Neutral citation number: [2024] UKFTT 1067 (GRC)

Case Reference: FT/EA/2024/0107

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Choose hearing type.
Decision given on: 29 November 2024

Before

JUDGE TAFT
MEMBER MARION SAUNDERS
MEMBER DAN PALMER-DUNK

Between

STOP UK LIES AND CORRUPTION

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

Definitions:

"DN"	the Decision Notice which is the subject of this appeal, namely IC-267543-K5H2 dated 27 March 2024
"FOIA"	Freedom of Information Act 2000
"ICO"	The Information Commissioner's Office
"PA"	The Public Authority (as defined by Schedule 1 of FOIA)
"the Requester"	the person who applied for information – referred to in FOIA, section 1 as the applicant

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"the Rules"	The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2010/43), as amended[1]

Mode of hearing: The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Rules.

REASONS

Relevant law

1. As far as is relevant, FOIA provides:

General right of access to information held by public authorities

1(1) Any person making a request for information 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 that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) …

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment of deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

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

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsections (1)(a) is referred to as "the duty to confirm or deny".

2. FOIA defines "Information" at section 84 which provides:

Interpretation

84 "information" (subject to sections 51(8) and 75(2)) means information recorded in any form;

3. FOIA defines a "request for information" in Section 8(1) as one that:

Request for Information

8(1) (a) is in writing;

(b) states the name of the applicant and an address for correspondence; and

(c) describes the information requested.

4. FOIA requires a public authority to provide advice and assistance to a Requester.

Duty to provide advice and assistance.

16(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

5. There is a process of challenge – the first challenge is for the Requester to apply to the ICO for a Decision Notice (FOIA, section 50). If either side (the Requester or the PA) wishes to challenge the ICO's Decision Notice, they are entitled to appeal to this Tribunal (FOIA, section 57). This Tribunal's powers are found in FOIA, section 58 which provides:

Determination of appeals

58(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.

6. The Tribunal's function therefore is to examine the DN that is the subject of the appeal to consider whether it was legally correct, and if not to issue a substituted decision notice. It has no other powers.

7. In *Berend v Information Commissioner and LB Richmond (*EA/2006/0049), the Information Tribunal held as follows:

> 37. *The question of whether* [the public authority] *had complied with its section 16 and section 1 FOIA obligations are questions of fact.*
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> …
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> 40. *Under section 45 FOIA the Lord Chancellor has published a Code of Practice (the Code) to assist public authorities. Where the public authority has complied with the Code they will be held to have fulfilled their obligations, however, failure to comply with the Code does not inevitably mean that a public authority has breached section 16 FOIA.*
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> …
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> 46. *The Tribunal is satisfied that the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request.*

8. Whilst this Tribunal is not bound by that decision, we agree that this is the correct approach.

<u>Background</u>

9. The Appellant seeks to know about the actions of the Cabinet Office in relation to the 5-week waiting period for Universal Credit. A request was made on 27 October 2023 as follows:

I am writing to make a formal request for information under the Freedom of Information Act 2000. My enquiry pertains to the actions of your office concerning the minimum five-week waiting period for the first Universal Credit payment – a subject of considerable public interest. A separate FoI request on this matter has already been issued to the DWP pertaining to any information they may hold.

To ensure compliance with the cost limitations set forth by the Act, I have narrowed my request to the following key questions:

1) *What specific measures has your office undertaken to alleviate the detrimental impact of the five-week waiting period on Universal Credit claimants?*

2) *Has your office evaluated or acted upon recommendations from external bodies, such as the Joseph Rowntree Foundation, to mitigate the hardships associated with the five-week waiting period? If so, could you summarise this from your recorded information?*

Public Interest Statement: The disclosure of this information serves the public interest by shedding light on your office's openness to external expertise in refining the Universal Credit system. This is especially pertinent given the extensive public discourse and media scrutiny surrounding the challenges posed by the five-week waiting period.

While we acknowledge that this question may intersect with exemptions under Section 35 of the FOI Act, we clarify that our intent is not to uncover early-stage policy formulation but to ascertain whether the Department is receptive to external input.

3) *Is the government cognisant of the need to reassess or modify the existing five-week waiting period for Universal Credit? If affirmative, could you summarise this from your recorded information?*

Public Interest Statement: The release of this information is crucial for public discourse, as it would indicate whether the government acknowledges the need for reform in the Universal Credit system, particularly concerning the five-week wait. This information is vital for the electorate to make an informed decision in future general elections.

We understand that this question might be subject to exemptions under Section 35, but our focus is on gauging the government's awareness of the issue, rather than exposing preliminary policy ideas. We are prepared to vigorously argue for the release of this information if it is deemed exempt, as the public has a right to know whether the government comprehends the challenges created by the five-week waiting period.

10. On 30 October 2023, the Cabinet Office responded by stating that the email did not contain a valid request for information as outlined in Section 8(1)(c) FOIA, specifically highlighting that the Act does not require public authorities to create new information or provide opinion or explanation to respond to a request. The response signposted the Appellant to guidance on the ICO's website about how to make a valid request and information on how to contact the Cabinet Office if the Appellant wished to alternatively have their request treated as correspondence.

11. On 30 October 2023, the Appellant requested an internal review of its response. On 31 October 2023, the Cabinet Office wrote to the Appellant, maintaining its position.

12. On 31 October 2023, the Appellant complained to the ICO. On 14 November 2023, the ICO wrote to the Cabinet Office to confirm that they considered that questions 1 and 2 of the request were in fact valid requests for information, advising the Cabinet Office to respond to those questions within the statutory time limit, but that their initial view was that question 3 was not a valid request. The ICO confirmed this initial view to the Appellant, informing them of the steps they had advised the Cabinet Office to take. The Cabinet Office responded to questions 1 and 2 after this intervention by the ICO.

13. There was then further correspondence between the Appellant and the ICO over the validity of question 3. At the same time, the Appellant made a further request to the Cabinet Office, essentially rewording question 3 to refer to the particular information that the Appellant sought to obtain. The Cabinet Office responded to that request initially to say that the request exceeded the cost limit. The Appellant responded to narrow the time frame of the request, following which the Cabinet Office responded to say that they had established that the information was not held by them, redirecting the Appellant to the Department for Work and Pensions (DWP).

14. On 7 January 2024, the Appellant complained to the ICO that they should have required the Cabinet Office to respond to the originally worded question 3 and to provide advice and assistance under Section 16. The ICO therefore issued a Decision Notice dealing with these issues. That Decision Notice confirmed that question 3 did not meet the criteria in Section 8(1)(c) so was not a valid request and that the Cabinet Office met its obligations under Section 16 to offer reasonable advice and assistance.

Grounds of Appeal

15. The Appellant's Grounds of Appeal (dated 28 March 2024) set out their position as follows:

    (a) The DN is based on a narrow interpretation of question 3 that fails to appreciate the request's aim to obtain recorded evidence.

    (b) An identical enquiry was submitted to the DWP, who had responded.

    (c) The Cabinet Office's generic response was insufficient to comply with the duty in Section 16, which requires direct interaction to clarify or refine requests.

    (d) The DN overlooked a precedent, in the form of EA/2022/0353.

Response – Information Commissioner

16. The ICO's Response in respect of Section 8:

    (a) describes the test in Section 8(1)(c) as "low" but nevertheless suggests that the wording should be read objectively and that the public authority is not under any obligation to go behind the words in the request;

    (b) asserts that an objective reading of question 3 is to ask whether the government was aware of a need to reassess or modify the five-week waiting period and that this is not a request for information;

    (c) asserts that a valid request for information must allow the requested information to be distinguished from other information held by the public authority, and that question 3 did not do that;

(d) asserts that the second part of question 3 requires the answer to the first part to be yes, that the DWP's response suggests that the answer is no and that therefore no summary of the recorded information is required; and

(e) the DWP's response was similar to that of the Cabinet Office.

17. The ICO's Response in respect of Section 16 asserts that:

(a) what is reasonable assistance is determined by a request's specific characteristics;

(b) question 3 was not unclear and so did not require the Cabinet Office to seek clarification; and

(c) the Cabinet Office's direction to the ICO's website and offer to treat the question as correspondence was reasonable advice and assistance in these specific circumstances, relying on the fact that the Appellant was able to reword question 3 and eventually receive a response.

Evidence and Submissions

18. The Tribunal considered an Open Bundle comprising of 725 pages.

19. Neither party filed formal Skeleton Arguments but both made submissions in correspondence to the Tribunal, copied to the other. Some of that correspondence is contained in the Open Bundle, with some postdating the production of the Open Bundle.

20. The Tribunal has had regard to submissions made in correspondence contained in the Open Bundle as well as emails from the Appellant dated 10 August 2024 and 9, 14, 15, 16, 23 and 24 September 2024 and from the ICO dated 23 and 24 September 2024.

Discussion

General

21. Much of the correspondence to the Tribunal considered the ICO's request that the appeal be struck out. The appeal was not struck out but considered fully on its merits having regard to the evidence in the Open Bundle and the submissions made in correspondence.

22. The Appellant has sought to rely on various Decision Notices from the ICO as "precedents". The Tribunal is not bound by ICO decisions, though they can contain helpful illustrations of how FOIA should be applied. The Tribunal has not been assisted by the Decision Notices contained within the Open Bundle.

23. The Appellant complains that the Decision Notice does not make any findings regarding questions 1 and 2. The Appellant particularly refers to the ICO's summary

of its decision, which refers only to its finding that question 3 was not a valid request under Section 8.

24. The Tribunal has recorded above the history of the matter, including the fact that the ICO informed the Cabinet Office that its view was that questions 1 and 2 did in fact describe the information requested and advised it to respond to those questions. That history is also recorded in the Decision Notice at paragraph 9:

> *Having considered the wording of the complainant's request, the Commissioner was of the view that questions one and two were valid requests for information as they clearly described distinguishing characteristics of the information the complainant wanted (specific measures taken by the Cabinet Office in the case of question one and any evaluation conducted in the case of question two). The Commissioner wrote to the Cabinet Office on 14 November 2023 to confirm this and advised it to respond to questions one and two of the request before the 20 working day time limit from receipt of the request expired. He also confirmed that it was his initial view that question three was unlikely to be a valid request for information under FOIA. The Commissioner also wrote to the complainant to explain his position and the action he had asked the Cabinet Office to take.*

25. The Tribunal has reminded itself of its powers under Section 58. They are limited to considering whether the Decision Notice that is the subject of the appeal is in accordance with the law. The Decision Notice that is the subject of this appeal considered question 3. The ICO did not issue a Decision Notice in respect of questions 1 and 2 – its advice to the Cabinet Office caused them to then respond to these aspects of the request.

26. This Tribunal does not have the power to ask the ICO to amend its Decision Notice to include a decision on questions 1 and 2 or to issue a new Decision Notice in respect of questions 1 and 2. Our powers are limited to considering whether this Decision Notice, which considered only question 3, is in accordance with the law.

27. The Appellant has asked the Tribunal to do a number of things that it does not have the power to do. Our powers are limited to a single question: is the Decision Notice in accordance with the law. If it is not, we have the power, and indeed duty, to issue a substituted Decision Notice. We cannot, however, do any more than that. We have no power, by way of example, to consider service complaints.

28. The Appellant has relied upon further requests made to the Cabinet Office that were also rejected under Section 8(1)(c). The Appellant appears to rely upon this request as showing a pattern of rejection of FOI requests. Again, the Tribunal's function is to consider whether the Decision Notice that is the subject of the appeal is in accordance with the law, i.e. whether this particular Decision Notice is legally correct. The Tribunal is not permitted to look at other requests, even though they might be made by the same requester to the same public authority. We are not able to look at patterns but must instead look at the request that is the subject of the Decision Notice to determine whether the Decision Notice is in accordance with the law.

29. The Appellant has asked the Tribunal to consider making an order for costs against the ICO. Rule 10(3) of the Rules requires a party to accompany a written application

for costs with a schedule of the costs or expenses claimed. The Appellant has not done so. The Tribunal has not therefore considered this application.

Section 8

30. The Tribunal's role is to look at the wording of the request to determine whether it describes the information requested. We agree with the ICO's view that what constitutes a description is a low test. There must however be a description.

31. The Tribunal considers that the approach of the Information Tribunal in *Berend* was correct: the public authority must read the request that is made. It is not under any obligation to read words into a request such that it describes information if it does not.

32. The Appellant relies on various Decision Notices that use variations of the term "cognisant" and asserts that these show that it is a widely used and understood term. The Tribunal agrees that the word is widely understood. However, this misunderstands the ICO's DN in this case. The ICO does not suggest that the request did not comply with Section 8 because the word "cognisant" is not understood. The ICO said that question 3 did not describe the information requested. That is the correct test.

33. The Appellant complains that the ICO failed to appreciate the cohesive purpose of the request. The Tribunal considers that it would not be appropriate for a public authority, or indeed the ICO or this Tribunal, to attempt to second guess the requester's reasons for a request. The reasons for the request cannot therefore form part of the assessment as to whether the request describes the information that is sought.

34. It is quite possible that a requester might *intend* to request particular information but does not *actually* describe the information requested in the request. Again, it would not be appropriate for a public authority, the ICO or this Tribunal to seek to establish the requester's intentions when making a request.

35. The Tribunal has looked at whether the DWP responded to identical wording under FOIA. It is correct to say that question 3 in the Appellant's request to the DWP was identical to question 3 in their request to the Cabinet Office. The Tribunal does not however accept the Appellant's assertion that the DWP provided a response under FOIA. The response starts with an explanation of the role of FOIA and that it does not require a public authority to give an opinion or explanation, generate answers to questions, or create or obtain information it does not hold. The DWP then went on to say that the request asks questions that would require new information to be created. Nevertheless, it goes on to provide an explanation that is specifically said to be provided *"outside our obligations under the FOI Act"*.

36. The Appellant complains that the DN did not fully quote the original request in that it missed text setting out why the requester believed that it was in the public interest to disclose the information. We have quoted the full request above and in doing so

consider the full request when determining whether the request met Section 8(1)(c) by describing the information required.

Section 16

37. Section 16(2) confirms that a public authority has complied with the duty in Section 16(1) if it conforms with the Code of Practice. The relevant sections of the Code of Practice confirm that

> 1.7 *There will be occasions where a request is made under the Act but does not in fact meet the above description of being a request for recorded information. This may include requests for explanations, clarification of policy, comments on the public authority's business, and any other correspondence that does not follow the definition of a valid request in section 8. It is best practice to provide an applicant with an explanation of why their request will not be treated under the Act if this is the case and to respond to their correspondence through other channels as appropriate. It is open to the applicant to appeal the handling of their correspondence to the Information Commissioner's Office.*
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> …
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> 1.15 *Public authorities do not have to comply with requests that do not meet the requirements set out in section 8. It is good practice to write to the applicant and explain this if this is the case.*
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> …
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> 2.6 *There may be instances when a public authority needs to contact an applicant to seek clarification either regarding their name or the information they are seeking in order for the request they have made to meet the requirements set out in section 8 of the Act.*
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> …
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> 2.8 *There may also be occasions when a request is not clear enough to adequately describe the information sought by the applicant in such a way that the public authority can conduct a search for it. In these cases, public authorities may ask for more detail to enable them to identify the information sought.*

38. The Code of Practice could therefore be said to require direct interaction to clarify requests, as asserted by the Appellant. However, the Tribunal considers that such interaction is only necessary where the request is not clear. There is no obligation on a public authority to seek clarity where a request is clear, but it does not describe the requested information.

39. The case described as EA/2022/0353 in the Grounds of Appeal is published on the National Archives Find Case Law as *Harrison v The Information Commissioner* [2024] UKFTT 8 (GRC). In the decision, the First Tier Tribunal found that the public authority had not complied with Section 16(1) FOIA. The original request that formed the subject of this judgment was not clear. The First Tier Tribunal found therefore that the public authority should have sought clarification. This judgment does not bind this Tribunal. Nevertheless, the Tribunal does not consider that it is relevant to the issues before us.

40. The Appellant complains that the ICO has falsely claimed that the Cabinet Office's response to the original request enabled the Appellant to then make a valid request.

The Tribunal understands the Appellant to be referring to the ICO's Response to their Appeal. The Tribunal has considered the Decision Notice, which makes no such claim but instead sets out the sequence of events factually (at paragraphs 12 to 15). The Tribunal has had no regard to whether or not it was the Cabinet Office's response that enabled the Appellant to send a valid request in determining whether the Cabinet Office complied with Section 16.

Conclusion

Section 8

41. The Tribunal has considered the original request in its entirety to look at question 3 in context to determine whether it described the information requested. It did not. Whatever the Appellant may have intended, on an objective reading of the question it does not describe the information that the Appellant is looking for. The question was not therefore a valid FOI request so the Cabinet Office was not under a duty to respond.

Section 16

42. The Tribunal then considered whether the request was clear enough and whether the Cabinet Office had a duty under Section 16 to seek more detail to enable it to identify the information sought. The request was clear. The difficulty was not that it required further detail to identify the information sought, but that it didn't identify it at all.

43. The Tribunal therefore concludes that the Cabinet Office had no duty under Section 16 to seek clarity from the Appellant. It complied with the best practice indicated in paragraphs 1.7 and 1.15 of the Code of Practice by informing the Appellant that the request was not valid under Section 8 and by signposting the Appellant to advice on the ICO's website and offering to treat the question as correspondence.

44. The Tribunal does consider it relevant that the Appellant was able to submit a focused question that did describe the information requested, and that the Cabinet Office was able to respond, albeit after narrowing the timeframe to reduce the cost.

Signed   Date: 27 November 2024

Judge Taft