LESSONS LEARNED ON FOIA FROM CASELAW

Louise Jones, Guildhall Chambers

Introduction

1. This part of the seminar will cover:

(1) A review of a number of the most interesting FOIA cases from the last year or so;

(2) A brief discussion of instances where FOIA / SARs have been used to good effect in litigation.

2. I could not hope to provide exhaustive coverage of all recent FOIA cases. I have selected from a range of courts and tribunals what seem to me to be particularly interesting cases.

"Vexatiousness"

Dransfield & Craven v The Information Commissioner [2015] EWCA Civ 454

3. Judgment was handed down in this case just over a year ago, but it is an important decision setting out statements of principle, and was the first time that the Court of Appeal had to consider the question of vexatiousness in the information law context.

4. In preparing this talk, I took a look at Mr Dransfield's blog, and the background to this case is perhaps best understood by appreciating his description of himself as "a tireless Freedom of Information and Health and Safety Campaigner." Historically Mr Dransfield had clearly made a great wave of FOI requests to the Local Authority, and then the Local Authority refused to deal with what was in itself a polite and precisely worded request on the basis that that the request was vexatious because of his previously health and safety requests and requests relating to lightning protection systems. There had clearly been a difficult relationship between the parties previously but the UT had found that the volume of requests made and correspondence had placed a considerable burden on the authority, and there was also a likelihood of a future barrage of correspondence. The issue in this

appeal was whether past requests are relevant only if they taint or infect the request which is said to be vexatious.

5. In Mrs Craven's case, she had a similar history of making a number of requests pursuant to the Environmental Information Regulations, some of which had been extremely wide-ranging and which related to questions about primary and secondary legislation rather than information held by the authority.

6. Thus the issue in the appeal was for the CA to consider the scope of the power of a public authority to reject a request under FOIA (and the Environmental Information Regulations) on the grounds that the request was "vexatious" (s14(1) FOIA) and in the second claimant's case, "manifestly unreasonable" (s12(4)(b) EIR).

7. The CA clearly observed the importance of the constitutional right for ordinary citizens to obtain the information held by an authority and know what the authority knows. They also noted the importance of environmental information, which may be very important to the requester since it may affect the region where the requester lives, or even the requester's property.

8. In this context, Arden UJ (giving the only judgment) found that there must be some limits on the ability to look at past dealings in this situation. She said: "**Even if the requester has made vexatious requests in the past, there must always be the possibility that, on this occasion, the requester, like Matilda's last request in Hillaire Belloc's poem, may be making a request that needs to be heeded, and that the request is for information that ought to be disclosed to achieve the statutory objective. The requester is after all exercising an important statutory right**." (§61). It is beyond the scope of this talk to delve too far into comic poetry, but you will remember that Matilda, having been a consummate liar, had cried wolf one too many times, and then ultimately burned in a fire, her final plea that she had been burning having been ignored!

9. On the facts of Mr Dransfield's request, the CA accepted that the UT accepted that there was a link between the past dealings involving him and Devon CC and the current request. But, more generally, Arden LJ found that clear bright lines as to what constitutes "vexatiousness" cannot be drawn. She found that it would be better to allow the law develop rather than attempt a comprehensive or exhaustive definition, but said:

> "I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a right is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be said that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available." (emphasis added, §68)

10. On Ms Craven's appeal, the CA concluded that the two tests in FOIA and the EIR had, to all intents and purposes, the same meaning.

11. The implications of this decision are that requests that are thought to be vexatious under both FOIA and EIR should be treated with considerable care, and close attention should be paid to Arden LJ's guidance. An authority should not be too quick to assume that a request is vexatious.

12. I understand that Mr Dransfield has been refused permission to appeal to the Supreme Court, and I have also noticed on the Upper Tribunal website that a number of his other attempts to bring challenges to authorities' or the Information Commissioner's decisions have been struck out.

Public interest in preventing disclosure – prisons / children

Willow v Information Commissioner & Ministry of Justice [2016] UKUT 157 (AAC) (judgment handed down 24.3.16)

13. This appeal related to a request for disclosure of an unredacted version of the training manual on physical restraint used in Young Offender Institutes and Secure Training Centres. The Information Commissioner decided that the redacted information was exempt from disclosure under section 31(1)(f) of FOIA, and that the public interest favoured withholding it. The FTT and the UT rejected the appeal against this decision. The appellant was an experienced social worker with an interest in youth justice.

14. The basis for withholding the redacted parts of the training manual arose from the application of section 2(2)(b) of FOIA – which permits nondisclosure if the public interest in maintaining the exemption outweighs the public interest in disclosing the information – and section 31(1)(f) which prevents disclosure where it would, or would be likely to, prejudice the maintenance of security and good order in prisons or in other institutions of detention.

15. The MOJ's position, which was accepted by the Commissioner, was that disclosure of the techniques in the manual could lead to the development of counter-measures by both young people and adults in prison.

16. There was a reasons challenge, but the interesting point on appeal was the argument that the FTT had failed properly to apprehend and discharge its obligation to treat the best interests of the child as a primary consideration pursuant to article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"). Article 3.1 of the UNCRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

17. The Information Commissioner and MOJ did not dispute that the interests of children should be considered as part of the public interest balancing exercise, but asserted that this was precisely what had been done. The UT – applying the Supreme Court decisions in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 47 – rejected the ground of appeal. The Supreme Court's approach suggested *inter alia* that if the construction of UK legislation is in doubt, the court may conclude it should be construed consistently with the UNCRC. There was no ambiguity in the FOIA provisions.

"Sensitive personal data"

Blacker v The Law Society [2016] EWHC 947 (QB) (judgment handed down 23.4.16)

18. The Law Society is not subject to FOIA. Rather, in 2005 it adopted a voluntary 'Freedom of Information Code of Practice', which is intended to confer rights which reflect those in FOIA. Paragraph 3 of the Code makes it clear that the Law Society is following the Act as though it did apply, even though it does not.

19. In *Blacker v The Law Society*, the claimant, a solicitor who was being investigated by the SRA, sought to prevent the disclosure to a FOI request from a third party of closed files held by the SRA pertaining to him.

20. The FOI request itself had not had a smooth history – the third party had not been content with the responses provided to his initial request by the SRA, and the matter was taken to the Freedom of Information Adjudicator for the Law Society. The Adjudicator upheld the third party's complaint to a certain extent (applying the public interest test) and ordered the disclosure of the closed files in question. The files related to "certain limited exchanges of correspondence", and the Adjudicator considered that any sensitive personal data in those files should be redacted. The court agreed with the Adjudicator's decision – the files had been created in the exercise of the SRA's regulatory function, and with appropriate redactions did not contain any personal information.

21. The claimant's arguments were two-fold. First, he contended that the remaining information that was to be disclosed would still identify him which was embarrassing and had adverse consequences for him – the court held that this may be so, but it did not provide him with a cause of action. Second, he objected to the Law Society's voluntary adoption of the Code in 2005 – this could not now be the subject of a claim for damages by a solicitor unhappy with its terms. The underlying claim was struck out.

Haslam v Information Commissioner & Bolton Council [2016] UKUT 0138 (AAC) (judgment handed down 10.3.16)

22. The successful appellant in this appeal was a journalist who worked for the Bolton News and had made a FOIA request to the Council for disclosure of information about councillors who had received reminders for non-payment of council tax. He was initially told that there were 6 such councillors and was given some details (e.g. political party, amount, where proceedings had got to), but was not given their names. The journalist pursued the matter in relation to the two councillors who had been summonsed to court; one then voluntarily identified himself, so there was one name remaining at issue.

23. The Council refused to provide the name on the basis of the personal data exemption (s40 FOIA). Judge Markus in the UT found that the key issues relevant to fairness – and to the necessary balancing exercise - in the case were the reasonable expectations of the councillors, the consequences for them of disclosure of their names and the balance of those expectations and consequences against the interests in disclosure.

24. The Council argued that non-payment of council tax is an essentially private matter, and the UT accepted that there is a private element to it (for example in the sense that it is a private debt in respect of which the individual incurs a private liability). But, the UT continued:

> *"40. But, in the case of a councillor, it is not only a private matter. A councillor is a public official with public responsibilities to which non-payment of council tax is directly and significantly relevant. A number of specific features of this were advanced in submissions to the First-tier*

Tribunal. In particular, section 106 of the Local Government Finance Act 1992 bars a councillor from voting on the Council's budget if he or she has an outstanding council tax debt of over two months. If a councillor is present at any meeting at which relevant matters are discussed, he or she must disclose that section 106 applies and may not vote. Failure to comply is a criminal offence. Thus council tax default strikes at the heart of the performance of a councillor's functions. It is evident that setting the council's budget is one of the most important roles undertaken by councillors. The loss of one vote could make a fundamental difference to the outcome. This adds a significant public dimension to the non-payment of council tax. The very fact that Parliament has legislated in this way reflects the connection between non-payment and the councillor's public functions. Moreover, as the Commissioner observed in his decision notice, recent failure to pay council tax is likely to impact on public perceptions and confidence in a councillor as a public figure. "

25. The UT held that releasing the name would not contravene the data protection principles, because processing was necessary for the purposes of legitimate interests pursued by Mr Haslam, and was not unwarranted because of prejudice to the councillor's rights/legitimate interests.

26. The UT also reminded us that whilst FOIA is in general 'motive blind', this did not mean that the 'third party' had to be treated as if it were the public as a whole rather than the requester. But as the requester here was in fact a journalist his interests were effectively the same as those of the public at large.

Information Commissioner v Colenso-Dunne [2015] UKUT 0471 (AAC) (judgment handed down 25.8.15)

27. There is an inherent and arguably highly unsatisfactory tension in the position of the Information Commissioner, raising the age-old question of 'Who will watch the watchmen?'. It arises because the Information Commissioner ("IC") is:

(1) The statutory regulator in the arena of information rights, holding the ring between requesters under FOIA and public authorities. So if requesters are unhappy with the response of public authorities to their FOIA requests, they may complain to the IC.

(2) The IC is also himself a public authority (see Part VI of Schedule 1 to FOIA).

28. It may, therefore, come to pass, as happened in *Information Commissioner v Colenso-Dunne* [2015] UKUT 0471 (AAC), that the IC in his capacity as a public authority is investigated by the IC in his capacity as regulator. In this case, the IC found himself in the perhaps invidious position of having to defend the privacy rights of journalists, some of whom at least may have been less than scrupulous as regards the privacy rights of others.

29. In *Colenso-Dunne*, the Upper Tribunal dismissed the Information Commissioner's appeal against a First-tier Tribunal ("FTT") decision which related to a list of 305 journalists' names seized by the ICO during a raid in 2003 on the home of a private investigator. This was part of Operation Motorman, which included the IC's campaign against the unlawful trade in personal information, and the seizure of the journalists' names by the IC related to the phone-hacking scandal and in turn to related civil and criminal

    proceedings, and the establishment of the Leveson Inquiry. The IC published a report to Parliament on the unlawful trade in personal information entitled 'What Price Privacy?' (May 2006), and Mr Colenso-Dunne's request was for further information to supplement that provided in the IC's report, essentially requesting a detailed breakdown of the journalists involved, including their first, middle and last names.

30. The IC (in its capacity as a public authority) refused to release the list of journalists' names in response to Mr Colenso-Dunne's request under FOIA. Initially their refusal was based on two limbs: that the cost of compliance would exceed the appropriate limb of £450 (in reliance on section 12 of FOIA); and on the basis that the information concerned was exempt under section 40(2) of FOIA as personal data.

31. The IC (as regulator) – and perhaps in all the circumstances unsurprisingly - dismissed Mr Colenso-Dunne's appeal. It upheld the decision not to provide the names of the journalists on the basis that the information was "sensitive personal data" which had been correctly withheld by the ICO under section 40(2) of FOIA, and that the information in question was also correctly withheld under section 44(1).

32. This case raises an interesting question about the approach to take to the definition of "sensitive personal data". Here, the UT endorsed the release of a list of journalists' names where there was at least a question mark over the legality of the transaction (but not an allegation of criminality as such), finding that this approach had appropriate regard to the privacy rights of those journalists who, on the face of the record, had no questions to answer. Perhaps this was a surprising endorsement given that the Leveson Inquiry had declined to release the names of the journalists.

33. The UT looked closely at section 2(g) of the DPA. A caution[1]; a warning letter from the police (a step short of a caution)[2]; and false allegation as to the commission of a crime[3] had hitherto been found to be within the scope of section 2(g). The UT considered that whether particular information falls within section 2(g) must be a question of fact in the circumstances of any given case.

34. The approach that the FTT had taken, which disclosed no error of law, was to conduct a balancing exercise. This resulted in the Tribunal sifting out those journalists' names where the enquiry was plainly legitimate or the information was incomplete. The remaining sub-set of the original list was limited to those instances where there was at least a question mark over the legality of the transaction (but not an allegation of criminality as such); this was the data which effectively fell within paragraph 6(1) of Schedule 2 to the DPA.

35. This is a careful result that turns on the particular facts of the case, but does show perhaps that the definition of sensitive personal data may leave some room for the release of information that encroaches on the edge of criminality.

1 *MM v UK* (App. No. 24029/07 [2012] ECHR 24029/07, The Times, January 16 2013
2 *R(T) v Commissioner of Police for the Metropolis* [2012] EWHC 1115 (Admin) at [70], a finding not questioned on appeal.
3 *The Law Society & Ors v Kordowski* [2011] EWHC 3185 (QB) at [83].

Exemptions in ss35 and 36 FOIA – the chilling effect & impeding provision of frank advice

36. The last year has seen some attempts to grapple with the guidance given by Charles J in *Department of Health v ICO & Lewis* [2015] UKUT 159 (AAC), judgment handed down on 30 March 2015. Charles J had reviewed the approach to be taken to reliance on the exemption in section 35. In particular, he observed that disclosure under FOIA should be approached on a contents, specific information basis and not a class basis (with shades of the approach to public interest immunity being reflected in this). A contents based assessment must show that the actual information is an example of the type of information within the class description of an exemption and why disclosure of the contnets will cause or give rise to actual harm to the public interest, i.e. there must be evidence to this effect. Attempts should be made to identify specific public interests engaged in support of disclosure. Charles J found that oral evidence can be useful although the FTT should assess the need for it. Of particular note is Charles J's warning about the position of senior civil servants – their evidence may say that there should be transparency but only on departmental terms, but their evidence often warrants a 'Mandy Rice Davies' sidenote, i.e. 'he would say that, wouldn't he?'. Charles J found that a high degree of deference to either side is unlikely to be appropriate when assessing the public interest balance, although judicious recognition of the extent of Government expertise may be appropriate.

37. In *The Home Office v The Information Commissioner & Sloan* (EA/2015/0030), the FTT found that the public interest favoured disclosure of the requested information over the need to hold back based on s36 FOIA. Information was requested in relation to Operation Compliance, a programme concerning the wide ranging arrest of suspected illegal immigrants, used Twitter to promote awareness of enforcement action. The FTT found a lack of evidence of the chilling effect contended for by the Home Office, applied Charles J's guidance carefully and dismissed the Home Office's appeal. Note the careful application of Charles J's guidance. See also *DWP v IC, Slater & Collins* [2015] UKUT 353 (AAC).

LPP when a FOIA request later made

Hallows v Wilson Barca [2015] EWHC 3122 (Ch) (judgment handed down 10.9.15)

38. The claimant has lived in a tent on the edge of Hampstead Heath since the mid 1980s on a plot of land that he owns. He brought a claim against solicitors who had previously acted for him in the registration of the land and alleged that they failed to register the fact that he claims to have rights of way on that land. He alleged that this would affect the value of any development on the property.

39. The claimant's solicitor decided it would be helpful to obtain the views of the Local Authority Planning Department on whether planning permission would be granted. This 'pre-planning' advice was given. Subsequently, Wilson Barca's solicitors sought information in relation to planning matters from the Local Authority under FOIA. As a result of that request, they were provided with the pre-planning advice that had been given to the claimant's solicitors.

40. The claimant contended that the communication received from the Local Authority was legally privileged in that it was obtained in the context of litigation. The difficulty arose with the manner in which the pre-planning advice had been sought – if the solicitor had revealed that he was not seeking advice on a real-life scenario but rather a hypothetical case for the purposes of litigation, the Local Authority may well have refused to give the 'preplanning advice'.

41. The court said:

> *"11. Where advice is sought from a Local Authority in this context, the solicitor needs to bear well in mind that local authorities are statutory bodies, public authorities, and that they fall within the Freedom of Information Act 2000. They come under a statutory duty to provide information to any member of the public. That differentiates the Freedom of Information Act 2000 from the Data Protection Act.*
>
> *12. There are certain exemptions under the Freedom of Information Act in Part 2. Section 41 provides an exemption for information provided in confidence but that is only if that information was*

> *obtained by the public authority from another person. What is sought to be said to be within the exemption would have to be the advice given by the local authority which, therefore, does not fall within the exemption. There is also an exemption for legal professional privilege. What seems to me to be the position is if a local authority does give advice where it knows it is pursuant to legal professional privilege, then, of course, it will be duty bound to follow that exemption and refuse to provide the information under s.42."*

42. But in this case, the nature of the request was that the Local Authority could not have known that this was in the context of litigation or that any legal professional privilege could possibly exist. The court continued at §15:

> *".... It seems to me that if a solicitor seeks advice in this way, and it does not reveal in any way that it is going to be covered by legal professional privilege, then it has to be subject to the duties of the Local Authority under the Freedom of Information Act 2000. The solicitor knows that there can be no restraining of a local authority unless he puts it on notice of the legal professional privilege. He should know that this information will come into the public domain."*

43. The court, perhaps surprisingly, was not critical of the solicitor for obtaining the advice in this way (how else could he have got the information he needed?), but the consequence of the court's analysis was that privilege could no longer attach to the advice when it was made public under FOIA. The submission that the FOIA request was in itself improper was wholly rejected by the court: the defendant's solicitors in making the request could not have known that litigation privilege was claimed.

44. So, this case serves as a useful reminder that solicitors engaged in litigation should at all times remain mindful of the obligations of a public authority under FOIA, and unless it is very plain that a claim for legal privilege is being made over certain material, the material may well be released in a FOIA request. For planners, see also *Tidman v Reading BC* [1994] 3 PLR 72 as a comparison (LPAs do not owe a duty of care in providing pre-planning advice).

Use of twitter to make an FOI request

Ghafoor v Information Commissioner EA/2015/0140 (judgment handed down 9.11.15)

45. Can a valid FOIA request be made in a tweet? The short answer according to the FTT in this case was no. Mr Ghafoor used the Twitter handle "@FOIkid". The DWP tweeted a message about the jobs on Universal Jobmatch, and Mr Ghafoor tweeted seeking the basis for DWP's assertion and attempting to make a FOIA request.

46. The issue arose whether this was a valid request within the meaning of sections 1 and 8 of FOIA. The FTT held that section 8(1) requires the request for information to be made using the "real name" of the person making it, and that the provision of an address for correspondence must one which is "suitable for correspondence" between the requestor and the public authority about the request.

47. As the Twitter handle did not contain Mr Ghafoor's real name, the public authority should not be required to look elsewhere for it, and it was not, the FTT held, a valid request. But what would this mean for email addresses, which either do not include a full name because they are generic, or which could not be verified as being someone's real name? It will be interesting to see how this point develops.

Vicarious liability

Axon v Ministry of Defence [2016] EWHC 787 (QB)

48. This was a civil claim arising, circuitously, from a data breach by an employee. The key point for present purposes arises from an obiter remark of Nicol J answering whether if the employee who carried out the data breach had committed a tort against the claimant, whether MOD would have been vicariously liable:

> *"If [a tort had been committed], then it would seem to me to be just to require the MOD to assume vicarious responsibility. This is not simply*

> *an example of the employment being the opportunity for the wrong to be committed. As part of her work, she needed to have access to security sensitive and confidential information. As part of her work she shared office space with the J9 Pol/Ops PJOBS team and was likely to learn other information in consequence. There is always an inherent risk that those entrusted with such information will abuse the trust reposed in them, but rather than this being a reason why vicarious liability should not be imposed, I think, on the contrary, it is a reason in its favour. True it is that Ms Jordan-Barber's activity did nothing to further the MOD's aims, it was carried on without their knowledge, and it received no encouragement from the MOD. What she did was prohibited. However, those features do not preclude vicarious liability (and Ms Michalos did not suggest they did). Notwithstanding them, if I had held that Ms Jordan-Barber had committed a tort (contrary to my findings), I would have concluded that that hypothetical tort would have been sufficiently closely connected with her job for it to be just for the MOD to be vicariously liable."* (§95, emphasis added)

49. It will be interesting to see how these obiter remarks play out – if Nicol J is correct, this is potentially costly for employers.

Postscript

Bizottsag v Hungary (18030/11) – heard in Strasbourg in November 2015

50. Finally as a postscript, *Bizottsag v Hungary* (18030/11) was heard by the Grand Chamber towards the end of 2015 and judgment is awaited. K*ennedy v UK* is stayed behind it. The applicant NGO relied on Article 10 of the ECHR, complaining that the Hungarian courts' refusal to order the surrender of the information sought amounted to a breach of its right to access to information. Is there, then, a human right to freedom of information? This judgment is awaited with interest.

Litigation

51. Finally, it is worth noting the remarks of Warby J in a judgment handed down on 6 April 2016 in *Guriev & Gurieva v Community Safety Development (UK) Ltd* [2016] EWHC 643 (QB). The questions around the subject access requests made in the case are probably fact-specific, but of wider interest is Warby J's judgment at §72:

"I have difficulty also with the notion that the use of a SAR for the purpose of obtaining early access to information that might otherwise be obtained via disclosure in pending or contemplated litigation is inherently improper. [..] the Court of Appeal seems to have taken a different view [...]. In Dunn v Durham County Council [2012] EWCA Civ 1654, [2013] 1 WLR 1305, the court considered, in the context of proceedings claiming damages for child sexual abuse, the interaction of the disclosure regimes under the CPR and the DPA. The claimant had made a SAR. Munby and Tomlinson LJJ agreed with the judgment of Maurice Kay LJ, who saw nothing wrong in principle with using SAR as a means of obtaining information from an adversary in actual or pending litigation. ...". (§72).

52. A few recent examples of cases where SARs/FOIA requests have been used to good effect include:

(1) *Bokrosova v LB Lambeth* [2015] EWHC 3386 (Admin) – housing information obtained in 2 focused FOIA requests was not then disclosed at pre-action stage. The Claimant was able to challenge this and the steps she had taken were to her advantage.

(2) *Flynn Pharma v Drugsrus Ltd* [2015] EWHC 2755 (Ch) – this was a trade mark infringement claim where the Claimant had made an FOIA request to the Prescription Pricing Authority and obtained useful evidence of prescribing practice which assisted his case.

(3) *Babbage v SSHD* [2016] EWHC 148 – a SAR enabled the Claimants to proceed despite poor disclosure from the Secretary of State for the Home Department. The Secretary of State had taken such a poor approach to disclosure that without the information obtained from a SAR he may not have been able to execute his case.

53. A SAR/FOIA request should always be considered as an option in the early stages of litigation, and potential defendants should respond to such requests in the knowledge that litigation may follow.

Louise Jones
Guildhall Chambers

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