



NCN: [2023] UKFTT 164 (GRC)

Case Reference: EA/ 2022/02124

5

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

10 Heard: by determination on the papers
Heard on: 20 February 2023
Decision given on: 21 February 2023
Before: Judge Alison McKenna

15

Dr. TONY CUTLER

Applicant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent
Second
Respondent**

THE EQUALITIES AND HUMAN RIGHTS COMMISSION

**RULING on rule 4 (3) Application:
The appeal is struck out.**

20

REASONS

25

1. On 27 January 2023 the Registrar struck out this appeal under rule 8 (3) (c) of the Tribunal's Rules¹ on the basis that it had no reasonable prospects of success. By application dated 10 February 2023 the Applicant has asked for that decision to be considered afresh by a Judge, pursuant to rule 4 (3) of the Tribunal's Rules. This I now do.
2. The Information Commissioner issued a Decision Notice dated 13 July 2022 in which he found that the public authority (the Second Respondent) did not hold information within the scope of parts one and two of the Applicant's request and was entitled to rely on the statutory exemption under s. 44 FOIA 2000² in respect of parts three to eight.

30

¹ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

² [Freedom of Information Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

3. The Applicant lodged a Notice of Appeal with the Tribunal dated 3 August 2022. The First Respondent filed a Reply on 6 September 2022 and the Second Respondent, having been joined, filed a Response on 8 November 2022. The Second Respondent's Response included an application for the appeal to be struck out under rule 8 (3) (c) of the Tribunal's Rules. In accordance with rule 8 (4), the Applicant was given an opportunity to make representations on the proposed strike out, which he duly did on 19 December 2022.
4. In considering the Applicant's original information request as described in the Decision Notice, I note that parts one and two of the information request are phrased as questions: "... is that what you intended?" and "...would you regard?". As such, it is difficult to see how they can be described as requests for recorded information so as to require the public authority to respond under FOIA 2000. However, the case seems to have proceeded on the basis that the request was for any information that would help answer those questions.
5. The Applicant's Notice of Appeal takes issue with the adequacy of the Information Commissioner's investigation and its finding on the balance of probabilities that no information within the scope of parts one and two of the information request was held. It does not take any issue with the finding that the public authority was entitled to rely upon s. 44 FOIA 2000. It asks the Tribunal to direct a fresh investigation as to whether information is held.
6. In considering afresh whether to grant the Second Respondent's application for a strike out, I have considered the Upper Tribunal's decision in *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC), in which it is stated at [41] that:
- ...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 to summary judgement 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...The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all.*
7. I have considered the Applicant's representations under rule 8 (4) in which I note he refers to his original information request as his 'questions' to the public authority. It seems to me that this case proceeded on a confused basis from the start, because parts one and two of the request were indeed questions and thus not properly to be regarded as requests for recorded information. The public authority and the Information Commissioner have been helpful to the Applicant in trying to overcome this difficulty, but it follows from the opaque nature of the original request that there was never a clearly identified range of recorded information which was to be searched for by the public authority. In my view, any case in which there has been a search for insufficiently particularised information is bound to fail because the Tribunal will never be able to make a finding whether any such search was adequate or inadequate.
8. I conclude that this is not an appeal which is fit for a full hearing as its prospects of success are fanciful. It seems to me that the Applicant should make a fresh information request which is properly phrased as a request for recorded information, so that the public authority can make a fresh response.
9. Having considered this matter afresh under rule 4 (3), I find that I agree with the Registrar that this matter should be struck out. I direct accordingly.

(signed)
Judge Alison McKenna

Dated: 20 February 2023

