



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

Appeal No. EA/2010/0126

BETWEEN:

MICHAEL KING

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**DECISION OF THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

Paper hearing by: Claire Taylor, Tribunal Judge
Paul Taylor, Tribunal Member
David Wilkinson, Tribunal Member

On: 19 November 2010 at Holborn Bars, with further sittings after 3 sets of directions in 2011
Date of Decision: 4 January 2012

Subject Matter

Freedom of Information Act 2000: Request For Information, Duty to Advise and Assist

Decision of the Tribunal

The Appeal is dismissed.

REASONS FOR DECISION

Introduction

1. The Appellant seeks from the Information Commissioner's ('Commissioner' or 'Respondent') records of complaints where Crawley Borough Council failed to comply with the Freedom of Information Act 2000 ('FOIA') and the Environmental Information Regulations ('EIR'), in handling information requests, and the Commissioner never served a 'decision notice'.
2. Unusually, in this case, the Commissioner has had to act both as the public authority receiving the request, and an independent investigatory body deciding whether it itself has complied with the Act in handling the request. This Tribunal is independent of the Commissioner.
3. The issue for the Tribunal concerns the scope of the request and duty to advise and assist.

Background

4. Under the FOIA, anyone who has requested information from a public authority may apply to the Commissioner for a decision as to whether the authority dealt with the request in accordance with the Act. The Commissioner has to make a decision and serve a "decision notice", unless he considers that specific circumstances apply:
 - A. *"On receiving an application under this section, the Commissioner shall make a decision unless it appears to him— (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45, (b) that there has been undue delay in making the application, (c) that the application is frivolous or vexatious, or (d) that the application has been withdrawn or abandoned."* (S.50(2) FOIA.)
5. On 28 November 2006, the Commissioner published "A Robust Approach to FOI Complaint Cases" ('policy')¹. This stated:
 - A. *"We have been dealing with complaints under the Freedom of Information Act and Environmental Information Regulations for over a year. That year has been a learning one for the Commissioner, as it has for complainants and public authorities... In particular the experience has led us to re-evaluate the assumption that, except where there has been an explicitly agreed informal resolution, a Decision Notice is the only appropriate way to conclude complaints.*
 - B. *This paper ... sets out a new, strategic approach. In particular this new approach is designed to ensure that, in every way, we are prioritising our cases sensibly so that we do not fully take up individual cases, or issue Decision Notices, which are very unlikely to produce outcomes which will promote the effective use of the legislation. A new policy will also ensure that we are not hampered in the exercise*

¹ The Commissioner informed us in response to directions that this policy is no longer in force.

of our statutory functions by work which only serves to frustrate the legislation, or bring it (or the Commissioner) into disrepute.”

- C. In essence, our new approach is not to take up, or continue with, any FOI or EIR case where no useful purpose would be served if we were to proceed to an adverse Decision Notice. In our opinion pursuing an application in this situation would mean that the application is frivolous or vexatious under s50 of the Act. Such cases will be closed, or dealt with in other ways if they appear to raise enforcement or similar issues.

D. **Basic criteria**

Typically cases falling within this new policy will be those in which, assuming the complaint of non-compliance by the public authority were to be upheld, there are no ‘specified steps’ (under section 50(4)) which could be included within a Decision Notice. In other words, there is nothing which we could effectively require the public authority to do.

Unless one of the exceptions (see below) is involved, such cases will include those where:

1. The alleged breach is insignificant ... with no practical consequence;
2. The refusal notice may be technically defective, but it is completely obvious, from the face of the evidence, that the request was properly refused;
3. The breach was of a procedural nature only (including failure to provide advice or assistance) which the public authority has subsequently acknowledged;
4. ... the requested information has now been provided...

- E. The key factor in all these cases is that there is no constructive or remedial action which a Decision Notice could require the public authority to take. Even if the complaint was upheld in its entirety, as it raises issues so minor as to make the use of the complaints machinery in relation to it entirely disproportionate, no useful purpose would be served by proceeding any further.

- F. All such cases should be closed, with a letter of explanation to the complainant. Where the complaint has identified a breach of the Act which is more than trivial, the attention of the public authority will be drawn to the breach together with any relevant published advice. The letter to the public authority will be copied to the complainant. The closure will normally be maintained, even if the complainant is unwilling to withdraw or abandon the complaint and is trying (without good grounds) to insist on a Decision Notice.

G. **Exceptions**

Certain cases will, however, be dealt with through the serving of a notice even though the notice cannot specify any steps. These will include ...where the Commissioner has reasonable grounds for believing that:

1. The public authority has deliberately delayed its response to a request or has otherwise deliberately failed to meet its obligations;
2. The effect of delay or other non-compliance served the purposes of the public authority and requires censure in an adverse Decision Notice (e.g. avoiding disclosure at a critical time);
3. The requested information was eventually disclosed, perhaps after Commissioner intervention, but it would be right in the circumstances to proceed to a Decision Notice, for example to provide a formal record of the outcome;
4. The public authority has delayed responses or otherwise failed to meet its

obligations in similar circumstances in previous cases:

5. There are sound reasons of principle or precedent for proceeding to a Decision Notice; or
6. It would be manifestly unreasonable in the particular circumstances not to proceed with the case.

We will always give proper consideration to complainants who argue that particular cases fall within these exceptions.

H. **Process...**

To give effect to the above change of approach:

- cases where no steps can be specified and which do not fall within any of the exceptions listed above should be identified and closed as early as possible, even if this means that a few have to be subsequently re-opened...
- the outcome should be recorded accurately to facilitate possible enforcement follow-up and enable more detailed management information to be produced.

In all these cases, the parties should be told that the case is not proceeding or has been closed on the grounds that “there are no steps which the Commissioner could include in a Decision Notice and it appears to the Commissioner that to pursue the complaint further would be frivolous or vexatious...”

- I. The fact that a case has not been concluded by way of a decision notice simply means that there are no useful steps that can be specified by means of a decision notice. It does not mean that the complaint is not taken seriously... Where appropriate, including those cases where non-compliance or other short-coming has been acknowledged, a warning will be given to the public authority about the consequences of future non-compliance. Any further action will be taken in accordance with our FOI Enforcement Strategy approved in 2006...

J. **Improving compliance**

This change of approach does not mean that we will ignore or tolerate non-compliance by public authorities... evidence of persistently non-compliant public authorities should be gathered. Such evidence will be used to support the proportionate and targeted use of the other regulatory tools at our disposal.

- K. Where we become aware of a pattern of non-compliance by a public authority, there are better-suited ways forward which do not depend on Decision Notices. These include informal or formal advice, published guidance, section 48 Practice Recommendations, or section 52 Enforcement Notices. Such tools are likely to be increasingly used to require recalcitrant public authorities to take steps to ensure compliance with their obligations under the Act.
- L. It will be important, therefore, to ensure that we have proper records of all cases in which we become aware of non-compliance by public authorities, even if those cases have not led to the serving of a decision notice. We should monitor other Commissioner complaints database for evidence of emerging patterns or ‘hot spots’ of non-compliance arising from a particular case or series of similar or related cases. Enforcement staff and the Regional Offices can, of course also be alerted directly where, although a complaint is being closed, the public authority in question appears to need closer scrutiny.”

(Emphasis and paragraph numbers added)

The Request for Information

6. On 26 August 2008, the Appellant wrote to the Commissioner as follows:
 - A. *Your Robust Case handling Policy states 'It will be important, therefore, to ensure that we have proper records of all cases in which we become aware of non-compliance by public authorities, even if those cases have not led to the serving of a decision notice: please send a copy of these records relating to Crawley Borough Council ('the request')."* (Words in parenthesis and emphasis added.)
7. The Commissioner responded on 9 September 2008. It refused to provide the information on the basis that it consisted of 'third party information' that was exempt from the requirements of disclosure. It stated that the Data Protection Act 1998 ('DPA') provides that a data controller is not obliged to comply with an information request - where it relates to another individual – unless that individual consents or it is reasonable to comply. It did not identify which section of the DPA it was referring to. The Commissioner did not explain why or what part of the information was considered to relate to an individual. Contrary to s.17 FOIA, it also did not identify the exemption under FOIA it relied upon or even make any reference to the Act, and it was certainly not clear why it thought an exemption applied.
8. However, the Commissioner did provide the Appellant with a summary of the cases recorded relating to the Council where there had been no decision notice, as follows:
 - A. *"...a total of eight complaints have been recorded by this office, the first recorded in 2005. This office has not had a need to serve a formal notice on the Council.*

Of the eight complaints made, 4 were withdrawn, compliance was found to be likely in 1 complaint, but found to be unlikely in the second complaint, with remedial action invoked by the Council.

The two further complaint matters were referred back to the complainants as they had not completed the Councils internal review procedure, these matters were not further referred to this office."
9. On 22 September, the Appellant requested a review. He stated that it was not the identifiable individuals he was asking about, but information about the substance of the cases:
 - A. *"Of the information requests made to Crawley Borough Council to which you refer, one was made by me...The remaining were not made by me. My request for information relates to the substance of these cases and not for details of any individual. Should there be any reference to any identifiable individual these can be deleted as they do not form the subject of my request... Therefore please review my request for the above information".* (Emphasis added.)
10. The Commissioner responded on 7 October:
 - A. *"You state that the information now requested concerns the substance of the cases concerning Crawley Borough Council referred to the Commissioner... For the reasons previously identified to you the information that can be disclosed to you is limited."* However, the concern raised in each complaint was explained:

- i. Case 1 concerned the Appellant's original complaint, which the Appellant had been sent.
- ii. Case 2 concerned a copy of a funding application that the Council withheld as available by some other means. The case was closed as the complainant had failed to pursue the Council's internal review process.
- iii. Case 3 and 4 concerned the withholding of legal advice about a telephone mast. The Council had claimed the legal professional privilege exemption. One case was closed because the complainant had failed to pursue the Council's internal review process. The other complaint had been withdrawn.
- iv. Case 5 concerned the withholding of information about the Council's local development framework. The Council had claimed the legal professional privilege exemption, and the case had been withdrawn.
- v. Cases 6, 7 and 8 concerned the DPA. The Commissioner gave similar information in relation to these cases. In one, the complaint had been withdrawn. The office considered that the Council was likely not to have complied with the Act in the second, but to have complied in the third.

Personal Details removed

11. On 3 November the Appellant replied:

A. *"You have confused substance with synopsis... I therefore require the above information with just the personal details of identifiable individuals removed in order not to contravene the Data Protection Act; I did not ask for a brief explanation. Please comply with my Freedom of Information request."*

(Emphasis added.)

12. On 6 November, the Commissioner refused to disclose further information. His officer advised that it now appeared that the Appellant was requesting "*copies of the casework file in respect of the cases [the Commissioner had] outlined to [the Appellant]*". He now cited s.44 FOIA, as exempting information that is prohibited from disclosure under another Act. The relevant prohibition under another Act was identified as s.59 DPA. (This prevents disclosure of information collected in the course of an investigation where there is no lawful authority to do so.) It was not clear what the Commissioner's reasoned analysis was for this claim.

13. On 30 November, the Appellant confirmed: "*My request for information is exactly the same as I had made in my letter of 26 August.*" He requested the decision be reviewed.

Further Information Provided: 'Appendix A'

14. On 22 December, confusingly, the Commissioner sent two letters to the Appellant. One was from the Deputy Commissioner for Data Protection stating that further information could be supplied to the Appellant without breaching s.44 FOIA. The other explained that the Deputy Commissioner had reviewed the case and decided the 'closing letters' in respect of each of the cases would be provided, along with a file note, where such existed. Confusingly, the second letter did not refer to s.44 FOIA, but did claim s.40(2) FOIA applied so as to exclude personal data relating to individuals with whom the Commissioner had corresponded:

A. *"We consider that when individuals make complaints to the Commissioner they do not anticipate or expect the details of their complaints, or any actions taken by the data controller concerned or the Information Commissioner in connection with*

their complaints, to be disclosed to anyone else. Therefore, we consider that such a disclosure would be unfair and in breach of the first Data Protection principle which states that – “Personal data shall be processed fairly and lawfully.”

15. Various letters seem to have been disclosed at this point along with some records of telephone calls. These letters were said to “*contain more detail of the circumstances of the complaint.*” It was not clear what other information the Commissioner thought was held relating to the relevant complaints and precisely why it was decided that such withheld information was personal data. There was no real analysis provided as to precisely what was the scope of the request, and what information fell within the scope.

The Complaint to the Information Commissioner

16. On 19 January 2010, the Appellant applied to the Commissioner for a decision under s.50 FOIA as to whether it had complied with the Act, noting that:

- A. *Personal Data: “The Information Commissioner already discloses, in Decision Notices issued under [s.50 FOIA] which are published on the Information Commissioner’s website, details of complaints, actions taken by the data controller concerned or the information Commissioner in connection with complaints. Consequently, [the] assertion that complainants do not expect this information to be disclosed is not true. There is a legitimate public interest of openness and accountability in disclosing details of complaints under the [FOIA] and the publication of Decision Notices meets that public interest. The removal of any details which would identify an individual removes any possibility of unwarranted harm to the interests of the individual who made the complaint. It is therefore clear from the above that it must be fair and lawful to disclose this information.*
- B. *However, the Information Commissioner operates a Robust Case Handling policy [where] complaints are dealt with informally and Decision Notices are not issued, consequently the legitimate public interest of openness and accountability is not being served. In the absence of a Decision Notice in these cases, provided details which would identify an individual are removed so that there would be no unwarranted harm to the interests of the individual concerned, it would be in the public interest of openness and accountability to release the information I have requested.”*

17. The Commissioner’s complaints officer (as investigator) wrote to the Commissioner’s internal compliance division, (who had dealt with the review) asking for the information that had been withheld with detailed reasons for its non-disclosure. Ms Powell, a compliance manager, provided a detailed response to the Commissioner on 26 June, explaining that:

- A. Scope: The scope of the request had been interpreted as asking for all copies of correspondence on any complaint previously received by the Commissioner concerning Crawley C.
- B. She now considered three of the cases already mentioned to the Appellant were outside the scope of the request because they concerned the DPA:

“

I should point out at this stage that it would appear that the copies of the letters on the three RFA cases fall outside the scope of Mr King's original request as his request concerned Council's compliance with the FOIA and our implementation of our robust handling policy which again relates to the handling of complaints concerning non compliance with FOIA only. It would be my view therefore that these should not have been provided in response to Mr Kings request as they concern Crawley Borough Council's compliance with the DPA and not the FOIA.

”

- C. Exemption: The Commissioner was relying on s.40(2) but not s.44 FOIA. She also said the initial response to the request of 9 September incorrectly asserted that s.7(4) DPA applied as an 'exemption'.
- D. Documents: Whilst an indication of the number of complaints received and brief details of the outcome had been provided to the Appellant, copies of letters had been withheld. She provided the complaints officer with:
- i. Appendix A: documents with certain information redacted under s.40(2) FOIA already provided to the Appellant. These were "*selected copies of correspondence of the eight cases*".
 - ii. Appendix B: the un-redacted version of Appendix A and letters not provided but which she thought should have been.
 - iii. Appendix C: letters sent to the Crawley BC in the five cases alleging non-compliance with FOIA, with personal data redacted. She suggested these be provided to the Appellant with a view to informally resolving his complaint.
- E. Personal Data: As regards s.40(2), she suggested:

“

As you are aware the first principle states that 'personal data shall be processed fairly and lawfully'. We consider that when individuals make complaints to the ICO they do not anticipate or expect the personal details of their complaints, to be disclosed to anyone else. Therefore, we consider that such a disclosure would be unfair and in breach of the first Data Protection principle.

We have also redacted some names of employees at Crawley Borough Council that are recorded in this correspondence. We are of the opinion that these are junior members of staff who are not in a public facing role. We have as a check search their website for each name and none appear.

Whilst we consider that this information is exempt it should be noted that during the initial correspondence concerning his request he made it clear that he was not seeking the personal data of the third parties and therefore this is actually outside the scope of his clarified request.

”

18. The complaints officer then wrote to the Appellant providing Appendix C and asserting that "The [Commissioner] has clearly reversed its decision and is now providing a full response to your request."
19. On 20 July 2009, the Appellant replied that his complaint had not been fully resolved:

- A. *“My original request was for all records relating to complaints against Crawley BC. You have, with one exception, only supplied copies of documents originating from the Information Commissioner’s Office...withheld documents under [s.40(2) FOIA], from the individuals making complaints against Crawley Borough Council to the Commissioner, and Crawley Borough Council’s responses... Therefore, please deal with my complaint concerning those documents withheld documents under [s.40(2) FOIA], i.e. documents from the individuals making complaints and from Crawley Borough Council for each of the seven complaints which have been made against Crawley Borough Council. As I have said, the names and addresses of individuals can be removed in order to avoid unwarranted harm to the interests of the individuals concerned.” (Emphasis Added.)*
20. On 4 August, the complaints officer responded that the Commissioner had now released everything that was the substance of the cases, *“as per your initial request”*. Therefore, the Commissioner would not use his resources to investigate the matter further. She wrote that if specific documents were now requested, then he would need to resubmit his request.
21. On 20 August, the Appellant responded that the claim that his request was for the substance of the cases was not true. He then asserted that his original request was for *“the full case records concerning Crawley Borough Council which had been closed under its robust case handling policy.”*
22. The Appellant subsequently submitted a service complaint form to the Commissioner in relation to the handling of his case. Consequently, on 28 September 2009, the complaint officer’s line manager wrote to the Appellant:
- A. *“The central issue raised appears to one of interpretation. Your initial request of 26 August 2008 and reiteration on 22 September 2008 and 30 November 2008 clearly ask for information about complaints received about Crawley Borough Council. The matter appears to have been clouded by the use of the term ‘substance of the complaint’ in the letter of 22 September. I can understand how this would have been seen as a refinement of the initial request as the substance of a complaint can readily be seen to describe the nature of the issue brought before the Commissioner for consideration. This is quite distinct from the whole case file.*
- B. *However, your letter of 30 November 2008 restates the request of 26 August 2008 asking for a ‘copy of these records relating to Crawley Borough Council.’ This could fairly been seen as different from the substance and more akin to asking for the case files, albeit in a redacted form.*
- C. *As the subsequent correspondence has made it clear that this is indeed what you have asked for I shall reopen the case ... with the instruction that it is the whole case file that requires consideration, accepting the point you have made that there may well be personal information that requires redaction.”*
23. This letter seems to have resulted in the Commissioner proceeding to issue his decision notice.

The Decision Notice

24. In his decision notice of 17 June 2010, the Commissioner concluded that he had provided the Appellant with all information that was held that was within the scope of the request and required no steps to be taken.

25. However, in handling the request, he had breached:
- A. Section 1(1)(b) FOIA: by not providing the information that could be disclosed at the completion of the internal review.
 - B. Section 10(1) FOIA: the last disclosure was made on 1 July 2009, such that he breached the timeline stipulated for compliance.
 - C. Section 17(1) FOIA: by missing the refusal notice deadline in providing the refusal notice on 6 November 2008, when it cited s.44 FOIA. (We note that we would regard the letter of 9 September as the refusal notice and this was provided on time. However the Commissioner did not comply with other requirements of s.17 FOIA at that stage, as outlined in paragraph 7 above.)
26. He also stated that he had neglected to carry out an internal review at the right stage and failed to conform with paragraph 38 of the section 45 Code of Practice regarding how complaints should be dealt with according to the complaints procedure.
27. He explained that:
- A. *“The complainant specifically asked the Commissioner to consider the decision to refuse to disclose all of the documents on each of the case-files, which he felt fell within the scope of his request. The parties disagree on what was actually requested. This notice will therefore focus on whether the Commissioner was correct to interpret the request as it did. The complainant specifically stated that any reference to any identifiable individual can be deleted as they do not form the subject of the request, therefore this Decision Notice does not address the redacted information as it was clearly excluded from the request.” (Para.11 of the notice.)*
 - B. *The Commissioner is aware that the original request was for the substance of the cases, and that in his letter dated 3 November 2008, the complainant refined his request to exclude third party personal data. (Para.15 of the notice.)*
 - C. *“The Oxford English Dictionary defines substance as: “The essential nature or part of a thing etc.” In considering the above definition it is apparent that the information the complainant is seeking at paragraph 15 does not correspond with the original request at paragraph 2 and further clarification at paragraph 5. In its initial handling of the request the Commissioner provided the complainant with a synopsis of each complaint along with the closure letters which confirm the action taken by the Commissioner for each of the 7 cases in question. A further disclosure was made by the Commissioner on 1 July 2009 which consisted of redacted letters and telephone notes generated by the Commissioner in each case. The Commissioner considers that the Commissioner has correctly provided the complainant with all the information it held that fell within the request.” (Para.s 17 to 21 of the notice.)*

The Appeal to the Tribunal

28. The Appellant appealed to the Tribunal by notice dated 5 July 2010. The Tribunal conducted the case management for the appeal without preliminary hearings because the Appellant was not available. This was regrettable. It is common for issues concerning the scope of a request to be resolved at a preliminary hearing, and where there is a second preliminary hearing prior to the hearing, the judge has the opportunity to ensure the

submissions address the matters the panel may consider need to be covered and that all relevant documents have been submitted.²

29. The panel first met to consider the appeal on 25 November 2010. There were further matters to be put to the parties, which had not been addressed in their submissions, and documents that seemed relevant were missing. The panel held further meetings to consider the further submissions.
30. The Tribunal has had the benefit of a witness statement; submissions from the parties; a bundle of documents; and other legal decisions submitted by the parties. We have considered all of this material, even if not specifically referred to below. We have been given Appendices A and C but not B.

The Appellant's Grounds of Appeal

31. The Appellant's grounds for disputing the Commissioner's decision are:
 - A. Scope of Request: The Commissioner wrongly interpreted 'substance' and because of this erred in finding that it had provided all the information which fell within the scope of the Appellant's request;
 - B. Scope and Personal Data: The Commissioner erred in finding that it had correctly interpreted the Appellant's request as excluding third party personal data; and
 - C. S.16 FOIA: The Commissioner erred in not finding that the Commissioner had breached this section.

Evidence and Submissions

32. The Appellant's submissions included the passages below. (We have inserted some headings).

Ground A: Scope

A. Scope of Request

"It is not for me to know how the Information Commissioner organises his records. However, my request was for "proper records of all cases in which we become aware of non-compliance by public authorities... "records of all cases" would include all case papers such as "documents from the individuals making complaints and from Crawley Borough Council for each of the seven complaints which have been made against Crawley Borough Council" (p. 89), which therefore falls within the scope of my request."

- B. *"If it was the case that it did not fall within the scope of my original request, then as it was in writing to the Information Commissioner's Office it would have constituted a new Freedom of Information request under section 1 of the FOIA. I can see no reason to re-submit a Freedom of Information request once it has been made. The Commissioner has in the past considered as new requests that which they did not consider to be a request for an internal review."*

- C. Substance: *"The Oxford English Dictionary Online defines the word substance in 23 ways". It is therefore difficult to understand why the decision notice only*

² The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 sets out the parties' obligation to cooperate with the tribunal. We consider this to include attending prehearings or failing that, providing full reasons for it not being possible to find any time to do so.

considers one definition. The Concise Oxford Dictionary (p. 28) gives five definitions for 'substance': noun 1 a particular kind of matter with uniform properties. 2 the real physical matter of which a person or thing consists. 3 solid basis in reality or fact: the claim has no substance... 5 the most important or essential part or meaning...7 an intoxicating or narcotic drug. The Information Commissioner's Office appears to be relying on the fifth definition above, whereas my intention was to convey the meaning of the second.

- D. *The real physical matter of the thing, i.e. records of cases relating to Crawley Borough Council, consists of documents, e.g. letters, e-mails, notes etc. The use of the word substance in this sense does not exclude documents relating to communications between the complainant and the Information Commissioners Office, or between Crawley Borough Council and the Information Commissioners Office, and is not limited to documents generated by the Commissioner as the decision notice claims.*
- E. *In further submissions:*

The Information Commissioner's Office (ICO) was aware that I did not require a synopsis (p. 59) as provided on 7th October 2008 (pp. 56-58), and therefore knew that my use of the word substance could not have meant "essential nature", "nub" or "gist", or "what the complaint was about". As a result on 22nd December (pp. 65-67) the ICO released copies of some of the correspondence (i.e. the 'physical matter of which the thing consists') but declined to disclose other correspondence under section 40(2) of the Freedom of Information Act 2000 (p. 65) because it was personal data.

From my letter of 3rd November 2008 (p. 59) the ICO was aware that there was more than one objective reading to the word 'substance' as used in my request but did not seek further clarification (paragraph 89 Berend v Information Commissioner & London Borough of Richmond upon Thames (EA/2006/0049 & 0050). The ICO therefore knew which objective reading applied: in releasing copies of correspondence it is clear that the ICO understood the context of my request as requiring copies of correspondence and not just its essential nature, nub or gist, etc.

- F. *New Request:*

Footnote 8: "The Commissioner also notes that the Appellant has been invited previously to make a further/ new request if he wanted to request copies of correspondence from (for example) complainants [90] and [40 (paragraph 43)]. To date it appears that the Appellant has not accepted this invitation."

On 20th July 2009 I made a request for "documents from the individuals making complaints and from Crawley Borough Council for each of the seven complaints which have been made against Crawley Borough Council" (p. 89) which had previously been "withheld under section 40(2) of the Freedom of Information Act 2000" (pp. 65 & 89). My request was for information previously withheld (p. 65), and so it was not a new request.

However, if it was the case that it did not fall within the scope of my original request, then as it was in writing to the ICO it would have satisfied section 1 of the FoIA and constituted a new Freedom of Information request: I can see no reason to repeat or re-submit a Freedom of Information request once it has been made as suggested by the ICO (p. 90). The ICO has in the past treated requests which they did not consider to be part of an internal review as new requests and responded to them as such (pp. 2, 34 & 89). The ICO did not treat or respond to my request for "documents from the individuals making complaints and from Crawley Borough Council for each of the seven complaints which have been made against Crawley Borough Council" (p. 89) as a new Freedom of Information request.

Ground B: Scope and Personal data

- G. *The Commissioner stated in his Decision Notice that he "is aware that the original request was for the substance of the cases, and that in his letter dated 3 November 2008, the complainant refined his request to exclude third party personal data."*
- H. *The Appellant did not refine his request in this way: In his letter of 20th July 2009 he required "documents from the individuals making complaints and from Crawley Borough Council for each of the seven complaints which have been made against Crawley Borough Council. As I have said, the names and addresses of individuals can be removed in order to avoid unwarranted harm to the interests of the individual concerned."*

Ground C: s.16

I. Whilst the guidance document *“What should be considered when interpreting a request?”* may have been published after the internal review, and it may be that the Tribunal has no jurisdiction to consider whether the Commissioner complies with his own guidance, but it must have been clear to the Commissioner that he was not satisfied with the information provided, and so the Commissioner would have had a duty to provide advice and assistance under section 16 of the Freedom of Information Act 2000 and to conform with the section 45 Code of Practice:

- i. *“The provision of advice and assistance is a wide-ranging duty – for example it applies both to prospective and actual applicants for information – and has the potential to be relevant to most, if not all, stages of the request process under the Act. The provision of advice and assistance can be seen as the means by which a public authority engages with an applicant in order to establish what it is that the applicant wants and, where possible, assists him in obtaining this, maintaining a dialogue with the applicant throughout the process.”* (Freedom of Information Awareness Guidance No 23 Advice and Assistance, published October 2004, updated January.)

ii.

Paragraph 35. *“The Commissioner considers that there was only one objective reading of the request. Accordingly, the Commissioner does not consider that there was any requirement on him to clarify the request with the Appellant. It is clear, however, that the Appellant remains dissatisfied.”*

As I have shown above the ICO knew my use of the word ‘substance’ could not have meant “essential nature”, “nub” or “gist”, or “what the complaint was about”, and that there must have been more than one objective reading of my request. Consequently, the ICO should have clarified my request.

J. *Where more than one possible interpretation exists it is the duty of the authority, in this case the Information Commissioners Office, to request clarification, as their own published guidance, “What should be considered when interpreting a request?”* (p. 104) states:

- iii. *“Where the request is not clear, or can be read in more than one way, the public authority will need to ask the requester for clarification. The authority should not try to guess what the requester might want”*
- iv. *“You should not:*
 - *provide the requester with the information you think they want rather than what the request asks for;*
 - *try to guess the meaning of an ambiguous request, make assumptions, or attempt to work it out from your background knowledge of the requester;*
 - *refuse an otherwise clear request because the requester does not use the same terminology to describe the information as used by the public authority;”*

33. For the Commissioner, Ms. Powell gave testimony as internal compliance manager responsible for the team that responds to requests for information under FOIA, EIR and DPA. She stated:

- A. Scope: When writing to the case officer dealing with Mr King's complaint on 26 June 2009, we stated that *'The second part of the request which was dealt with under FOIA was interpreted as asking for all copies of correspondence on any complaint previously received by the Commissioner concerning Crawley Borough Council'*. For clarity this statement was that the request has been interpreted as complaints received concerning Crawley Borough Council not any correspondence received as part of such complaints.
- B. *"Given the wording Mr King used, and the subsequent refinements to his request for information, I disagree that his request could be interpreted as covering correspondence sent to the Commissioner by other complainants."*
- C. *"Whilst we acknowledge that there were other failings at the outset in dealing with Mr King's request we believe that there is only one objective reading of the scope of Mr King's request (with the refinements) and that Mr King has now received all the information within the scope of in his initial request."*

34. Following directions from the Tribunal for a copy of information disclosed to the Appellant, the Commissioner provided Appendix A, and C to the Tribunal. Broadly, these contained a selection of letters from the Commissioner, predominantly to the Council and otherwise records of telephone conversations and letters to complainants. This was standard correspondence that might be expected at some point during an investigation by the Commissioner. (The Tribunal had also directed to see a copy of the information not so far provided, which the Respondent had disputed was within the scope of the request. Instead the Respondent provided a list of the information which it considered might fall within each party's definition of the scope of the request. The list identified the category of document, such as email or letter, in some cases who it was to or from and its date. As such, the list did not assist us in understanding what had not been disclosed. However, the matter was not pertinent to our findings.)

35. The following is a summary of submissions put to us by the Respondent:

- A. *"The Commissioner considered that the 22 September 2008 letter constituted a further request for information, rather than considering it to be a request for an internal review"*. Footnote: *"The Commissioner recorded in the Decision Notice that in adopting this approach the Commissioner failed to recognise the Appellant's correspondence as a request for internal review, thus failing to comply with paragraph 38 of the section 45 Code of Practice."*
- B. *In the Commissioner's response dated 7 October 2008, the Commissioner noted that 'the information now requested concerns the substance of the cases concerning Crawley Borough Council referred to the Commissioner'. Accordingly, the Commissioner stated that 'the substance of the other seven complaints, with their outcomes, are as follows ...'. The Commissioner then gave, for each of the eight complaints he had received, a brief description of the complaint, the applicable regime (i.e. either the Data Protection Act 1998 or FOIA) and the outcome of the complaint."* Footnote: *"As the Commissioner's document 'A Robust Approach to FOI Complaint Cases' only relates to FOIA, the details of cases received by the Commissioner as regards the Data Protection Act 1998 were not, in fact, within the scope of the request."*

- C. *“The Commissioner provided details of what had happened in all complaints about the Council that he had received, not just those which dealt with non-compliance with FOIA.”*

Ground A: Scope

- D. The Commissioner contends that given the factual background of the request (the robust approach) and the regulatory framework, what fell within the scope of the request (whether this was the Appellant’s intention or not) was, essentially, the records that the Commissioner held about Crawley Borough Council’s compliance with FOIA. This is what has been provided.
- E. Objective Request: *“A public authority need not look for other possible readings of a seemingly clear request or check previous correspondence: it should be able to take the request at face value. The Tribunal noted that, in Berend v Information Commissioner & London Borough of Richmond upon Thames (EA/2006/0049 & 0050) (‘Berend’) (para.86), when considering requests under FOIA the request should be read objectively by the public authority and there is no requirement to go behind what appears to be a clear request.”*
- F. *“Accordingly, because the Appellant had asked for certain records, stated that he wanted the ‘substance’ of those records, and specifically said that personal information was not the subject of his request, the Commissioner considers that he was entirely correct to interpret the request for information as he did. The Commissioner considers the request is clear and there is only one objective reading of it. There was, therefore, no need for the Commissioner to revert to the Appellant to seek clarification of the request.”*
- G. Substance: It is clear that there exist a number of dictionary definitions of the word ‘substance’. However, in the context of this request, it cannot be considered to have the meaning put forward by the Appellant. When considering non-compliance by a public authority, the ‘substance’ of the case is its ‘essential nature’, its ‘nub’ or ‘gist’; in other words ‘what the complaint was about’.
- H. The request could not be interpreted as covering correspondence sent to the Commissioner by other complainants.
- I. The Appellant’s alleged ‘clarification’ on 20 July 2009 was submitted long after the original request for information, and the internal review decision. It was also a long time after the original application under s.50 FOIA to the Commissioner.
- J. New request: *“The Appellant might have expected to receive different information to that which actually fell within the scope of his request, and which he was provided with. However, this does not mean that this is what fell within the scope of the Appellant’s request. If the Appellant requires certain case papers, the correct approach would be to submit a new request for information so that it might be considered under FOIA. It would however be likely that at least some information would be exempt from disclosure under section 40(2) FOIA.”*
- K. The Appellant had already been invited previously to make a further new request if he wanted, for example, copies of correspondence from complainants. To date, it appears that the Appellant has not accepted this invitation.

Ground B: Scope and Personal data

- L. The information which fell within the scope of the Appellant's request for information and which has been provided to the Appellant has been redacted to exclude personal data.
- M. The Appellant's request explicitly excluded personal data: The Appellant advised the Commissioner on 22 September that '*[s]hould there be any reference to any identifiable individual these can be deleted as they do not form the subject of my request*'; and on 3 November 2008 that he required the information '*with just the personal details of identifiable individuals removed in order not to contravene the Data Protection Act 1998*'.
- N. In view of this clear direction from the Appellant, the Commissioner considers that the information about individuals was clearly excluded from the Appellant's request.
- O. The Commissioner did not rely on section 40(2) FOIA not to provide this information because such information did not fall within the scope of the request. Ms Powell notes in her evidence that such information [personal data] 'is actually outside the scope of [the Appellant's] clarified request'.

Ground C: s.16

- P. Since there was only one objective reading of the request, the Commissioner was not required to clarify the request with the Appellant. It is clear, however, that the Appellant remains dissatisfied. Even if the Tribunal finds against the Commissioner's reading of the request, there would have been no breach of section 16 FOIA because the Commissioner considered there was only one objective reading of the request.

36. Replies to further questions from the panel are referred to below in our findings.

The Task of the Tribunal

37. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

38. The questions before the Tribunal are:

- A. Scope: what was the scope of the request? Did the Commissioner wrongly interpret substance and therefore fail to provide all information within the scope of the Appellant's request;
- B. Scope: did the Appellant exclude personal data from the scope of the request?
- C. Did the Commissioner fail to comply with s.16 FOIA

Our Findings

A. Scope: what was the scope of the request?

The law

39. We were referred to the decision of *Berend*, whose reasoning we adopt at paragraph 86:

“The Tribunal is satisfied ... that:

- *the request should be read objectively by the public authority,*
- *there is no requirement to go behind what appears to be a clear request,*
- *the Tribunal is tasked to consider the request in the terms in which it was phrased and (in the absence of clarification under section 1(3) or amplification under section 16 FOIA and the section 45 Code) that subsequent amplification of the request should be treated as a fresh request.*

40. In this case, we find that the Appellant’s request was clear and unambiguous quoting as it did the Respondent’s own policy paper to explain what records he wanted to see.

41. It was phrased: “Your Robust Case handling Policy states ‘It will be important, therefore, to ensure that we have **proper records of all cases in which we become aware of non-compliance** by public authorities, even if those cases have not led to the serving of a decision notice: **please send a copy of these records** relating to Crawley Borough Council.” (Emphasis added)

42. The Decision Notice focused on the meaning of ‘substance’. We are unclear why it and the internal review before it did not first analyse the actual request. It is clear that:

- A. The Appellant is quoting from the Commissioner’s policy, which requires the Commissioner to maintain ‘proper records’ of all cases where the Commissioner becomes aware non-compliance of the FOIA or EIR, but does not proceed with issuing a decision notice.
- B. The Appellant has asked for those ‘proper records’.

43. In approaching this, we would have expected an officer of the Commissioner to first review its policy document so as to double-check what it applied to; then to confirm what its records of non-compliance were; to check whether there were any entries in relation to Crawley; and then respond to the Appellant. It seems this was not done effectively. As a result, there followed a confusing and protracted dialogue culminating in submissions that seem to us to have long ago left the real issue behind, such that as a tribunal, we have not been able to accept a good deal of the reasoning presented to us by either party.

44. As a tribunal, we are required to look at the issues afresh and in the way that we judge right, so as to consider what was the scope of the request and thus whether the Commissioner failed to provide all information within that scope. Therefore we first consider what the policy document applies to and which were the cases where the Respondent became aware of non-compliance.

Scope of Policy Document:

Cases 6 to 8: DPA?

45. It is clear that any complaints relating to the DPA are outside the scope of the request because the policy document is described as relating to FOIA and EIR complaints that would otherwise result in a decision notice. This narrows down the scope of the request to cases 2 to 5. (See para.s 5A, 8 and 10 above.)

46. We put this point to the parties. Whilst the Commissioner had covered this as a footnote to his submission, we wanted to be sure both parties were given an opportunity to focus on its significance. The Commissioner stated that although some information had been provided to the Appellant about cases 6 to 8, these fell outside the scope of the request.

47. The Appellant explained that:

- A. *"My reference to the robust case handling policy and non-compliance by public authorities was intended as a preamble establishing a reason that records of all cases should be kept and was not part of my Fol request. The subject of my [sic] actual request "please send a copy of these records relating to Crawley Borough Council" was simply "records of all cases".*
"Please send a copy of these records relating to Crawley Borough Council" was simply "records of all cases".

However, it is not my interpretation, but the interpretation of the Commissioner which is relevant. Paragraphs 4 and 6 of the Decision Notice states:

'4. The complainant was provided with some information relating to eight other complaints the Commissioner had received from other parties.'

'6. The Commissioner provided a brief explanation of the substance of the seven complaints which did not relate to the complainant.'

- B. *"It is clear from the above that the Commissioner's interpretation of my request was that I had requested details of all cases concerning Crawley Borough Council, including data protection cases... Paragraphs 13 and 14 of the Decision Notice states:*

'Appendix C consisted of further information, suitably redacted, which the Commissioner wished to provide to the complainant in an attempt to fulfil [sic] his initial request and resolve his subsequent complaint.'

14. The information contained in Appendix C was sent to the complainant on 1 July 2009...

...'21. The Commissioner considers that the Commissioner has correctly provided the complainant with all the information it held that fell within the request.'

- C. *"It is clear that the author of the Decision Notice interpreted my request in exactly the same way. i.e. that I had requested details of all cases concerning Crawley Borough Council, including data protection cases... It is clear from the above that the only question concerning my request was to do with the interpretation of my use of the word "substance" and not whether the data protection cases were or were not included in my request."*

- D. *In conclusion, the Commissioner has consistently interpreted my request to include all cases concerning Crawley Borough Council, including data protection cases. I was content with such an interpretation, and as the Commissioner had not indicated otherwise they led me to believe this was their interpretation and therefore there was no need for me to clarify my request in any way. It is now far, far too late for the Commissioner to change their mind about their interpretation of my request."*

48. We do not accept the Appellant's argument that the first part of his sentence referring to the policy is a preamble and the second half constitutes the request (*see para.47.A*). The second half of the sentence "*please send a copy of these records*" cannot be read to make any sense without the reference to the policy, and '*these*' makes it quite clear what he is referring to. We note that the Appellant's first page of his Notice of Appeal is dedicated to quoting from the policy. He then highlights that "*Unlike the issue of decision notices, the Robust Case Handling policy is not in the legitimate public interest of openness, and accessibility, and therefore not accountable. This policy is open to abuse by the Commissioner...*" It is therefore most clear, that his interest is in matters relating to cases within this policy where no decision notice has been issued, i.e. not DPA cases. Further, this is the only way that his request can make sense.

49. As to his second point, (*sub-paragraphs 47.C above*), without providing clear legal argument to support it, the Appellant seems to be arguing that the Commissioner is estopped from claiming that the DPA cases are outside the scope, because:

A. Having already provided the Appellant with information on them he clearly interpreted the scope differently.

However, an authority is allowed to provide more information than requested.

Further, we found neither party's handling of this case to be particularly clear or consistent. The Commissioner's handling of the request has been confusing to follow. For instance, whilst the Appellant was given information relating to eight cases concerning the Council, the letter from the complaints officer to the internal compliance manager (referred to above) indicates that at least at some point before submissions to this Tribunal it was recognised that the DPA cases were not within the scope of the request. It is regrettable that no reference to this was made in the decision notice, and the handling of the matter may well have led the Appellant to assume the Commissioner considered the DPA cases were within the scope. Equally, the Appellant has not been consistent - his letter of July 2009 about his request indicates shifting ground.

B. He says it is far too late for the Commissioner to change their mind about the interpretation of his request.

However, this appeal is about the scope of the request. The Tribunal must therefore review the original request and consider the scope. It is clear from the information before us that the Appellant has experience of making information requests. If he had intended to ask for copies of all documents relating to complaints against the Council, that is what he would and should have asked for.

50. Adopting *Berend*, it is the objective reading of the request that is relevant. Given that we consider the text of the request to be clear, this is the only basis for which to determine the appeal. Accordingly, the DPA complaints are beyond the scope of the request.

Cases 2 to 5: withdrawn or referred back

51. As regards the remaining cases 2 to 5, we take into account that two were withdrawn and two were closed because the complainant had failed to pursue the Council's internal review process.

52. On a plain reading, cases that have been withdrawn or referred back do not fall within the policy document. The policy examined when the Commissioner would judge when not to proceed with a decision notice on the basis that to do so would be frivolous or vexatious under s.50(2)(c) FOIA (*see para.s 4, 5.C, 5.D and 5.H*). In cases 2 to 5, the Commissioner would not need to consider whether or not proceeding with a decision notice would not be appropriate, because under sections 50(2)(a) and (d) it was not to proceed with a decision notice.

53. We asked the parties to provide submissions on this point.
- A. The Commissioner replied that it was not possible to give a definitive response about why a particular outcome was chosen for the four cases, and that it had provided the Appellant with information about those cases.
 - B. The Appellant stated that his request concerned all cases relating to Crawley Borough Council and did not relate to any specific legislation, be it FOIA or DPA. However, as we have dealt with elsewhere in this decision, the wording of the request relates to the policy document, so this is not correct.
 - C. He stated that *“the ICO consistently interpreted my request in this way, and I understood that some information from these cases was being withheld under an exemption. Therefore the Commissioner’s policy and that part of s.50 FOIA that cases 2-5 fall under has no relevance to the scope of my request. In any case it is for the Commissioner to decide what is included in his own policy, not me.”* However, the Commissioner does not seem to have been consistent in its interpretation of the request, and the scope of the request is not agreed between the parties. As a tribunal we must consider what we think to be the correct objective reading of the request.
54. We have considered the submissions. On balance, we find it hard to see how the four cases fall within the policy document and thus the scope of the request, and we do not think we have been provided with sufficiently compelling reasons to show that it does.

Proper Records

55. For the reasons explained above we do not regard that cases 2 to 5 fall within the scope of the request. Nevertheless, we set out briefly below our position on how the parties have approached the meaning of ‘proper records’, since this is what the parties focused much of their attention upon.
56. Both parties seem to consider that the solution to this debate lies on the meaning of ‘substance’. The Decision Notice states that the *“the original request was for the substance of the cases”*, but this was not the case. The Appellant asked in his request for the proper records. Later when he clarified that he wanted the ‘substance’, this was only with reference to him not requiring the officer to include information about individuals such as names and addresses, as a direct response to the Commissioner stating that it could not provide the information dealing with individuals. The Appellant never refined his request. We do not think there was any ambiguity here – he repeatedly used the word substance as a means to state he was not interested in individuals’ details. He did not use it to change the original request and never claimed to have changed his request. (On 30 November 2008, he confirmed: *“My request for information is exactly the same as I had made in my letter of 26 August.”*) On 20 July 2009, after the Commissioner’s investigation, the Appellant claimed his complaint had not been fully resolved because his *“original request was for all records relating to complaints against Crawley BC.”* On 20 August, he stated that the claim that his request was for the substance of the cases was not true. He asserted that his original request was for *“the full case records concerning Crawley Borough Council which had been closed under its robust case handling policy.”* This seems to us disingenuous. In reality, he had asked for the ‘proper records’ and not the full case records.
57. Curiously, whilst the Commissioner asserted (we think correctly) that where the Appellant first used ‘substance’ he meant the essential nature, nub or gist of the matter, it is hard to see from the seemingly random selection of letters and notes disclosed to the Appellant, how the Commissioner’s office concluded that he had been provided with the essential nature of the complaints.

Conclusion

58. In short, we have concluded that the request by definition excluded the DPA cases and related to proper records in respect of cases of detected non-compliance by public authorities. We do not see how cases that were withdrawn or referred back for internal review could be described as of relevance to the policy document. This is because such cases fall outside the policy document, as there is no need for the Commissioner to judge it not necessary to proceed with a decision notice. Accordingly, on the information provided to us, it did not hold any information within the scope of the request.

B. Scope: Did the Appellant exclude personal data from the scope of the request?

59. Although we consider the appeal to have already failed at the first ground, for completeness we examine the remaining two.

60. We regard it as clear from the correspondence that the Appellant never intended to exclude 'personal data' from the scope of his request to the extent that this meant anything other than retracting identifying names and addresses of individuals. This is relevant because the Respondent stated it was not relying on s.40(2) FOIA as a relevant exemption because any personal data did not fall within the scope of the request. Consequently, it seems to have withheld some documents in their entirety that came from the Council or were sent to or from a complainant, instead of blanking out the identifying words.

61. The Appellant has been consistent on this point. He stated:

- a. On 22 September 2008: *"My request for information relates to the substance of these cases and not for details of any individual. Should there be any reference to any identifiable individual these can be deleted as they do not form the subject of my request"*.
- b. On 3 November 2008: *"You have confused substance with synopsis... I therefore require the above information with just the personal details of identifiable individuals removed in order not to contravene the Data Protection Act; I did not ask for a brief explanation. Please comply with my Freedom of Information request."*
- c. On 20th July 2009: *"As I have said, the names and addresses of individuals can be removed in order to avoid unwarranted harm to the interests of the individual concerned."*

62. The Commissioner stated that he was *"aware that the original request was for the substance of the cases, and that in his letter dated 3 November 2008, the complainant refined his request to exclude third party personal data."* (See para. 15 of the Decision Notice.)

63. To the extent that the Commissioner considers here that 'third party personal data' is broader than identifying names and addresses of individuals, then it is clear that the Appellant did not intend to exclude the former from the scope of his request. This area of law is particularly complex and the Appellant is not legally represented. Further he does not have sight of the case files to know if his words might be construed to mean anything broader. From a plain reading of his text, it seems clear that 'details of any individual' and 'any reference to identifiable individual' means the names and addresses, and not anything more subtle or broader.

64. To the extent that the Commissioner does not consider that 'third party personal data' is anything other than the names and addresses, it is not apparent why he decided that some letters and documents should have been disclosed to the Appellant and not others. Even though the Commissioner argued that the request was limited to the substance (i.e. crux) of each complaint, it does not seem disclosed Appendices A and C readily revealed this. Since they have not disclosed to us the contents of the papers withheld, it is far from clear why their whole content with names and addresses redacted could be said to be third party personal data.

C. Did the Commissioner fail to comply with s.16 FOIA

The Law

65. The Act states:

- a. *“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*
- b. *(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”*
(S.16 FOIA)

66. We have not been shown any paragraphs from the code of practice under section 45 which the Commissioner in particular is said not to have complied with. However, of most relevance appears to be the section regarding clarifying the request. This provides that:

- a. A request for information must adequately specify and describe the information sought by the applicant.
- b. Authorities may ask for more detail, if needed, to enable them to identify and locate the information sought. They should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. If, following the provision of such assistance, the applicant still fails to describe the information requested in a way that would enable the authority to identify and locate it, it is not expected to seek further clarification. (See *para.s 8 to 12 Sec. of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000 Issued under section 45 of the Act. November 2004.*)

Our Findings

67. The Appellant asserts that since it must have been clear that he was not satisfied with the information provided, the Commissioner would have had a duty to provide advice and assistance under s.16 FOIA. However, under that section, if the Respondent has conformed with the code, it has complied with the duty. In this case, this means considering whether the Commissioner complied with requirements related to clarifying the request.

68. We found that the text of the request was clear and adequately specified the information sought. Therefore we do not see why the Commissioner would have needed to clarify what it meant. The Commissioner ought to have known whether it held the proper records it had

referred to in relation to the specified Council. Whilst the Commissioner did not approach the request in the same way that we would have, we do not think the fault lay in not asking the Appellant what his request meant. He was after all quoting the Commissioner's own policy document.

69. Accordingly, we find the Commissioner conformed with the code of practice and so did not breach section 16.
70. Further, we would note that even if the Respondent's duty to advise and assist were to go beyond that of the code, it has been clear from this appeal that the Appellant is experienced and conversant with the process of bringing information requests and the Commissioner would not reasonably have expected to provide him with any general advice.

Conclusion

71. To conclude, we find that the scope of the request did not include DPA cases or FOIA cases that a complainant had withdrawn or that had been referred back to the public authority for internal review.
72. Proper records for cases within the policy document would comprise those found in the enforcement log, and any cases that were marked up.
73. The Appellant did not exclude third party personal data from the scope of his request, except for any names and addresses of individuals.
74. The Respondent did not breach s.16 FOIA.
75. Our decision is unanimous.

Other matters

76. We have not found the picture presented from the information provided (and sometimes omitted until directions were sought) to be particularly clear. Our somewhat detailed chronology of events has attempted to make sense of this.
77. As an observation, we question whether if a deputy commissioner undertakes the initial review of the request made to the Information Commissioner, this will make it difficult for someone ranked below to perform the independent investigation and arrive at a different conclusion.
78. The judge apologises for the delay in producing this decision. As the parties will know, this was due to unforeseen lengthy illness.

Signed:

Claire Taylor
Tribunal Judge

5 January 2012