



Appeal number: EA/2019/0243P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

MARTIN ADEDEJI

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA

**Determined on the papers, the Tribunal sitting in Chambers
on 4 May 2020**

MODE OF HEARING

1. This determination was conducted by a Judge sitting alone in accordance with paragraph 11(3)(a) (i) of the Chamber's Composition Statement.¹
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules².

¹ <https://www.judiciary.uk/wp-content/uploads/2014/10/amended-grc-feb-2015.pdf>

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 204, plus 462 additional pages provided by the Appellant.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. There is a long history to this matter, which I summarise as follows. In 2015, the Appellant made an information request for minutes of meetings held by a public authority between 2009 and 2015. The request was refused under s. 14 of the Freedom of Information Act 2000 (“FOIA”). The Appellant complained to the Commissioner, who issued a Decision Notice agreeing with the public authority. In 2016, the First-tier Tribunal allowed the Appellant’s appeal and substituted a Decision Notice requiring the public authority to disclose the minutes, redacted to protect commercially sensitive and personal data. The public authority sent information within the scope of the request to the Appellant but stated that it did not hold minutes for 2013 and part of 2014. The Appellant asked the ICO to investigate the public authority’s compliance with the Tribunal’s Decision. The ICO did so and determined that the public authority had undertaken all reasonable enquiries to locate the missing information and that no further action was required. The ICO did not take any further action in response to the Appellant’s further emails in June and July 2017, which contained the additional information he relied on to assert non-compliance by the public authority with the Tribunal’s Decision.

6. The Appellant had obtained this additional information by way of a subject access request to the public authority. He considered that this information suggested that the missing minutes were indeed held by the public authority, because there had been reference to them in the public authority’s correspondence with the ICO. The ICO took no further action, having concluded its enquiries.

7. The Appellant then made a request to the Information Commissioner’s Office (“ICO”) on 6 May 2018 in the following terms:

Please inform me whether or not you hold the information specified below and if you do please provide me with a copy of all information you hold fitting the scope of my request.

I am requesting a copy of all information you hold that you processed from, and on, the 12 June 2017 onwards and which

² Although the Notice of Appeal requested an oral hearing, the Appellant confirmed on 3 September 2019 that he agreed to a determination on the papers.

(1) The [public authority] failed to send to the Appellant by the 2 September 2016 even though it fell within the scope of information specified in the Tribunal's...decision which stated ...the Public Authority must by 2 September 2016 disclose to the complainant the minutes of all practice meetings for the period 2009 to 1 September 2015 redacted to remove any commercially sensitive or personal data.

(2) Evidences, on the balance of probabilities, that ...made a false statement when they informed the Appellant and the Commissioner that they had, by 2 September 2016, provided the Appellant with all the information they held that fell within the scope of that specified in the Tribunal's... decision...

(3) Also, please provide the summary of the Information Commissioner's Enforcement Powers and Appeal procedures, which your document...stated are available on request.

8. The ICO responded on 5 June 2018 that it did not hold information within the scope of parts (1) and (2) of the request. The ICO said that it did hold information from 12 June 2017 onwards associated with the previous Tribunal case and asked the Appellant if he wanted this. The ICO provided a link to the information requested in part (3) of the request. On internal review, the ICO confirmed its position on parts (1) and (2) of the request on 6 August 2018 and provided the Appellant with an alternative link to the information requested in part (3), as the Appellant had not been able to access it.

9. The Appellant complained to the Commissioner, who issued Decision Notice FS50801289 on 11 June 2019. She found that, on the balance of probabilities, the ICO did not hold the information requested in parts (1) and (2) of the information request; that the ICO had complied with its obligations in respect of part (3); that it had breached s. 10 (1) of the Freedom of Information Act 2000 ("FOIA") in relation to part (3) because it did not respond within 20 days of the request; and required no further steps to be taken.

10. The Decision Notice explained that the ICO had searched its records management systems and found that the information held in connection with the earlier investigation into the matter to which the Appellant referred had been destroyed but that records were still held in relation to the subsequent Tribunal appeal. The Commissioner had considered the additional information which the Appellant had provided to support his case that the requested information was held by the ICO but concluded that it did not provide compelling evidence of the matters for which the Appellant contended. The Commissioner noted that, if the ICO did hold copies of the emails on which the Appellant relied (which she found it did not), they would be exempt from disclosure under a. 40 FOIA in any event as they constituted the personal data of the requester.

11. The Appellant appealed to the Tribunal.

Appeal to the Tribunal

12. The Appellant's Notice of Appeal relied on grounds that the information he had obtained though the subject access request showed that the Commissioner held the requested information. He submitted that he had provided this further information in the correspondence from himself to the ICO in June and July 2017, but it had not been disclosed, although it fell within the scope of the May 2018 request.

13. The Commissioner's Response dated 9 August 2019 maintained the analysis as set out in the Decision Notice. It is noted that the terms in which the information request was made required the Commissioner to form a judgement as to whether the public authority had *failed* to send the Appellant information and *evidences* that the public authority had made a false statement. It is further noted that FOIA provides a right to request recorded information but not to require the Commissioner to make this type of judgement. The Commissioner had interpreted the Appellant's request not to include within its scope his own correspondence, as it had been assumed he already had this. The Appellant had not stated otherwise, despite a direct request from the ICO. The Commissioner submits that, for this reason, the 2017 emails to which the Appellant refers were not within the scope of his information request of 6 May 2018. Nevertheless, she has offered to provide the Appellant with this information if he still requires it.

14. The Commissioner noted that the Appellant was inviting her to confirm in a published Decision Notice that the public authority had not complied with the Tribunal's Decision, with reference to information provided by himself after she had declined to investigate the matter further. The ICO had informed the Appellant that it does not consider that the ICO is responsible for enforcing Tribunal Decisions and accordingly the Commissioner suggests that the Appellant may be mis-using FOIA in an attempt to circumvent the ICO's approach to enforcement. She invited the Appellant to withdraw his appeal.

15. The Appellant's Reply relied on an argument that the ICO had conceded that it held information within the scope of the request that had not been disclosed to him. He stated that he reasonably expected the ICO to have analysed the evidence he had submitted in 2017 and to send him its recorded conclusion.

16. The Commissioner applied for the Appellant's appeal to be struck out on the basis that FOIA conferred a right to recorded information and not a right to argue that information *should* be held. As the Appellant's case fell into the latter category, and as the ICO did not carry out a further investigation after 2017, the Appellant's case that further information is held has no reasonable prospect of success. The Appellant submitted in response that he had reasonably believed that his 2017 emails had generated a further enquiry in respect of which the requested information would be held. He noted that he had only received a response to those emails in 2019, due to an oversight at the ICO (for which the ICO has apologised). The Registrar refused the application for the Appellant's appeal to be struck out on 15 November 2019.

17. In response to the Tribunal's Directions, the Appellant subsequently provided a copy of the additional information on which he relies to the Tribunal and the Commissioner.

18. In further submissions dated 27 January 2020, the Commissioner submitted that she had no information of her own to substantiate the Appellant's claim that the public authority had provided him with information which it had told the ICO it did not hold. She was aware that he obtained some further information, but not when he had received it. She notes that the minutes to which the Appellant referred had been included in the bundle for the Tribunal hearing, so he had in any event received them. In these circumstances, the Commissioner would not have taken any enforcement action against the public authority in respect of its earlier statement that it did not hold these minutes.

The Law

19. Section 1 (1) (a) FOIA entitles a requester of information to be informed in writing whether a public authority holds the requested information and, if so, to have that information communicated to the requester under s. 1 (1) (b) FOIA³.

20. A decision as to whether a public authority holds requested information is to be decided on the balance of probabilities.

21. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“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.

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

22. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/1>

Evidence

23. Neither party has provided the Tribunal with witness evidence.

24. I have considered the correspondence relating to the earlier Tribunal appeal, provided by ICO, and the additional material provided by the Appellant.

25. I have also considered the additional information referred to by the Appellant in his 25 December 2019 email (page 60 of the first bundle and the first tab of the second bundle), which he submits “*evidences it likely that the Information Commissioner did hold information fitting scope of my 6 May 2018 FOI*”.

Conclusion

26. It seems to me that the request made on 6 May 2018 may not in fact have properly engaged FOIA. I say this because it is not a straightforward request for recorded information, but only for information which met an evaluative standard that the Appellant has himself imposed. It would seem reasonable for any public authority to have sought to clarify such a request.

27. The approach taken in the Decision Notice to which this appeal relates is that the request was understood by the Commissioner not to include within its scope information which was already within the possession of the Appellant. It seems to me that this was an entirely reasonable approach and I find no error of law or inappropriate exercise of discretion in the Commissioner’s understanding of the scope of the request.

28. That being the case, the Decision Notice records the steps that the ICO took to search for additional information within the scope of the request. It does not seem to me that the Appellant has here met the burden of proof which rests on him in establishing to the requisite standard that the ICO did hold additional information within scope. The Decision Notice explains that the correspondence from the initial enquiry was no longer held. The Appellant may not, within the terms of FOIA, seek to overcome that difficulty by re-supplying the information to the ICO himself and then arguing that it is held. I discern no error in the Decision Notice in this regard and have no hesitation in dismissing this appeal.

29. I note the long history of this matter and find it regrettable that the Appellant continues to make FOIA requests in respect of matters concerning an appeal which has already been determined by the Tribunal, and in respect of which he has already received the information he requested to the satisfaction of the ICO. I agree with the Commissioner that this particular request appears to have been made with a view to forcing the Commissioner’s hand to comment publicly on an enforcement matter in which she had already declined to become involved.

30. I also agree with the Commissioner that such an approach involves a misuse of FOIA. The Commissioner may wish to refer to the views I have expressed here in

making an application for a strike out, or costs, or for a Civil Restraint Order in any future case in which the Appellant seeks to resurrect these issues. I hope the Appellant will now regard this matter as closed.

(Signed)

JUDGE ALISON MCKENNA

DATE: 7 May 2020

CHAMBER PRESIDENT

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