



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0244**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice

Dated 9th September 2014

BETWEEN

Mr James Pritchard

Appellant

And

The Information Commissioner

Respondent

Determined at an oral hearing at Birkenhead County Court on 2nd February 2015

The Appellant attended and represented himself

The Commissioner chose not to be represented.

Date of Decision 10th March 2015

BEFORE

Fiona Henderson (Judge)

Pieter de Waal

And

Paul Taylor

Subject matter: s 1(1) FOIA whether information held

Decision: The Appeal is Refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice dated 9th September 2014 which held that Wirral Metropolitan Borough Council (the Council) correctly applied s12(1) FOIA. The Tribunal's decision was announced orally at the hearing, the Tribunal sets out the reasons for that decision below.

Information Request

2. The Appellant wrote to the Council on 12th May 2014 stating that he required to know:

"how many DHP claimants are EU migrants, plus foreign nationals". He clarified that this was a request under FOIA and that the figures he required concerned 01.04.13-01.04.14.

3. The Council responded on 20th May 2014¹ stating that the information was not held as *"there is no legal requirement to ask claimants of Discretionary Housing Payments to declare their ethnicity"* and that the Council does not therefore collect or record the information requested.

4. The Appellant submitted a further request on 27th May 2014 asking in relation to the Wirral area:

"how many foreign and EU migrants claimed housing benefit and Council tax benefit/council tax support since 01/04/2013 to the present day (date of reply). I would also like to know how many of these people claimed DHPs as a top up".

5. The Council refused this request on 4th June 2014² stating that it was not held because whilst the application form contained an optional Equal Opportunities section in which a claimant could indicate their ethnicity if they wished, there was

¹ P20 bundle

² P22 bundle

no requirement for applicants to declare whether they were foreign or EU migrants.

6. The Appellant asked for an internal review³, he drew the Council's attention to part 15 of the form which asks for proof of identity, which can include:

"A birth certificate, marriage certificate, passport, National Insurance number card, medical card, driving licence, UK residence permit, EEC identity card or recent gas and electricity bill." The implication being that the type of identification provided might provide some indication of whether the claimant was an EU migrant or other foreign migrant.

7. The Council upheld their original decision in a letter dated 19th June 2014 stating that:

" there is a wide choice of documentation which can be supplied..." the implication being that some types of proof of identity e.g. a gas bill would not indicate the nationality of the claimant and thus this would not enable a total figure to be provided from the information in this part of the form.

Complaint to the Commissioner

8. The Appellant complained to the Commissioner who conducted an investigation. In their letter of 22nd August 2014 to the Commissioner provided during the investigation, the Council indicated that it was now relying upon s12 FOIA⁴ because the cost of compliance exceeded the appropriate limit. The Commissioner upheld the refusal to provide the information on that basis.

The Appeal

9. The Appellant appealed on 1st October 2014 on the grounds that he did not accept the Council's evidence because:

³ The internal review was only requested in relation to the second request.

⁴ *"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".*

- a) the Council originally argued that the information was not held because there was no requirement to state nationality; when the Appellant contends that the effects of the questions on the form is that applicants have to,
- b) the Council was being obstructive because they had changed the basis of their refusal from “information not held” to “retrieval of the information exceeds the costs limits”.

10. The Tribunal heard oral submissions from the Appellant. The Council did not apply to be joined and the Commissioner was not represented at the oral hearing, he relied upon his decision notice and his response to the Appeal. The Tribunal was provided with an open bundle comprising some 67 pages.

11. In their evidence to the Commissioner the Council stated⁵:

- i) there was no statutory duty or requirement to collect certain types of information relating to benefits,
- ii) the questions regarding nationality are to determine eligibility to claim benefits and not to keep a record of nationality.

12. The Appellant has not drawn our attention to any part of the form where the claimant is required to declare if they are an EU or other foreign national. From this the Tribunal is satisfied that there was no specific question asking if the claimant was an EU or other foreign migrant.

13. The Appellant’s contention is that this information would be apparent from the questions that had to be answered on the form. In particular he drew attention to the page of the claim form which asks⁶:

	You	Your Partner
...

⁵ P43 bundle

⁶ P27 bundle

<p>Have you or your partner come to live in England, Northern Ireland, Scotland, Wales, the Republic of Ireland, the Channel Islands or the Isle of Man from any other Country?</p>	<p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>We will write To you about this</p>	<p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>We will write To you about this</p>
<p>If 'Yes' which country?</p>	<p><input type="text"/></p>	<p><input type="text"/></p>

14. Additional questions on p23 of the form ask for the National Asylum Seeker Service (NASS) reference number and ask if the claimant or their partner are receiving Support under Part VI of the Immigration and Asylum Act 1999 in which case they are required to provide proof of this.
15. The Council's evidence was that the information is used to see if a claimant is eligible to claim⁷. If they are eligible then the claim is processed in the normal way and the fact they are a person from abroad who meets those tests is not recorded. The Tribunal understands this to mean that no separate record, log or analysis is prepared listing or totalling those claimants who are EU or other foreign migrants or what benefits these specific categories of claimants claimed.
16. The Council's evidence was that benefit claim forms are scanned "flat" onto a document management system which does not have optical character recognition and so, cannot be searched electronically. The basis of the Council's reliance upon s12 FOIA was the amount of time they estimated that it would take to check manually each of the 23,789 new benefit claim forms in the system to collate the answers given in that (and other) parts of the form from which information could be retrieved relevant to the information request. They had undertaken a sampling exercise which indicated that 42 cases could be reviewed per hour.
17. The Appellant does not believe that this information is not electronically searchable and from speaking to Council employees he believes that the Council

⁷ The asylum questions are to determine eligibility for free school meals.

has upgraded its computer systems and would be able to search these files electronically. The Tribunal considered whether to adjourn for oral evidence on this issue, but was satisfied that it was not necessary in light of our analysis of exactly what information has been requested and what is held (and was held at the time when the request was made) and the evaluation process that would have to be followed to arrive at the information requested from this raw data.

18. We have broken the Appellant's information requests down into their constituent elements in order to illustrate our reasoning. We make the observation that although there is provision in s1(3) of the Act for the public authority to seek clarification, they did not do so in this case. In our judgment it does not alter the outcome on the facts of this case, however, it is important to note that where a request is not clear a public authority must ensure that it is proceeding on the correct factual understanding as it may save time, money and avoid supplementary requests. Failure to do so risks breaching the Act if a request is impermissibly refused or if the wrong or insufficient information is provided in consequence of failing to understand the terms of the request.
19. In this case the Council appear to have assumed that the request only applied to new claims, however, from the terms of the request it could have included all those who were in receipt of the specified benefits during the relevant time in which case the number of files from which information would need to be collated would be even greater.
20. There is some ambiguity in terms of what exactly the Appellant wanted as it is not clear in request 1) whether he wanted:
 - a figure for EU migrants,
 - a separate figure for other foreign migrants or
 - a combined figure.

In relation to request 2 it is also not clear whether the Appellant was asking for separate figures for claimants for:

i) Housing benefit,

ii) Council tax benefit/Council tax support or

he only wanted answers relating to people that were claiming both these benefits at the same time.

21. Whichever interpretation of the questions is used we are satisfied that to answer the request would necessitate a statistical analysis of the raw data provided on the forms. As set out above we are satisfied on a balance of probabilities that the Council do not already hold the information as a total figure in relation to these categories. In order to provide these totals the Council would have to extract the data relating to the country that the claimant or their partner have come from, decide whether it is EU or not, and analyse this in relation to the type of benefit claimed. On any view of the questions this will require subsets of data to be provided (e.g. the claimants who are claiming DHP on top of other benefits).

22. During the sampling exercise the Council's evidence was that in 29% of the cases reviewed the question relating to country had not been answered which suggests to us that an accurate total may not be achievable. The Appellant did not accept this evidence as he believed that the form would be sent back to be fully completed before it would be accepted for processing, but we observe that it may be that this question can become redundant in light of information elsewhere on the form, or elsewhere in the file and that to answer this question information might need to be pieced together from:

a) The voluntary ethnicity questionnaire (which may or may not have been completed),

b) The documentary information provided (e.g. a passport),

c) Any additional correspondence in the file.

23. Additionally we take into consideration that coming to live in the United Kingdom from any other country does not necessarily indicate foreign or EU migrant status and answering yes to the "country" question could include British Nationals who

have been living abroad and have returned, thus the circumstances of each case would have to be examined. This requires an evaluation of the evidence and amounts to more than the adding up of results to the positive responses to a single question.

Conclusion

24. The numbers as requested are not held, the Council holds the raw data from which it might be possible to extract the information in order to provide what amounts to a statistical analysis. For these reasons we uphold the decision that the Council did not breach s1(1) FOIA in failing to provide the information requested but we refuse the appeal on different grounds from the Commissioner, in that we find that the information requested was not held.
25. Our decision is unanimous.

Dated this 10th day of March 2015

Fiona Henderson
Tribunal Judge