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/ 0058

BETWEEN:-

W J BUNTON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Determined on the papers on 28 February 2012

By

Alison McKenna, Tribunal Judge
Andrew Whetnall, Tribunal Member
David Wilkinson, Tribunal Member

Decision dated: 9 March 2012

Subject matter:

s. 11 Freedom of Information Act 2000;
regulation 6 Environmental Information Regulations 2004

DECISION

This appeal is hereby dismissed.

REASONS

Background

1. This appeal concerns the Appellant's information request to the public authority, Homes for Islington, dated 29 June 2008 as follows:

   " "…*Many thanks for sending a duplicate copy of the 'section 20 notice'* [1] *…would you please let us have a copy of the documentation which links the works listed on the estimate sent with the section 20 estimate and the Contractor's itemised list of work and costs*".

2. Following further correspondence, Homes for Islington provided the Appellant on 24 October 2008 with certain information in spread sheet format and other information in .pdf format. Following further correspondence (which the Respondent treated as comprising an internal review, although it was not referred to as such), on 24 February 2009 the Appellant asked Homes for Islington to re-send him the information he had requested in a format which allowed him to select and search for data, or to issue a refusal notice under the Freedom of Information Act ("FOIA"). On 26 February 2009 Homes for Islington informed the Appellant that it could not send him the information in the format he had requested, explaining "*the letter and the documents attached …are not meant to be cut and pasted and are a stand alone response to your request under the FOIA*". The Appellant continued to correspond with Homes for Islington until, on 25 August 2009, he complained to the Information Commissioner.

3. The Information Commissioner ("the Respondent") investigated the Appellant's complaint and issued a Decision Notice FS50265451 dated 3 February 2011. He concluded that the Appellant's information request in relation to internal works fell under FOIA but also that the Environmental Information Regulations 2004 ("EIR") were engaged in respect of the external works covered by the section 20 notice. He concluded that s.11 of FOIA did not permit the Appellant to request that information be provided in a specific electronic format and further that the request for that format had not in any event been made at the time of the information request, as required by s.11. He reached the same conclusion in relation to the analogous provision under regulation 6 (1) of the EIR. He found that there had been certain breaches of the procedural requirements of FOIA and EIR by Homes for Islington, but required no remedial steps to be taken by the public authority.

4. The Appellant now appeals against the Respondent's decision notice.

Procedural Matters

5. The Appellant originally requested an oral hearing of this appeal. The Respondent took the view that the appeal could be determined on the papers as it involved submissions as to matters of law and there was no disputed

[1] This refers to a notice under s.20 of the Landlord and Tenant Act 1985.

evidence. In a written ruling dated 5 August 2011, Judge McKenna directed that the Respondent need not attend the oral hearing but could provide the Tribunal and the Appellant with written submissions. The oral hearing would therefore take the form of the Appellant making oral submissions only.

6. The initial date for the hearing was vacated at the Appellant's request. Shortly before the date subsequently fixed for an oral hearing, the Appellant asked for permission to provide written submissions and not to attend the hearing in person in view of the adverse weather conditions. This request was granted by the Tribunal, who considered all of the Appellant's written representations when it met to determine this matter on the papers. By the time of the hearing, the Appellant's written submissions comprised some 40 pages together with diagrams. At the Appellant's request, his submissions were provided to the Tribunal panel in colour. The Tribunal did not invite the Respondent to comment on the Appellant's written representations as the Respondent had in any event opted out of responding to his oral submissions.

7. The Respondent had provided the Appellant with a copy of the decision of a differently constituted panel of this Tribunal in *Innes v IC and Buckinghamshire County Council* EA/2011/0095[2]. On 14 February the Appellant made an application in which he asked for Judge McKenna to recuse herself from his appeal on the basis that she had chaired the panel in the *Innes* case, in which the decision as to the meaning of s. 11 FOIA ran counter to the Appellant's submissions.

8. The Tribunal has considered the Appellant's recusal application very carefully. It is a serious matter for a party to legal proceedings to express a lack of confidence in their Tribunal. On the other hand, it is an important principle of the administration of justice that parties should not be able to choose their Judge or Tribunal for themselves. We have taken into account the fact that, firstly, Judge McKenna is but one member of the panel and the views of the other members may differ from hers on the facts of this case. Secondly, that the decision in *Innes* is merely a first instance Tribunal decision, which does not itself set a precedent. Legal precedent may only be set by the Upper Tribunal or by the Appellate Courts above it and so this Tribunal is entirely free to reach a different conclusion from the panel in *Innes*.[3] If the Appellant wishes to argue that the Tribunal's eventual decision in his case is wrong in law then he may seek permission to appeal to the Upper Tribunal. Thirdly, we have considered the Court of Appeal's decision in *Locabail (U.K.) Ltd. v Bayfield Properties Ltd. and Another* [2000] Q.B. 451**,** in which the then Lord Chief Justice Lord Bingham provided the following guidance:

> *"25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment*

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2 http://www.informationtribunal.gov.uk/DBFiles/Decision/i557/20111011%20Decision%20&%20Ruling%20EA20110095.pdf.

3. It is a matter of public record that permission to appeal to the Upper Tribunal has been given in the Innes case.

> *background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v. Icori Estero S.p.A. (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91))….."*

9. We note that the reference to "previous judicial decisions" in the list of instances where an accusation of bias could not ordinarily be soundly based squarely covers the situation which the Appellant complains of. Taking all the above factors in to account, we concluded that the recusal application should be refused and that the original panel, including Judge McKenna, should proceed to determine this appeal.

The Appellant's Arguments

10. In his notice of appeal dated 28 February 2011 and in the additional documents provided to the Tribunal, the Appellant relied on many arguments, which the Respondent helpfully categorised into three principal submissions, as follows:

    (i) The first ground of appeal was understood to be that the Respondent's decision erred in law in its application of s. 11 FOIA and regulation 6 of EIR.
    (ii) The second ground of appeal was understood to be that the Decision Notice did not enumerate each and every occasion on which Homes for Islington had breached the procedural requirements of FOIA and the EIR.
    (iii) The third ground of appeal was understood to be that the Respondent should have issued a practice recommendation in respect of the public authority's failure to provide an internal review.

    The Appellant has not, in subsequent correspondence, objected to the Respondent's categorisation of his arguments into these three areas and we have adopted this formulation for our own ease of reference.

11. As noted above, by the time of the hearing we had before us an open hearing bundle of some 300 pages (there was no closed material in this case) and some 40 pages of written submissions and diagrams produced by the Appellant. Inevitably we find the volume of written submissions produced by the Appellant difficult to summarise here, but we set out the main arguments below. If we have not specifically referred here to any particular nuance of his arguments then it does not mean that we have not considered them all carefully.

12. In relation to ground one, the Appellant's submissions were as follows:

    a. That the request with which we are concerned did not constitute a request for information in a different format after the information had

been provided as the information requested had not in fact been provided at the time the request for a specific format was made;

b. That the information requested was available in a text format but Homes for Islington then scanned it and sent it in an electronic image (pdf) format. Its original availability as a text document shows that it was "practical " to send it in that format;
c. The Respondent's interpretation of s. 11 FOIA and regulation 6 of EIR is inconsistent with the public interest;
d. "The request" should not be read as the event of an instance but as an on-going process (the Appellant's data flow diagrams illustrate this process). FOIA permits a public authority to revert to the requester for clarification. The Act does not prohibit the requester from offering clarification of the original request without being asked to do so by the public authority;
e. The general public is now very familiar with digital records and is aware that .pdf image files produce less distinct images and less readily searchable information than text files or .xls spreadsheet files. The clarity of display, not just on screen but of print outs, may be inferior in an image file. A search tool will not find words in a .pdf image file as it would in a text file or an .xls file. It is not possible to conduct arithmetical functions in a .pdf image file. A .pdf file can contain textual information rather than an image only, and a request for a .pdf with textual information would fall within the "preference" permitted by FOIA;
f. Section 1, 14, 11 and 84 of FOIA refer to "information". In order to interpret that term one must look at the meaning of FOIA more generally. In this case, certain information was missing from the information provided (the number of dwellings) so a follow-up communication about this issue should not have been interpreted as a separate information request.
g. The Appellant was entitled to ask for the information in a textual form because the information requested was held by the public authority in this way on its computer system. That is the "information" for the purposes of the Act;
h. S. 11 FOIA permits a request to be made for "any one or more" of the means of communication specified. S. 11 only covers requests where a preference has been given, it does not apply to other requests for information. A requester may not know what form information is in at the time he requests it and so it is wrong to interpret s. 11 as requiring specification of the "means" of communication at the time the request is made;
i. In this case the parties had corresponded by e mail throughout so it should have been assumed that the information was sought in electronic form;
j. *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73 (referred to in the *Innes* decision) interprets the Scottish Act and not the English Act and does not support the Respondent's proposed interpretation of s. 11 in any event;
k. In its support for the Respondent's view as to the correct interpretation of s. 11 FOIA, *Coppell on Information Rights Law* (page 436) is both tentative in language and erroneous in its conclusions.

13. The Appellant's arguments as to grounds two and three were as at paragraph 10 above and have not been substantively elaborated upon since the submission of the Grounds of Appeal.

The Respondent's Arguments

14. In his response to the Grounds of Appeal and the Appellant's original written submissions for the hearing, the Respondent submitted that the Tribunal should dismiss the appeal for the following reasons:
In relation to ground one:

i. The Respondent has correctly interpreted s. 11 FOIA and regulation 6 EIR in the Decision Notice;
ii. It is clear that both s. 11 and regulation 6 require the requester to specify at the time of making the request their preference for the format in which they wish to receive it;
iii. The Appellant did not express his preference at the time of making his request but did so later;
iv. That neither s. 11 nor regulation 6 entitles the requester to express a preference for a specific software format in any event;
v. Where a stated preference has been made at the relevant time the public authority shall give effect to it "so far as is reasonably practical" which provision affords discretion to public authorities who are not required to comply with the preference stated;

In relation to ground two:

(i) That the Appellant's complaint goes to the style and format of the Decision Notice and not to its content;
(ii) Section 10 of FOIA refers to the time limit for responding to the substantive request for information and not to every reiteration of that request;

In relation to ground three:

(i) Paragraph 58 is expressly stated not to form part of the Decision Notice and so falls outside the remit of the Tribunal's jurisdiction.

The Relevant Law

FOIA

15. Section 11: Means by which communication to be made.

(1)Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—

(a)the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

(b)the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

(c)the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

(2)In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3)Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4)Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

EIR

16. Regulation 6: **Form and format of information**

6.—(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a)it is reasonable for it to make the information available in another form or format; or

(b)the information is already publicly available and easily accessible to the applicant in another form or format.

(2) If the information is not made available in the form or format requested, the public authority shall—

(a)explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;

(b)provide the explanation in writing if the applicant so requests; and

(c)inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.

The Powers of the Tribunal

17. This appeal is brought under s.57 of 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 -*
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> *(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 provisions relating to appeals also apply to decisions falling under the EIR by virtue of regulation 18 of the EIR.

The Tribunal's Conclusions

18. Notwithstanding the volume of paper produced in this case, we have found it difficult to identify precisely what information the Appellant is seeking and which he says he has not been provided with by the public authority. We note from pages 51 and 59 of the bundle that Homes for Islington invited the Appellant to come into its office for a meeting to discuss his complaints at a relatively early stage in this case, and from page 66 that the Appellant declined that offer.

19. In reaching our decision to dismiss this appeal, we have noted that we are not bound by the First-tier Tribunal's decision in *Innes.* Neither are we bound by the decision of Inner House of the Court of Session in *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73[4] concerning equivalent provisions in the Freedom of Information (Scotland) Act 2002 . We have accordingly not placed any reliance on those cases in reaching our decision in this case.

20. In relation to the first ground of appeal, we conclude that the Appellant did not express a preference for the form (or format) of the information he was requesting at the time he made the request. His request was made on 29 June 2008 and his expression of preference for a format was made on 29 October 2008. Section 11 FOIA is clear about the requirement to express a preference about the form in which the information is to be provided at the time of making the request. Regulation 6 EIR is not identical: it refers directly to the requester's right to specify a preferred format, and requires the public authority to give an explanation if the preferred format is not supplied although, as with FOIA s11, it permits a reasonable alternative. The public authority and the appellant in this case both appeared to assume that the request was being dealt with under FOIA, although the Information Commissioner's office noted that there were some arguments for assuming that the Environmental Information Regulations applied because at least some aspects of the information requested concerned environmental works. As FOIA was the assumed framework of both requester and public authority, we do not read any great significance into the different wording of FOIA and EIR in this respect and consider that the Respondent's decision to "read across" from FOIA to EIR for the purposes of interpretation was reasonable.

21. We reject the Appellant's submission that a request under FOIA and EIR should properly be regarded as an on-going process rather than a single event.

[4] http://www.bailii.org/scot/cases/ScotCS/2009/2009CSIH73.html

We note that, whilst FOIA "stops the clock" if a public authority needs to seek clarification from a requester (see FOIA s 1(1), s 1(3) and s 10 (6)(b)) there is no similar provision in respect of clarification by the requester provided to the public authority on an unsolicited basis. This means that the public authority remains subject to a requirement to answer the request promptly and in any event within 20 days of having received it, notwithstanding the later unsolicited clarification. We conclude from this that a request cannot, for the purposes of the Act, therefore be understood to be taking place over a period of time because such an interpretation would prevent a public authority from knowing when the 20 day period expires.

22. As the Respondent has pointed out, a finding against the Appellant on this point is sufficient to dispose of the appeal. Nevertheless, we go on to consider the Appellant's other arguments in brief.

23. In relation to the second substantive area of argument in relation to ground one, we find that there is no right to receive requested information in any particular form but a right to express certain preferences which may be given effect to if reasonably practicable. As the Respondent rightly points out, this affords considerable discretion to public authorities as to how they provide the information requested. It follows that even if the Appellant is right that he was entitled to specify a software format, this does not mean that Homes for Islington were bound to comply with his request. Further, we find that on a plain reading of s. 11, while there is a right to express a preference as to form it is not clear that this extends to specification of a particular software format. The Appellant argues that it would have been practicable to provide the initial text files which were printed, signed and scanned to produce the image file. The public authority gave reasons for the format used, describing the image format as a consequence of a wish to send a signed letter in e-mail form and a suitable stand-alone response to the request, which it did not intend to be cut and pasted. While it is clear that a spreadsheet or text file could be more convenient for a requester than an image file and could include more information, the Tribunal notes that the public authority had provided a spreadsheet when first requested to do so, had given information absent from that spreadsheet when it became clear that it was relevant to the underlying issue of concern, had made genuine efforts to find out what further information the requester wanted, and was not using an image file in order to conceal or withhold material which it knew to be relevant to the request. In the light of these factors we find no basis for ruling that the public authority's refusal to comply with the requested format was unreasonable.

24. In relation to ground two, we find that the Decision Notice contains sufficient information about the procedural breaches of FOIA and the EIR to make clear that Homes for Islington was in breach of the respective requirements. We do not find that the failure to enumerate complained of by the Appellant constitutes an error of law or inappropriate exercise of discretion by the Respondent.

25. In relation to ground three, we concur with the Respondent that the exercise of a general power to make recommendations under s. 48 FOIA falls outside of the jurisdiction of the Tribunal and that we may not adjudicate on that matter. We also concur with the Respondent that as the comments in the Decision

Notice on this point expressly “do not form part of this Decision Notice” then they are not appealable to the Tribunal under s. 58 of FOIA.

26. For all the above reasons, we now dismiss this appeal.

Signed:

[Signed on original]

Alison McKenna
Tribunal Judge Dated: 9 March 2012