



**First-Tier Tribunal
General Regulatory Chamber
Information rights**

**Appeal reference:
EA/2017/0032**

Between

BEN LOTZ

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**DECISION ON
RESPONDENT'S APPLICATION FOR STRIKE OUT
UNDER RULE 8(3)(C)**

1. The respondent has requested the Tribunal to strike out the appeal on the basis that the Tribunal does not have jurisdiction and/or that there is no reasonable prospect of the appeal succeeding. The appellant has made submissions as to why his appeal should not be struck out.

2. I consider that the issues are such that I can decide this matter without a hearing, compatibly with the overriding objective.

3. The relevant passages of the response of 28 March 2017 are as follows:

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 ("the Act") against the Commissioner's decision notice dated 24 January 2017 with the reference number FS50624477.
2. As required by rule 23(3) of the 2009 Rules, the Commissioner hereby states that she currently opposes the Appellant's appeal.
3. Further, the Commissioner invites the Tribunal to strike out this appeal under rules 8(2)(a) and 8(3)(c) of the 2009 Rules.

The Request

4. On 26 October 2015, the Appellant contacted the Department for Work and Pensions ("DWP") seeking the following information:

...1) Can you please provide a csv-file of the folder for sent items from the email account of the Secretary of State for Work and Pensions?

2) Can you if possible include the date field?

A csv file (including the date) can be easily extracted within less than 1 hour in the manner described by the following website: [web link provided]"

5. On 23 November 2015, the DWP confirmed that it did not hold the requested information. Two days later, the Appellant requested an internal review. On 23 December 2015, the DWP provided its internal review in which it upheld its earlier position that the information was not held. The Appellant then complained to the Commissioner.

The Decision Notice

6. On 24 January 2017, the Commissioner issued her decision notice in which she concluded that the DWP did not, on the balance of probabilities, hold the requested information.

The Appellant's Grounds of Appeal

7. The Appellant has specifically confirmed that he does not seek to challenge the substantive conclusion reached by the Commissioner in her decision notice, namely, that the DWP does not, on the balance of probabilities, hold any further information. Rather, the Appellant has said:

"...This is a limited appeal. this appeal does not seek further information from the DWP. ...This appeal is strictly against the ICO only..."¹

8. The Appellant seeks the removal or rewording of §§25-28 of the decision notice, which are contained within the 'other matters' section of that notice.
9. In short, the Appellant considers that the paragraphs he complains of *"...indirectly..."* hold him accountable for the *"...unlawful behaviours/failures of the Public Authority..."*
10. The Appellant also argues that some comments are *"...prejudicial and false"* and that others are an unfair portrayal or representation of his actions in this matter.

The Commissioner's Response

11. The Appellant explicitly states that he does not seek to challenge the substantive finding of the Commissioner's decision notice. Rather, his complaint is with matters set out under the heading "Other Matters".
12. As such, the Appellant is not seeking to challenge the findings of the Commissioner's decision notice itself. Accordingly, in the Commissioner's submission, the Tribunal does not have jurisdiction to deal with the matters complained of by the Appellant in this appeal. As such, she invites the Tribunal to strike out this appeal under rule 8(2)(a) of the 2009 Rules.
13. In support of this view, the Commissioner refers to the non-binding but, in her view, informative and persuasive judgment of a differently constituted First-tier Tribunal in *William Stevenson v Information Commissioner* (EA/2015/0117, 6 November 2015). In that case, the

Appellant requested certain information from a named public authority (“UHMB”). UHMB relied on section 12 of the Act to refuse to comply with the request on the basis that it would exceed the appropriate cost limit. The Commissioner found that section 12 of the Act was not engaged, that UHMB had breached its obligations under section 16 and that it had also breached section 10. The Appellant in that case appealed on the basis that he sought a correction of the decision notice to reflect that UHMB did hold the requested material or had deliberately deleted it. He also referred to UHMB’s alleged bad faith and cavalier attitude in dealing with his request and that it was not in the public interest for UHMB to have sought to rely on section 12.

14. The judgment states as follows:

“...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. ... 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. ...

19. For these reasons, this appeal is struck out by virtue of Rule 8(2)(a), which is in mandatory terms. ...”

(Commissioner’s emphasis)

15. It is also the Commissioner’s submission, argued here in the alternative, that there is, in any event, no right of appeal to challenge the contents of the ‘Other Matters’ section of a decision notice. This is because that section does not form a part of the decision reached by the Commissioner; in the present case, the Commissioner’s decision is found at paragraph 24 of the decision notice. The Other Matters section of a notice (a section which is not included in all notices) is simply intended to provide the Commissioner’s further observations or clarification where, in a given case, the Commissioner considers it may be of assistance to the parties or the wider public. Accordingly, where included, such a section is explicitly set out after the Commissioner’s substantive decision.
16. In *Billings v Information Commissioner* (EA/2007/0076, 6 February 2008) the then Information Rights Tribunal accepted that this was the correct interpretation when it said:

“...8. As the “Other Matters” section did not form part of the reasoning by which the Information Commissioner reached his decision, there is no basis upon which the criticism may be said to demonstrate that the Decision Notice did not comply with the law. This is not therefore a ground of appeal that we can contemplate...”

17. At paragraph 9 of *Billings* the Tribunal went on:

“9...The section of the Decision Notice headed “Other Matters” included quotations from the Appellant’s correspondence relating to the PHSO conflict of interest policy. The Grounds of Appeal include a complaint that it did not also include a quotation from the conflicts policy itself and added: “Whilst, it is accepted that the Information Commissioner’s view is that the request was untenable it is essential that the extracts above are included in the decision notice in the interests of balance and fairness”. Again, this is not a basis for appealing. The Appellant makes no challenge to the conclusion reached by the Information Commissioner, but simply expresses the view that the reasons for that decision recorded in the Decision Notice should have been expressed differently. For the same reasons that are set out above ... this does not form any basis for an appeal from the decision. The Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law...”

18. Whilst the Commissioner readily accepts that this decision is not binding on this Tribunal, in her submission it is, as with *Stevenson*, both informative in its reasoning and persuasive in its conclusion. Accordingly, the Commissioner maintains that the Appellant’s appeal has no realistic prospects of succeeding and, as such, she submits it should be struck out under rule 8(3)(c) of the 2009 Rules.

Conclusion

19. In light of the above, the Commissioner maintains she got her decision right in this case: further, the matters which the Appellant raises in his grounds do not form part of that substantive decision. Accordingly she invites the Tribunal to strike out this appeal under rule 8(2)(a) or, in the alternative, rule 8(3)(c) of the 2009 Rules.

6. In his submissions as to why his appeal should not be struck out, the appellant says:

“Dear GRC

My immediate response would be that:

I maintain that the document is intitulated Decision Notice + the paragraphs are continuous, therefore the part of the DecisionNotice that I am appealing against is part of the DecisionNotice.

If the ICO don’t want the respective paragraphs to be part of the DecisionNotice, then they should not have included them. (Or, they could just permanently remove them.)

In addition to this, it appears that the attitude, reasoning + explanations expressed in the disputed paragraphs negatively influenced the decision, which I maintain was based on an inappropriately superficial investigation.

The ICO say that I do "not seek to challenge the substantive conclusion reached by the Commissioner in her decision notice". I cannot confirm this to be true. What I actually am saying, is that:

Neither I nor the ICO know whether the decision is correct, because of the manner in which it was arrived at.

Neither I nor the ICO know whether the DWP hold (the) relevant information, because of the manner in which the investigation was conducted.

Above all, I maintain that the ICO should have exercised their discretion differently.

Relying on FOIA s58(1)b, I therefore am satisfied that the tribunal has jurisdiction.

As to whether this appeal will be successful, that depends on how well I will be able to make my case + how receptive the tribunal will be to my arguments. I do not think that it serves justice to prejudice + preempt that process.

If you need more or more elaborate reasons/arguments for not striking my appeal out, then please let me know".

7. I agree with the decisions reached in the cases cited by the respondent. The essence of a decision notice is that it is a "decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I" of FOIA (section 50(1)). It is on this basis that the reference in section 58(1) to the notice not being in accordance with the law needs to be construed.
8. The same is true of section 58(1)(b): "to the extent that the notice involved the exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently". The discretion in question must relate to the actual decision of the respondent. If that decision involved the exercise of discretion, then the Tribunal can allow the appeal if it considers the discretion should have been exercised differently.
9. It is difficult to identify any such discretion in the case of decision notices under section 50. The respondent's task is to decide if the public authority has acted in accordance with FOIA. That will often involve making a judgment (for instance, as to where the balance of the public interest lies in the case of so-called qualified exemptions). But that is not to be equated with the exercise by the respondent of any discretionary decision. Section 58(1)(b) has a greater role in appeals concerning information notices and enforcement notices, as to which the respondent has discretion whether to serve on a public authority.
10. The effect of section 58 is, thus, not to enable appeals to be brought in respect of extraneous comments and observations made by the respondent in decision notices (albeit that these may be considered useful) or otherwise in respect of

the way in which the notice is expressed. Parliament has understandably seen fit to avoid such a situation.

11. The appellant's grounds of appeal make it plain that he in fact had no complaint with the decision that the public authority did not hold the requested information: see his grounds of appeal at endnote i below. In his submissions set out in paragraph 6 above, the appellant appears to be seeking belatedly to raise the suggestion that the public authority does hold the information in question and that the respondent was wrong to decide otherwise. If that is the appellant's intention, it should have been plainly articulated in the grounds of appeal. It would be a disproportionate expenditure of time and effort to permit the appellant to amend his grounds so as to argue that issue at this stage. This is particularly the case, given the absence of anything to indicate that the appellant might be able to show on the balance of probabilities that the information is held.
12. There is no purpose in letting these proceedings continue. The appellant would be bound to fail, in that the appeal would be dismissed. The issue is, I consider, not so much jurisdictional as that the appellant is not challenging any operative aspect of the decision notice.
13. The appeal is struck out under rule 8(3)(c).

Judge Peter Lane

13 March 2017

Promulgated 12th April 2017

ⁱ The appellant's grounds of appeal are set out in full, as follows:

This is a limited appeal.

I object to para25-para28 (especially para27 + para28) in the DecisionNotice (DN) FS50624477 from Jan2017.

Why should requesters be penalized for the failures of PublicAuthorities (PAs) or ICO?

Especially regarding para27: It is not my fault, if against my wish/intent the DWP or ICO dismember + incorrectly reassemble my requests or instead of requesting clarification from me, (at times blatantly ignore or) misinterpret what I am asking for.

As a rule, when I make a new FOI-request, I generally make clear reference to the FOIA; whereas when I just make a query or enquiry or supply further information, I don't.

There is also the practical question, how can I be expected to ask for a review without submitting relevant arguments (which the PA/ICO then are able to mis-reinterpret as new requests)?

It is not my fault that the DWP breached section16 + failed to give me adequate advice + assistance.

As such, I don't agree that I should be indirectly held accountable for the unlawful behaviours/failures of the Public Authority.

I believe it would be fairer to say, that if anything that I did subsequent to deficient or misleading advice or in the complete absence of (any constructive) advice, caused more work for the DWP or the ICO, that this would (within reason / as long as it arose out of their failure) not be my fault. I do not want to be held accountable for the unlawful behaviours/failures of others. I am not a reckless person + I ask the tribunal to recognise that.

The comment at the end of para28 is prejudicial + false. I am not aware of that. (Please also see the FTT decision EA/2016/0150 from 6-1-2017 para48.) What I am aware of is that the DWP do not wish to disclose the information. That is something entirely different, as this wish may be contrary to the FOIA.

I thus feel unfairly portrayed/treated/branded by this characterisation by the ICO. Therefore, I request that at least paras27+28 (if not also paras25+26) are being removed from the DN.

I also find the scope in para7 vague. + I find that the investigation was superficially conducted.

Nonetheless, this appeal does not seek further information from the DWP.

This appeal is strictly against the ICO only.

Any aspect of this appeal that might impose a duty on the DWP to duplicate disclosure of information that I am requesting in other requests/litigation parallel to the duration of this appeal, is hereby expressly excluded from this appeal. (Tribunal's emphases).