



Neutral citation number: [2023] UKFTT 00825 (GRC)

Case Reference: EA-2023-0119P

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

Heard in GRC Remote Hearing Rooms, Leicester: on the papers

Heard on: 18 September 2023

Decision given on: 05 October 2023

Before

**TRIBUNAL JUDGE A. MARKS CBE
TRIBUNAL MEMBER K. GRIMLEY EVANS
TRIBUNAL MEMBER A. CHAFER**

Between

CHRIS R HENDERSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant: represented himself

The Respondent: was represented by Sapna Gagani

Decision: The appeal is **allowed**. The Substituted Decision Notice below is substituted for the Information Commissioner's Decision Notice:

SUBSTITUTED DECISION NOTICE

To: Vale of White Horse District ('the Council')
135 Eastern Avenue
Milton Court
Abingdon
Oxfordshire
OX14 4SB

By email to: foi@whitehorsedc.gov.uk

By Decision reference **EA-2022-0119** of the First Tier Tribunal, General Regulatory Chamber (Information Rights), the Tribunal is not satisfied that the information requested was in existence at the date of the request.

Accordingly, the Council should have responded to the request that the information was not held.

The Commissioner is directed to ensure that this Substituted Decision Notice is sent to the Council.

No further directions are necessary.

Dated: September 2023



Alexandra Marks CBE
(Recorder sitting as a Judge of the First Tier Tribunal)

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-175354-B0V9 dated 13 February 2023 which held that the Vale of White Horse District Council ('the Council') was entitled to withhold the information requested under section 43(2) (commercial interests) of the Freedom of Information Act 2000 ('FOIA').
2. Both parties agreed to the Tribunal making a decision based on all the papers in the case rather than requiring an oral hearing. The Tribunal was satisfied, in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), that it could properly determine the issues in this case without an oral hearing.

The requests for information, internal review and responses

3. On 25 February 2022, the Clerk to Radley Parish Council ('the Clerk') wrote to the Council as follows:

"At the Parish Council meeting yesterday evening, the subject of mobile homes was discussed, with particular reference to the proposed rent increase in April. Pebble Hill and Woodlands Park are both within the parish of Radley.

The Council understood from Councillor [name redacted by ICO] that you are in the process of preparing accounts for the parks and I have been asked to formally request a copy of those reports as soon as they are ready. This will help the Council to see what level of surplus, or loss, the Vale makes from these parks."

4. The Council responded in March or April 2022¹ that the information was withheld under s.43(2) FOIA.
5. On 27 May 2022, the Council wrote to the Clerk that it had carried out an internal review of its decision to withhold the requested information and was maintaining its position. The Council apologised that its original response to the request was outside the prescribed 20 working days for the Council to respond.
6. On 12 June 2022, Mr Henderson complained about the Council's handling of the Clerk's request to the Information Commissioner ('the Commissioner').

The Commissioner's investigation and Decision Notice

7. On 21 June 2022, the Commissioner notified the Council that it had accepted Mr Henderson's complaint for investigation.
8. On 13 February 2023, the Commissioner issued Decision Notice IC-175354-B0V9 which in summary concluded that:

¹ The precise date is unclear: the copy response in the bundle (pages C37-8) is dated 21 March 2023 but this date is clearly incorrect since the Clerk's request for an internal review was made in May 2022. The Council's internal review response is dated 27 May 2022 (page C41) and cites the date of the original response as 25 April 2022 and 'outside the prescribed 20 working days' – which a response on 21 March 2022 would not have been. To further confuse matters, the Decision Notice (page A2) states that the Council's original response was 'on 24 April 2022'.

(a) The Commissioner is satisfied that the Council is operating a commercial activity; and that disclosure of the requested information would prejudice its commercial interests by revealing its costings to local competitors who would then be able to use this information to seek a commercial advantage over the Council. The Commissioner therefore concluded that s. 43(2) FOIA was engaged.

(b) Applying the public interest test, factors in favour of disclosing the information are transparency and accountability to the public of the Council's operations, including commercial activity that it undertakes with public resources. Disclosure of the information would allow scrutiny of the Council's management of this business, specifically in the context of proposed rent increases, the reason behind the request.

(c) Factors in favour of withholding the information include the public interest in the Council being able to compete with other providers who would not be subject to FOIA, and maintaining the viability of the Council's business. The Council has also referred the requester to other information it has published about the basis for the rent increases.

(d) While noting that accounts for the mobile home parks were reportedly previously published during the 1990s, and early 2000s, the Commissioner must make his determination based on circumstances present at the time of the request.

(e) There is no evidence available to the Commissioner that indicates that the Council is acting improperly in its management of the business, and which would increase the public interest in disclosure.

(f) The Commissioner found that the public interest balance favours maintaining the s.43(2) FOIA exemption in this case.

Appeal to the Tribunal

9. In Mr Henderson's Notice of Appeal to the Tribunal, he challenged the Commissioner's Decision Notice.

10. The papers available to panel and the parties are set out in paragraph 18 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

11. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'Any person making a request to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if this is the case, to have that information communicated to him.'

Section 2(2)(b) FOIA: public interest test

12. Section 2(2)(b) FOIA provides that:

'... section 1(1)(b) does not apply if or to the extent that—

...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43(2) FOIA: commercial interests

13. Section 43(2) FOIA provides that information is exempt from disclosure where this “...*would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*”

14. According to *Hogan v Information Commissioner [2011] 1 Infor LR 588* at paragraph 34, assessing prejudice involves the following steps:

- (a)** Identifying the ‘*applicable interests*’ within the relevant exemption;
- (b)** Identifying the ‘*nature of the prejudice*’. This means showing that:
 - (i) The prejudice claimed is. ‘*real, actual or of substance*’; and
 - (ii) There is a ‘*causal link*’ between the disclosure and the prejudice claimed.
- (c)** Deciding on the ‘*likelihood of the occurrence of prejudice*’.

15. This approach was approved by the Court of Appeal in *DWP v Information Commissioner [2016] EWCA Civ 785*.

16. The exemption in s.43(2) FOIA is a qualified exemption which means that a public authority may only withhold the information if the public interest balancing exercise required by s.2(2)(b) of FOIA (set out above) favours maintaining the exemption rather than disclosure.

The role of the Tribunal

17. The powers of the Tribunal in determining appeals against the Commissioner’s decisions for the purposes of FOIA are as follows:

s.57 Appeal against notices...

- (a)** *Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...*

s.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.*

Evidence

18. Prior to the hearing the parties had submitted written evidence and submissions. These were set out in an Open Bundle of 60 pages (including an Index).

Submissions

Appellant's submissions

19. In his Notice of Appeal, Mr Henderson said, in summary:

(a) No example has been given as to how any conceivable commercial advantage could accrue to competing park owners.

(b) The major part of any disclosure of commercial interest might be the rents figures. These are public knowledge because tenants on various sites discuss them openly with each other.

(c) Running costs and maintenance expenditure are not a commercial secret as the Council set the standards and operating conditions etc. for their own and other sites. Only totals rather than specific items of expenditure need to be disclosed.

(d) It difficult to see how knowledge even of specific contracts could give any commercial advantage to 'competing' private park owners: meaningful price comparisons on grounds or road maintenance would be almost impossible given the variations in topography and location.

(e) Site maintenance at the parks is poor and tenants seek to discover where the rental income has been spent if not on their site.

(f) The request is not for any commercial gain but for tenants' knowledge and for the upholding of tenants' proper rights.

Commissioner's submissions

20. In the Commissioner's response dated 26 May 2023 to the Notice of Appeal, the Commissioner said that:

(a) The Commissioner has considered the Appellant's grounds of appeal and does not consider they disturb his decision. Accordingly, the Commissioner stands by his decision as set out in the Decision Notice.

(b) The Commissioner has no further submissions and nothing further to add but invites the Tribunal to dismiss the appeal.

Discussion and decision

21. The panel considered first the relevant facts of this case.

The facts

22. The panel found the following facts established on the balance of probabilities:

(a) Apart from the Council, there are other mobile home park operators in the area.

(b) The Council is operating Pebble Hill and Woodlands parks as a commercial activity.

(c) Due to the presence of other mobile home park operators nearby, the Council's commercial activity is conducted on a competitive basis.

(d) The Council, like other local authorities, by law operates a financial year which runs from 1 April to 31 March the following year.

(e) The accounts which the Clerk requested on 25 February 2022 were acknowledged to be '*in the process of ...being prepared*' and not '*ready*' at the date of the request. The accounts sought were therefore for the financial year 2021-2022, not any previous year.

(f) The financial year 2021-22 had not ended at the date of the request. Accounts for that year were therefore not in existence at the time of the request.

Error of law or wrongful exercise of discretion?

22. Having made the above findings of fact, the panel went on to consider whether the Decision Notice is not in accordance with the law or whether the Commissioner ought to have exercised his discretion differently.

23. The panel first considered whether the Decision Notice is in accordance with the law.

24. The panel concluded that the Decision Notice correctly stated that '*...the Commissioner must make his determination based on circumstances present at the time of the request.*'

25. The Commissioner's approach to whether information is held is clearly stated on his website that '*You do not have to create new information in response to a request. FOIA only applies to any recorded information which you already held at the time of a request*'.

26. However, neither the Council nor the Decision Notice address the fact that the accounts requested did **not** exist at the date of the request and therefore could not be held by the Council in accordance with s.1(1)(a) FOIA nor could they be provided in accordance with s. 1(1)(b) FOIA. The request in this case was premature.

Conclusion

27. In short, the panel considers that the Decision Notice contained an error of law: the information requested did not exist at the date of the request. The Council should therefore have responded to the request that it did not hold the information thereby discharging its duty under s.1(1) FOIA.

28. In view of this conclusion, the panel did not go on to consider whether the Commissioner ought to have exercised his discretion differently.

29. The Tribunal allows the appeal and substitutes for the Commissioner's Decision Notice IC-175354-B0V9 the Substituted Decision Notice set out on page 2 above.

Closing observations

30. The panel considers that, had the request not been premature and the accounts requested had existed at the time, it is possible that the exemption in s.43(2) (commercial interests) would have been engaged.

31. However, the panel notes that the Decision Notice neither cites the *Hogan* criteria set out in paragraph 14 above nor apparently takes account of the Commissioner's guidance on this exemption which states that *'It is not sufficient for you simply to argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship (emphasis added) between the disclosure of the information in question and the prejudice you envisage'*.

32. The guidance goes on to cite as an example the Tribunal's decision in *Hartlepool Borough Council v The Commissioner EA/2017/0057 (14 March 2018)* which says: *'...the onus rests with the party making the assertion that the exemption is engaged to make good its claim...'*

33. In this case, the bundle did not include a copy of the correspondence issued as part of the investigation by the Commissioner. Such correspondence typically includes an invitation to the public authority to justify its position as well as to provide any withheld information and supporting submissions. Nor did the bundle in this case contain any submissions, further evidence or other material from the Council.

34. Overall, the panel considers the material in the bundle would have been inadequate to make good the claim that the exemption in s.43(2) was engaged nor, even had the panel concluded that the claimed exemption was engaged, properly to assess the balance of the public interest as required by s. 2(2) FOIA.

Alexandra Marks

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)

Date: September 2023