



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2013/0068

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50453022 dated 13 March 2013**

Appellant: The Office for Standards in Education

Respondent: The Information Commissioner

Second Respondent: Roger John

Date and place of hearing: 10 December 2013, Field House

Date of decision: 25 February 2014

Date of promulgation: 26 February 2014

Before

**Anisa Dhanji
Judge**

and

**John Randall and Pieter de Waal
Panel Members**

Subject matter

FOIA section 10(1) - whether the public authority had complied with section 1(1) within the statutory time limit.

Procedure Rules, paragraph 22 - whether the Tribunal should extend the time limit for the notice of appeal.

DECISION

The Appellant's appeal is allowed.

The Tribunal does not extend the time for the Second Respondent to appeal against the Decision Notice.

Signed

**Anisa Dhanji
Judge**

Date: 25 February 2014

REASONS FOR DECISION

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 13 March 2013.
2. It arises from a request for information made by the Second Respondent, Mr Roger John, to the Appellant, the Office for Standards in Education (“Ofsted”). The request was for information in relation *inter alia*, to a questionnaire sent by Ofsted to the parents of a school attended by Mr John’s child or children.
3. Mr John was dissatisfied with the way his request for information had been handled by Ofsted and he complained about this to the Commissioner. The Commissioner found that Ofsted had dealt with the request as it was required to do. He found, however, that Ofsted had been in breach of the Freedom of Information Act 2000 (“FOIA”) by not having provided the requested information to Mr John within the 20 day time limit specified in section 10(1) of FOIA. However, since the Commissioner considered that the information had now been provided to Mr John, he did not require any further steps to be taken.
4. Ofsted has appealed against the Decision Notice, asserting that it had, in fact, complied with the 20 day time limit, and that the Commissioner failed to understand the proper chronology of events.
5. Mr John has sought to appeal against the Commissioner’s Decision Notice out of time.

Issues

6. The issues before the Tribunal are as follows:
 - Issue 1: Did Ofsted comply with the 20 day time limit specified in section 10(1) of FOIA when responding to Mr John’s request for information?
 - Issue 2: Should the Tribunal extend the time for Mr John to appeal against the Decision Notice?
7. If the answer to Issue 2 is “no”, then there is no valid appeal before us by Mr John. If the answer is “yes”, then we will need to go on to consider and decide on the substantive points that Mr John is seeking to raise in his appeal, and we will also need to consider whether Ofsted and the Commissioner have had a sufficient opportunity to respond to those points.
8. Issue 2 would normally have been decided in advance so that, by the time of the hearing, the substantive issues to be addressed would have been clearly identified. However, as indicated later in this determination, matters became so protracted that case management directions were made by the Chamber President to the effect that Mr John could make his submissions on Issue 2 at the hearing.

The Appeal Hearing

9. Mr John requested an oral hearing and attended in person, representing himself. Ofsted and the Commissioner had notified the Tribunal that they would not be attending the hearing.
10. We explained the procedure of the hearing to Mr John, as well as the scope of the issues before the Tribunal, as set out above. We confirmed with him that he understood that the Tribunal had not yet decided whether to extend the time for his appeal, and that in line with the Case Management Note dated 4 December 2013 by the Chamber President, he would have an opportunity at the hearing before us, to put forward evidence and submissions in support of his application to extend the time for his appeal. We explained that we would reserve our decision on his application, and therefore, that although we would hear his evidence and submissions on the substantive issues that he wished to raise in any such appeal, we would only consider those issues if we decided to extend the time for his appeal.
11. Early in the hearing, Mr John indicated that the prospect of the hearing was stressful for him. We assured him that he was under no obligation to present evidence, make submissions, or answer any questions. He could put forward such evidence and make such submissions as he wished or he could ask the Tribunal to determine the issues on the papers. He said that he felt well enough to proceed. He did not seek an adjournment.

Evidence and Findings

12. We have considered all the evidence before us, even if not specifically referred to in this determination. In particular, we have considered the contents of the agreed bundle and the agreed supplementary bundle, the further evidence lodged by Ofsted in response to our directions following the hearing, as well as all written submissions received from the parties.
13. We have of course, also considered the evidence and submissions presented orally by Mr John at the hearing.

Issue 1: Did Ofsted comply with the 20 day time limit as set out in section 10(1) of FOIA when responding to Mr John's request for information?

14. In order to address this issue, we need to set out the chronology relating to Mr John's request, although we do not seek to refer to every step.
15. Mr John sent an email to Ofsted on 31 May 2012 and requested information about what measures Ofsted had taken to ensure that fathers of school children, particularly those who may not live with a pupil's mother, were given advance notice of a certain inspection, sent a certain questionnaire, and provided with the opportunity to express their views. He asked for his question to be answered in relation to a specific inspection, as well as to inspections generally.
16. Ofsted acknowledged the request on 2 June 2012 and sent a further response on 6 June 2012, providing some information and suggesting that Mr John might wish to contact the school in question for further information.
17. On 10 June 2012, Mr John sent an email to Ofsted, stating that he was not satisfied with the response he had received. He also attached a table in which he indicated the statistical data he expected Ofsted to provide about parental questionnaire responses broken down by various demographic factors. He further set out in 6 sub-paragraphs, a description of the information which he said was required.

18. Ofsted acknowledged his email on 11 June 2012. It said that his request of 31 May 2012 had not been treated as a request under FOIA and that therefore, it could not carry out an internal review of its response to that request. However, it considered that his request of 10 June 2012 was made under FOIA and it would be considered as such.
19. Mr John sent a further email to Ofsted on 12 June 2012. He said that his request of 31 May 2012 was a valid request under FOIA and he renewed his request for an internal review. He pointed out that the 20 working days for a response (of 31 May 2012) expired on 30 June 2012, not 6 July 2012.
20. Ofsted replied on 14 June 2012. It said, amongst other things, that it was happy to consider Mr John's letter of 10 June as a clarification of his queries made on 31 May 2012.
21. Ofsted provided a substantive reply on 28 June 2012 in the form of a 3 page letter. It also informed Mr John that if he was not satisfied with the response he could seek an internal review.
22. On 31 July 2012, Mr John requested an internal review and this was provided by way of an email from Ofsted on 16 July 2012.
23. We turn now to the question of whether Ofsted dealt with the request within 20 working days. In response to the findings in the Decision Notice that it had not done so, Ofsted says that although its letter of 6 June 2012 to Mr John was written outside the scope of FOIA, upon receipt of Mr John's letter dated 10 June 2012 indicating that its letter of 6 June 2012 did not fully communicate the information he required, and having received clarification and an expansion of his requirements as set out in his letter dated 10 June 2012, Ofsted immediately acknowledged the request and provided a full response by 28 June 2012. Ofsted says that since its response of 28 June 2012 was sent within 20 working days of Mr John's original request of 31 May 2012, it had clearly complied with the 20 working day timescale set out in FOIA.
24. The Decision Notice does not refer to Ofsted's letter of 28 June 2012. The Commissioner has said (in his Response dated 13 May 2013), that he did not refer to Ofsted's letter of 28 June 2012 because that letter did not disclose the information requested or provide a formal refusal.
25. We have to say that we find it difficult to understand the Commissioner's position. As already noted, the Commissioner has accepted that substantively, Ofsted dealt with Mr John's request as required by FOIA. The only issue is whether it dealt with it within 20 working days. If the Commissioner does not consider Ofsted's letters up to and including 28 June 2012 to be its response, then it must be that he regards Ofsted's letter of 16 July 2012 to be his response. Indeed he has indicated as much. That, however, is clearly at odds with the stated purpose of the 16 July 2012 letter and indeed with its content (namely to set out the outcome of the internal review), and fails to recognise the substantive response provided in Ofsted's letter of 28 June 2012. We accept Ofsted's position, as evidenced by the contents of the 16 July letter, that the purpose of that letter was to set out the outcome of its internal review, and that Ofsted's response had already been provided to Mr John by 28 June 2012.
26. For all these reasons, we find that Ofsted dealt with Mr John's request within 20 working days, and therefore, it was not in breach of section 10(1) of FOIA.
27. For completeness, we would mention that while both Ofsted and the Commissioner have said a great deal in their submissions in relation to Issue 1, not all of it is strictly

relevant to the specific question that the Tribunal has had to decide. However, we endorse the Commissioner's view that Ofsted should not have dealt with Mr John's request of 31 May 2012 "outside the Act". Clearly, it should have recognised that request as a valid request under FOIA and treated it as such from the outset. We also consider that given the terms of that request, Ofsted may have been entitled to treat Mr John's email of 10 June as a fresh request, (in which case the time for the reply to that request would have started afresh). However, that is not a point that Ofsted have taken and so it is not an issue that we need to consider further.

Issue 2: Should the Tribunal extend the time for Mr John to appeal against the Decision Notice?

28. The time limits for sending or delivering a notice of appeal to the Tribunal are set out in paragraph 22 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "Procedure Rules"). Paragraph 22(1) provides that the notice of appeal must be sent or delivered to the Tribunal within 28 days of the date on which the notice of decision was sent to the. Paragraph 22(2) sets out what the notice of appeal must include.
29. Paragraph 22(4)(a) provides that where a notice of appeal is provided to the Tribunal later than the time required by paragraph 22(1), it must include a request for an extension of time and the reason why it was not provided in time. Paragraph 22(4)(b) provides that unless the Tribunal extends the time, the Tribunal must not admit the notice of appeal. The power to extend time is contained in paragraph 5(3)(a) which empowers the Tribunal to extend or shorten the time for complying with any rule.
30. The question before us, having regard to the overriding objective as set out in paragraph 2 of the Procedure Rules (that cases should be dealt with fairly and justly), and the specific factors set out in paragraph 22(2), is whether we should, in the circumstances of this case, extend the time for Mr John to appeal against the Decision Notice. Fairness and justice must of course be assessed from the point of view of all the parties, not just Mr John.
31. It may be helpful, at this point, to set out a brief chronology relevant to Mr John's application to extend the time for his appeal. Although we have considered the entire chronology, for brevity, we will only refer to the key steps.
32. The Decision Notice against which Mr John seeks to appeal is dated 13 March 2013. It was sent to him on the same date. There is no evidence before us as to exactly when he received it, but Mr John does not say there was any delay. He had clearly received it by 26 March 2013 because he wrote to the Commissioner on that date to say he was considering whether to appeal against the Decision Notice. However, Mr John did not appeal. Ofsted, however, did appeal, and did so in time. Mr John asked to be joined as a party and was made a party to that appeal pursuant to a Case Management Note dated 30 May 2013. He had been fully informed, therefore, of all matters concerning that appeal and knew that it was advancing. He would also have known that raising any new issues late in the day might derail the timetable of the appeal that was already under way.
33. It appears that Mr John first indicated his intention to appeal against the Decision Notice in his email to the Tribunal on 30 July 2013, more than 4 months after receiving the Decision Notice. However, at that time he provided neither a notice of appeal nor an explanation for the delay, nor indeed did he even apply for an extension of time. In short, he entirely disregarded the requirements of Rule 22. We are mindful that Mr John is unrepresented. However, it appears that he was aware of the requirements of Rule 22 because in the e mail of 30 July 2013, he acknowledged

that he needed to apply for leave to appeal out of time. However, even at that late stage, rather than making that application, he requested a further 21 - 28 days to “consider, prepare and submit” the appeal as well as his response to Ofsted’s appeal (which by now was also out of time). He explained that he was asking for this additional time because he had health issues and some personal crisis. He also said that he had been involved in other litigation and was “somewhat overloaded”.

34. Considerable further correspondence ensued. It is not necessary, at this juncture, to refer to their precise content in any detail. Suffice to say that the Tribunal felt it necessary to make further case management directions. In particular, the Tribunal’s Registrar issued Case Management Notes dated 31 July 2013, and 1 August 2013. In the latter she pointed out, *inter alia*, that Mr John had not submitted a notice of appeal, nor had he provided any explanation for why he had not lodged his appeal in time. She granted him an extension of time to 21 August 2013 to lodge his response to Ofsted’s appeal. No timetable was set in respect of Mr John’s own appeal, no doubt because it was a matter for him whether or not he still wished to lodge an appeal. By an email dated 15 August 2013, Mr John renewed his request for an extension of time to 28 August 2013. He said he was attaching his “Med 3 Certificate” in support.
35. Mr John then lodged what he described as his “Response and Draft Proposed Grounds of Cross Appeal”. This was a lengthy document (16 pages), which was dated 4 September 2013. Even at this point, however, he did not submit his appeal. Instead, he requested permission to appeal out of time and said that the reasons would be set out in his “forthcoming application for permission”. He said that the delay was because, *inter alia*, of health reasons and the complexity of the task. He did, however, set out his “Proposed Grounds of Appeal”.
36. By an email to the Tribunal dated 6 September 2013, Mr John stated that his “out of time application” was yet to come.
37. On 3 October 2013, the Tribunal’s Registrar issued a further Case Management Note in which she pointed out that Mr John’s application for permission to appeal had still not been received. Mr John eventually sent in his notice of appeal on 4 November 2013, together with what he described as his “additional submission” in support of his application for permission to cross-appeal. This was over 7 months from when he received the Decision Notice and more than 4 months since he first indicated his intention to appeal.
38. There was yet further correspondence, culminating in further case management directions, this time by the Chamber President, on 5 November 2013 and 4 December 2013, respectively. In the latter, and no doubt in an attempt to stem the volume of pleadings and correspondence, Mr John was directed that he could make his submissions as to why he should be granted an extension of time for his appeal, at the hearing.
39. At the hearing, we gave Mr John an opportunity to make his application, and to add anything he wished to what he had said in his various written communications to the Tribunal to explain the very considerable delay. In brief, his reasons are that at the relevant times, he was in poor health through long term illness, that he had financial difficulties, that he had other personal matters to deal with (in particular a school admissions appeal for his daughter), that the Commissioner had improperly withheld information from him, that he had not received any letter from Ofsted dated 18 July as referred to in the Decision Notice (this was in fact a reference to Ofsted’s letter of 16 July), and that he had not received the hearing bundle until 3 July 2013.

40. We do not consider that any of these grounds begin to justify the very considerable delay in issue here. We are prepared to accept that Mr John has had health issues which, partly at least, have been a factor in the delay, but there is no medical evidence to show that any health difficulties have been of such a nature and have endured for such length of time that Mr John could not reasonably have been expected to lodge a notice of appeal in time. We also bear in mind that in the time period in question, Mr John was able to send lengthy emails and other communications to the Tribunal. If ill-health did not prevent him from doing that, we fail to see how it would have prevented him from lodging an appeal, if not in time, then at least much sooner than he did. Furthermore, at no time in that period did he contact the Tribunal to say that he wished to lodge an appeal but was unable to do so because of ill health. We find it likely that the real reason for the delay is because Mr John did not decide, until many months had passed after the Decision Notice had been issued, that he wanted to appeal against it. Ill health may have been a contributing factor, but we are not satisfied that he was prevented by ill health from appealing in time or seeking an extension of time at a much earlier stage.
41. To the extent that Mr John maintains that he did not have all the documentary material that he needed in order to lodge his appeal and/or that the Commissioner had deliberately concealed certain information, we would note that any appeal can only be against the Decision Notice. That is a document which he had. He was not required, with his notice of appeal, to substantiate any grounds of appeal with detailed documentary evidence.
42. We also keep in mind, in this regard, the grounds of Mr John's intended appeal. His first argument is that section 10(1) of FOIA requires public authorities to deal with requests promptly. He says that 20 working days is the outside date and that public authorities may have to deal with requests sooner in order to meet the "promptly" test. That is not a point on which Mr John would have needed any further documents in order to lodge an appeal. Mr John also says that the promptness point was not dealt with in the Decision Notice and he did not know that he could raise, in an appeal, an issue that had not been dealt with. He was also concerned that he might find himself liable for costs. We appreciate the difficulties that lay litigants can face. However, we are not persuaded that these are the reasons that Mr John did not appeal in time. Mr John did not raise any concerns or questions with the Tribunal about what issues he could appeal against, nor did he inquire about any potential liability for costs. These are also not the reasons for delay he gave in his various communications to the Tribunal about his intended appeal.
43. Second, Mr John wishes to appeal on the basis that Ofsted have not provided him with a full response to his request. On that issue, too, the Decision Notice contained the information he needed in order to lodge an appeal. It specifically sets out the Commissioner's finding that, albeit late, Ofsted had responded to Mr John's request. Even if the agreed bundle which Mr John says he received on 3 July 2013 shed any light for the first time on whether he had been provided with a satisfactory response, it does not explain his continued delay after that date.
44. Mr John also asserts that the time for him to lodge an appeal had not started to run because the Decision Notice was in some way not compliant with FOIA. We find that argument to be misguided. Even if for some reason the Decision Notice was not compliant with FOIA, it would not prevent the time limit for an appeal to start to run.
45. In considering whether to extend time under paragraph 5(3)(a) of the Procedure Rules, we have also taken into account the potential prejudice to the other parties in having to deal with new issues raised late in the day. The Commissioner and Ofsted

have strongly opposed Mr John's application. The Commissioner, in particular, has argued that it would be wholly contrary to the overriding objective in paragraph 2 of the Procedure Rules to allow the right of appeal to remain open indefinitely. He has also argued that permission, if granted, would result in the disposal of an already well advanced appeal being further delayed and that it would put both the Commissioner and Ofsted to considerable additional expense funded by the public purse if they had to revisit and recast their original pleadings. Ofsted similarly resists Mr John's application. In the circumstances, we consider there is force in the points the other parties have made and we find that an appeal by Mr John at this late stage would be unfair to them. We also consider that the further expense and delay that it would involve, would not be proportionate to the importance of the case.

46. In all the circumstances, we do not extend the time for the Notice of Appeal under paragraph 5(3)(a) of the Procedure Rules. It follows that there is no valid appeal before us by Mr John.

Other Issues

47. There are a number of issues that have arisen during the course of this appeal which have had no bearing on our findings, nor, in our view, on the fairness of the proceedings, but there are two which we will mention briefly, for completeness.
48. First, Mr John wanted the oral hearing to be recorded. He was given the necessary information, in relation to this matter, by the Tribunal Secretariat. In brief, he was informed that the Tribunal's proceedings are not recorded as a matter of course but that arrangements can be made for them to be recorded and for the recordings to be transcribed at the cost of the party requesting it. Mr John declined to pay the cost and therefore the hearing was not recorded.
49. Second, Mr John has made sweeping allegations against the Commissioner, claiming that the Commissioner has engaged in deliberate concealment and dishonesty. We do not consider that the evidence before us supports such allegations, but in any event, if Mr John has any complaint to make against the Commissioner, there are other channels through which that may be done. The Tribunal has no jurisdiction to deal with complaints against the Commissioner.

Decision

50. Ofsted's appeal is allowed.
51. We do not extend the time for Mr John to appeal against the Decision Notice.
52. Our decision is unanimous.

Signed

Anisa Dhanji
Judge

Date: 25 February 2014