FOIA in 2018 — key cases

It will be easy to remember 2018 for the implementation of General Data Protection Regulation and the developments around 'the right to be forgotten'. But despite its perhaps lower profile in the eyes of commentators, FOIA continued to throw up interesting questions of legal and practical importance. Louise Jones, Barrister at Guildhall Chambers, reviews some of the FOIA caselaw from 2018

Arguably the most substantial Upper Tribunal ('UT') cases of 2018 emerged from the application of the exemptions in section 35 ('formulation of government policy') and section 36 ('prejudice to the effective conduct of public affairs'). The application of those exemptions arose in the context of requests for information about (among other things):

- the Public Duties Cost Allowance paid to former Prime Ministers that was paid to Nick Clegg (*Cabinet Office v IC and Webber*);
- the control of schools in Birmingham in 2013—the so-called 'Trojan Horse' affair (*Department for Education v IC & Christopher Whitmey*);
- correspondence between the Advisory Committee on Business Appointments and Tony Blair (*IC v Malnick & ACOBA* 2018); and
- minutes of a meeting of the Honours and Decorations Committee which discussed the creation of a National Defence Medal (*Cabinet Office v IC & Morland* 2018).

Last year also saw the UT grappling with the Court of Appeal's guidance given in *Department for Business, Energy and Industrial Strategy (DBEIS) v IC and Henney* on the proper approach to the definition of 'environmental information' in the Environmental Information Regulations ('EIRs'). Two UT decisions on this demonstrate the potential importance to requesters of the choice of statutory regimes.

In *DfT, DVSA & Porsche Cars GB Ltd v IC & John Cieslik*, the UT held that the requested information, which was around the Vehicle and Operator Services Agency safety evaluation of the vehicle throttle malfunction, was not environmental information. This overturned the decision of the First-Tier Tribunal, which had ordered disclosure having decided that none of the exemptions in the EIRs applied.

With the Freedom of Information Act ('FOIA') being the applicable regime, it seemed likely that section 44 would provide an absolute exemption preventing disclosure, and the matter was remitted to a fresh FTT. Thus, the decision that the information sought was not environmental information may be the end of the road for the requester.

By contrast, in *IC v Department for Transport and Hastings*, the UT concluded that the information requested was environmental information. This was a request about a meeting which took place between the Prince of Wales and government ministers from the Department for Transport and the Department for Communities and Local Government.

The government had sought to rely on the exemption in section 37(1)(a) FOIA ('communications with the heir to the throne') in the FOIA context. There being no EIRs equivalent to section 37(1)(a), the categorisation of information as falling under the EIRs may prove to be very helpful to this requester. However, as with *Cieslik*, the matter was remitted to a fresh FTT, in this case to consider the EIRs exemptions. A close reading of *Hastings* in particular would repay anyone grappling with requests that may straddle both the EIRs and FOIA.

So what of other, less well-known, FOIA cases of 2018?

Two decisions stand out for the practical points that we can take from them, and which may assist FOI practitioners going forwards.

Reuben Kirkham v Information Commissioner

Described itself by the UT as a 'fascinating case' (Judge Jacobs), *Reuben Kirkham v Information Commissioner* (copy at www.pdpjournals.com/docs/887963) looked closely at section 12 FOIA — the costs exemption. Mr Kirkham sought information from Cambridge University relating to the University's proposals to the Engineering and Physical Sciences Research Council in response to the Council's call for applications for Doctoral Training.

Although the University offered to answer a part of one of Mr Kirkham's questions, in the main it relied on section 12. The Commissioner investigated how the University had made its

estimate of the expected costs of complying with the request, and the FTT directed that additional questions be asked of the University in making this assessment, before dismissing the appeal.

Reasonably enough perhaps, the requester argued that he would have been content for a 'sufficient' search to take place, rather than every nook and cranny necessarily being considered. However, this would not be consistent with the scope of the duty in section 1 FOIA.

Section 12 does not work by allowing a certain amount of disclosure to be made until the cost limit is reached. To be entitled to rely on section 12, a public authority needs to make an estimate which should include reasonable costs and be related to the matters that may be taken into account. Thus the focus is on the public authority, how it holds the information and how it would retrieve it. The cost of compliance will be related to these factors.

How then should an estimate be made? Mr Kirkham argued for an estimate being made with rigour. He produced in the UT slides containing illustrations of the method and formulae involved. The UT described this as the 'rigorous scientific approach' to making an estimate. At paragraph 24 of the decision, Judge Jacobs, ruling in favour of an ordinary interpretation of the word 'estimate', said:

"An estimate involves the application of a method to give an indication of result. In the case of FOIA, the result is whether the cost of compliance would exceed the appropriate limit (Regulation 4(1)). It follows that the method employed must be capable of producing a result with the precision required by the legislation in the circumstances of the case. The issue is whether or not the appropriate limit would be reached. The estimate need only be made with that level of precision. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls."

"Requesters and practitioners will want to keep in mind that the approach to a costs estimate will need to withstand similar scrutiny. We can infer that whilst scientific rigour may not be necessary in making an estimate, the Information Commissioner will be anxious to ensure that estimates are sufficient to allow the requester to place confidence in it."

It is not difficult to see how excessively onerous and impractical such an approach would quickly become for most public authorities. Section 12 would effectively be rendered unworkable.

However, the requester in this case asked a fair question according to the UT: "How do we know they're not just making it up?".

The UT answered this by reference to the role of the Information Commissioner and FTT in taking a sceptical approach to an estimate, and requiring the public authority to provide persuasive evidence of how they undertook the estimate, with follow up questions if necessary.

Requesters and practitioners will want to keep in mind that the approach to a costs estimate will need to withstand similar scrutiny. We can infer from this case that whilst scientific rigour may not be necessary in making an estimate, the Information Commissioner will be anxious to ensure that estimates are sufficient to allow a requester to place confidence in it, and have good faith in the reliability of the public body's approach in this regard.

In another interesting aspect of this case, Mr Kirkham suggested that section 12 should require the public authority to commence a search, whereas the public authority contended that section 12 operates predictively. Whilst the UT accepted that section 12 operates predictively, it left open the possibility that in a particular case, it may be appropriate to form an estimate based on trying a search perhaps for just part of the information requested. This is a question for another day and it will be something for those faced with a section 12 argument to keep in mind.

There may yet be some force in the point of view that a public authority cannot know how expensive a search is going to be and whether the appropriate limits will be exceeded if it has no or little meaningful idea what it holds that is relevant to the request. It is possible to imagine scenarios where an estimate — albeit one that does not require scientific rigour — could only be given if a public authority had conducted at least some kind of basic search. As computing technology advances to make system-wide searches more feasible and straightforward, this may be an area that proves ripe for litigation in the future.

R (The Good Law Project) v The Secretary of State for Exiting the European Union

2018 saw a FOIA issue reaching the Administrative Court in *R (The Good Law Project) v The Secretary of State for Exiting the European Union* [2018] EWHC 719 (Admin) (copy at www.pdpjournals.com/docs/887964). The claimants in this case sought permission to judicially review the government's refusal to disclose two categories of documents about the likely consequences of the United Kingdom's proposed departure from the EU. The claimants said that they had requested this information on the basis of the common law and Article 10 of the European Court of Human Rights, and not under FOIA. The defendant treated the request as if it were made under FOIA.

The Court (Supperstone J) held that the defendant's was the correct approach, observing at paragraph 3 that: "Parliament, by FOIA, has created a specialist statutory mechanism for addressing requests for information

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held by public authorities. The claimants cannot by framing their requests in the way they have done avoid the legal regime established by Parliament to deal with disputes arising from information requests."

The claimants then sought to argue that FOIA was not a suitable alternative remedy in the exceptional circumstances of this case, because it could not produce a resolution sufficiently quickly. They argued that urgency was integral to their objectives, given the tight timetable for the negotiation of Brexit, and a FOIA request could simply not be resolved in the time available.

The claimants relied on evidence from Maurice Frankel of the Campaign for Freedom of Information. The evidence as to the likely timetable was that:

- first an internal review would take place which — although not a statutory requirement — is normally a precursor to the Information Commissioner accepting a complaint. This would likely take two months, though difficult cases routinely take much longer, the average period being 16 weeks. The Information Commissioner's guidance is that such a review be conducted and provided within 20 days;
- then, the requester can complain to the Information Commissioner under section 50 FOIA. The evidence, based on a survey sample, was that the average period between the making of such a complaint and the issuing of the Information Commissioner's decision was 156 working days, or 32 calendar weeks. That is longer than the aspirational timetable set out in the ICO's guide for public authorities on 'how we deal with complaints', where the ICO states that its aim is to resolve cases within six months of receiving them. Of course, after the Commissioner's decision, either party could then appeal to the FTT as of right, with all the consequent delays that may ensue in that process.

In this case, the Information Commissioner had indicated that it was highly likely that it would be considered a priority case. She clarified that she attaches 'priority' marks to a small number of requests which are extremely high profile or require special prioritisation and expedition.

Nonetheless, the Court accepted the argument for the government that there was nothing fundamentally unfair about the timeframe imposed by FOIA. The Court did not accept that the FOIA mechanism was not capable of dealing with cases that require expedition. This meant that, in public law terms, there was a suitable alternative remedy other than judicial review in this case, and permission to apply for judicial review was refused.

There does not appear to have been further evidence before the Court to explain exactly what 'expedition' would mean on the part of the ICO, nor greater clarification of when expedition might be available. A case that is extremely high profile is probably reasonably clear-cut, but there are potentially many circumstances in which a requester may claim that receiving the information sought is most useful — or indeed only useful — if the information is received in a timely fashion.

Given that a wait in excess of six months for a determination by the Information Commissioner is the norm, there are doubtless many requesters who would dearly like to have their request expedited. Even though only a small number of cases will benefit, the fact that a speedier route to information may be possible is useful to keep in mind.

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