



Tribunals Service

Information Rights

IN THE FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER

Case No. **EA/2010/0028**

**Information Commissioner's
Decision Notice No: FS50161574**

Appellant: The Cabinet Office

Respondent: Information Commissioner

On the papers alone

Date of decision: 25 January 2010

Before

**David Marks QC (Judge)
Sitting Alone**

DECISION OF THE FIRST-TIER Tribunal

Ruling

The Tribunal, in the circumstances, does not regard it as necessary to make any ruling as to the disclosure of the Confidential Annex appended to the Appellant's Notice of Appeal and to its Grounds of Appeal.

REASONS FOR DECISION

General

1. The General Regulatory Chamber (GRC) was established on 1 September 2009. It set out and established the so-called First-tier Tribunal system which was established by Parliament under the Tribunals Courts and Enforcement Act 2007. The GRC brings together a range of previously separate tribunals that heard appeals on various regulatory issues. It was thought appropriate that such tribunals share a common set of rules as to practice and procedure.
2. The 2007 Act represented a complete sea-change on how tribunals are and are to be organised. It also set up an Upper Tribunal to deal in general with appeals from and enforcement of First-tier Tribunal decision.
3. Up until 17 January 2010, matters dealing with issues principally under the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA) were dealt with by the Information Tribunal (the Tribunal) originally called the Data Protection Tribunal which, as its name suggested, was set up under the data protection legislation.

4. Since that date, i.e. January 2010, the Tribunal has become part of the First-tier Tribunal system within the GRC. It is now to be referred to as the First Tier Tribunal (Information Rights). However, for ease of reference this ruling, and no doubt subsequent rulings and judgments in the new tribunal generally will continue to refer to the new tribunal as the Tribunal.
5. The GRC and, in particular, the Tribunal as part of the GRC is now regulated by a new and lengthy set of rules called The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976. These are extensive Rules which number 45 separate rules being split into various parts. The first part is an introduction, the second part deals with general powers and provisions, the third part deals with proceedings before the relevant tribunal, and part four deals with the corrections setting aside and reviewing and appealing of Tribunal decisions.
6. Prior to the above date, the Tribunal's practice and procedure was subject to the Information Tribunal (Enforcement Appeals) (Amendment) Rules 2002 (2002/2722). These Rules were in turn amended by 2005/450. In addition, the Tribunal issued and generally abided by its own set of Practice Notes.
7. In particular, the Tribunal had a Practice Note dealing with Confidentiality and Redaction. There is no need to set out the contents of that particular Practice Note save to say that where an exemption is claimed under FOIA and the Tribunal is required to see the information to determine the appeal, the responsible Chairman or Deputy Chair shall ensure action is taken to maintain appropriate confidentiality. The pre-existing Rules in Rule 14 addressed the directions that the Tribunal was able to make as to disclosure. The Practice Note merely reflected a well established practice and procedure that the parties would ensure that there would be an open bundle and a closed bundle, the latter to

contain confidential information not to be disclosed either in the open hearing or in such other circumstances that the Tribunal thought appropriate both prior to and during the appeal process itself.

8. The abiding objective was to ensure that the Tribunal had all the information it required to make a decision in the case. In effect, the Tribunal was given the widest possible ambit in order to ensure that appropriate confidentiality was maintained with regard to documents and evidence that any party claimed to be confidential for the purposes of the appeal as a whole. See generally the Tribunal's ruling in a series of decisions involving *Sugar v The Information Commissioner and the BBC*.

The New Regime : the Practice Note of 8 January 2010

9. A new Practice Note to coincide with the entry into of the new system is entitled "Protection of Confidential Information in Information Rights Appeals before the First-tier Tribunal in the General Regulatory Tribunal on or after 18 January 2010".
10. As the Note itself explains, it seeks to set out the arrangements for protecting confidential information in Information Rights Appeals and related matters before the Tribunal. Reference is made to the GRC Rules which have been mentioned above.
11. At paragraph 4, reference is made to the typical case where the requesting party seeks to have disclosure of certain information, but the Tribunal will need to see the information which is being withheld in order to reach its decision. The present case is not such a case. As will be seen, there has at least, initially, been opposition in the present case by the public authority to revealing a confidential annex appended to its Notice of Appeal. At paragraph 8 of the new Practice Note, the following appears, namely:

“Where a party to proceedings claims that an exemption under Part II of FOIA has been applied, or would apply to information (such as documentary or oral evidence and submissions) and the Tribunal requires to see the information in order to determine the appeal, the Judge should ensure action is taken to maintain appropriate confidentiality. This applies in particular when the Tribunal is making directions under Rule 5 as to the disclosure of documents, statements of facts and evidence and skeleton arguments.”

12. The Practice Note then goes on to stress that suitable directions be issued in the time leading up to the appeal to ensure that information is kept confidential in such circumstances as may be appropriate. The old system would continue, namely, that there would probably be in most cases an open bundle and a closed bundle.
13. The abiding principle is, as it always has been, that the Tribunal should ensure that it has all the information it requires to make a just and fair decision in the particular appeal or in the given case. In particular, if a party claims that documents or evidence needed to be kept confidential from one or more of the other parties, again, the Tribunal should ensure making appropriate directions as to confidentiality.
14. In Part II of the new GRC Rules, Rule 14 gives power to the Tribunal to make an order prohibiting the disclosure or publication of specified documents or information. By sub-Rules (6) and (7), the following is provided, namely:
 - “(6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specify the other persons.

- (7) The party making an application for a direction under paragraph (6) may withhold the relevant documents or information from other parties until the Tribunal has granted or refused the application.”
15. The present appeal involves a number of exemptions being claimed by the relevant public authority. It is not necessary to recite the terms of the Decision Notice in full. The same can be referred to on the appropriate page of the website of the Commissioner. The public authority has here claimed reliance upon a number of exemptions. In the Decision Notice, the Commissioner thought it appropriate in paragraph 24 to append by way of a Confidential Annex to his Decision Notice certain issues and information which had emerged during the Commissioner’s investigation with the public authority. The said annex in the terms of paragraph 24 were said to have been provided to the public authority alone.
 16. The Tribunal has been assured formally by the Commissioner that in due course the Confidential Annex to the Decision Notice will be, of course, made available to the Tribunal for the purpose of the appeal.
 17. In the reasonably lengthy Grounds of Appeal which accompanied the Notice of Appeal in this matter (the said Notice of Appeal being dated 22 December 2009 in the wake of the Decision Notice which was dated 21 December 2009), the Grounds relating to the said Notice of Appeal took issue with one particular dissemination of the Commissioner relating in this instance to the Commissioner’s reasoning on two exemptions relied upon. The Grounds stated that the grounds for impugning the Commissioner’s reasoning were themselves set out in a Confidential Annex to the Grounds of Appeal.
 18. Initially, the public authority, by its legal representative was reluctant to provide a copy of the said Annex, even to the Commissioner, as

evidenced by certain email exchanges with the Commissioner. It seems that since those exchanges, and by the date of this ruling, the said Annex has been produced to the Commissioner and no doubt the public authority will ensure that the said Annex, as well as the Commissioner's own Annex, be part of the material put before the Tribunal on the appeal. In those circumstances, contrary to an earlier suggestion made in a formal exchange by the public authority that a direction be required to that effect under Rule 14(6) and/or (7) of the new GRC Rules, the Tribunal is no longer asked to make such a rule.

19. The Tribunal concludes by saying that it is hoped that in future cases when any such Annex is thought to be appropriate by or on behalf of a public authority, the matter will be dealt with in the same manner as in the present case without there being any need to seek any specific direction from the Tribunal. However, the fact remains that there is a clear jurisdiction to do so in an appropriate case.
20. In the circumstances, the Tribunal proposes to make no specific ruling on this issue.



David Marks QC
Tribunal Judge

1 February 2010