FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2014/0086
Appellant:	Debbie Bryce
Respondent:	The Information Commissioner
Second Respondent:	Trinity Hall Cambridge
Judge:	NJ Warren

DECISION NOTICE

A. Introduction

1. Trinity Hall Cambridge, ("Trinity Hall") now a party to these proceedings, has applied for the Tribunal decision dated 8 October 2014 to be set aside on the ground of procedural error. I extend time for the application to be considered.

2. Rule 41 GRC Procedural Rules states as follows

Setting aside a decision which disposes of proceedings

41.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and
(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
(d) there has been some other procedural irregularity in the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

3. The Tribunal decision has of course been published so I need only summarise it here.

4. Students at Trinity Hall automatically become members of the Trinity Hall Association ("THA"). Ms Bryce made a request for information under the Freedom of Information Act ("FOIA") to Trinity Hall. She wanted all THA's minutes and correspondence for the period 2003-2008. Trinity Hall said that it did not hold that information. She complained unsuccessfully to the Information Commissioner ("ICO") and then appealed to the Tribunal. The Tribunal decided that THA was very much part of Trinity Hall and therefore came within its obligations as a public authority under FOIA. It directed disclosure of the information. It was unnecessary to explore another issue as to whether Trinity Hall held the requested information in its archive.

B. The Tribunal Procedure

5. It is necessary to say a little about the procedure followed in this case.

6. When Ms Bryce appealed to the Tribunal the ICO, as is routine, wrote to Trinity Hall drawing attention to the appeal and the possibility of joining the proceedings as a party. A similar notice, in the case of an appeal by a public authority, is routinely sent to the person requesting the information. It is now asserted by Trinity Hall, and not, as I understand it, disputed by the ICO that the notice explained that the ICO would defend his decision notice on the basis of the reasoning set out in it and that to do so he would rely on the information provided by Trinity Hall in the course of the ICO investigation. Trinity Hall assert that the notice was misleading in this case because, contrary to the impression given, the ICO did not pass on to the Tribunal all the information which he had received.

7. Trinity Hall declined to join the proceedings.

8. Both Ms Bryce and the ICO were content that the Tribunal should decide the case without a hearing and accordingly on 29 July 2014 the Tribunal met to consider the papers.

9. It seemed to the Tribunal that Ms Bryce was making a number of assertions, not contested in the material before them, about the links between Trinity Hall and THA upon which fairness required that Trinity Hall should have the opportunity to comment. They therefore extended a second invitation to Trinity Hall to join the proceedings as a party. They also supplied a helpful list of five issues which might usefully be addressed in Trinity Hall's submissions, if it became a party.

10. On 8 August 2014 Trinity Hall replied to say that it did not wish to be joined as a party but would be happy to provide "a full response to the points raised in your letter" by early September.

11. The Tribunal Judge was not prepared to receive a response from Trinity Hall outside of the framework of it being joined as a party. On 2 September the Tribunal wrote explaining this, saying that it was for Trinity Hall to decide whether it wished to apply to be a party to the appeal in order to make representations. It was given a further 48 hours in which to do so.

12. On being copied in to this notice, the ICO wrote to the Tribunal and to Trinity Hall. The ICO considered that:-

> "….the Tribunal will be very much assisted by hearing from Trinity Hall. In noting this, the Commissioner is aware that he is regrettably unable to assist further than he has already concerning the specifics of the relationship between Trinity Hall and the Trinity Hall Association."

The ICO suggested that the Tribunal should exercise its power under Rule 33(2)(b) to permit or request Trinity Hall to "make written submissions in relation to a particular issue".

Trinity Hall, understandably, seemed to be uncertain then about how to proceed. The Tribunal, having not received an application from Trinity Hall to be joined as a party, proceeded to reach and publish its decision.

C. What Should Have Happened?

13. Whilst I have no doubt that Trinity Hall and the ICO acted in good faith, it is necessary in order for me to deal with this application to give my views on whether their responses to the Tribunals notice dated 31 July were correct.

14. In my judgement, Trinity Hall should have applied to become a party to the proceedings. The Tribunal does not automatically join public authorities to appeals against ICO decision notices made by persons requesting information – although any request to be joined will invariably be granted. The same principle applies when a public authority is the appellant and the information requestor is a potential third party.

15. By and large this policy works well and allows the Tribunal to reach its decision without increasing costs and anxiety for the potential third party. When the Tribunal specifically invites a public authority to join proceedings in order to defend its original handling of a FOIA request, there is usually a good reason for doing so. Public authorities can hardly complain that their voice has not been heard if they decline the invitation.

16. In my judgement, the Tribunal Judge was entirely correct in refusing the offer to send a "response to the points raised in your letter". Public authorities wishing to make their own representations to the Tribunal should do so as a party. In defending their original decision, they should not seek to evade the obligations to the Tribunal already assumed by the information requestor and the ICO, especially those under Rule 2 GRC Procedural Rules.

17. For the same reason, it would, in my judgement, have been inappropriate for the Tribunal to direct representations under Regulation 33(2)(b) as the ICO suggested.

18. In my judgement also, the ICO's intervention dated 2 September 2014 misunderstood his responsibilities to the Tribunal.

19. At this stage, the ICO was resisting Ms Bryce's appeal on the basis that his decision notice was correct. The Tribunal on 31 July had pointed out a number of difficulties, as they saw them, on the papers which they presently had. Now, sometimes in those circumstances, the ICO might take the view that the Tribunal's concerns are illusory or ill founded – in which case it would be helpful to the Tribunal to receive a further submission from the ICO to enlighten them.

20. That was not the case here; to the contrary, the ICO took the view that more information was needed. Since he did not invite the Tribunal to allow Ms Bryce's appeal, this implied that more evidence or information was required if his decision notice was to be defended successfully. It seems to me that it was then incumbent on the ICO to make further investigations in order to obtain the information he required to repair his case. Alternatively, of course, depending upon the nature of the information received the ICO might alter his stance in relation to his decision notice. It is simply not good enough for a respondent to an appeal in the First Tier Tribunal to sit back as if its duties came to an end on the date when its own decision notice was signed.

21. I do not accept that there was any procedural error by the Tribunal in dealing with the replies it received to its letter dated 31 July.

D. The Data Protection Act

22. I have explained how appeals generally proceed with only two parties. Sometimes in the life of an appeal circumstances change and the potential third party must be invited again to join the proceedings. This, the Tribunal correctly did on 31 July 2014, on factual grounds concerning the evidence.

23. In some appeals (of which this is an example) there may come a stage at which, for the first time, attention focuses on whether any exemptions under FOIA should apply. A pause may be essential in respect of the personal data exemption because there is a risk that in leaping directly to an order for disclosure the Tribunal places the public authority in a conflict between its duties as a data controller and its duty to abide by the Tribunal decision. This principle though is not confined to the personal data exemption. The Tribunal must be careful not to bypass a public interest balancing exercise if the circumstances are such that FOIA requires one. The Tribunal has a number of procedural devices available to it in these circumstances. It can postpone a decision; it can decide a preliminary issue; it may even be possible for the Tribunal to set aside the ICO decision notice and direct that the public authority now deal with any relevant exemptions [1]

24. It seems to me that the disclosure of the correspondence of an alumni association such as THA would inevitably require consideration of the personal data exemption under FOIA. The Tribunal should not have issued its decision without inviting submissions on that issue. I think it right to characterise this omission as a "procedural irregularity in the proceedings" within Rule 41(2)(d).

[1] Information Commissioner v Gordon Bell [2014] UKUT 106 (AAC), sometimes suggested as authority against such a stratagem, was a case in which the Tribunal had neglected to set aside the ICO decision. See also the interesting discussion in Clucas v ICO EA/2014/00060 at paras 36-61.

25. I must therefore consider whether it is in the interests of justice to set aside the Tribunal decision. Despite the importance of finality, I am satisfied that it is in the interests of justice to do so. Two factors point strongly to this conclusion. First, Trinity Hall may have difficulties as data controller under the Data Protection Act if the decision is allowed to stand. Second, both Trinity Hall and the ICO have now applied for permission to appeal to the Upper Tribunal. I have no doubt that if those proceedings ran their course the Tribunal decision would be set aside. It is better to do that now.

26. I therefore set the decision aside.

E. What Happens Next

27. The effect of my decision is that the appeal will be considered afresh by a new Tribunal, differently constituted, which will not be bound by any previous findings.

28. I propose to give some case management directions now. The Registrar may alter or add to these directions.

29. Within 14 days Trinity Hall should notify the Tribunal whether it consents to the matter being determined without a hearing.

30. Trinity Hall has indicated that if a new Tribunal also finds that it holds the requested information it wishes to raise the following further issues:-

    (a) Whether the request is vexatious.

    (b) Whether the personal data exemption applies.

    In order to decide whether the request is vexatious or whether disclosure of personal data might be lawful the Tribunal will need to know from Ms Bryce how she proposes to use the information. Within 14 days therefore Ms Bryce should write to the Tribunal, with a copy to the ICO and to Trinity Hall, explaining why she wants it. It may be, even at this late stage, that an explanation of this will allow Trinity Hall to resolve the disagreement.

31. Within one month of receipt of this information from Ms Bryce, Trinity Hall must send to the Tribunal, with a copy to the ICO and to Ms Bryce, a response to the appeal to include the information and submissions on which it relies. The issues raised by the last Tribunal in its note dated 31 July 2014 may be a helpful guide on the question of whether or not the information is held.

32. Trinity Hall will be entitled to ask for the personal data exemption to be considered.

33. It may be that raising the issue whether the request is vexatious needs permission from the Tribunal. See the contrasting positions in APPGER v IC and MOD [2011] UKUT 153 (AAC) and the Appendix to the Department of Education of Science v ICO and McInerney (EA/2014/0270). The response should include any arguments in relation to any exercise of a discretion.

34. Within 14 days of receipt of the Trinity Hall response Ms Bryce and the ICO must send in any reply which they wish to make to it.

35. Would the ICO then please cooperate with the parties to produce a new bundle?

36. Before taking this decision I have invited Ms Bryce to comment on the possibility of a set aside under Section 41. Although Trinity Hall have sent to the Tribunal some of the material which it earlier supplied to the ICO, I have not considered this in making my determination. It is unnecessary for me to deal with any question under Rule 41(2)(b) which might arise in respect of this information.

37. The ICO may wish to reconsider the wording of the notice which goes out to potential third parties. Is Trinity Hall's claim that it gives a misleading impression reasonable? If so, the Tribunal's Registrar would be happy to assist with any necessary redrafting.

NJ Warren

Chamber President

Dated 15 January 2015