11KBW

FOIA / EIR
Recent Developments

Leo Davidson

Scope of paper

Developments in freedom of information law over the past 12 months

Freedom of Information Act 2000

- The proper order when the public authority loses: *NHS England v Information Commissioner* [2019] UKUT 145 (AAC)

- Wide requests, vexatiousness and when to seek clarification: *Home Office v Cruelty Free International* [2019] UKUT 299 (AAC)

- The balancing test
  - The proper approach to the balancing exercise and some choice words about FTT authority: *O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC)
  - The final word (again?) on the time for conducting the balancing test: *Maurizi v Information Commissioner* [2019] UKUT 262

Scope of paper

11KBW

Environmental Information Regulations 2004

- Dealing with whether “mixed information” is “environmental information”: *Department for Transport v Information Commissioner* [2019] EWCA Civ 2241

- Vexatious requests under the EIR: *Vesco v Information Commissioner* [2019] UKUT 247 (AAC)

11KBW

Freedom of Information Act 2000

Recent Developments

Freedom of Information Act (NHS England)

11KBW

***NHS England v Information Commissioner* [2019] UKUT 145 (AAC)**

The proper order when the public authority loses

- Requests about seven-day service to be delivered by NHS England
- Refused access to presentation made by Deloitte relevant to proposals
- FTT upheld appeal but made following order:

> *The Tribunal allows the appeal for the reasons given below. NHS England is required to respond anew to Dr Dean's enquiry, taking into account the Tribunal's decision, within 28 days of the publication of the decision. This judgment stands as the substituted Decision.*

Freedom of Information Act (NHS England)

11KBW

- FTT concerned about requiring disclosure when there might have been other exemptions the public authority could rely upon.
- Problem: decision in *Information Commissioner v Malnick* [2018] UKUT 72 (AAC)
- UTT Response (at §12): *"… the tribunal was right to be concerned that there could be exemptions that had not been considered by either NHS England or the Information Commissioner. But it was wrong to deal with that issue by remitting the case back to the authority. What it should have done was to give directions to the authority to identify any other exemptions that might apply, to consider whether or not any did, and then to make a decision accordingly."*

Freedom of Information Act (CFI)

11KBW

***Home Office* v Cruelty Free International* [2019] UKUT 299 (AAC)**

Wide requests, vexatiousness and when to seek clarification

- CFI requested info from the Home Office in the following terms:

  Would you please disclose the information you hold in relation to the two cases, which according to p 26 of the Animals in Science Unit Inspectorate Annual Report … were referred by you in 2014 to the Crown Prosecution Service?

- Home Office ultimately relied upon section 14 (vexatious or repeated requests) on the basis that it would involve a "huge" burden.

**Julian Milford of 11KBW appeared for the Home Office*

Freedom of Information Act (CFI)

11KBW

"…The terms of a request are a matter for the request. No one has any power to change it. The public authority has power to ask for more information under section 1(3)(a) in order to help it identify and locate the information requested. An it is obliged by section 16, if it applies, to provide advice and assistance to a requester. But that is all. On a complaint … the role of the Commissioner is to decide whether the request was dealt with in accordance with Part I … nowhere is there power for the Commissioner to change the wording of the request. And on an appeal ... the role of the First-tier Tribunal is to decide whether the Commissioner's notice was in accordance with law … Again, that assumes the request as presented by the requester. Nowhere is there power for the tribunal to change the wording of the request." (§14)

Freedom of Information Act (CFI)

11KBW

"… The terms of the request were in the widest terms. It is easy to understand why, because CFI obviously wanted to catch as much information as possible. But that carried with it the risk that it would catch so much material that the Home Office would rely on section 12 or section 14. The Commissioner had to accept the request as presented, which she did. The tribunal also had to accept it as presented, but it do not. That was an error of law." (§15)

"*The Tribunal criticised the Home Office for not segregating the information relevant to Case 1 from that relevant to Case 2. It is the fact that the estimate for the material for Case 2 was ten times the size for Case 1. But the request covered both and that is what the Home Office had to deal with."* (§16)

Freedom of Information Act (CFI)

11KBW

- Request can be considered vexatious simply by reason of the cost burden of compliance: §17
- But the cost burden not necessarily sufficient to render the request vexatious – it is question of context and all the relevant consideration must be weighed: §§19-20
- The fact that there are specific provisions deal with cost burden doesn't mean they will deal with every eventuality: §21

Freedom of Information Act (CFI)

11KBW

- No lack of clarity in the request
- Home Office could identify and locate the information
- *"… Consequently, the power for the Home Office to require further information under section 1(3)(a) never arose. … even if the Home Office had exercised the power under section 1(3)(a), it still would have been a matter for CFI whether, and if so, how to alter the terms of their request. The Home Office could not force them to do so, nor could the Commissioner, and the tribunal had not power to take that task about itself. The Home Office did invite CFI to 'refine' their request, but in the context that meant 'narrow down', not 'make clearer'."* (§22)

Freedom of Information Act (O'Hanlon)

11KBW

O'Hanlon v Information Commissioner* **[2019] UKUT 34 (AAC)**

The proper approach to the balancing exercise and some choice words about FTT authority

- A request made to the Commissioner in her capacity as a public authority after a failed appeal concerning a request made to an NHS Trust.
- Section 42 (privilege) (a qualified exemption) applied. Argued that Commissioner's conduct in earlier appeal meant that public interest favoured disclosure.

**Zoe Gannon of 11KBW appeared for the Commissioner*

Freedom of Information Act (O'Hanlon)

11KBW

- *"Section 2(1)(b) says 'outweighs', which inevitably leads to talk of balance, as I did in paragraph 4, and scales, as the tribunal did. These metaphors may be difficult to avoid, not least because they have a statutory basis, but they conceal the analysis that section 2(1)(b) requires. The first step is to identify the values, policies and so that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it di. This explanation should not be difficult if the tribunal has undertaken the analysis in the first two steps properly. It may even be self-evident."* (§15)

Freedom of Information Act (O'Hanlon)

11KBW

Request by the Commissioner to address an error made by the FTT concerning the law of privilege

"… So why should the Commissioner worry? The answer is that the Commissioners have made rods for their own backs by treating statement of law by the First-tier Tribunal as significant. The correct approach is to treat the decisions of the First-tier Tribunal with the respect they are due, no less but no more. What is their due? (a) A decision of that tribunal is, subject to any appeal, binding as between the parties on the issues decided. The Commissioner is under a duty to accept it as such and does. (b) I know from the documents in this case that the Commissioner analyses each case to see what lessons can be learned for the future. That is a proper and valuable practice. (c) The problem comes when the Commissioner treats the First-tier Tribunal's decisions as containing authoritative statements of the law. They do not. Anything that the tribunal says in one case is not binding in any other. If it is wrong, it must not be followed in other cases. If it happens to be right, all to the good, and the same law should be applied in later cases. But it should be applied only because it is the law, not because it was said by the tribunal in a previous case." (§17)

Freedom of Information Act (Maurizi)

11KBW

Maurizi v Information Commissioner* [2019] UKUT 262

The final word (again?) on the time for conducting the balancing test

- Request made by an Italian journalist for correspondence held by the CPS concerning Julian Assange
- Section 30 (public authority investigations and proceedings) relied upon (qualified exemption
- Argued that Tribunal erred in assessing public interest in disclosure/maintaining the exemption as at the date the CPS made the decision

**Robin Hopkins of 11KBW appeared for the Commissioner*

Freedom of Information Act (Maurizi)

11KBW

Wasn't this point already decided in *All Party Parliamentary Group on Extraordinary Rendition v Information Commission* [2015] UKUT 377 (*APPGER*) and approved in *R(Evans) v Attorney-General* [2015] UKSC 21?

- UTJ Mitchell said it was and *APPGER* binding (§184)
- Reconsidered the law and considered that he would have reached the same decision in any event (§§168, 185)

See Panopticon Blog*: https://panopticonblog.com/2019/10/23/when-to-assess-the-public-interest-in-a-foia-request-four-years-ago-says-upper-tribunal-in-maurizi/*

11KBW

Environmental Information Regulations 2004

Recent Developments

Environmental Information Regs (Dept Transport)

11KBW

***Department for Transport v Information Commissioner* [2019] EWCA Civ 2241**

Dealing with whether "mixed information" is "environmental information"

- Request for information concerning information relating to a meeting between HRH The Prince of Wales and a Minister at the Department for Transport. IC directed disclosure.
- Withheld on the basis of FOIA s 37(1)(aa) (communications with the heir to the throne). Absolute exemption.
- Argued should have been dealt with under EIR 2004 which contains no such exemption.
- Issue for CA – was the information sought "environmental information" and subject to EIR 2004, or was it subject to FOIA?

Environmental Information Regs (Dept Transport)

11KBW

- Definition:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

…

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

…"

Environmental Information Regs (Dept Transport)

11KBW

- *"With the assistance of counsels' submissions on the relevant law – now principally the decision of this court in Henney – it was not difficult in the end to apply that law to the materials and to reach a decision on the specific materials in issue. I found that that relatively easy decision was clouded by having to analyse proposed theoretical tests for resolving issues of this kind which had emerged from the discussions in the decisions below. This is not a criticism in any way of the very careful and rigorous decisions of both Tribunals nor is it a criticism of counsels' submissions before us. It is simply an observation that, without resorting to general principles that might be applied in* ***all*** *cases of potentially "mixed" information, it was an easier task simply to look at the relatively small amount of disputed material in the present case and then reach a decision one way or the other. In short, with the assistance described, when one went to the close material, without too much theorising, all fell into place."* (§23)

Environmental Information Regs (Dept Transport)

11KBW

- Noted IC and FTT had more material to determine the status of
- *Henney* states the law on what constitutes "environment information"
- Restated principles §§26-31
- *"In seeking to provide "guidance" for the general run of cases where "mixed" information is in issue, it seems to me that one will rarely need to do more than apply these principles to the information as a whole, in order to see whether (in the context of the whole and applying a broad and holistic view) the disputed elements of the information are "on" the "measure" in question. I would not wish to expand on those principles in the present case."* (§32)

Environmental Information Regs (Vesco)

11KBW

***Vesco v Information Commissioner* [2019] UKUT 247 (AAC)**

Vexatious requests under the EIR

- Requester sought information from Government Legal Department:

  "1. Please give the name of the public authority responsible for enforcing the [Gas Safety (Installation and Use) Regulations 1998].
  2. Are British Standards: BS 5440 (flue emissions) enforceable when indicated within Regulations?"

- Refused on the basis that the request was "manifestly unreasonable". Decision of the FTT used the language "vexatious".

Environmental Information Regs (Vesco)

11KBW

Proper approach to determining if “manifestly unreasonable” exception applies

- Three stage test:
  - 1) Is the request manifestly unreasonable? (reg 12(1)(a))
  - 2) 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? (reg 12(1)(b))
  - 3) Does the presumption in favour of disclosure mean that the information should be disclosed?

Environmental Information Regs (Vesco)

11KBW

Stage 1 (§17)

- Can look at authorities for vexatiousness under FOIA
- Starting point is whether request has no reasonable foundation (ie no reasonable foundation for thinking that the information sought would be of value to the requester, the public or any section of the public, judged objectively
- Hurdle of satisfying is high
- *Dransfield* factors relevant but not an exhaustive checklist
- Also consider previous requests: whether to same body, time lapse, and whether change in circumstances.

Environmental Information Regs (Vesco)

11KBW

Stage 2 (§18)

- Simply being manifestly unreasonable is not a basis for refusing – must apply public interest
- Public interest fact specific
- Starting point is the content of the information in question and relevant to consider what specific harm might result from disclosure
- Public interest(s) in disclosing and withholding should be identified (applying *Hanlon*).
- The Directive and the Aarhus Convention and the policy behind recovery of environmental info to be taken into account

Environmental Information Regs (Vesco)

11KBW

Stage 3 (§19)

- If disclosure doesn't result from first two stages, consider presumption inf avour of disclosure under EIR reg 12(2)

Overall (§20)

- Three stage process is burdensome, but exists to ensure policy of Directive/EIR properly considered and implemented. Any grounds for refusal to be restrictively interpreted.