

FREEDOM OF INFORMATION ACT 2000

Determined on papers

Decision Promulgated

Prepared 26th April 2006

28th April 2006

Before

**Mr C Ryan, Deputy Chairman
Mr J Randall, Lay Member
Dr M Clarke, Lay Member**

Between

MICHAEL A JOHNSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

We have decided to dismiss the Appeal

Reasons for Decision

- 1 With the consent of the parties we have determined this appeal without a hearing. The question we have to determine is whether the Oldham Metropolitan Borough Council (“the Council”) falsely denied that it held certain information requested by the appellant, Mr Michael A Johnson (“the Appellant”), contrary to Section 1(1)(a) of the Freedom on Information Act 2000 (“FOIA”). The information requested was “Sunday Attendance Sheets” prepared by officers of the Council and recording information about those selling

goods at certain car boot sales between 1998 and 2004. The Council provided the Appellant with copies of such sheets for the years 1998 to 2000, but in a letter to the Appellant dated 14 February 2005 the Council stated that it did not hold any in respect of the years 2001-2004 inclusive. At the time the Council did not explain why Sunday Attendance Sheets existed in respect of some years but not others. The entirety of its letter of 14 February 2005 simply read:

"Your fax 13th February 2005 - Attendance Sheets 2001/2/3/4.

"I write to advise you that the information you have requested, is not held by Oldham Metropolitan Borough".

- 2 The Appellant was therefore faced with a bald statement that the Sunday Attendance Sheets existed for 1998 to 2000, but not for 2001 to 2004, with no explanation as to why that was the case. Section 16 of the FOIA imposes on a public authority an obligation to provide advice and assistance to persons making a request for information. This appeal does not give rise to any question of breach of Section 16, but the Council's letter was certainly unhelpful and, not surprisingly, the Appellant did not find it very convincing. He complained to the Information Commissioner and explained why he believed that the information did exist.
- 3 When the Information Commissioner started his investigation the matter was referred by the Council to its Information Manager, Ms Mulvihill, who adopted a more helpful approach. In a letter to the Information Commissioner on 31 May 2005 she explained that the Council had stopped using Council inspectors to record car boot sale attendance details. She explained that the Appellant had been provided with all copies of the attendance sheets up to time when the decision to discontinue had been made and that obviously, no such sheets existed for any later periods. Ms Mulvihill went on to describe other material which had been provided to the Appellant in an attempt to provide him with the data which he appeared to require.
- 4 On the basis of those statements from the Council the Information Commissioner informed the Appellant, by a letter dated 7 June 2005, that he, the Information Commissioner, was likely to conclude that the Council had complied with its obligations under Section 1(1)(a) of the FOIA, but he invited the applicant to provide any evidence he had to support his belief that the Council was withholding information. A subsequent letter from the Information Commissioner dated 20 June 2005 conveyed the same basic message. The Appellant provided no additional evidence, although he repeated his belief that Sunday Attendance Sheets would have been completed between the years in question. He also questioned, not unreasonably, why the explanation provided by Ms Mulvihill had not been given to him at the time when the Council wrote its letter of 14 February 2005.
- 5 On 3 August 2005 the Information Commissioner issued a Decision Notice in which he concluded that the Council had complied with Section 1(1) of the FOIA on the basis that the Council had satisfied him

that "since 2000 it no longer utilises Council Inspectors to carry out inspections of car boot sales and therefore does not hold Sunday Attendance Sheets for the years 2001 to 2004".

6 On 24 August 2005 Mr Johnson lodged a notice of appeal to the tribunal. Subsequently the Information Commissioner, as respondent to that appeal, invited us to strike the appeal out on the ground that it disclosed no reasonable grounds of appeal. We declined that invitation in a decision dated 30 November. A copy of that decision is attached. In it we set out (paragraph 7-10) a summary of each side's case. Then, in paragraphs 13-15 we summarised the submissions of the parties as to why they considered that the appeal should or should not be struck out. We concluded that there was sufficient doubt as to the possible existence of the Sunday Attendance Sheets in question that the evidence should be considered at a full determination. We based our conclusion on the material that was before us at the time and we highlighted the following two points, arising from it, which we felt contributed to the doubt:

- (a) The Appellant had produced copy Minutes recording the Council's decision to start collecting information through Sunday Attendance Sheets and had suggested that the absence of an equivalent record dealing with the alleged decision to discontinue the process was suspicious.
- (b) One of the Council's representatives, a Mr D Wild, had told the Appellant that he was searching for materials, (which the Appellant believed were post 2000 Sunday Attendance Sheets), some time after the date when, according to the Appellant, he (Mr Wild) should have been aware that they would not exist if there had indeed been a decision to discontinue visits by Council Inspectors.

7 Faced with these two areas of doubt, which we had to set against the bald conclusion of the Information Commissioner set out in paragraph 5 above, we did not feel that the Appeal was unwinnable. We therefore decided that it should go forward to a full determination. Directions were then given for the mutual disclosure of written material and the exchange of written evidence.

8 As a result of those directions we had before us, in determining the Appeal, the following materials that we had not seen when we made our decision to refuse the strike out application:

- (a) The Appellant did not serve a witness statement; instead he lodged a copy of our decision on the strike out application on which he had written "I rely upon written submissions section page 5", an apparent reference to paragraph 13 of the Decision, in which we summarised the two areas of doubt referred to in paragraph 5.
- (b) The documents disclosed by the parties, and included in a bundle provided to us, included the letters to the Appellant of 7 and 20 June (referred to in paragraph 4 above) in which the Information Commissioner had made it clear that, in the absence of further information from the Appellant, he would be likely to reach the decision which he did subsequently make and incorporated in his Decision Notice. The Appellant provided no evidence in response to that

information, any more than he did in response to our directions that he make and lodge a witness statement before we determined the appeal.

- (c) A witness statement made by Ms P Clements, the Complaints Resolution Officer within the Information Commissioner's office who handled the investigation, disclosed how the matter was investigated with the Council. It is supported by copies of contemporaneous correspondence, including in particular the letter from Ms Mulvihill of 31 May 2005 in which the Council provided, for the first time, its explanation as to why the Sunday Attendance Sheets for the year 2000 to 2004 did not exist.

9 In these circumstances we have concluded that, despite the last chance provided to him under the terms of our strike out application decision, and the directions made under it, the Appellant does not have any evidence to set against that set out in the Council's letter of 31 May 2005 on which the Information Commissioner relied. His appeal therefore fails

10 We also had one further document, which did not form part of the agreed bundle prepared by the parties, and which was not available to the Information Commissioner before he issued his Decision Notice. It was sent to us separately by the Appellant shortly before we convened to determine the appeal. It is a letter written to the Appellant by the same Mr Wild referred to in paragraph 6(b) above. It is dated 21 December 2005 and apparently forms part of a chain of correspondence on another, (but apparently related) matter. The relevant part of the letter reads:

"In 1995, the then Market Manager, Mr P Alford informed me that he had stopped the inspectors attending the Car Boots, as the recharge for overtime was becoming expensive.

Mr Alford subsequently left the Council in 1998.

The inspectors resumed their inspections in July 1998.

The last recorded inspection of Car Boots was in January 2001, by which time the Car Boots at Aerospace and the Lancaster Club were subject to a contract/agreement that the operators had signed agreeing to allow second hand goods only on the Car Boots.

We can confirm that there is no documentation with regard to the inspectors ceasing their inspections, and that the instruction to cease inspections would have been made verbally as many management decisions are. But who actually made the decision, is unknown and may have been made by someone who no longer works for the Council."

11 Although this does not add very much detail to the information previously provided to the Information Commissioner by the Council it is the only direct statement on the issue made by Mr Wild, the writer of the original, uninformative letter from the Council dated 14 February 2005. In paragraph 15 of our decision on the strike out application, we commented on the absence of any reference to what Mr Wild might say in response to the area of doubt set out in paragraph 6(b) above. We find the clear and

logical explanation of the absence of Sunday Attendance Sheets, set out over Mr Wild's signature in this letter, further comfort to us in concluding that the Council did not issue a false denial.

Signed



Date: 26 April 2006

Chris Ryan

Deputy Chairman

Annex

Decision on Strike Out Application

Information Tribunal

Appeal Number: EA/2005/0013

FREEDOM OF INFORMATION ACT 2000

Before

**Mr Christopher Ryan, Deputy Chairman
Mr John Randall, Lay Member
Dr Malcolm Clarke, Lay Member**

Between

MICHAEL A JOHNSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

We have decided to reject the application by the Information Commissioner to have the Appellant's Notice of Appeal struck out on the ground that it disclosed no grounds of appeal pursuant to Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 ("the Rules").

Reasons for Decision

Background Facts

1 On 18 January 2005 the Appellant, Michael A Johnson ("Mr Johnson") made a request to Oldham Metropolitan Borough Council ("the Council") under the Freedom of Information Act ("the Act") for copies of Sunday Attendance Sheets prepared by Council officers who attended car boot sales within the Borough of Oldham and recorded information about those selling goods there. In subsequent correspondence Mr Johnson made it clear that his request related to Sunday Attendance Sheets for the years 1998 to 2004.

- 2 On 10 February 2005 the Council provided Mr Johnson with copies of Sunday Attendance Sheets for the years 1998 to 2000. It did not provide Sunday Attendance Sheets for any other years. It explained the absence of Sunday Attendance Sheets in respect of other years in a letter to Mr Johnson dated 14 February 2005. We have not been provided with a copy of that letter but it appears to be common ground between the parties that the reason put forward by the Council was that it did not hold this information.
- 3 Mr Johnson was not satisfied with the Council's response and asserted his right under section 50 of the Act to apply to the Information Commissioner for a decision whether his request for information had been dealt with in accordance with the Act. We have not seen a copy of Mr Johnson's application.
- 4 By a Decision Notice dated 3 August 2005 the Information Commissioner decided that the Council had complied with its duties under the Act in that it had, within the stipulated period of time, informed Mr Johnson whether it held the information requested and, to the extent that it did, had communicated that information to him. The Decision Notice included just one sentence recording the Information Commissioner's reasons for reaching his decision. It read: "The Council...satisfied the Commissioner that since 2000 it no longer utilises Council Inspectors to carry out inspections of car boot sales and therefore does not hold Sunday Attendance Sheets for the years 2001 to 2004"
- 5 It also appears to be common ground that the Council volunteered certain statistics assembled by third parties covering car boot sales that took place during the years during which, it said, Sunday Attendance Sheets were not available. Although not strictly relevant to the issues arising on the Appeal we mention this fact because it appears that there is some dispute between the parties as to whether certain correspondence and a statement by a Council official relate to that information (and are therefore irrelevant for our purposes) or to the Sunday Attendance Sheets (in which case they may be relevant to the credibility of some of the evidence on which the Information Commissioner may have relied).
- 6 On 24 August 2005 Mr Johnson lodged a Notice of Appeal from the Decision Notice to this Tribunal. The Information Commissioner stands as the sole respondent to that appeal. The Council is not named as Respondent and has not applied to be joined as a party to the appeal.
- 7 In his Grounds of Appeal, Mr Johnson set out the history of his dealings with the Council during a period of time in the 1990s, during which he operated a site or sites for temporary

markets and car boot sales. It is evident that Mr Johnson considers that he was treated unfairly by the Council and certain of its officers in a number of ways and over a period of time. Whether or not that was the case is not an issue on which this Tribunal can make any contribution. Its only relevance is that it appears to constitute the historical background against which Mr Johnson made certain allegations of fact in his grounds of appeal. First he said:

“I firmly believe that OMBC [i.e. the Council] have deliberately withheld important documents requested under the Freedom of Information Act 2000 (Jan 05). Documents requested are known as Sunday Attendance Sheets introduced in August 1998 - September 2000. Prior to these sheets 1 or 2 OMBC officers had visited my site since May 1991 every Sunday morning to check and count attending vehicles (see Council Minutes for 7 Nov 1989 - 17 Dec 1991 pro-stance). OMBC claimed on several occasions that they could not find the requested sheets ... then state that after they terminated my licences [in] Sept 2000 they stopped sending out officers, that a bond of trust was formed with BAE Systems, that they supply their own attendance figures.”

We understand that BAE Systems refers to the body that organised car boot sales on the site where Mr Johnson had operated, before he lost his licence to do so.

8 Later in his grounds of appeal Mr Johnson said:

“After requesting OMBC Sunday Attendance Sheets from OMBC for August 1988 - September 2000, Mr David Wild, Senior Markets Officer whom I have been informed has over 30 years experience within markets, sent out over 120 plus sheets (I believe by mistake)”.

9 In addition to the formal grounds of appeal, we have taken note of a letter from Mr Johnson dated 3 August 2005 addressed to the Information Commissioner and commenting on the Decision Notice. The letter was copied to the Tribunal by Mr Johnson. In it he set out two additional factors which, in his view, cast doubt on the credibility of the Council’s statement that it had ceased collecting information on Sunday Attendance Sheets in 2000. First, he wrote that it was in his view “quite convenient” for the Council to state that no Sunday Attendance Sheets existed in the light of the matters which were in dispute between the Council and himself at the time. Secondly, he suggested that any decision to abandon the

process of completing Sunday Attendance Sheets would have been contrary to the Council's previously declared policy on the point, as evidenced by the copy minutes mentioned in the passage quoted in paragraph 7 above.

10 By his Reply to Mr Johnson's Notice of Appeal, the Information Commissioner, having recorded that he had been "satisfied with the explanation provided ... by the Council that since on or around the year 2000 it no longer utilised Council Inspectors [at car boot sales] and therefore "Sunday Attendance Sheets" were not held for subsequent years", challenged Mr Johnson's evidence in the following terms:

- 19 The Appellant states that he is of the belief that the "Sunday Attendance Sheets" for the years 1998-2000 were provided to him by mistake and does not accept that such sheets do not exist for subsequent years. However no evidence is provided in support of this.
- 20 The Appellant refers to Council Minutes and Policies, extracts of which are appended to the Notice of Appeal. These Minutes make reference to the monitoring and inspection of car boot sales. However, they do not state that "Sunday Attendance Sheets" must be recorded and in any event date from 1989 and 1991. They are not therefore relevant to the issue of whether inspections were carried out post-2000 and whether "Sunday Attendance Sheets" are held for that period.
- 21 The Appellant makes reference to section 37 of the Local Government (Miscellaneous Provisions) Act 1982 and section 50 of the Food Act 1984 in support of his appeal. Section 37 of the Local Government (Miscellaneous Provisions) Act 1982 relates to the giving of notices by persons intending to hold temporary markets on their land. Section 50 of the Food Act 1984 concerns the establishment of markets by local authorities in their area. Neither places any requirement on local authorities to carry out inspections or hold or record "Sunday Attendance Sheets" or the information contained in "Sunday Attendance Sheets".
- 22 The Appellant provides no evidence to rebut the Council's assertions that Council Inspectors had stopped inspecting car boot sales, and thus completing Sunday Attendance Sheets, from 2000."

Application to Strike Out

- 11 The Information Commissioner asserted, on the basis of the paragraphs quoted above, that Mr Johnson's Notice of appeal disclosed no reasonable grounds of appeal and applied for it to be struck out under Rule 9. The relevant part of Rule 9 provides that "...where the Commissioner is of the opinion that...the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply...a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out".
- 12 As both Mr Johnson and the Information Commissioner had stated that they considered that the appeal could be disposed of without an oral hearing, we have dealt with the application to strike out on the same basis. We have reached our decision on the basis of the documents referred to above, supplemented by written submissions, which each party was invited to lodge, limited to the issue of whether the Notice of Appeal should be struck out.

Written Submissions

- 13 In Mr Johnson's case his further submissions took the form of a copy of a letter which he had written to the Information Commissioner on 4 October 2005 setting out his reasons for disagreeing with the Reply, including certain of the conclusions recorded in the paragraphs quoted in paragraph 10 above. In most cases his comments are either not relevant to the issues before us or take the form of mere argument. However he made the following two points which we consider are potentially relevant:
- (a) He suggested that if the Council could not provide any Council minutes, later than the date to those on which he had relied (see paragraph 13 above), recording the suspension or removal of Inspectors, then the ones relied on by him "would still be deemed as ongoing and still in force".
 - (b) In relation to paragraph 22 of the Reply he stated "Mr David Wild, Senior Markets Officer, stated on several occasions that he had searched for requested sheets, only to state several months later that inspections ceased after September 2000. Surely Mr David Wild would have been aware of this (if it was true) as it was part of Mr Wild's duties from May 1991 to collate information from Inspector's sheets and forward invoices, even more so, when Council introduced Sunday Attendance Sheets in August

1998.” He then repeated his firm belief that Sunday Attendance Sheets were in use between 2001 and 2004.

Mr Johnson thus challenges the Information Commissioner’s finding of fact on the basis of both documentary evidence and the evidence of a potential witness, in the form of Mr Wild. The Decision Notice does not provide any detail on either issue, against which the strength of the challenge may be assessed.

- 14 The Information Commissioner lodged written submissions which were received by the Tribunal on 24 October 2005. In large part they comment on matters raised by Mr Johnson regarding his wider dispute with the Council, which, as we have said, are not relevant to the Appeal. However, in response to Mr Johnson’s challenge regarding the apparent absence of minutes recording the discontinuance of Sunday Attendance Sheets (see paragraph 13(a) above) he said

“The Appellant suggests that unless the Council can provide subsequent minutes stating that inspection of car boot sales by Council Inspectors were to stop, then it must be assumed that they have continued. The Council have not been asked to provide council minutes relating to this matter and nor, it is submitted, is it necessary for them to do so. The Council have stated to the Respondent and to the Appellant that they stopped using Council Inspectors to carry out inspections of car boot sales after 2000.”

It is clear from this that the Information Commissioner accepted the Council’s assertion that Sunday Attendance Sheets had been discontinued without being provided with, or calling for, any contemporaneous written evidence to that effect.

- 15 In relation to Mr Johnson’s assertion that Mr Wild of the Council had indicated that he had searched for the Sunday Attendance Sheets that were now said never to have existed (see paragraph 13(b) above) the Information Commissioner submitted as follows:

“The Appellant states that Mr David Wild of the Council has advised him on several occasions that he was searching for the information requested only to say some months later that it was not held. It is not clear what correspondence the Appellant is referring to. It is assumed that the Appellant might be referring to letters dated 21 March 2005 and 24 May 2005. (copies attached). However, these letters refer to the alternative information that the Council sought to provide to the Appellant about car boot sales as

described in paragraph 16 of the Commissioner's Reply and not to "Sunday Attendance Sheets".

We observe that there is no reference here to what Mr Wild says in response to Mr Johnson's challenge, only a suggestion that, if Mr Johnson was referring to certain particular letters, then he had misunderstood the searches to which they refer. We have no basis on which to resolve the resulting doubt at this stage.

Later in his submission the Information Commissioner stated:

"The Appellant states that he believes that "Sunday Attendance Sheets" for the years 2001 to 2004 must exist unless it can be proved otherwise. The Council have stated to the Commissioner that "Sunday Attendance Sheets" for the years in question do not exist as Council Inspectors have not been used for this purpose since 2000. This assertion is made in the third paragraph of the enclosed copy letter from the Council to the Commissioner's Case Officer dated 31 May 2005.

The Relevant Law

16 Section 1(1)(a) of the Act had the effect of requiring the Council to inform Mr Johnson whether or not it held Sunday Attendance Sheets. If it did, then section 1(1)(b) required it to communicate that material to Mr Johnson. The sub-section reads in full:

"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."

17 The essence of Mr Johnson's challenge, therefore, is that the Council made a false denial under section 1(1)(a) when it told him that it had discontinued the process of completing Sunday Attendance Sheets in 2000 and therefore did not hold the information requested for any period after that date.

18 Section 58(2) of the Act has the effect that the Tribunal may review any finding of fact on which the Information Commissioner based his Decision Notice. The Commissioner's application to have the Notice of Appeal struck out therefore amounts to an assertion that Mr

Johnson has established no reasonable grounds on which to challenge the Information Commissioner's conclusion that Sunday Attendance Sheets were not completed after 2000. The effect of Mr Johnson's opposition to the application (albeit not expressly stated by him in his written response to the application) is that there is sufficient doubt on the point that the evidence on both sides should be examined at a full hearing.

Application of the Law

19 We have concluded that there is such doubt and that the evidence should be considered at a full determination. The Decision Notice does not summarise or refer to any of the evidence that apparently led the Information Commissioner to satisfy himself (in the terms quoted in paragraph 4 above) that Sunday Attendance Sheets for the years in question did not exist. We have referred above to the two areas of evidential challenge raised by Mr Johnson and the Information Commissioner's response to each. Against the background of the bald assertion in the Decision Notice we do not believe that the responses are sufficient to enable us to conclude that the Appeal is unwinnable. We make no comment as to whether or not Mr Johnson's challenge will ultimately succeed, but we have concluded that he should be allowed to proceed and have it tested at a full determination.

Signed

Date: 30 November 2005

Chris Ryan

Deputy Chairman