



NCN: [2023] UKFTT 00776 (GRC)

Case Reference: EA/2022/0185

**First-tier Tribunal
General Regulatory Chamber
[Information Rights]**

**Heard by determination on the papers.
Heard on: 14 September 2023.
Decision given on: 18 September 2023**

Before

TRIBUNAL JUDGE ALISON McKENNA

Between

EDWARD WILLIAMS

Applicant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CHIEF CONSTABLE of SOUTH YORKSHIRE POLICE

Second Respondent

RULING ON COSTS APPLICATION

The application for costs is refused.

REASONS

Background

1. The appeal was determined by the Tribunal in a Decision promulgated on 9 August 2023 (“the Decision”), following a determination by a panel on the papers. The appeal was allowed but no substituted Decision Notice was made.
2. The Tribunal concluded that it was unable to determine the application of s. 38 FOIA to the information requested as the request was unclear and had not been clarified by the public authority or the Information Commissioner, with the result that each party was applying the statutory test to a differently composed group of individual. The Tribunal allowed the appeal but recommended that the Appellant should make a fresh request which was clear as to its scope and that the public authority should clarify any uncertainty before proceeding to claim an exemption.
3. The Applicant has made an application for costs, received by the Tribunal on 11 August 2023. It apparently relies on rule 10 (1)(c) of the GRC’s Rules¹, i.e., that the Decision Notice which was the subject of the appeal was unreasonable.
4. The Applicant has not enclosed with his application a schedule of costs but applies for £500 on the basis of 4 hours at £125. He was unrepresented in the substantive proceedings and has not explained how these costs were incurred.
5. Both Respondents have responded to the application. After the Second Respondent made his submission on 1 September 2023, the Applicant confirmed that his application was against the First Respondent only. The First Respondent opposed the application in his submission of 5 September 2023.

The Law

6. Proceedings before the First-tier Tribunal do not generally involve costs shifting. There is a rarely invoked provision at rule 10 (1)(b) of the Tribunal’s Rules, giving the Tribunal power to award costs against a party who acts unreasonably in bringing, defending or conducting the proceedings. There is a further provision at rule 10 (1) (c) in relation to some Respondents only, including the Information Commissioner, which allows costs to be awarded if the decision under appeal was itself unreasonable.

Submissions

7. The Applicant submits that, as the Information Commissioner did not know who’s mental health he was seeking to protect in upholding the public authority’s reliance on s. 38 FOIA, the Decision Notice must have applied to a hypothetical individual and that thus the Decision Notice was unreasonable.
8. The Second Respondent submits that whilst the Decision Notice was found to contain an error of law, this is not the same as it being unreasonable. Further, that costs are rightly awarded sparingly in Tribunal proceedings and that this is not a case where the Tribunal should exercise

¹ [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

its discretion to award costs. Further that the basis on which the costs are said to have been incurred is insufficiently particularised for the Tribunal to make an order.

Conclusion

9. The award of costs is a discretionary power. I note that the Tribunal did not describe the Decision Notice as unreasonable in any respect, although it did find there to be an error of law. As is usual in such cases, the appeal was allowed for this reason. However, no substituted Decision Notice was made because the Tribunal found there had been considerable confusion between the parties as to the scope of the request. The Decision is clear that the confusion was initiated by the Applicant's own lack of clarity and perpetuated by each of the Respondents in failing to clarify the scope of the request. The Tribunal therefore attributed responsibility for the confusion to all three parties and did not single out the First Respondent for distinct criticism.
10. In these circumstances I conclude that this is not a case in which it would be appropriate to exercise my discretion to award costs against the First Respondent. Accordingly, I now refuse this application.

(Signed)
Judge Alison McKenna

Dated:14 September 2023

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