



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0148

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50557347

Dated 15th June 2015

BETWEEN

Mr William McLellan

Appellant

And

The Information Commissioner

Respondent

Determined at an oral hearing at Field House on 7th December 2015

Date of Decision 5th February 2016

BEFORE

Ms Fiona Henderson (Judge)

Mr Malcolm Clarke

And

Ms Alison Lowton

Representation

The Appellant represented himself

The Commissioner chose not to be represented at the oral hearing and made written submissions

Subject: s14(1) FOIA whether request is vexatious

Case Law: *Dransfield v The Information Commissioner and Devon County Council*
[2015] EWCA Civ 454

Decision: The Appeal is allowed

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50557347 dated 15th June 2015 which held that the London Borough of Ealing, the Council, correctly applied s14(1) FOIA to the request.

Background

2. The Council had a system of controlled parking zones (CPZ) for which residents were able to buy an annual permit. The Appellant was issued with 3 Penalty Charge Notices (PCNs) for parking within a CPZ with an expired resident's permit on display. The Council refused his appeals against these PCNs however, the Appellant was successful upon appeal to the Parking and Traffic Appeal Service (PATAS).
3. The Appellant has been in correspondence with the Council in relation to the Council's enforcement of these PCNs. His case is that within this correspondence there were requests for information which were not dealt with appropriately under FOIA or were not responded to at all.
4. He appealed one instance of this to the Commissioner and the Commissioner made a determination dated 10th November 2014. In that case the Appellant had complained to the Commissioner about the handling of a request included in the letter of 21st May 2012. (This was eventually responded to by the Council following a further request in 2013). On 5th November 2014 the Appellant confirmed to the Commissioner that he was happy to restrict his complaint to the time take by the Council to respond to his request for information which on the balance of probabilities he accepted was not held. In Decision FS50533483 the Commissioner held that the Council had breached s1(1) and 10(1) of FOIA by failing to respond to the complainant's request within 20 working days.
5. Parallel to the PATAS proceedings and the complaint to the Commissioner the Appellant made an internal complaint to the Council about the way that the PCNs had been pursued and his correspondence handled. The Appellant complained to the Council and a stage 3 review took place. This did not address the failure of the

Council to provide the information requested included in the earlier correspondence. The Appellant reiterated his information requests which was responded to by the Council on 19th August 2013 and included the following:

“Your letters to the council were considered under the corporate complaints procedure, not under the Freedom of Information Act...”

6. On 2nd October 2013 the Appellant wrote to the Council responding to the internal review of that response stating that although his letters were answered his specific requests for information were not answered.

“Should my request have been answered under at least one of the Council’s procedures?”

7. In a letter dated 9th October 2013, the Council’s director of marketing and communications wrote:

“When the Act is not cited, it is up to the officer who received the request to either respond to it or refer it to the FOI team who can process it and ensure the appropriate information is collated and supplied. In this instance, the receiving officers felt it was an appeal/complaint and processed it as such”.

8. The Appellant appealed the stage 3 complaint to the Local Government Ombudsman who appears to have adjudged that much of the complaint related to the handling of FOIA which was the remit of the Information Commissioner. Consequently, the Appellant entered into correspondence with the Information Commissioner in January 2015 asking for rulings on other instances in the same set of correspondence when the Appellant maintained that the Council had failed to respond to his requests for information which were still outstanding. In a letter dated 28th January 2015 the Commissioner included the following points:

“In relation to the remaining 4 requests which you maintain are still outstanding, would you please let me know when you last contacted the council about these?...”

If you have not done so already you may wish to contact [the freedom of information officer at the Council - telephone number given] in relation to these outstanding requests.

As I advised earlier, the Commissioner will not normally investigate complaints where more than 3 months have elapsed since the complainant's last meaningful contact with the public authority concerned..."

Information Request and complaint to the Commissioner

9. Consequently, the Appellant made the information request that is the subject of this appeal, in a letter received on 27th February 2015 citing 3 instances when his request to know to whom to complain about the system for sending out renewal forms and a request for how the Appellant could arrange for the issue of renewal forms to be debated in the Chamber, had not been provided. He continued:

"[The Director of Marketing and Communications] stated that an officer must decide whether to respond [to] a request for information or refer it to the FOI team. As the PBOM chose not to respond to my request under appeals/complaints system – should he have referred it to the FOI team?"

10. The Council responded to this letter as a FOIA request in their letter dated 27th March 2015 providing details of to whom to complain and how to go about getting an issue debated. The letter repeated but did not answer or comment upon the question *"should he have referred it to the FOI team?"*

11. The Appellant asked for an internal review of the failure to answer this element of his request and the Council responded on 1st April 2015 stating that the response has been given previously namely:

"When the Act is not cited, it is up to the officer who received the request to either respond to it or refer it to the FOI team". I can only re-iterate that council departments have the discretion to respond to enquiries in the most appropriate way."

12. The Council then relied upon s14 FOIA on the basis that the request had been answered already and relying upon the headings from the Commissioner's guidance. The Appellant complained to the Commissioner the same day. The Commissioner upheld the Council's decision.

The Appeal

13. The Appellant appealed on 21st July 2015 on the grounds that the Commissioner failed to take into account the context of the matter (as the Council had failed to review his stage 3 complaint in light of the Commissioner's earlier finding that the Council had breached s10 FOIA.) and in the course of attempting to prove the Council's FOIA breach the Council wrongly declared his correspondence vexatious and applied s14 FOIA.

14. The Commissioner responded on 18th August 2015 relying upon his decision notice and maintaining that the Appellant's continuous correspondence in this matter was an attempt to reopen issues that have already been investigated and concluded previously via PATAS, and his previous decision notice (and the internal complaint albeit not to the Appellant's satisfaction). He relies upon the previous course of dealings between the Appellant and the Council being such as to make the overall burden on the Council's resources substantial. Additionally he concluded that the Appellant had been unreasonably persistent in this matter given that the PCNs were overturned in December 2012. He further argues that many instances of the Appellant's correspondence were requests for opinions which would not be covered by FOIA or for information which was not held.

15. The case was listed for an oral hearing on 7th December 2015. The Appellant attended in person, the Commissioner chose not to be represented and relied upon the written materials. The Tribunal has been provided with an open bundle of documents and further written representations from the Appellant which he expanded orally.

Scope

16. In his grounds of Appeal the Appellant sought the following remedy:

- Repeal of Section 14 (1&2) and

- the council to uphold my Stage Three Complaint.

The Tribunal understands this to mean that he seeks a finding that s14(1) FOIA was wrongly applied. However, the Tribunal has no jurisdiction to intervene in the Council's Stage three Complaint which is outside the remit and jurisdiction of this Tribunal.

Analysis

17. In *Dransfield v The Information Commissioner and Devon County Council [2015]*

EWCA Civ 454 the Court of Appeal upheld the Upper Tribunal's reasoning in the same case and approved their focus on whether there is an adequate or proper justification for the request. They also set out four considerations (which were not intended to be exhaustive or an alternative formulaic check- list) namely:

- (1) the burden (on the public authority and its staff);
- (2) the motive (of the requester);
- (3) the value or serious purpose (of the request) and
- (4) any harassment or distress (of and to staff).

18. We apply the reasoning of *Dransfield* to this case and are satisfied that the focus on adequate or proper justification for the request is encompassed within the headings (2) and (3) of the 4 considerations as set out above. We also address the burden on the public authority which is relied upon in his reasoning by the Commissioner.

19. The Appellant's request and his prior correspondence was worded politely and harassment and distress were not in issue in this case.

20. The Tribunal accepts that there has been substantial correspondence with the Council in terms of FOIA requests, a previous appeal to the Commissioner, an appeal to PATAS and a stage 3 complaint which was appealed to the LGO. It is being argued that the Appellant was unreasonably persistent in his correspondence and that the case ought to have been resolved when the PCNs were successfully appealed to PATAS, the argument being that this is another attempt to re-open the issues which have already been dealt with.

21. In assessing the burden on the public authority the Tribunal has regard to the correspondence as set out in the bundle. We are satisfied that at least some of the correspondence has arisen from the failure of the Council to process information requests appropriately (as evidenced by the Commissioner's finding in FS50533483) which has necessitated the Appellant repeating some of his requests. Additionally, it is apparent that some duplication has occurred by addressing complaints to the wrong authority (e.g. elements of his complaint to the LGO were deemed by them to fall within the jurisdiction of the Information Commissioner) we remind ourselves that the Appellant is a lay person with no particular expertise in local government or the law.
22. We have had regard to the fact that the various avenues followed by the Appellant whilst having their genesis in the issue of the PCNs have evolved as a result of the way that the Council has conducted itself (e.g. failure to recognise FOIA requests and provide information when requested). The Appellant is not able to resolve all his issues through one avenue as each organisation has its own limited jurisdiction (PATAS, ICO and LGO) and prior to being able to access any of those organisations the Appellant has had to exhaust the Council's internal processes. The Appellant was successful in front of PATAS and the ICO; the Tribunal is wary of concluding that an Appellant has generated "burdensome" correspondence because he has had to go to appeal having been unable to resolve the matter using the Council's own internal processes (especially in a case where the appeal was successful).
23. When the Appellant sought to raise his unanswered requests with the Commissioner he was encouraged to contact the Council to chase up the response. The Appellant having outstanding information requests and having been advised to re-contact the Council, the Tribunal does not consider it appropriate to categorise this correspondence as persistent. The request was understood to be and treated as a FOIA request by the Council, however, the question of "*...should he have referred it to the FOI team?*" although repeated in the body of the FOIA response dated 27th March 2015 was not addressed in that letter. It was only when the Council were challenged

for their failure to answer this part of the request that they determined that the request was vexatious.

24. The internal review of 1st April 2015 in our judgment does not resolve the matter. Whilst it is correct that the Appellant has been told previously “*When the Act is not cited, it is up to the officer who received the request to either respond to it or refer it to the FOI team*”. The following sentence “*I can only re-iterate that council departments have the discretion to respond to enquiries in the most appropriate way.*” does not answer the question asked. Whilst it is true that the Council can choose to provide the information “locally” or through their FOIA team, under FOIA they are required to answer it in compliance with the Act and they do not have the option (as appears to have been the case here e.g. in relation to previous requests for the complaint details) not to respond at all.
25. The Appellant argues that the matter is not concluded by the quashing of the PCNs as his complaint is the failure of the Council to follow its own stated policies and FOIA. We agree, from the submissions before us we are satisfied that the Appellant’s motive was seeking an understanding of why despite there being an obligation under FOIA to respond to information requests under the Act and a policy of triage to deal with information requests to allocate responsibility for providing the information, it does not appear to have been applied in his case. The Appellant’s contention was that despite one adverse finding before the Commissioner, it was not clear to him that the situation had improved as the Council were still “cherry picking” which parts of his letters to respond to. He was not satisfied that the Council understood their obligations under FOIA and he relied upon the failure of the Council to address this request in their initial response and their assertion that they had previously answered the question, when there is no evidence that they had, in support of this argument.

Conclusion

26. Having found that the request in its context was not unreasonably burdensome and there was proper justification for the request, we are satisfied that s14(1) FOIA was not applicable in this case and the appeal should be allowed.
27. In determining what if any steps should be taken we have had regard to the wording of the request; in our judgment it is asking for an opinion. The recorded information is the policy, the Appellant has already had that. The Appellant agreed at the hearing that he is seeking confirmation that this policy was not followed in his case. This is a conclusion to be drawn from the facts, a judgment or an opinion and not a request for recorded information. We do not therefore require any steps to be taken.
28. We note that the Appellant is a litigant in person and in relation to other requests, the Council have refused to provide answers to questions on the grounds that the information is not held as the question is a request for an opinion and not information. We consider that this approach is in keeping with the requirement to provide advice and assistance pursuant to s16 FOIA and would have been an appropriate response under FOIA in this case.
29. Our decision is unanimous.

Dated this 5th day of February 2016

Tribunal Judge