**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL**
**(INFORMATION RIGHTS)**
**GENERAL REGULATORY CHAMBER**

**Appeal No: EA/2010/0173**

**BETWEEN:**

**TONY WISE**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

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## DECISION AND REASONS

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**Determined on the Papers by:** **Alison McKenna, Tribunal Judge**
**Henry Fitzhugh, Tribunal Member**
**Roger Creedon, Tribunal Member**

**On: 4 March 2011**

**At: Tribunals Service, Fox Court, London**

**Date of Decision: 15 March 2011**

**Subject Matter:**

**Section 1(1) Freedom of Information Act 2000**

### Decision of the Tribunal

**This appeal is hereby dismissed.**

## Reasons for Decision

*The Information Request*

1. This appeal concerns a request made by the Appellant to the Lancashire Police Authority ("LPA") on 31 August 2008 for documentation concerning the LPA's decision not to include in its newsletter "*Dialogue*" an article on the Intelligence and Anti-Corruption Team. There had previously been a published intention to include such an article and the Appellant sought information under the Freedom of Information Act 2000 ("FOIA") about why the decision not to do so had been taken.

2. The Appellant's request was for:

> "…*all internal documentation, files, reasons, decisions or any other information to explain why the "Focus on the Intelligence and Anti-Corruption Team within PSD[1]" has never been in your public leaflet "Dialogue" as promised it would be in August 2007 or at any other time in the future. Please include all official internal documentation or any other official media that evidences or provides or provides reasons for this decision?*
>
> *Please include all paper records, e mails, information stored on computer, audio or video cassettes, microfiche, handwritten notes or any other form of recorded information including and not exclusive to any written records, typed, handwritten and scribbled notes, emails, spreadsheets, photographs, tapes records, flip-charts, videos, audio tapes, computer tapes, logs, answer phone messages, tapes of telephone conversations, archived records or any other internal documentation or media explaining the reasons or decisions in relation to omitting "Focus on the Intelligence and Anti-Corruption team within PSD" from August 2007 "Dialogue", as promised, or from any other issue in the future".*

3. LPA responded on 18 September 2008 that there had been no deliberate omission of the article and stated it did not hold any information in relation to the request. It explained that the articles in "*Dialogue*" are driven by its interaction with the public and are subject to the Editor's discretion. The outcome of an internal review was communicated in writing to the Appellant on 14 October 2009 (although LPA took the view that the outcome of the internal review had already been communicated to him in person on 30 September 2008). The Appellant's complaints about the handling of the internal review are outside the Tribunal's jurisdiction and we do not comment on them in this decision.

*The Decision Notice*

4. The Appellant contacted the Respondent on 23 November 2009. He raised a number of issues which fell outside of the Respondent's statutory remit. After further inquiries the Respondent invited the Appellant to withdraw his complaint. The Appellant then asked the Respondent to issue a formal Decision Notice.

[1] "PSD" stands for the "Professional Standards Department" which deals with complaints about police officers and staff.

5. The Respondent made enquiries about the searches LPA had carried out in order to respond to the information request, and then published his Decision Notice FS50280472 on 22 September 2010, in which he found that on the balance of probabilities no records of the decision had been kept and that LPA had complied with its obligations under FOIA.

*The Appeal*

6. The Appellant submitted a Notice of Appeal and accompanying grounds on 15 October 2010. He stated in his Grounds that he did not believe that the Respondent had undertaken a proper investigation because he had believed the LPA without critical challenge to the evidence it had presented.

7. In his Response to the Appeal, the Respondent applied for a strike out of the Appeal, under rule 8 (3)(c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended ("The Rules"). This was on the basis that there was no reasonable prospect of the Appellant's case succeeding. On 29 November 2010, Judge McKenna ruled that the Appellant had raised an issue which was one for the Tribunal to determine, namely, whether the Respondent had carried out a proper investigation so that, on the basis of the investigation, he was entitled to make the findings of fact on which he relied in reaching his conclusion. Judge McKenna was not satisfied that it was then appropriate to strike out this appeal, however she invited the Appellant to provide amplification of his Grounds of Appeal once he has seen the evidence to be included in the bundle for the Tribunal. It was then open to the Respondent to apply for a strike out on the basis that there were no reasonable prospects of success at that stage. The Respondent did not in the event make a further strike out application.

*Mode of Hearing*

8. The Appellant requested that this matter be determined on the papers. The Respondent agreed with that request. The Tribunal was satisfied that it could properly determine the issues without an oral hearing. The Tribunal had before it an agreed bundle of papers and submissions, running to over 129 pages.

*The Law*

9. Section 1(1) of FOIA states that

"*Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request and (b) if that is the case, to have that information communicated to him*".

*The Powers of the Tribunal*

10. This appeal is brought under s.57 FOIA. The powers of the Tribunal

in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

*"If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*
*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

*The Appellant's Case*

11. In his Grounds of Appeal, the Appellant did not argue that the Respondent's test for deciding whether LPA held the requested information (the balance of probabilities test) was wrong. The Appellant made serious allegations against the Respondent in the course of making the point that he was not satisfied that a proper investigation was conducted into his complaint. He alleged that the Respondent was biased, prejudiced and dishonest and displayed blatant predetermination of the issues.

12. As permitted by the Tribunal's directions, the Appellant sent us an extensive skeleton argument dated 20 February 2011, which may be summarised as follows:

(i) The Respondent did not conduct a fair and impartial investigation;

(ii) The Respondent has accepted bare assertions from LPA;

(iii) The balance of probabilities test is appropriate but has been misapplied; a higher test would be appropriate in this case due to the public authority being small;

(iv) His arguments and evidence provide a reasonable suspicion that the evidence relied upon by the Respondent is unsafe;

(v) Document 40 in the bundle (an e mail sent subsequent to the information request) provides the best evidence of how LPA responded to his request yet has been substantially disregarded by the Respondent in favour of unsupported assertions;

(vi) LPA asserts that it made searches which are not referred to in the initial response and internal review. This suggests they were not in fact carried out;

(vii) That the disputed circumstances of the internal review demonstrate bad faith on the part of LPA;

(viii) The Respondent took into account assertions from LPA that it had made searches for the information requested after the Appellant had been told that the Decision Notice would be drafted on the basis of the evidence already collated. These assertions were made for the first time at a late stage of the investigation, were not rigorously tested and were included at a late stage because the Decision Notice would otherwise have been "unsafe". The issue of whether internal searches for the information were or were not made is crucial to the Respondent's decision;

(ix) The Appellant referred us to decisions of differently-constituted panels of this Tribunal and to arguments presented in those cases;

(x) The Appellant made a number of submissions in relation to his meeting with the Chief Executive on 30 September 2008 and the internal review;

(xi) The LPA has shown itself to be unreliable in a number of other instances. The Appellant provided the Tribunal with two witness statements, one made by the Appellant himself on 25 January 2011 and the other by Allan Wise (who is the Appellant's brother) on 23 January 2011, which are directed to this issue.

*The Respondent's Case*

13. The Respondent filed a Response to this appeal, pursuant to rule 23(7) of the Rules, in which he denied the allegations made against him and asserted that a proper investigation had been undertaken and reasonable findings of fact had been made which supported his conclusions as set out in the Decision notice.He invited the Tribunal to dismiss the appeal.

14. The Respondent did not file a skeleton argument prior to the hearing.

*The Tribunal's Conclusions*

15. In this case, the Respondent was required to decide whether, at the date of the Appellant's request, LPA held any recorded information in relation to that request. Having made his enquiries, the Respondent concluded that, on the balance of probabilities, no recorded information which related to the information request was held by LPA.

16. The Decision Notice demonstrates that the Respondent found as a matter of fact that:

a. LPA's Chief Executive had explained to the Appellant in 2008 that there had been a shift in approach to the content of "*Dialogue*" so as to communicate specific information to the public;
b. LPA had made inquiries on receipt of the Appellant's information request, which included a search of its manual and electronic records. These searches confirmed that no information was held;
c. "*Dialogue*" is produced by a small team of 12 officers and their interaction with each other tends to be face-to-face;
d. There is no business purpose for which LPA would need to keep the requested information and no such information had been created, deleted or destroyed;
e. The requested information was not covered by LPA's records management policy.

Based on his findings of fact, the Respondent concluded that on the balance of probabilities no recorded information relevant to the information request was held by LPA at the relevant time.

17. The Appellant now seeks to challenge those findings of fact and the decision based upon them. This means that the "burden of proof" in this appeal lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the decision made by the public authority and upheld by the Respondent was wrong. This is a proper question of law for the Tribunal to determine. The statutory scheme which has been created in Information Rights cases provides for the Tribunal to consider the evidence and to make its own decision so that any deficiencies in the Respondent's investigation may thereby be corrected. In this case, the Appellant has gone further than challenging the Respondent's decision and has made some serious allegations of bias, dishonestly and pre-determination against the Respondent. Such allegations have not assisted the Tribunal to determine the question before it and have merely introduced additional issues for the Tribunal to consider. They have not assisted the Appellant either, as they are entirely unsubstantiated. The Tribunal wishes to make clear that it does not accept these allegations.

18. It is settled law that the "standard of proof" applicable in civil cases generally and in appeals to the First-tier Tribunal in particular is the civil standard i.e. the balance of probabilities test. Accordingly, we are bound to reject the Appellant's contention that a higher standard of proof should be applied to LPA's evidence in this case. The Appellant has argued that his own analysis of the evidence is such as to raise a "reasonable doubt" in this case, however that argument relates to the criminal standard of proof (which is "beyond reasonable doubt") rather than to the civil test which we are bound to apply.

19. In considering whether the balance of probabilities test is met, the Tribunal may have regard to the likelihood of the fact at issue. The more likely the fact, the less persuasive need be the case to justify it. To quote Lord Hoffman[2], "…*some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian"*.

[2] Secretary of State for the Home Department v Rehman [2003] 1 AC 153

20. The Tribunal has considered the fact that this case relates to an editorial decision in respect of LPA's newsletter. The Tribunal is satisfied that there is no statutory, policy or practical reason for records of such editorial decisions to be kept by LPA. The Tribunal is, in the circumstances, satisfied that there is no error of law in the Respondent's finding on the balance of probabilities that no records relevant to the information request were kept.

21. The Appellant places much weight on the fact that the Respondent obtained a response to its question as to whether a search for the relevant information had been made only days before the Decision Notice was issued. He asks the Tribunal to conclude that LPA's response must have been untrue because otherwise it would have mentioned the searches made at an earlier stage in the inquiry. The Tribunal notes that the Respondent had asked LPA about searches in February 2010 (page 56 of the bundle) but that LPA's response on 18 February (page 59) did not answer all the relevant questions put to it. The Tribunal concludes that if the Respondent had paid closer attention to detail in the investigation he might have chased up the outstanding issues earlier but that in fact he did not do so until September of that year (pages 128 – 129 of the bundle) when he received confirmation that a search for the requested information had been made. In the context of the fact that LPA had no obligation to preserve information about editorial decisions, the Tribunal is satisfied to the civil standard that LPA did carry out a search and that no information was found. Indeed, there is no evidence to the contrary. The Tribunal has identified a certain lack of rigour in the investigation on this point (which, as stated above, is cured by the Tribunal's own review of the evidence) but it does not agree with the Appellant that this is evidence of dishonestly on the part of either LPA or the Respondent. In the overall context of LPA's interaction with the Respondent, the Tribunal finds merely that the relevant question had not been answered at the relevant time.

22. The Tribunal notes that the Appellant has not been able to produce any factual evidence to support his contentions, and that much of his case is inferential, based upon close textual analysis and the suggestion (made in the witness evidence and elsewhere) of bad faith on the part of LPA (particularly in relation to the internal review). We do not criticise the Appellant for his lack of extrinsic evidence – it is obviously difficult for someone outside an organisation to produce evidence of what goes on inside it – however, we have not been persuaded that the Appellant's personal analysis of the documents is one we should adopt. In other words, he has not convinced us that it is more likely than not that his version of events is correct and consequently that the Respondent's findings of fact may not reasonably be relied upon to support the conclusions in the Decision Notice. In reaching that conclusion, we have taken into account the lack of a reason or duty to hold the information requested and the inherent likelihood that no such information would therefore have been held by LPA. If, for example, the information requested had related to a statutory function of LPA, we would have required more evidence to persuade us that the information was not held because that would have been inherently more unlikely.

23. The Tribunal notes that during the course of its enquiries, the Respondent considered not only the information provided by LPA about its search for the requested information, but also evidence that had apparently come into being *after* the date of the information request (in particular, the e mail at page 40 of the bundle) in order to see if it suggested that recorded information had in fact been held by LPA at the date of the request. We concur with the Respondent's approach to this evidence. In our judgement, it does not support the Appellant's contention that no searches had in fact been made by LPA simply because they are not mentioned in that document. The e mail at page 40 of the bundle was a suggested reply to the Appellant explaining that no information was held; it was clearly never intended to be a factual account of the steps taken by LPA to reach that conclusion.

24. In all the circumstances, the Tribunal finds that there is no error of law in the Respondent's Decision Notice. We find that the Respondent's findings of fact were reasonable and furthermore that they supported the conclusions he reached in this case. For these reasons, the Tribunal hereby dismisses this appeal.

Alison McKenna
Tribunal Judge

Dated: 16 March 2011