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The right to change your mind - a public authority's prerogative?

Further information
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Contact
Paul Dacam
T +44 0 (20) 7296 2615
paul.dacam@hoganlovells.com

Jamie Potter
T +44 0 (20) 7296 5499
jamie.potter@hoganlovells.com

The right to change your mind - a public authority's prerogative?

Paul Dacam, Partner, Jamie Potter, Associate and Tom Mabbott, Trainee Solicitor, at Hogan Lovells International LLP, examine the issue of late reliance on exemptions in relation to information rights

In only the second substantive judgment of the Upper Tribunal in an information rights appeal, Judge Edward Jacobs, sitting alone, has overturned a long line of Information Tribunal jurisprudence, opening the way for public authorities to rely, as a matter of right, on Part II exemptions that were not previously raised in a refusal notice or internal review before the Information Commissioner ('the Commissioner') and the First-tier Tribunal. Prior to this judgment, most Tribunals had found that new exemptions could only be relied upon at the discretion of the Commissioner or the Tribunal.

In reaching his decision, Judge Jacobs was considering two appeals from decisions of the Information Tribunal (as it then was) on the issue of late reliance on exemptions: *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC) ('DEFRA') and *Information Commissioner v Home Office* [2011] UKUT 17 (AAC) ('Home Office').

This article is intended to provide a summary of Judge Jacob's decision, while also identifying a number of questions left unanswered. It is not intended to suggest that it would be preferable to leave the question of late reliance to the discretion of the Commissioner and/or Tribunal, but only to highlight the complexity of this issue.

THE INFORMATION TRIBUNAL DECISIONS

The appeal in the Home Office case arose because, after relying on section 35 (public policy) of the Freedom of Information Act 2000 ('FOIA') in its refusal notice, its internal review and before the Commissioner, the Home Office instead sought, before the Information Tribunal, to rely upon sections 40 (personal data) and 42 (legal professional privilege) in respect of both the original information withheld and new information the Home Office had subsequently identified. The Home Office argued it had a right to rely on such new exemptions.

A panel headed by Judge DJ Farrer QC considered the previous jurisprudence on this issue (which had generally determined that the Tribunal had a discretion in these circumstances), but decided instead that the Tribunal was obliged to consider new exemptions raised by a public authority. The Tribunal principally relied, in reaching this decision, upon its interpretation of the Tribunal's obligation to allow an appeal where the Decision Notice "is not in accordance with the law" (section 58).

The Information Tribunal judgment in this case was the subject of a detailed case summary in this journal in January/February 2011 (Volume 7, Issue 3, page 13). In brief, the Commissioner had argued that section 58 required only consideration of the application of the exemptions addressed by the Decision Notice; however the Tribunal considered this interpretation was inconsistent with the discretion that the Commissioner was also proposing. Instead, the Tribunal preferred the interpretation put forward by the Home Office, namely that the Tribunal was required to determine whether the Information Commissioner had reached the right result, and as such was required to consider the application of any new exemptions raised. The Tribunal did not consider this required either the Tribunal or the Commissioner to raise exemptions of their own initiative except where such exemptions clearly applied. The Tribunal also considered this interpretation was "at its lowest, not incompatible with normal Tribunal procedure "obliged to consider new exemptions raised by a public authority. The Tribunal principally relied, in reaching this decision, upon its interpretation of the Tribunal's obligation to allow an appeal where the Decision Notice "is not in accordance with the law" (section 58).

In contrast, a differently constituted Information Tribunal in DEFRA upheld previous jurisprudence of the Tribunal confirming that there was a discretion to allow late-claimed exemptions. This case arose under the Environmental Information Regulations ('EIRs') when DEFRA sought to rely on three exemptions it had not previously raised before reaching the Tribunal. Considering the matter as a preliminary issue, the Tribunal noted that the existence of a discretion was consistent with the underlying purpose of the legislation, namely to provide for disclosure of information by public authorities.

Previous Tribunal judgments had also identified that a discretion was consistent with the fact that FOIA imposed time limits on public authorities to respond to a request and that public authorities were not bound to apply an exemption in any event. Moreover, a previous Tribunal had suggested it was entitled to refuse to entertain a late exemption in its discretion as part of "its formal and authoritative determination under the FOIA scheme of the significance of that exemption in relation to the public authority's obligations…" (See, in particular, *Crown Prosecution Service v Information Commissioner* [2010] UKFTT 139 (GRC)).

THE UPPER TRIBUNAL JUDGMENT

"Section 17 does not actually require public authorities to identify relevant exemptions, only to identify exemptions upon which they rely."

The majority of Judge Jacobs' judgment deals with the Home Office appeal and the raising of late exemptions under FOIA; however, he applies an identical analysis to the issue under the EIRs and therefore decides the DEFRA appeal in a consistent manner. It is worth noting at the outset that, by the time of the Home Office appeal, the requested information had been disclosed by the Home Office, but the parties (and the Judge) agreed that the hearing should proceed due to the importance of the issues involved. Although the requester was not represented in this appeal, Judge Jacobs did have the advantage of submissions from Counsel for the requester in DEFRA.

Unlike the Information Tribunal in Home Office, Judge Jacobs primarily based his decision not on the statutory role of the Tribunal, but instead considered from the outset the general legislative scheme and the policy that underpinned it, in particular with respect to the conflict between the rights of third parties (to whom the information may relate) and the rights of requesters.

THIRD PARTY V REQUESTER RIGHTS

Judge Jacobs' principal concern appeared to be that the existence of a discretion to refuse late-claimed exemptions would provide inadequate protection for third parties who may have rights in information, or who may otherwise be prejudiced by the disclosure of information. As the First-tier Tribunal, on appeal, was the ultimate arbiter of the application of exemptions, as well as of the public interest test, anything less than an absolute right to rely on new exemptions could "hamper a full consideration of the public interest and prevent the interests of third parties being taken into account."

According to Judge Jacobs, the right to rely on late-claimed exemptions was also consistent with the fact that public authorities are not obliged to rely on exemptions and may withdraw such reliance at any time: a fact, according to Judge Jacobs, indicative of the right of a public authority to change its mind during the process. However, what is not reconciled in the judgment, is the conflict between the protection of third party rights and the public authority's discretion to disclose irrespective of the application of an exemption under FOIA, including where the Tribunal has found that a particular exemption applies and/or where third party rights apply. In these circumstances, the responsibility for the protection of third party rights lies not under FOIA, but instead under other statutes such as the Data Protection Act 1998, or in private law claims, for example, breach of confidentiality.

Against the rights of third parties (and the legislative scheme — see further below), Judge Jacobs considered the rights of requesters, both as to the uncertainty that would be created for the requester, and the lack of any incentive on the part of the public authority to raise all relevant exemptions at the outset. Judge Jacobs was not satisfied that any more certainty could be provided to a requester by the existence of a discretion to allow late exemptions. Moreover, he did not consider that such a discretion could solve the problem of what he described as 'cavalier authorities' who fail to fulfil their obligations under FOIA from the outset. However, while it may be correct that a discretion will not solve the problem, Judge Jacobs did not seem to address the fact that a right to claim exemptions before the Tribunal may itself facilitate such cavalier behaviour on the part of public authorities.

With respect to the argument that the existence of a right to introduce new exemptions may result in the case before the Information Tribunal being entirely different to that considered by the Commissioner (as was effectively the case in Home Office), Judge Jacobs noted that it was not uncommon for an appeal system to bypass the role of the initial decision-maker, highlighting his experience with the Social Security Tribunal. However, in the case of FOIA, the Commissioner is not the initial decision-maker: it is the public authority, which itself has two bites of the cherry (a fact also seemingly overlooked, as discussed later).

The policy arguments against the existence of a right to claim exemptions late were therefore not enough to counteract the policy arguments in its favour, nor were they sufficient to override Judge Jacob's analysis of the legislative structure, which he described as "incompatible with the limitation on the public authority's rights and with the existence of the discretion that [the Commissioner (in its submissions)] asserts for the Information Commissioner and the First-tier Tribunal", and is worth considering further.

THE LEGISLATIVE SCHEME

Judge Jacobs first emphasised that the initial handling of the request by a public authority is an 'administrative process' and not an 'adjudicative matter that results in a decision'. While recognising the importance of a public authority making the right decision the first time round, he also highlighted the importance of there being a right to correct innocent errors as a matter of good administration, particularly in circumstances where the public authority identifies new information. However, this section of the judgment makes no reference to the fact that there already exists a formal process by which administrative errors can be corrected, namely the internal review. In most cases this process will involve persons more experienced in FOIA matters reviewing the information and considering which exemptions should be applied. As a result, the public authority has already had two bites of the cherry before the matter even reaches the Commissioner.

Judge Jacobs next identifies the Commissioner's role as the 'decision-maker' in the process, and as such finds that this role extends beyond considering the matters raised by the requester in his or her complaint. Because the Commissioner may consider matters of both substance (e.g. the application of exemptions) and procedure (e.g. timing), Judge Jacobs finds that the Commissioner may "give a decision that the public authority was in breach of section 17 for failing to identify a relevant exemption." However, this view is

questionable, as section 17 does not actually require public authorities to identify relevant exemptions, only to identify exemptions upon which they rely. The effect of Judge Jacobs' decision is that the Commissioner's role now potentially extends wider than that of the public authority.

Judge Jacobs further suggests that the requirement in section 50(4) for the Commissioner to decide whether the authority failed to communicate information where it is required to do so means that the Commissioner must itself form an independent judgment as to whether an exemption applies, and if it does, where the balance of the public interest lies. In this respect, Judge Jacobs did not consider that the scope of the Commissioner's decision was limited either by the terms of the complaint made to it or of the refusal notice, or by the reference in section 50(1) to the Commissioner making "a decision whether, in any specified respect, a request has been dealt with in accordance with the requirements of Part I". To limit the Commissioner's role in this way would, according to Judge Jacobs, be a disadvantage to requesters, who cannot be privy to all relevant information in the way that the Commissioner can. Again, one has to question this conclusion: it would seem unlikely that many requesters would wish a complaint to the Commissioner to result in new, or even more, exemptions being claimed.

The natural result of Judge Jacobs' finding, as he discusses, is that the Commissioner is obliged to take the initiative and consider all exemptions, including those that were not relied upon by the public authority, particularly where they protect third parties. This goes beyond the position of the Information Tribunal in Home Office, which found the Commissioner had no such obligation.

Judge Jacobs does attempt to limit the obligation, stating: "The Commissioner does not have to consider every exemption, only those that merit consideration on the information presented. Nor does the Commissioner have to launch any investigation into every aspect of every exemption. The Commissioner is, though, expected to be more proactive in the protection of third parties."

It is difficult to see, however, how the Commissioner can perform this expanded role without considering, at least in a summary form, every exemption in relation to every complaint.

Judge Jacobs does consider the lynch-pin of the original Home Office decision — the statutory scope of the First-tier Tribunal — in respect of which he agrees with the First-tier Tribunal's analysis (although perhaps not placing quite as much weight upon the point). This means that the "tribunal must consider any relevant issue put it [sic] by the parties." It is, however, worth noting that Judge Jacobs acknowledges that the right to raise exemptions late remains subject to the Tribunal's powers to control its own procedures. It will be interesting to see how such powers are exercised going forward.

CONCLUSION

According to Judge Jacobs, the existence of a discretion on the part of the Commissioner and the Information Tribunal in considering new exemptions raised before them: "favours disclosure and therefore the public interest in disclosure. This produces a distortion in the balancing exercise, which under section 2(1)(b) and (2)(b) is presented as an even-handed one."

However, it has commonly been understood that FOIA as a whole, and the public interest balancing exercise in section 2(1)(b) specifically, in fact contains a presumption in favour of disclosure — where the scales are equal, then information is to be disclosed. It is not clear just how significantly this particular decision eats into that presumption. What is clear is that this is almost certainly not the end of the debate: the DEFRA matter is now going before the Court of Appeal and similar issues are also currently being considered by different panels of the Upper Tribunal.

Postscript: Since this article was first submitted, judgment has been handed down in one of the Upper Tribunal cases considering similar issues: *All Party Parliamentary Group on Extraordinary Rendition v Information Commission and Ministry of Defence* [2011] UKUT 153 (AAC) (in relation to which the authors acted for the APPGER). The three-member Tribunal decided that it was not necessary to determine the issue from *Home Office* on the particular facts of the case before them (which related principally to late reliance by the MoD on the section 12 costs exemption). However, the Tribunal did express "some general concerns that an indefeasible right in the public authority to raise whatever exemption it thought fit whenever it wanted to would raise a number of real problems with the scheme of the Act. A further article on this judgment is being prepared for the next edition of *Freedom of Information* journal.

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