



Neutral citation number: [2023] UKFTT 1034 (GRC)

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

**Appeal Reference: EA/2023/0287**

**Decided without a hearing  
On 7 December 2023**

Decision given on: 20 December 2023

**Before**

**TRIBUNAL JUDGE HEALD**

**Between**

**STEVEN PAUL BURKE**

**and**

**THE INFORMATION COMMISSIONER**

Appellant

Respondent

**DECISION AND REASONS**

1. The Appeal is struck out.

**Background**

2. On 8 July 2021 Mr Burke made a request for information to Ribble Valley Borough Council (“the Council”) pursuant to the Freedom of Information Act 2000 (“FOIA”). In response the Council indicated it did not have some of the information requested but did provide some information.
3. Mr Burke requested an internal review of the replies to his questions 2, 3 and 6. The Council maintained its position on these questions. He then complained to the Commissioner who issued a decision notice on 2 December 2022 requiring the Council

to carry out additional searches and issue a fresh reply which it appears they did on 13 January 2023.

4. Mr Burke renewed his complainant to the Commissioner as he believed more information should have been located. The Council then identified and disclosed additional information.
5. The Commissioner issued the Decision Notice on the 17 May 2023 in which it reported its conclusion that:-

*“..... on the balance of probabilities, the Council does not hold any further information within the scope of parts 2, 3 and 6 of the request, beyond that which it has already disclosed.”*

### **The Appeal**

6. On 12 June 2023 Mr Burke appealed the Decision Notice by section section 57 FOIA. Directions were issued on 1 September 2023 in which the parties were given a timetable to serve any Response and Reply.
7. On 5 September 2023 the Commissioner provided a response to the Appeal (“the Commissioner's Response”) in which it also applied for the Appeal to be struck out by rule 8(3)(c) Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“2009 Rules”).
8. Mr Burke was informed of the Commissioner's strike out application as required by rule 8(4) 2009 Rules. From the papers it appears that he decided not to serve a Reply to the Commissioner's response.

### **The Tribunal's Role**

9. By section 58 FOIA the Tribunal's role in this appeal is to consider whether the Decision Notice is not in accordance with the law or if the Commissioner should have exercised a discretion differently.
10. If the Tribunal determines the Decision Notice was not in accordance with the law or that a discretion should have been exercised differently it can allow the appeal or substitute a different Notice that could have been served by the Commissioner but unless these apply the Tribunal shall dismiss the appeal.

### **Strike out**

11. Rule 8(3) of the 2009 Rules provides that: -

*(3) The Tribunal may strike out the whole or a part of the proceedings if  
(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*

12. In *HMRC -v- Fairford Group (in liquidation) and Fairford Partnership Group (in liquidation)* [2014] UKUT 0329 the Upper Tribunal summarised the task to be carried out by a Tribunal in these circumstances: -

*41. In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing.....A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, ....The tribunal must avoid conducting a 'mini-trial'."*

13. In *AW-v-Information Commissioner and Blackpool CC* [2013] 30 ACC the Upper Tribunal at paragraph 7ff set out the principles governing the application of rule 8(3) (c) 2009 Rules. These included: -

*"...It is well established in the ordinary courts that the historic justification for striking out a claim is that the proceedings are an abuse of process .... On that basis, the power should only be exercised in plain and obvious cases"*

*"More recent rulings from the superior courts point to the need to look at the interests of justice as a whole ....It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules."*

14. Rule 2 of the 2009 Rules refers to the overriding objective which is *"to enable the Tribunal to deal with cases fairly and justly."* Rule 2(3) 2009 Rules provides that the Tribunal *"must seek to give effect to the overriding objective when it (a) exercises any power under these rules or (b) interprets any rule or practice direction."*

### **Review**

15. The Tribunal has been provided with a bundle of papers which includes the Decision Notice, the Appeal, the Commissioner's Response and correspondence.

16. In support of his position Mr Burke asserts that the information does exist because it must have existed at some point and a council has a duty to retain such information. He says:-

*"2.7 These Financial records must undoubtedly have existed for this period as all Councils have a duty of care to retain or archive this information..."*

17. In its response the Commissioner refers for example to *Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190*. In *Clyne* the Tribunal decided as follows:-

*"38. The Tribunal finds it very surprising that there is so little by way of recorded information relating to the period between October 2007 and March 2008 especially in light of the way that the case was administered prior to that date. The issue for the Tribunal is not what should have been recorded and retained but what was recorded*

*and retained. The Tribunal has not received an explanation that satisfies it that no recorded information was generated, nor an adequate explanation as to why if generated it has not been retained. Whilst the Tribunal accepts that this information is not in the paper file when it might have been expected it to have been placed there, the Tribunal, rather than concluding that the information has never existed in recorded form, is satisfied that this reflects inconsistent and poor administrative practice. “*

18. Mr Burke’s grounds of appeal mention that some of the information he requested was only provided “*after pressure from the ICO...*” The manner in which a public authority respond or fails to respond might be an indication that there is more to find. However in this case I found no evidence that the Council was, for example, ignoring its obligations or acting to frustrate Mr Burke’s FOIA rights such that one would conclude there was more information (on the balance of probabilities) to be found.
19. In part 6 of the Appeal Mr Burke says “*This will then enable this Appeal to be determined on fact rather than probability.*” *Bromley and others -v-Information Commissioner and the Environment Agency EA/2006/0072* is authority for the proposition that where there is a dispute as to whether the information does or does not exist the Commissioner must seek to resolve the question on the balance of probabilities.
20. Mr Burke appears himself to recognise in the Appeal that the information still sought might not exist. He says “*.It may be that ‘the balance of probability’ is indeed that the Council no longer holds this information. ...*” The outcome section of the appeal also indicates an acceptance by Mr Burke that the information might not exist. He says:-

*“ If the Council is not unable, or still unwilling, to provide this information for whatever reason (e.g. because it has been LOST or DESTROYED) then the reason for this must be made ABSOLUTELY clear in any response bt the Council arising from this Appeal”.*
21. Mr Burke in the grounds of the Appeal asks that if the information is no longer held then “*.... the Commission needs to determine the legal basis under English Law as to why it does not at this point in time and what happened to it.*” I accept that such a question falls outside the scope of the FOIA request, the Appeal and the role of the Tribunal.
22. Finally Mr Burke in the Appeal says “*this has not been adequately pursued by the Commissioner.*”
23. Taking the complaints together it is clear that the Commissioner took steps to investigate the original complaint including in December 2022 by requiring the Council to carry out further searches. As regards the renewed complaint paragraphs 17-22 of the Decision Notice set out in some detail what it did to reach its conclusion.
24. In my view it could not be realistically argued that these were not appropriate steps upon which the Commissioner could reach its conclusion. As recognised in *Bromley*:-

*“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records...”*

**Conclusion**

25. A strike application is decided summarily and will be granted where there is not a realistic, as opposed to fanciful, prospect of an Appellant succeeding at a full hearing having regard to the overriding objective in rule 2 2009 Rules.
26. Based on the position of the parties and evidence provided in the bundle, including as to the steps take by the Commissioner, in my view:-
  - 26.1. the Commissioner adopted the correct legal tests when concluding that on the balance of probabilities the information still sought did not exist – even if, as Mr Burke says, it once did exist and still should exist.
  - 26.2. the Decision Notice cannot be said to be not in accordance with the law
  - 26.3. a discretion should not have been exercised differently.
27. Having considered the provisions of rule 2 2009 Rules in my view there is not a realistic prospect of the case succeeding and it should therefore be struck out.

**Decision**

28. Accordingly the Appeal is struck out pursuant to rule 8(3)(c) 2009 Rules.

Signed Simon Heald  
Judge of the First-tier Tribunal  
Date: 7 December 2023