Lewis* [2017] AACR 30), including the need for a detailed examination of the factors weighing on both sides of the balancing exercise, carried out by reference to the specific material in question. It

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went on to provide a detailed discussion of how it approached the diary entries in the present case, offering a potential blueprint for approaching future Ministerial diary requests.

## Relevant facts

The case concerned the Secretary of State for Health, then Jeremy Hunt's, Ministerial diary for an eight month period in 2015/16. The request for disclosure was rejected by the Department of Health both initially and on internal review. The requester complained to the Information Commissioner, which upheld the complaint and ordered disclosure of parts of the diary. The Department of Health appealed.

During the proceedings the Permanent Secretary to the Department provided a statement to the Tribunal setting out concerns about the disclosure of diary entries, including:

- that the entries would not necessarily constitute an accurate historical record;
- that the present government already published more information than any previous government, and that publishing Ministerial diaries would be "more labour intensive" than existing transparency measures;
- that protecting a safe space around the allocation of a Minister's time was vital, to prevent misunderstandings of the relative importance of stakeholders when set against their time with the Minister, and to allow the Minis-

ter to concentrate on the issues without distraction as to how the press or public might perceive the precise mechanics of decision making;

- that departments anticipating disclosure would divert resources to planning for and managing the media response to the diary; and

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**Although the Tribunal points out that each case will be considered on its merits, this decision provides a framework for analysing Ministerial diary requests, and a clear indication that the majority of Ministerial entries are likely to be disclosable. This will be of significant practical assistance in formulating and analysing future requests.**  
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- that publication would expose the Minister's movements and increase security risk.

The Tribunal reiterated that whenever a qualified exemption is applied, it is necessary to balance specific public interest considerations relating to the particular information concerned. This accords with the approach in *Lewis*, in which the Upper Tribunal rejected a class based approach to the public interest balance. In line with this approach, the Tribunal went on to give individual consideration to 2,794 individual diary entries.

This consideration is not recorded in detail, but the Tribunal set out some of the underlying principles and common factors in its approach.

First, it applied *Lewis* in concluding that all entries, including constituency, political and personal entries, were 'held' by the Department.

Second, it concluded that travel arrangements fell within section 40(2) (personal data). It con-

sidered that there was little or no public interest in disclosure, which was significantly outweighed by the public interest in not compromising the Secretary of State's security by revealing patterns of regular travel.

Third, it considered personal entries also fell within section 40(2). Again the Tribunal considered there to be little or no public interest in disclosure, but significant public interest in the Secretary of State having a private life free from intrusion.

Fourth, it concluded that constituency and political engagements fell within section 35(1)(d) (information relating to the operation of a Ministerial private office). Given that the engagements were mostly public, the Tribunal concluded that the public interest in maintaining the exemption was low, and outweighed by the public interest in knowing the extent to which the Secretary of State took a particular interest in constituency matters that touched upon their Ministerial responsibilities.

The fifth category, ministerial entries, proved the most complex. These were considered capable of engaging section 35(1)(a) (information relating to the formulation of government policy), (b) (Ministerial communications) and or (d) (information relating to the operation of a Ministerial private office).

The Tribunal identified a number of public interests served by disclosure, with relative weightings. Rated as high were: (a) transparency as to who had access to the Secretary of State; and (b) public understanding as to how the Secretary of State spent his time.

It was sceptical about the public interests identified in favour of maintaining the exemption(s). In particular the Tribunal considered the 'distraction' argument (set out above) to have been overstated — Ministers were robust individuals and departments used to managing media relations.

It considered that the balance of the public interest generally favoured disclosure. However, the balance might tip towards maintaining the exemption where:

- revealing that a meeting had taken place could intrude on the formulation or development of government policy. The Tribunal found no such entries in this case;

- the meeting was concerned with personal casework or staff appointments, engaging section 40(2).

It rejected arguments that certain types of meetings attracted special status, including meetings with the Prime Minister, Cabinet meetings, Cabinet committee meetings and COBRA meetings.

## Points of interest

Although the Tribunal points out that each case will be considered on its merits, this decision provides a framework for analysing Ministerial diary requests, and a clear indication that the majority of Ministerial entries are likely to be disclosable. This will be of significant practical assistance in formulating and analysing future requests.

The case illustrates the sheer level of detail required in applying FOIA, with each of nearly three thousand entries in the diary being examined separately by the Tribunal.

The Tribunal was sceptical of the evidence given by the senior civil servant, describing how disclosure could affect the work of the department. Similar scepticism was also evident in the First Tier Tribunal's decision in Lewis (EA/2013/0087). The approach to such evidence may need to be reconsidered in future.

## Morton v Information Commissioner and Wirral Metropolitan Borough Council [2018] UKUT 295 (AAC), 10th September 2018

### Summary

The Upper Tribunal restated the

principles relevant to the identification and disclosure of personal data under section 40(2) FOIA, and (standing in place of the FTT) provided an example of how such an assessment should be carried out.

### Relevant facts

The case concerned an independent report commissioned by Wirral Metropolitan Borough Council ('MBC') into allegations that it had failed to safeguard the identities of a number of whistleblowers. The report was prepared by Nicholas Warren, retired President of the General Regulatory Chamber of the First-Tier Tribunal.

Disclosure of the report was requested under FOIA by another whistleblower, who had made separate allegations at a different time, also against Wirral MBC.

Wirral MBC declined to provide the report, and its decision was (in large part) upheld by the Information Commissioner, reasoning that even a redacted version of the report would allow the whistleblowers and relevant Council officers to be identified, and that disclosure would not be fair in the circumstances. It concluded therefore that the majority of the report fell within the absolute exception in section 40(2) FOIA.

The appeal was heard by the Upper Tribunal (UTJ K Markus QC), standing in the shoes of the First-Tier Tribunal, which decided not to hear the case because of the involvement of Mr Warren.

**Personal data:** The case covers similar ground to *Miller* above, in that it required an assessment of whether the report constituted 'personal data' under section 40(2), i.e. data relating to a living individual who can be identified either from those data, or from those data along with other information which is in the possession

of, or likely to come into the possession of, a person. However, in this case the Upper Tribunal was considering the appeal at first instance, undertaking a complete reconsideration of the Commissioner's decision.

The Tribunal reiterated the principles set out in the *Miller* case (above), including the motivated intruder test, and went on to consider their application to the Warren Report. It concluded that the Warren Report provided enough detailed factual context to enable those who worked or had worked at the Council, or who had a knowledge of the background events, to identify the whistleblowers. It also concluded that the same was true of the Council officers referred to in the report: even with their names and job titles redacted, anyone with a working knowledge of the Council's staff and operations would be able to work out who was referred to.

The Tribunal also noted that anyone investigating the matter would gain added assistance from reports in the public domain analysing the allegations originally made by the whistleblowers, which could be cross-referenced to the Warren Report and provide an additional means of identifying the individuals referred to. The Tribunal analysed separately whether such investigation was likely – i.e. whether a 'motivated intruder' would actually exist. It considered it highly likely that an investigative journalist would have played this role, based on previous press interest in the allegations made by the whistleblowers and subsequent events.

**Fairness:** The Tribunal acknowledged the public interest in information revealing how the Council did or did not safeguard the interests of the whistleblowers, and also in information that would provide public accountability and transparency in relation to any compensation paid to them. However, it considered this to be substantially outweighed by the interests of the whistleblowers and Council officers, who were likely to suffer harm to their careers if identified, and who had been given clear assurances that the report would remain confidential.

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## Points to note

Particularly when read alongside *Miller*, above, the case provides a useful summary of the principles applicable when deciding whether requested information includes personal data enabling a living individual to be identified.

It also provides a case study showing how the Upper Tribunal would expect the Commissioner or First-Tier Tribunal to approach such an assessment. Notably: (i) it took into account background knowledge which would be held by Council employees, suggesting that it expected the 'motivated intruder' to seek out and interview such people; and (ii) it considered separately whether there was likely to be such a 'motivated intruder' in practice.

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