



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Appeal No. EA/2011/0098**

**BETWEEN:-**

**MR D M OUTTEN**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**DECISION**

**Introduction**

1. This decision relates to an application by the Commissioner to strike out Mr D M Outten's ("the Appellant") appeal. For the reasons given below, the Tribunal does strike out the whole of the Appellants appeal under rule 8 (3) (c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

**Background**

2. The Appellant appeals against the Commissioners Decision Notice dated 14 March 2011 under reference FS50349980 ("the Decision Notice"). The appeal is brought under section 57 of the Freedom of Information Act 2000 (the Act).

3. In summary, the Decision Notice concerned an information request made by the Appellant to Cheshire Constabulary (“the public authority”). In particular, the Appellant asked the public authority to provide information relating to an alleged rape case and any associated court case details. Although the public authority initially confirmed it did not hold the requested information, the subject matter of the case prompted the Commissioner to consider whether the public authority should instead have given a ‘neither confirm nor deny’ response. The Commissioner found that confirmation or denial would disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(5)(b)(i) should therefore have been applied. The public authority was not required to take any steps.
4. The Commissioner in its Response dated 4 May 2011 set out the Legislative Framework, as follows.

### **Legislative Framework**

5. The Act came into force on 1 January 2005.
6. Under section 1(1) of the Act a person who has made a request to a public authority for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested (section 1(1) (a)) and (b) if it does, to have that information communicated to him (section 1(1) (b)).
7. The duty to provide the requested information imposed under section 1(1) (b) will not arise where the information is itself exempted under provisions contained in Part II of the Act. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (this is the public interest test see section 2(2) of the Act).

8. Under section 50(1) of the Act, any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I of the Act.
9. Except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner has a duty to consider whether the request has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and public authority.
10. Where the Commissioner decides that a public authority has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or has failed to comply with any of the requirements of sections 11 and 17, the Decision Notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
11. Where a Decision Notice has been served, the complainant or the public authority may then appeal against the Notice under s 57 of the Act.

### **Request by Complainant**

12. By letter dated 6 August 2010 the Appellant wrote to the public authority making the following request:

*“I’ve been advised by the CPS to make a formal request under the Freedom of Information Act for the details of a court case that was investigated some ten years ago.*

*The report sent to the IPCC confirms the rape case exists, the victim was a [name redacted] and the perpetrator was a [name redacted] both of [location redacted].*

*I would like the details of the case, the date of trial, case number and the name of the court it was held at along with the outcome as permitted under the FOI Act.*

*I will forward them onto my solicitor upon receipt.”*

13. The public authority responded on 3 September 2010 confirming it did not hold any of the requested information. On 27 September 2010 (after repeating his request on 8 September 2010), the Appellant requested an internal review. In a letter dated 1 December 2010, the public authority upheld its original decision.
14. The complainant complained to the Commissioner on 5 September 2010 challenging the decision to withhold the information requested.
15. The chronology of the Commissioners investigation of this case is set out at paragraphs 9-11 of the Commissioners Decision Notice. In particular, the public authority contacted the Commissioner and confirmed that it was maintaining its stance that it did not hold the information. It advised that its view was that the information was not in the public domain. Further, the Commissioner undertook his own searches of the internet, which did not reveal that any of the requested information was in the public domain.

### **The Commissioners Decision**

16. The Commissioner served a Decision Notice dated 14 March 2011 in relation to this matter in accordance with s. 50 of the Act. The Commissioner concluded that confirmation or denial that the requested information was held would disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. As such, he concluded that the exemption provided by section 40(5)(b)(i) of the Act should therefore have been applied.

## **The Notice of Appeal**

17. The Appellants notice and grounds of appeal are contained within a letter to the Tribunal dated 1 April 2011. The Appellant enclosed with his letter to the Tribunal dated 1 April 2011, the following letters: -
- (i) Letter from the Constabulary to the Appellant dated 3 September 2010.
  - (ii) Letter from the Appellant to the Constabulary dated 8 September 2010.
  - (iii) Letter from the Constabulary to the Appellant dated 11 November 2010.
  - (iv) Letter from the Appellant addressed to Mr Gannon at the Constabulary dated 16 November 2010.
  - (v) Letter from the Constabulary to the Appellant dated 1 December 2010.
  - (vi) Letter from the Appellant addressed to Mr. Regan at the Constabulary dated 9 December 2010.
18. It would appear from the above correspondence that the Appellant intends to bring this appeal on the following ground: -
- The internal review of the Constabulary's decision to refuse the Appellants request for information should have been carried out by someone who was independent of the Constabulary.

## **Analysis of the Grounds of Appeal**

Whether the internal review of the public authority's decision to refuse the Appellants request for information should have been carried out by someone who was independent of the public authority

19. Section 58 (1) of the Act states that: -
- “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.”*

20. The Tribunal's task, under FOIA section 58 is therefore to decide whether the Commissioner's Decision Notice is in accordance with the law. The Tribunal is unable to detect in the Grounds of Appeal any connection between the content of the Appellant's letter of 1 April 2011 and a relevant part of the Commissioner's conclusions in his Decision Notice. The letter of 1 April 2011 (and the copy letters enclosed) appears only to relate to whether the Constabulary's internal review was carried out by an independent person. This argument fails to challenge the conclusion reached by the Commissioner in his decision notice, namely that the information requested is exempt under section 40.
21. The Tribunal therefore finds that the letter of 1 April 2011 does not contain any reasonable grounds of appeal.

**Additional grounds of appeal**

22. The Appellant sent a letter to the Tribunal dated 23 September 2011 together with enclosures with his response to the Commissioner's application in his Response for the appeal to be struck out.
23. In addition to repeating the argument that the officer who carried out the internal review of his request was not independent, the Appellant further argued that the rape case which is the subject of the Appellant's request to the public authority was in the public domain and that therefore the public authority was wrong to conclude that the information requested was not held and that therefore the information should be disclosed.

24. This represents a new ground of appeal. The Appellant has not sought and does not have permission to put forward this new ground of appeal. If he had applied to this Tribunal for permission to appeal on this new ground, this Tribunal would have refused permission. In this context, the Tribunal attaches significant weight to paragraphs 9 – 10 of the Commissioners Decision Notice:

9. *“Upon receiving notification from the Commissioner that he had received a complaint from the complainant, Cheshire Constabulary contacted the Commissioner and confirmed that it was maintaining its stance that it did not hold the information. It advised that its view was that the information was not in the public domain.*
10. *The Commissioner undertook his own searches of the internet which did not reveal that any of the requested information was in the public domain.”*

25. The Tribunal has no reason to doubt the credibility of the public authority. The public authority confirmed to the Commissioner that it did not hold the information and that it believed the information was not in the public domain. Further, the Commissioner undertook its own internet searches, which failed to indicate that any of the requested information was in the public domain. In light of this, and in the absence of any evidence from the Appellant to establish that the information is in the public domain, the Tribunal finds that this ground of appeal has no reasonable prospect of success. For that reason, the Tribunal indicates that, even if the Appellant had applied and been granted permission to appeal on this ground, the Appellant’s appeal would not have been successful.

### **Conclusion**

26. This is an appeal against the Commissioners Decision Notice, which concluded that the exemption under section 40(5)(b)(i) of the Act should have been applied by the public authority.

27. The onus is therefore on the Appellant to present arguments to the Tribunal as to why the Constabulary should confirm or deny whether the information requested was held by it and therefore why the Commissioner was wrong to reach the conclusion he did.
28. The Tribunal finds that the Appellants letter of 1 April 2011 contains no such arguments as to why he believed that the Commissioner was wrong or why he should have exercised his discretion differently. On that basis, the Tribunal finds that there is no reasonable prospect of the Appellants case succeeding.
29. The Tribunal therefore strikes out the whole of the Appellants appeal under rule 8 (3) (c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Signed:

**Brian Kennedy QC**

Tribunal Judge

Dated: 15<sup>th</sup> December 2011