



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0073

**Decided without a hearing
On 16 October 2018**

**Before
KAREN BOOTH
JUDGE**

Between

OFFICE OF RAIL AND ROAD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

MR DOUG PAULLEY

Second Respondent

DECISION AND REASONS

Sitting alone in Chambers on 16 October 2018

DECISION

1. The decision notice issued by the Respondent on 8/3/18 (Reference: FS50721224) is in accordance with the law and the appeal is dismissed.

REASONS

Background to the appeal

2. The Second Respondent, Mr Paulley, undertakes practical research into the accessibility of the national rail network by disabled passengers. He has raised many queries regarding this issue with the Appellant. In the summer of 2017 he sent 17 emails (including the email referred to in paragraph 3 below) to the Appellant raising concerns about Arriva Rail North and ScotRail.

The request for information

3. On 14/9/17 Mr Paulley sent the email at pages 62-63 of the bundle of evidence to the Appellant. In the last paragraph of that email he raised the following queries.

“If possible, please could you:

A) tell me what you would expect a station/train operator to do in order to comply with the obligation to provide information on accessibility of intermodal connections

B) take action to make Scotrail comply?”

From now on I shall refer to the first query as “query A”.

4. On 18/10/17 the Appellant sent a holding reply to the email as a whole, but without specifically mentioning query A. On 21/10/17, Mr Paulley sent a further email in the following terms:

“I appreciate you are investigating my concern, but out of wider interest, I wonder if you would mind please responding to my query from my email below:

“If possible, please could you tell me what you would expect a station/train operator to do in order to comply with the obligation to provide information on accessibility of intermodal connections?”

Is this in any of your documents?”

The complaint to the Information Commissioner

5. On 3/11/17 Mr Paulley complained to the Respondent about the lack of a response to query A as raised on 14/9/17 and in the subsequent reminder of 21/10/17. He sent the full email of 14/9/17 with his complaint.

6. On 17/11/17, the Appellant sent the substantive response at page 72 of the bundle, effectively stating that they did not hold any relevant information.
7. On 26/2/18 the Respondent's Case Officer wrote to the Appellant requesting them to respond to the request within 20 working days and providing links to relevant guidance. The Appellant responded on 27/2/18 informing the Respondent that they had responded to the request on 17/11/17 copying the Respondent in.
8. On 1/3/18 (page 89) the Case Officer asked Mr Paulley if he wanted the Respondent to issue a decision notice determining whether the Appellant had breached section 10(1) (time for compliance with request). The second sentence of paragraph 3 of that letter is somewhat confusing, but I understood it to mean that if Mr Paulley wanted to challenge the *substantive* (not held) response then he would need to exhaust the Appellant's internal review process first.

The Information Commissioner's decision

9. On 8/3/18 the Respondent issued her decision notice (Reference: FS50721224). She decided that the Appellant had breached section 10(1) of the Freedom of Information Act 2000 (FOIA) by failing to provide a response to query A within 20 working days. As the response had since been provided, no steps were required to be taken by the Appellant.

The appeal to this Tribunal

10. The Appellant appealed to this Tribunal. The grounds of appeal are set out on page 7 of the bundle (and elaborated on in pages 10-14) and can be summarised as follows.
 - The Respondent had based her decision on incomplete information.
 - The Appellant failed to trigger the internal review process before complaining to the Respondent (as required by section 50(2) of FOIA).
 - The Respondent failed to consult with the Appellant.
 - The Appellant had not considered query A, when first raised on 14/9/17, as a request for information under FOIA.
 - The Appellant had had no opportunity to make representations to the Respondent before the decision notice was issued.

The outcome sought was "the withdrawal of the decision notice".

11. The Respondent's Response is at pages 27-31 of the bundle, which I summarise as follows.
 - All relevant information was available to the Respondent when making the decision. In particular the Respondent was aware that the Appellant had responded to the request by then.

- Section 50(2) was not engaged as the only issue was for determination was whether section 10(1) had been breached. The internal review issue had ceased to be relevant by the time the decision was made as a substantive response had been given by then.
- The focus of the guidance referred to by the Appellant is on cases where a public authority has withheld information in reliance on one or more FOIA exemptions and not on cases involving purely procedural issues when it is fair and proportionate to engage in less extensive consultation. The Respondent did in any event take into account the Appellant's response of 27/2/18 indicating that they had responded to the request.

12. Mr Paulley's Response is at pages 33-36 of the bundle, which I summarise as follows.

- The email query concerned was a request for information under FOIA (citing relevant extracts from the Respondent's Code of Practice on request handling).
- Any expression of dissatisfaction about a response to a request for information should be treated as a complaint which should then be handled in accordance with the public authority's complaints procedure. His subsequent email of 21/10/17 constituted such a complaint.
- Given the lack of a response to the request, the Respondent had correctly dealt with the complaint despite the fact that the Appellant had not undertaken an internal review.

13. The Appellant's response is at pages 40-41 of the bundle, which I summarise as follows.

- The Appellant takes its FOIA responsibilities very seriously. This is the first complaint that has been upheld against them. They are aggrieved about the "black mark" on their FOIA record. The appeal was lodged to register their sense of unfairness.
- There has been a long and varied correspondence with Mr Paulley. They have always sought to be helpful to him, offering additional guidance/assistance where possible.
- Mr Paulley is usually clear in identifying when he wants his requests to be dealt with under FOIA. It is regrettable that he did not do so in this case when his request was included at the end of a long email covering a list of complaints.
- Questioning whether the full email containing the request had in fact been provided to the Respondent before the decision was made.
- The Respondent's assertion re ground 3 is not clear from the guidance itself.

- If the appeal is not upheld, the Tribunal is asked to require the Respondent's stance to be clarified in published guidance.

14. Mr Paulley made further submissions (pages 43 -46 of the bundle), which I summarise as follows.

- He *did* provide the full copy of the email in which the request was contained to the Tribunal ("I would always do so in a s50 referral, always have done so, and did so in this case.")
- He agrees that the guidance sent to the administrators of WhatDoTheyKnow.com (page 37 of the bundle) should be published. He also believes that the Appellant should follow the Respondent's guidance about FOIA requests not needing to be specifically flagged as such.
- He did not want the Appellant to prioritise the request over other issues in the email. He wanted them all to be dealt with within their stated timescales and in accordance with the legal requirements. In their response to his email of 14/9/17 they had stated that they would respond within 20 working days (also the long-stop for FOIA requests). They did not respond to the remainder of the email until March 2018.
- Even though his initial email did not flag the request as a FOIA request he chased it up in his email of 17/10/17¹.
- The mistake is the Appellant's and their attempt to shift the blame on to him is "illegitimate and cowardly".

The task of the Tribunal

15. The task of the Tribunal is set out in section 58 of FOIA:

58 Determination of appeals

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

¹The email concerned was in fact dated 21/10/17.

16. The parties had opted to have the appeal determined on the papers. The appeal involved three very narrow points and the bundle of evidence included detailed submissions from all of the parties. I was satisfied that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.
17. The evidence before me consisted of: the papers in the open hearing bundle only (130 numbered pages).

The issues

18. The only issue considered by the Respondent was whether the request for information was complied with in accordance with section 10(1) of FOIA. It seemed clear to me, however, that the appeal raised another (preliminary) issue; that is, whether the query in the email of 14/9/17 was a request for information within the meaning of section 1(1) of FOIA. The third issue was the Appellant's concern about their internal complaints procedure not having been exhausted before the complaint was made.
19. It is not within the Tribunal's powers to:
 - order the *withdrawal* of a decision notice issued by the Respondent (Appellant's desired outcome – page 8); or
 - require the ICO to issue guidance or clarify existing guidance (page 41).

What was decided and why

20. Section 8(1) of FOIA provides as follows.

- (1) In this Act any reference to a "request for information" is a reference to such a request which—
 - (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.

"Information" means "information recorded in any form" (section 84).

21. With some initial reservations, I concluded that query A when first raised on 14/9/17 was a "request for information" within the meaning of section 1(1) of FOIA. Read objectively, the request was for any recorded information held by the Appellant that indicated how it would expect a station/train operator to comply with the obligation referred to. Given the absence of any reference to recorded information held (such as guidance), I accepted why, on an initial reading, it may have been interpreted as a request for advice or a request for a view - and this is supported by Mr Paulley's comment in his email to the Respondent (top of page 56 of the bundle): "I appreciate that my question could appear to be a general enquiry rather than a Freedom of Information Request....."

The issue became beyond doubt when Mr Paulley sent his email of 21/10/17, which specifically asked whether that information was in any of the Appellant's documents. The Appellant responded within 20 working days of that date. However, I was satisfied, on balance, that it was sufficiently clear on receipt of the original email of 14/9/17 that this was a valid FOIA request.

22. As explained by the Appellant on page 11 of the bundle of evidence, the Appellant is the rail industry regulator and has responsibility for granting licences to train operating companies to allow them to provide passenger services. The terms of a licence include the requirement that licensed train and station operators must have a Disabled People's Protection Policy ("DPPP") which sets out how they will protect the interests of disabled users of their trains and stations. The Appellant issues guidance for and approves train operators' DPPPs. They do not investigate individual complaints made by passengers, but they do investigate some complaints concerning systemic issues with train operator arrangements.

In the context of those responsibilities, I consider that the Appellant should have interpreted the Appellant's request as a request for information about relevant information held by them within, for example, the guidance referred to on page 11.

23. As a regulator with specific responsibility for high profile policy issues, I would expect the Appellant's staff to be familiar with the guidance produced by the Respondent, including the "Recognising a request made under [FOIA]" Guidance (which is included in the bundle at page 107 onwards). That guidance includes a paragraph on "requests framed as questions" (paragraph 75) which indicates how flexible a public authority needs to be when considering requests that are not clearly framed as requests for recorded information.
24. The FOIA request was not recognised as such by the Appellant in error. I believe that that was a genuine oversight, however, and I do not agree with Mr Paulley's comments referred to in paragraph 14 (last bullet) above.
25. I noted the Appellant's point about Mr Paulley's usual practice of making it clear when he is making an FOIA request. I have not seen any of those other requests, but it seems clear (particularly from the comment quoted in bullet 1 of paragraph 14 above) that he is very experienced and knowledgeable in relation to FOIA. Although he is correct in stating that reference to FOIA is not a legal requirement, I think it is regrettable that he did not adopt his usual practice in this case and I would urge him to do so in the future.
26. The Appellant also raised the issue about the Appellant's complaints procedure not having been exhausted, before the Respondent issued her decision. By the time Mr Paulley had complained to the Respondent, the 20-working day deadline had clearly expired, and the substantive response was provided before the Respondent's investigation had even begun. The issue of the internal review process had, therefore, ceased to have any relevance by that stage. It was clear, however, from the Appellant's substantive response

dated 1711/17 (copied to the Respondent) that the Appellant had not regarded query 2, when first raised on 14/9/17, as a FOIA request and it seems to me that the Respondent ought to have addressed that issue before issuing the decision notice or, at least, within the decision notice itself. However, as I have addressed that issue and decided that query 2 was a valid FOIA request at the time it was first raised, the matter is now resolved.

Conclusion

27. The Respondent's decision notice is in accordance with the law and the appeal is dismissed.

**Signed: Karen Booth
Judge of the First-tier Tribunal**

Date: 17 October 2018

Promulgated date: 17 October 2018