



ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50566297**

Dated: 5th. May, 2015

Appeal No. EA/2015/0117

Appellant: William Stevenson ("WS")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

Date of Decision: 4th. November, 2015

Date of Promulgation: 6th November 2015

The Appellant appeared in person.

The ICO did not appear but made written submissions.

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Subject matter:

FOIA 2000 s.57

The Right of Appeal Against the Decision Notice.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal has no jurisdiction to entertain this appeal, since it is not an appeal against the Decision Notice. It therefore strikes out the appeal, pursuant to Rule 8(2)(a) of the Tribunal Procedure (First – Tier Tribunal)(General Regulatory Chamber) Rules 2009 (“the 2009 Rules”).

Dated this 4th. day of November, 2015

David Farrer Q.C.

Judge

[Signed on original]

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REASONS FOR DECISION

The Background

1. This appeal arises out of one of a number of requests from WS to different public authorities involved in events which led to the investigation into the University Hospitals of Morecambe Bay NHS Trust (UHMB) conducted by Dr. Bill Kirkup.
2. It is unnecessary to dwell on the history of those events, the details of the Request made on 22nd. August, 2014 or the reasoning of the Decision Notice ("the DN") for reasons which will become apparent.

The Request

3. The request was for information
 - (a) as to communications over a specified period in 2010 between named directors of UHMB and (i) Monitor and (ii) the Care Quality Commission, authorities concerned with the registration and supervision of NHS Foundation Trusts and
 - (b) as to whether such communications were provided to the investigation.

4. UHMB responded out of time on 7th. October, 2014, stating that it could not identify any documents and that the cost of compliance would exceed the limits set out in FOIA s.12. It provided some documents but, following an internal review, persisted in its reliance on s.12. WS complained to the ICO.

The DN dated 5th. May, 2014

5. The ICO was not satisfied that the cost of compliance would exceed the statutory limit. He further found that UHMB had failed in its duty under FOIA s.16 to give advice and assistance to WS as to how his objective might be achieved within the cost limits, if, as UHMB contended, some modification was necessary to keep costs within those limits. He gave an example of the kind of assistance that might have reduced costs.
6. Finally, he found that UHMB had breached FOIA s.10(1) by its failure to respond to the request within twenty working days.
7. He ordered UHMB to issue within thirty – five calendar days a fresh response which did not rely on FOIA s.12.
8. So his order and each of his three findings as to breaches of FOIA were in favour of WS and adverse to UHMB.
9. Though immaterial to my decision, I note that UHMB duly apologized for the delay and provided the requested information on 2nd. June, 2014. WS' complaint to the ICO had achieved its purpose.

10. By then WS had issued a notice of appeal dated 19th. May, 2015. It stated that the outcome which he sought was "Correction of the Decision Notice and acceptance that UHMB (holds the requested information or has deliberately deleted it)." His grounds of appeal referred to UHMB's alleged bad faith in not finding information and cavalier approach to its duties under FOIA. He submitted that such bad faith made a mockery of any request by the ICO for further searches. Finally, he asserted that it was not in the public interest for UHMB to rely on s.12.

11. An informal discussion of the issues with WS during the hearing did not suggest any enlargement of the scope of his appeal.

The reasons for striking out this appeal.

12. FOIA s.57(1) provides –

"Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

S.58 reads –

(1) If on an appeal under section 57 the Tribunal considers-

(a) That the notice against which the appeal is brought is not in accordance with the law, - - -

it shall dismiss the appeal - - -

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

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13. This is not an appeal as provided for in s.57 because it is not an appeal against "the notice".

14. "The notice", for the purposes of s.57 and s.58 means the decision(s) of the ICO as to whether the public authority was entitled to refuse to provide requested information together with any consequent order and whether it was in breach of ancillary statutory requirements such as s.10(1) (time for response) and s.16. (duty to advise and assist).which the ICO attributes to it.

15. As already observed, those decisions all went in favour of WS. There was nothing against which he could appeal.

16. Findings of fact which lead the ICO to such decisions are not part of "the notice". That is implicit in s.58(2). Indeed, the Tribunal frequently upholds a DN, whilst making markedly different findings of fact and of law, including findings that a different exemption was engaged but that the outcome is unchanged. The appeal is against the outcome of the DN, not the way in which the ICO has reached it nor the way in which he has expressed his reasons. ¹

17. In fact, it is hard to discern in the DN any suggestion that UHMB might not hold the requested information. Mistrust as to the intentions of UHMB has nothing to do with any finding in the DN anyway. A complaint that reliance on s.12 was not in the public interest ignores the obvious point that the DN had rejected reliance on s.12.

¹ See Coppel "Information Rights" 4th Edition p.923; Billings v ICO IT 6/2/08 § 5 - 9

18. In fairness to WS I should add that, when the above points arose during discussion at the hearing, he accepted with a good grace the difficulties in appealing this DN and the fact that he had achieved, as to this request at least, the desired outcome.

19. For these reasons, this appeal is struck out by virtue of Rule 8(2)(a), which is in mandatory terms. If contrary to my view on jurisdiction, this were not a case for striking out, then I should dismiss the appeal as required by s.58 because the DN was in accordance with the law.

David Farrer Q.C.

Tribunal Judge

4th. November, 2015