Recent decisions of the Commissioner and Tribunal

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Vesco v Information Commissioner [2019] UKUT 247 (TCC), 1st August 2019

Summary

The Upper Tribunal allowed an appeal against the First-tier Tribunal’s decision that a request for information under the Environmental Information Regulations 2004 (the ‘EIRs’) was manifestly unreasonable. The Upper Tribunal set out a three-stage approach to assessing manifest unreasonableness under the EIRs, emphasising that the exceptions to disclosure of environmental information must be interpreted restrictively.

Relevant facts

The requester was an individual with a long-standing concern about emissions from flue pipes. She requested information from the Government Legal Department (‘GLD’) which sought to identify the public authority responsible for enforcing gas safety in respect of flues under the Gas Safety (Installation and Use) Regulations 1998.

The GLD refused the request on the basis that it was manifestly unreasonable under Regulation 12(4)(b) of the EIRs. Under Regulation 12(4)(b) of the EIRs, a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable, where the public interest in non-disclosure outweighs the public interest in disclosure. The Information Commissioner (the ‘Commissioner’) decided that the GLD’s reliance on Regulation 12(4)(b) was correct. The First-tier Tribunal (the ‘FTT’) upheld that decision.

The Upper Tribunal’s decision

The Upper Tribunal decided that the FTT’s decision contained an error of law and should be set aside.

The Upper Tribunal explained that under Council Directive 2003/4/EC on Public Access to Environmental Information (the ‘Directive’) (which is implemented in domestic law by the EIRs) and case law of the Court of Justice of the European Union, grounds for refusal of requests for environmental information must be interpreted restrictively. This is in keeping with the aim of the Directive and the EIRs is to enable public access to environmental information.

A new three part test

The Upper Tribunal went on to explain that, when considering whether to refuse a request for environmental information on the basis that the request is manifestly unreasonable, public authorities must apply a three stage test:

Is the request manifestly unreasonable? (Regulation 12(1)(a)): The starting point is whether, judged objectively, there is any foundation for thinking that the information sought would be of value to the requester or to the public. The hurdle of satisfying this test is a high one. It may be relevant to consider factors such as the burden the request would place on the public authority, the motive of the applicant, the value or purpose of the request, and any previous requests by the applicant.

If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b)): The public interest in disclosing and withholding the information should be identified, and then a balancing exercise must be carried out.

Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2)): If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure set out in Regulation 12(2) of the EIRs.

This three-stage approach is different from the approach that applies to vexatious or repeated requests under the (Continued on page 12)
Freedom of Information Act regime. The three-stage approach aims to ensure that the policy of the EIRs and the Directive — namely, to ensure public access to environmental information — is properly considered and implemented by public authorities.

The Upper Tribunal found that the requirements of the manifestly unreasonable test, as explained above, had not been properly applied by the FTT. First, there was inadequate recognition by the FTT that the manifestly unreasonable test is a high test, and must be interpreted restrictively. The FTT had not properly considered, or considered at all, the various factors relevant to whether the request had a reasonable foundation. It had focused only on the history of the case, and the fact that the requester had made previous requests, which had meant that its decision was one-sided. These factors were relevant, but were by no means the only factors that should have been considered. Given the request related to gas safety, set against the background of the Aarhus Convention (which led to the adoption of the Directive) and the Directive, an explanation would be required if the FTT did not consider this to be serious or valuable purpose.

Further, the FTT had not properly considered the second and third stages of the test set out above. The Upper Tribunal rejected the Commissioner’s argument that the FTT’s decision had incorporated the Commissioner’s decision (which had considered the second and third stages of the test). Even if the FTT had adopted the Commissioner’s decision, the Commissioner’s reasoning on stages two and three of the test would not have been sufficient to save the FTT’s decision, as the Commissioner had not taken account of many factors potentially relevant to the public interest, and had not explained how the presumption of disclosure had been applied to the facts. Given these errors, the UT set aside the FTT’s decision, and remitted the case to a differently constituted FTT, directing it to take account of the UT’s guidance on the law.

Points to note

This is an important judgment, as it is the first time the Upper Tribunal has considered the ‘manifestly unreasonable’ exception in Regulation 12 of the EIRs in detail, and constitutes the leading authority on the topic. The Upper Tribunal’s three-stage approach will therefore need be adopted by public authorities in future cases.

The Upper Tribunal’s judgment emphasises that exceptions to the disclosure of environmental information are to be interpreted restrictively. This should be borne in mind when considering each of the exceptions in Regulation 12(4) of the EIRs.

Edward Williams v IC and Ministry of Justice,
EA/2018/0205, 12th August 2019

Summary

The FTT upheld a decision not to disclose legal advice taken by the Secretary of State on the grounds of legal professional privilege. The Secretary of State had taken advice on whether he was likely to be successful in bringing judicial review of a decision of the Parole Board, and had given details of that advice in a Ministerial Statement justifying his decision not to bring such proceedings. The Tribunal concluded that the Ministerial Statement had not been sufficiently detailed to waive privilege in the advice, and went on to conclude that the public interest balance lay in favour of maintaining the exemption in this case.

Relevant facts

The case arose out of the controversy surrounding John Worboys, the so-called ‘black cab rapist’, convicted in 2009. In 2018, a parole board decided to release him, sparking public concern. Two of his victims brought a crowdfunded claim for judicial review of the parole board’s decision, which was successful. The proceedings lead to a reform of the parole board process, introducing a new appeal process for victims to challenge parole board decisions.

The requester, Mr Williams, sought a copy of legal advice obtained by the Secretary of State for Justice relating to the decision not to issue JR proceedings or become a party to the proceedings brought by the victims. The Ministry of Justice refused to disclose the advice, and went on to conclude that the public interest balance lay in favour of maintaining the exemption in this case.

The Ministry upheld its own decision on internal review, and the decision was again upheld by the Information Commissioner. Mr Williams appealed to the FTT.

The requester did not dispute that section 42(1) was engaged. He argued however that: (a) the Secretary of State had waived privilege in the advice as a result of a Ministerial Statement in March 2018; and (b) the ICO had incorrectly applied the public interest balance.
Waiver

The Ministerial Statement was made on the day that judgment was handed down in the JR proceedings. It described the actions that the Secretary of State intended to take in response to the judgment, and set out the reasons why he had not brought his own proceedings.

On the latter topic, he explained that he had taken expert legal advice, elaborating as follows:

"I considered whether the [Parole Board’s] decision was legally irrational… The advice that I received was that such an argument was highly unlikely to succeed…I also received advice on the failure of process argument and was advised that this was not one that I, as Secretary of State, would have been able successfully to advance."

The Tribunal considered that the Statement referred to the existence of the legal advice, but did not disclose its contents, and therefore that privilege had not been waived.

The public interest balance

There was some debate as to whether the advice related to matters that were still ‘live’. In its analysis, the Tribunal noted that the ‘currency’ of advice was not determinative, as the factors pointing against disclosure pertained even after the conclusion of the relevant legal proceedings (relying on Savic v IC, Ago and CO [2016] UKUT 534 (UUT)).

It went on to assess the currency of the advice as at the date of the Ministry of Justice’s internal review, which took place after the JR proceedings had concluded, but before the Parole Board had taken its replacement decision, and while consultation on the procedural reform was ongoing. It concluded that at that point the matters to which the advice related were still ‘live’, and that this continuing currency added an element of sensitivity to the information that might not have been present had the request been made at a later date.

The Tribunal recognised that section 42(1) FOIA had no in-built bias against disclosure, but stated that it was required to take into account the public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.

On the public interest in disclosure, the Tribunal took into account the fact that a considerable amount of information about the Worboys case was already in the public domain, and the fact that judgment in the proceedings had already been given. It was therefore not persuaded that there was a high level of utility in the particular information requested. It did not refer specifically to the requester’s argument that there was a public interest in assessing whether the advice had constituted good value for money (the cost had already been disclosed).

The Tribunal therefore concluded that the public interest balance lay in favour of maintaining the exemption, and dismissed the appeal.

Points to note

The waiver issue was dealt with quite shortly by the Tribunal, but raises some interesting questions. When a person refers to privileged advice in the context of legal proceedings, the question of waiver turns on two related issues:

- the nature of what has been revealed and the circumstances in which it is revealed.

The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it simply been referred to, used, deployed or relied upon in order to advance the party’s case?

In the FOIA context, it must be arguable that the ‘deployment’ or ‘reliance’ can be a political rather than a legal one. For example, here the Secretary of State clearly used the advice to defend himself from accusations that he had failed to take action. Such an approach is implied in the FTT’s decision in Crothers v ICO (EA/2018/0074, 24th October 2018), though not made explicit.

The case also provides a further example of the complex ways that the ‘currency’ of legal advice can play into the public interest balance. Here, the Tribunal indicated that the advice was particularly sensitive because the Parole Board was yet to make its second decision, and the political process leading to creating a new avenue of appeal was still ongoing. On the other hand, it took into account the fact that there was limited utility in advice in relation to a case where judgment has been handed down. There is a clear tension between these two arguments.

Arron Banks v The Information Commissioner

EA/2019/0010, 19th September 2019

Summary

The FTT upheld the Commissioner’s decision that the ICO had been correct to refuse to disclose information relating to a particular line of enquiry into data misuse, on the basis that doing so could prejudice its broader investigation into the use of personal data during the Brexit referendum.

Relevant facts

In May 2017, the ICO commenced
a major investigation into the use of data analytics during the 2016 Brexit referendum, following allegations about the processing of personal data during the campaign. The investigation, which is known as Operation Cederberg, is ongoing and has led to a number of prosecutorial and regulatory actions against various bodies and companies.

As part of Operation Cederberg, the ICO investigated allegations that during the referendum campaign, a company called Eldon Insurance and another company called Big Data Dolphins Ltd sent UK citizens' personal data to the University of Mississippi in breach of data protection rules (the Mississippi Investigation).

Unconnected with the Mississippi Investigation, a UK citizen ('the Plaintiff') involved with the Fair Vote Project ('the FVP') brought a lawsuit against Eldon insurance Ltd and another company called Big Data Dolphins Limited. The purpose of the lawsuit was to determine whether UK data had been transferred to the University of Mississippi ('the University'), and if so whether the information had been used to illegally target voters during the referendum campaign.

On 26th April 2018, the Mississippi court in support of the preservation request, on the basis that the evidence might be relevant to the Mississippi Investigation and, more broadly, Operation Cederberg.

During a hearing which took place on 5-6th June 2018, however, the Mississippi court refused the ICO permission to introduce the letter.

On 14th June 2018, Mr Arron Banks — who has an interest in both Eldon Insurance and Big Dolphins Data — requested that the ICO disclose communications between the ICO and the Plaintiff and/or the FVP. The Mississippi court rejected the Plaintiff's case for a permanent preservation order on 21st June 2018, on the basis that he had not exhausted all reasonable means of finding out whether his data was being held by the University.

On 26th June 2018, the ICO responded to Mr Banks, confirming that it held information within the scope of his request. However, the ICO refused to disclose that information, stating that it was exempt under section 31 of the FOIA. Following an internal review conducted at Mr Banks' request, the ICO upheld its original position in a decision dated 25th July 2018. Mr Banks subsequently complained to the Commissioner about how his request had been handled. The Commissioner issued its decision notice upholding the ICO on 17th December 2018.

When to assess?

Section 31 FOIA provides for a qualified exemption where, amongst other things, disclosure of information would, or would be likely to, prejudice the exercise by any public authority of its functions for a number of specified purposes. Those purposes include ascertaining whether any person has failed to comply with the law, or whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

A key dispute between the parties related to the date on which the engagement of the section 31 exemption and the public interest balance should be assessed. Mr Banks argued that the relevant date was the date on which the public body issued a review decision. The Commissioner argued that the correct date was the date of the public body's initial response to the FOI request, and not at any later date.

The FTT held that, in accordance with clear case law, consideration of the exemption should generally focus on the circumstances at the time of the public body's response to the request. However, the cases did not specifically address the question of what should happen where the public body subsequently undertakes a review of its decision. In that situation, the FTT considered that the relevant time for assessing prejudice and public interest under section 31 was at the time of the review decision (in this case, 25th July 2018).

Mississippi or Cederberg?

Mr Banks argued that the section 31 exemption had ceased to apply by the time of the ICO's review on 25th July 2018. This was because, by that stage, the ICO would have known both that its letter had not been admitted into the Mississippi proceedings, and that the Plaintiff's case had been rejected. The Mississippi Investigation had therefore come to an end by the relevant time, such that it could not be prejudiced by disclosure.
In response, the Commissioner argued that the Mississippi Investigation could not be considered in isolation from the wider Operation Cederberg, which remained ongoing at the time of the FTT hearing.

The FTT rejected Mr Banks’ attempt to completely separate the Mississippi strand of the investigation from the rest of Operation Cederberg, which was a large and complex investigation into potential privacy breaches of which the Mississippi Investigation was only part.

Furthermore, the fact that Operation Cederberg was ongoing meant that the section 31 exemption was engaged regardless of whether the assessment was conducted on the date of the ICO’s response or its later review decision.

On either date, disclosure of the requested information would have been likely to cause prejudice to Operation Cederberg, whether by discouraging people from providing relevant information to the wider investigation, revealing the leads the ICO was following or potentially undermining future investigations.

Public interest

The FTT also accepted the Commissioner’s argument that the public interest was, on balance, in favour of maintaining the exemption. Again, this was to be assessed at the date of the ICO’s review. There was a public interest in understanding what the ICO was investigating and why. However, in order for the ICO to carry out effective investigations in fulfilment of its statutory functions, it had to be able to do so confidentially, without informing those who were subject to investigation of its lines of enquiry. The importance and range of Operation Cederberg, of which the Mississippi Investigation was only part, was another factor weighing heavily in the public interest against disclosure, as was the fact that the ICO had been explaining its actions, as far as it could, in near-contemporary public reports.

Points to note

This was a slightly unusual case, in that the request for information was made to the ICO itself as a public authority. However, the FTT rejected any suggestion that a different approach should be taken in cases in which the ICO was both the public authority making the decision and also responsible for considering the complaint and producing a decision notice.

This case demonstrates the importance of being clear as to the date on which the engagement of the relevant FOIA provision, and the public interest, should be assessed. Whilst the ongoing nature of Operation Cederberg rendered this a distinction without a difference in the present case, there may be other cases in which the assessment could change depending on whether it is conducted on the date of the public body’s initial response or later review.

This case also shows that requesters may have difficulty in showing that section 31 is not engaged in respect of a particular line of enquiry which, although itself concluded, is nevertheless linked to a wider ongoing investigation.

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