Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0069

Freedom of Information Act 2000 (FOIA)

Heard in Chambers **Decision Promulgated: 24 September 2007**

Date: 26 July 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Mr Humphrey Forrest

And

LAY MEMBERS

Ms Jenni Thompson

Mr Pieter de Waal

Between

Mr Richard Day

Appellant

And

INFORMATION COMMISSIONER
Respondent

And

Department for Work and Pensions
Additional Party

Final Decision

1. The Tribunal allows the appeal in part, as set out below, and substitutes the Decision Notice, annexed to this Decision, in place of the Decision Notice dated 2 August 2006.

2. This decision follows, and must be read with our earlier Preliminary Decision promulgated on 13 April 2007. For convenience, we reproduce points 1 and 2 of that preliminary decision here:

> **Preliminary Decision**
>
> 1. The Decision Notice issued on 2 August 2006 is wrong in law since it fails to deal with Mr Day's application for a Decision in relation to the handling of his request for information, dated 6 January 2005.
>
> 2. In relation to the 31 July 2005 request for information:
>
> a) The Decision Notice should have stated that the Department for Work and Pensions did hold the information requested, but that it had no duty to communicate the information since the cost of compliance with the request would vastly exceed the fee limit provided.
>
> b) The Decision Notice should have stated that in supplying the information that was provided, the CSA should have communicated the information that was accurate as at the date of receipt of the request or within 20 working days thereafter.

Reasons

1. This appeal has been dealt with in two stages. Our earlier Preliminary Decision sets out the background to the appeal and the two requests for information made by Mr Day. In that Preliminary Decision, we decided that the Information Commissioner should have dealt with Mr Day's first request for information, dated 6 January 2005 and addressed to an MP, Mr Ancram (the Ancram request) in the Decision Notice, and had wrongly limited the Decision Notice to consideration of Mr Day's second request for information, made on 31 July 2005 (point 1 above). We also made specific findings (points 2(a) and (b) above) that the Decision Notice was incorrect in two respects in how it dealt with the 31 July request. As neither the Information Commissioner nor the Department for Work and Pensions had dealt with the Ancram request as part of their preparation for that hearing (since they had not been dealt with in the Decision Notice at all), we then adjourned that hearing to give them an opportunity to do so, and issued Directions on 10 April 2007.

2. The Department for Work and Pensions subsequently issued an amended Response, on 2 May 2007; as did the Information Commissioner on 18 May. Mr Day replied on 31 May. These amended Responses dealt with the parties'

contentions in relation to the Ancram request, and with the Tribunal's findings in its Preliminary Decision in relation to the 31 July request. The Department for Work and Pensions also provided a letter to Mr Day, on 4 May 2007, providing further information.

3. A Directions Hearing on 8 June 2007 identified 7 issues remaining in dispute for consideration in the appeal:

31 July request:

i. Whether the Commissioner should have challenged the CSA over both inconsistent dates after the cut off period of 31 July 2005, namely 31 October 2005 and 19 November 2007 [an error: this date should read 2005].

Ancram request:

ii. Whether the tribunal has jurisdiction to order a substitute Decision Notice in relation to the Ancram Request, or to consider the Request further, following the High Court's decision in BBC v Sugar and Information Commissioner, [2007] EWHC 905 ?

iii. Whether Questions 1, 2, 4 and 5 of the Ancram Request were requests for information at all for the purposes of the Act?

iv. Whether a duty under section 16 to assist the appellant in relation to the Request arose at all?

v. Whether all the requested information that was held was disclosed to the Appellant, specifically,

- The information provided in answer to question 3 was not current at the time of the request, and
- Generally the information provided was very unclear, outdated and inadequate?

vi. Whether the CSA complied with section 10(1) of the Act by providing the information within 20 working days?

vii. Whether the 28 February 2005 letter complied with section 17(7) of the Act?

It was agreed that we should consider these in chambers without the parties present.

31 July request:

i. Whether the Commissioner should have challenged the CSA over both inconsistent dates after the cut off period of 31 July 2005, namely 31 October 2005 and 19 November 2005?

4. Our preliminary decision dealt with the question of whether the Decision Notice dealt with the 31 July request for information properly (point 2(a) and (b) above). Mr Day raised this further point in his Response of 31 May. It can be dealt with

briefly. The Child Support Agency replied to Mr Day's request for information of 31 July 2005 on 19 November 2005, giving information up to date on 31 October 2005. We upheld Mr Day's complaint that the information requested should have been provided "as at the date of the request or within 20 working days thereafter". Given that finding, it matters not whether the Commissioner should have challenged both the later dates referred to. Neither would have been adequate compliance with the duty in section 1(4) of the Freedom of Information Act. The point is fully covered in our Preliminary Decision in paragraphs 41 to 48.

6 January 2005 requests : Ancram

ii. Whether the tribunal has jurisdiction to order a substitute Decision Notice in relation to the Ancram Request, or to consider the Request further, following the High Court's decision in BBC v Sugar and Information Commissioner, [2007] EWHC 905.

5. This second issue arises because the decision in the Sugar case was given after our Preliminary Decision. The decision in Sugar raises the question of whether the Information Tribunal has jurisdiction to consider the Ancram request at all.

6. In an appeal of this sort, involving a Decision Notice, the Tribunal's jurisdiction stems from section 57 of the Freedom of Information Act (FOIA):

> *(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.*

7. A Decision Notice was never served in relation to the Ancram request. Instead, the Information Commissioner closed Mr Day's earlier complaint by letter of 18 May 2005, on the assumption that Mr Day had withdrawn his complaint, despite Mr Day's protests that he was not withdrawing and wanted a Decision Notice issuing.. Under section 50(2)(d) of the Act this is one of the specified situations where the Commissioner need not make a decision. We set out the factual sequence leading up to that supposed withdrawal in our Preliminary Decision; and described the Information Commissioner's conclusion as "bizarre". We decided that the Decision Notice was wrong in law since it failed to deal with Mr Day's complaint about the Ancram request.

8. In BBC v Sugar, Davis J held that "there are circumstances as set out in section 50(2)(a) - (d) where the IC can decline to make a decision as to whether or not a request has been dealt with in accordance with the requirements of Part 1: see s.50(3)(a). It was common ground before me that that if in any particular case the IC formed such a view then there would be no right of appeal under section 57 and the only right of challenge would be by way of judicial review"(paragraph 38). He set out the overall structure of the FOIA: " … an appeal only lies to the tribunal where (but only where) it has been decided by the IC whether or no the requirements of Part I have been complied with by a public authority and where a decision notice has been served." (paragraph 41).

9. Those findings appear directly to cover the situation in this case: the IC declined to take a decision, under s50(2)(d), and no Decision Notice was ever issued in respect of Mr Day's first complaint: it was simply closed. We are not persuaded

that we should attempt to distinguish the Sugar decision on its facts, or that, because the point about section 50 was not argued in Sugar ("common ground before me"), we should regard it as not binding on us. We accept that, in the light of Sugar, we had no jurisdiction to find that the Commissioner had been wrong to decide, under section 50, that the complaint had been withdrawn.

10. However, we did – and do - have jurisdiction to consider the complaint on 8 September about the way in which the July 31 request for information had been handled. That complaint led to the Decision Notice against which this appeal is brought. Did that complaint include a complaint about the way the Ancram request had been dealt with? We considered that question in our earlier decision, and decided, in paragraph 31 :" The September 8 complaint clearly incorporated a reference to the earlier complaint of 8 March which continued to be outstanding, pleading with the Commissioner to deal with the Ancram requests. The Decision Notice should have dealt with both requests; and both requests fall within the scope of this appeal".

11. That is a finding on the facts which provides an alternative basis for jurisdiction for us to consider the Ancram requests. It brings the Ancram request within the scope of our decision on the complaint of 8 September 2005 against the Decision Notice of 2 August 2005. It was neatly put by Ms Stout in her submission on behalf of the Information Commissioner: "The Tribunal did find that there was a reference to the Ancram request in the complaint of 8 September 2005. Accordingly, the issue becomes one about the content of the existing Decision Notice and not about whether or not a separate Decision Notice should have been issued. The distinction is a fine one, but the Commissioner accepts it." We find therefore that we do have jurisdiction to consider the Ancram request, and that point 1 of our Preliminary Decision was properly made on that factual basis.

12. A second issue in Sugar concerned whether the BBC was a "public authority" for the purposes of FOIA. The issue arose in that case in the particular circumstances of the BBC, which is a public authority for some purposes, but not where information is held solely for the purposes of journalism. That particular issue does not arise in this case, and we do not see that the reasoning on the question of public authority in Sugar affects our reasoning in the Preliminary Decision. We accepted that a request to an MP for information was not within the Act, since an MP is not a public authority; but found that once the request was forwarded to a public authority, and the public authority accepted it as a request to it under the FOIA, then the Act did apply (see paragraphs 25 to 27).

iii. Whether Questions 1, 2, 4 and 5 of the Ancram Request were requests for information at all for the purposes of the Act?

13. To answer this question, it is necessary, finally, to set out the Ancram request:

The Ancram Request

The 5 questions set out in Mr Day's letter to Michael Ancram MP on 6 January 2005 were :

1. In the past decade, since Court Orders have been allowed to be overturned by CSA officials, which body or authority is currently responsible for ensuring that just, equitable and satisfactory “out of court”” settlements are eventually reached between divorced or separating couples ?
2. Most importantly which body or authority actually ensures that satisfactory terms are fully discussed, between all of the interested parties, not just the mother, and are then subsequently agreed, properly ratified and satisfactorily recorded ?
3. How many appeals are submitted annually against CSA Assessments; what proportion of Appeals are submitted by fathers; what proportion are submitted by mothers and how many Appeals by fathers have actually been successful/upheld ?
4. What authority exists, or has been set up, to ensure that cases of serious and genuine misadministration, particularly those committed and admitted by target driven CSA and Appeal Service officers are actually heard ?
5. When are proper compensation payments for computer errors and administration going to be made and can individuals directly sue the American Company who installed the CSA system ?

14. All parties accepted that question 3 was a request for information within the Act. Mr Hare, for the DWP, argued that question 5 “is not a request for recorded information in any form since it contains an unaccepted assumption that errors and maladministration have occurred and should be compensated. As such, the Tribunal has no jurisdiction in relation to it.”.. Ms Stout made a similar argument in relation to questions 1, 2 4 and 5, that these “cannot reasonably be construed as being requests for recorded information because they consisted of questions put by [Mr Day] that (to put it crudely) set out his view as to how the child support system ought to be working and ask whether any of the elements of the scheme he envisaged ought to exist do in fact exist.”

15. Information is defined in section 84 of the Act as “*information recorded in any form*”. The Act therefore only extends to requests for recorded information. It does not require public authorities to answer questions generally; only if they already hold the answers in recorded form. The Act does not extend to requests for information about policies or their implementation, or the merits or demerits of any proposal or action – unless, of course, the answer to any such request is already held in recorded form.

16. At first sight, we had some sympathy with the response of the IC and DWP. We note Ms Stout’s point that there already exist various mechanisms to ensure that public bodies do answer reasonable questions, including the various Ombudsmen. FOIA should not be extended to require public authorities to enter into debate about the merits of processes, systems or policies, or to challenge misleading assumptions contained within questions, when complying with a FOIA request. However, there are difficulties (at least in relation to these questions) in finding that they can be described as “argumentative” or “tendentious” questions, and are not requests for recorded information, and so fall outside the Act. Such a finding would require detailed and finely balanced examination of the precise wording of the questions. The distinction would be hard to apply in practice: Mr Hare argued we should reject question 5, but accepts 1, 2 and 4; Ms Stout

rejected questions 1, 2, 4 and 5. Yet there might exist a straightforward factual recorded answer even to question 5: it is a matter of public knowledge that the CSA has proved controversial, and that various proposals for reform have been made over the years. Suppose for example, that following some report on the CSA, Parliament had approved a scheme enabling individuals "to sue the American company who installed the computer system" and providing for "proper compensation payments … to be made". If so, Mr Day's fifth question, far from being tendentious and outside the Act, could be answered simply, by providing recorded information on the implementation date of the scheme.

17. On the facts of this case, we note that Mr Simpson from the CSA in fact had no difficulty in answering the requests; he explained his understanding of the position, where it differed from that set out in the question; and gave a reasoned and helpful explanation, so far as he was able to: not one acceptable to Mr Day, of course, but that is because, fundamentally, his dispute is about the quality of the agency's work, not the adequacy of the recorded information provided. In replying in this way, the CSA were not always able to respond precisely to Mr Day's questions, since their premises were disputed. However, the answers seem to us to take into account the duty under section 16 to provide advice and assistance to people who make requests under the Act. The CSA might, for example, have simply given a blank denial to some of the requests, under section 1(1)(a), stating that they did not hold the information sought in recorded form. That may have been a technically correct answer, but it would not have been helpful to Mr Day.

18. We find that these 5 requests were requests for recorded information within the Act, and the answers provided, with the one exception set out below, complied with both the spirit and letter of the Act.

iv. Whether a duty under section 16 to assist the appellant in relation to the Request arose at all?

19. It follows from our reasoning above that the duty to provide advice and assistance applied to the Ancram requests, since they were requests for recorded information, within the Act.

v. Whether all the requested information that was held was disclosed to the Appellant, specifically,

- **a. The information provided in answer to question 3 was not current at the time of the request, and**
- **b. Generally the information provided was very unclear, outdated and inadequate.**

20. Given the mismatch between the information and assumptions used by Mr Day in his 5 questions, and those used by the CSA in recording information, it is not surprising that many of the questions he put received no direct answer. We have seen no evidence to suggest that all the requested information held was not disclosed to Mr Day; and we have found above, that generally the reply provided was helpful and in compliance with the CSA's duty under section 16. The

questions were in effect reformulated to address the closest categories of recorded information the CSA possessed to those stipulated by Mr Day, and then answered. In doing so, the CSA provided assistance to Mr Day "so far as it would be reasonable to expect" them to do so. We reject Mr Day's assertion that the information provided was very unclear, outdated and inadequate.

21. The one exception to that is in the answer to Question 3. Question 3 begins by asking: "How many appeals are submitted annually against CSA assessments?" and asks for a breakdown of appeals depending on whether submitted by fathers or mothers. The answer provided, on 28 February 2005, was: "In the period April 2003 to March 2004, 7212 appeals were received at the Central Appeals unit against maintenance assessment decisions. We do not record data on Appeals cases in the format you have requested, that is, by fathers and mothers."

22. To provide figures for a single year does not provide the information requested "annually". Either an average figure should be provided, or the raw data for the number of appeals for each of a series of years. It has not been established before us that "annual" data was not available or could not have been provided. (The letter of 4 May 2007 from the CSA is not clear on the point.) To this limited extent, the answer may not therefore have complied with the CSA's duty to provide recorded information.

23. Since our Preliminary Hearing, the CSA have provided Mr Ancram with further information in answer to question 3, by letter of 4 May 2007. Again, this is helpful in explaining the different categories of information used, but does not provide the information given "annually". It only covers the most recent annual information available at the time of the request, for the year 03/04.

vi. Whether the CSA complied with section 10(1) of the Act by providing the information within 20 working days ?

24. The letter of 5 January was referred by Mr Ancram to the CSA, who received it on 3 February 2005. Mr Simpson replied on 28 February 2005. Mr Day complains that this is outside the 20 working day period allowed under section 10 of the Act for replies. We have already explained that the original letter, to Mr Ancram, cannot be regarded as a request to a public authority, within the Act, since an MP is not a public authority. It is only once the letter reached the CSA, on 3 February, and was accepted by them as a FOIA request, that time under section 10 began to run. The reply, on 28 February, was sent within 20 days of receipt. We reject Mr Day's complaint that it was sent out of time.

vii. Whether the 28 February 2005 letter complied with section 17(7) of the Act?

25. Section 17 of FOIA imposes a duty on public authorities that refuse to comply with a request for information in reliance on an exemption under the Act to serve a notice explaining their refusal, and referring to the exemption relied on. Section 17(7) states that the notice must also refer to the authority's complaints procedure and refer to the right, under section 50 of the Act, to apply to the

Information Commissioner for a decision on whether the request for information has been dealt with under the Act. In this case, section 17 has no relevance since the CSA did not claim the benefit of any exemption or refuse to provide information under the Act. We reject Mr Day's complaint that there was a breach of section 17(7).

Conclusion.

26. We have set out above our findings on the 7 points previously identified for decision. In summary, in this Decision we have decided that Mr Day's complaint to the Information Commissioner on 8 September 2005 was a complaint about both his requests for information, of 8 January and 31 July 2005, to the CSA; and that the Decision Notice should have dealt with the earlier request as well as the later request; that the earlier request was in fact properly dealt with by the CSA, within the time allowed, and in conformity with their obligation to provide advice and assistance under the Act, save for one exception. Subject to that exception, we reject his other complaints about the way the Department replied to the Ancram request. In our previous Preliminary Decision we found that the Decision Notice should have contained different findings in relation to the 31 July request in two respects: it should have stated that the Department for Work and Pensions did hold the information requested, but that it had no duty to communicate the information since the cost of compliance with the request would vastly exceed the fee limit provided; and it should have stated that in supplying the information that was provided, the CSA should have communicated the information that was accurate as at the date of receipt of the request or within 20 working days thereafter. In both these respects the Decision Notice was wrong in law.

27. In such a situation, section 58 of the Act provides*: the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner.* Like other Tribunals that have considered the point, we read that power as cumulative rather than alternative, in the situation where, as here, we are allowing an appeal at the request of the complainant rather than of a public authority. The point is fully set out in the Tribunal's decision in EA/2006/0011 and 0013, Guardian Newspapers Ltd and Heather Brooke, the Information Commissioner and the BBC, at paragraphs 16 to 23 of the Judgment, and we gratefully adopt their reasoning.

28. We have not attempted, in our substitute Decision Notice, to set out the background to the two requests, or the chronology and findings of fact as the Commissioner might have set it out. We simply refer to our two decisions for the background and reasons for our findings and conclusion. Our substitute Decision Notice addresses the breaches of the Act that we have found, and sets out the steps required to be taken by the public authority in respect of those breaches.

Mr H Forrest
Deputy Chairman
Information Tribunal

Date: 24 September 2007

FREEDOM OF INFORMATION ACT 2000 (SECTIONS 50 and 58)

Appeals Number: EA/2006/0069

SUBSTITUTED DECISION NOTICE

Dated 24 September 2007

Public authority: **The Department for Work and Pensions**

Address of Public Authority: **Richmond House, Whitehall**

London SW1A 2NS

Name of Complainant: **Mr R Day**

7 New Street

Market Lavington

Devizes

SN10 4DX

The Substituted Decision

1. For the reasons set out in the Tribunal's two determinations of 13 April 2007 and 24 September 2007, this Decision Notice is substituted in place of the Decision Notice given by the Information Commissioner on 2 August 2006.

2. Mr Day complained to the Information Commissioner on 8 September 2005 about the way the CSA had replied to two requests for information made by him. The first of these had initially been sent to an MP, Mr Ancram, on 8 January 2005, but was subsequently forwarded to the CSA and accepted by them as a request under the Freedom of Information Act. The public authority had replied to that request on 28 February 2005, within the time limit of 20 working days of receipt of the request as required by the Act. That reply complied with their obligation under section 1 of the Act to disclose recorded information to Mr Day (save in one limited respect); and where the precise information requested was not recorded, the public authority had provided alternative information in accordance with their duty to provide Mr Day advice and assistance under section 16 of the Act.

3. In relation to one category of information requested, information about the number of appeals against CSA assessments submitted annually, information had only been provided for one year, rather than annually. Since it appeared the information was held for a number of years, the obligation to provide recorded information was breached in that limited respect. Although the public authority had since provided, during this appeal, further information to Mr Day, it did not provide annual information.

4. The second request for information was made on 31 July 2005. Some of the information requested was held by the public authority, but the cost of obtaining it would vastly exceed the fee limit provided in section 12 of the Act. The public authority therefore had no duty to communicate the information. The public authority did provide some, more recent information in answer to the request. This was not in the precise categories requested by Mr Day, but represented the nearest categories of information available, and as such, was a proper response by the public authority in accordance with their duty to provide advice and assistance. In one respect, however, the information provided was in breach of the Act: the public authority should have communicated the information that was accurate as at the date of receipt of the request (31 July 2005) or within 20 working days thereafter, rather than as at 31 October 2005, the date used when the request was eventually complied with on 30 November 2005. That belated compliance was also in breach of the obligation under the Act to provide information no later than 20 working days from the date of the request.

Steps required.

5. The public authority has apologised for its failure to provide the information requested on 31 July within the time limit, and has explained its failure to do so. No further action is required in respect of this breach.

6. On 4 May 2007, the public authority, in response to the Tribunal's Preliminary Decision, provided the information requested in the 31 July request which it held recorded up to 2 August 2005 (an appropriate date). No further action is therefore required in respect of that breach.

7. The public authority has not provided <u>annual</u> information for the number of appeals submitted against CSA assessments. The public authority should reconsider this request, and either provide the information "annually", or, if it is unable to do so, respond in compliance with the requirements of the Act.

Mr H Forrest Dated this 24th day of September 2007

Deputy Chairman, Information Tribunal