



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

Case No. EA/2014/0289

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 2 October 2014
FER0538083**

Appellant: Eric Griffiths

Respondent: Information Commissioner

Considered on the papers

Before
John Angel
(Judge)
and
Rosalind Tatam and Pieter de Waal

Subject matter: Regulation 16(1) Environmental Information Regulations 2004 ("EIR") (code of practice); section 58 FOIA (determination of appeals).

Date of Decision: 23 April 2015

DECISION

The Tribunal upholds the Information Commissioner's decision notice dated 2 November 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Griffiths has been engaged in a long-running course of correspondence with the Governing Body of Brampton Primary School (“the School”) in Cumbria concerning the ownership – and hence the responsibility for maintenance – of a large oak tree which is situated between two residential properties (including Mr Griffiths’) and the School grounds. In 2007 the acting headteacher of the school had the tree lopped. More recently the new headteacher disputed the school’s responsibility for maintaining the tree.
2. This led to Mr Griffiths writing to the school (a public authority within the meaning of section 3(1) and Schedule 1, Part IV of FOIA) on 17 February 2014 to request certain categories of information pertaining to the lopping of the oak tree. This included, so far as is material to the present appeal, the following:
 - a. *“2007 – Records in the form of letters sent or received, minutes, notes, invoices, diary entries and written instructions relating to the lopping of the oak tree at the southern end of the school grounds as dealt with by [a named headteacher]”* (“Item 1”); and
 - b. *“Records in the form of letters sent or received, minutes, notes, invoices, diary entries and written instructions relating to the management of the hedge and any tree at the southern boundary of the school grounds between 2006 and 2014”* (“Item 2”).

(“the Request”)

3. On 18 March 2014, the School purported to provide the information requested under FOIA. Mr Griffiths, however, considered that Items 1 and 2 had not been answered, and (on 13 April 2014) complained to the Commissioner that further information within the scope of those requests must exist within the School or within another public authority and that, in the latter event, the School had failed to transfer the request to that public authority.

The Commissioner’s decision

4. In his decision notice dated 2 October 2014 (“the DN”), the Commissioner held that:
 - a. The information falling within the scope of the Request comprised environmental information within the meaning of regulation 2 of the EIR, and should have been dealt with as such by the School when responding to Mr Griffiths’ request (DN, §§16 – 18);
 - b. On the balance of probabilities, the School did not hold any further information in respect of Item 1 of the Request, but did hold certain further information within the scope of Item 2 of the Request. The Commissioner accordingly ordered the School to disclose the information in question, or to provide Mr Griffiths with a valid refusal notice detailing any applicable exception under regulation 12 of the EIR (DN, §§21 – 34); and
 - c. The School had discharged its duties under the Code of Practice on the discharge of public authorities’ functions under FOIA which has been issued pursuant to section 45 of FOIA (the “section 45 Code of Practice”) in relation to the transfer of the request to another public authority. Specifically, the School had demonstrated that it had contacted a number of other public authorities, including the County Council, to try to establish if there was other information concerning the ownership or maintenance of the tree, but that it believed that there were no other records held outside the school concerning the lopping of the tree in 2007 (DN, §§35 – 37).

The Appeal

5. Mr Griffiths’ challenge to the DN is limited to the Commissioner’s finding that the School discharged its duty under “*section 45 of the Code of Practice*” (which appears to mean the School’s duty under the section 45 Code of Practice (i.e. the Code produced in accordance with section 45 FOIA as referred to in §4.c. above). In the Notice of Appeal Mr Griffiths seems to take issue with “*Paras 35 – 37 Decision notice only*”.
6. In particular, Mr Griffiths contends that the School appears to have “*avoided the very office where some of the information I had requested, in particular related to*

2007, was known to have been” when making its enquiries in response to his request. Mr Griffiths considers that certain further information within the scope of his request “may” be held by the Children’s Services department of Cumbria County Council (referring, in particular, to a conversation concerning the “management” of the oak tree which is said to have taken place between Mr Griffiths’ wife and a Council employee, a Ms McEwan, on 18 December 2013).

7. So it appears that Mr Griffiths’ case is that the School should either have sought the information within Ms McEwan’s office directly, or transferred his request to Cumbria County Council, and that, in failing to do so, the School breached its duties under the section 45 Code of Practice.
8. The Notice of Appeal also complains about certain defects in the disclosure which the School has provided in response to the DN, and in particular that one document (a written safety report for 2010) has been provided in incomplete form and that another, similar, report from 2007 has not been provided at all. It is not clear whether Mr Griffiths considers that this is a matter which falls within the ambit of his appeal, given the earlier statement that the appeal concerns §§35 to 37 of the DN “only”. For completeness, however, we shall deal with this matter.
9. The parties agreed that the Tribunal could consider the matter on the papers before them and that an oral hearing was not required. Case management notes were issued accordingly.

Legal Framework

FOIA

10. The following provisions of FOIA are relevant in this case:

Section 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.”

Section 39

“(1) Information is exempt information if the public authority holding it –

- (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations.”

Section 45

“(1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities’ functions under Part I [of FOIA]. (emphasis added)

(2) The code of practice must, in particular, include provision relating to –

...

- (c) the transfer of requests by one public authority to another public authority by which the information requested is or may be held.”

Section 50

“(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specific respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.”

...

(3) Where the Commissioner has received an application under this section, he shall either –

- (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
- (b) serve notice of his decision (in this Act referred to as a “decision notice” on the complainant and the public authority.”

Section 54

“(1) If a public authority has failed to comply with –

- (a) so much of a decision notice as requires steps to be taken,

...

the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

...

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in deference, deal with the authority as if it had committed a contempt of court.

(4) In this section “the court” means the High Court or, in Scotland, the Court of Session.”

Section 57

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

Section 58

“(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
(c) the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

11. The section 45 Code of Practice was issued by the Secretary of State for Constitutional Affairs in November 2004. It is entitled *“Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000”* (“the section 45 Code of Practice”). As required by section 45(2)(b) of FOIA, the section Code of Practice contains a section (Part III) dealing with the transfer of requests for information between public authorities. This sets out a number of recommendations as to how a public authority should act in a case where it has *“reason to believe that some or all of the information requested, but which it does not hold, is held by another public authority”* (§17). The Code states that *“in most cases”* this is *“likely”* to involve taking steps such as informing the applicant that the information may be held by another public authority, and suggesting that the applicant re-applies to that authority directly (§18), but that *“in some cases the authority to which the original request is made may consider it to be more appropriate to transfer the request to another authority”* (§19).

The EIR

12. Under regulation 2(1) of the EIR, “environmental information” is defined so as to include *“any information in written, visual, aural, electronic or any other material form”* on *“(a) the state of the elements of the environment, such as air, atmosphere, water, soil, land, landscape and natural sites...”*.

13. The effect of section 39 of FOIA is that environmental information within the meaning of regulation 2(1) of the EIR is exempt from disclosure under FOIA itself. A request for disclosure of such information instead falls to be considered under the EIR. In that regard, public authorities are under a general duty to make available environmental information on request: regulation 5(1) of the EIR.
14. Regulation 16(1) of the EIR provides that the Secretary of State may issue a code of practice providing guidance to public authorities as to the practice which it would "*in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under these Regulations*". A code of practice (the "Environmental Code") was issued pursuant to regulation 16 of the EIR on 16 February 2005. Part VI of the Environmental Code, which deals with the transfer of requests for information, is for all intents and purposes identical to the section on the transfer of requests under the section 45 Code of Practice.
15. Regulation 18 of the EIR, entitled "*Enforcement and appeal provisions*", provides that the enforcement and appeals provisions in Part IV and V of FOIA apply, subject to certain modifications, for the purposes of the EIR too. These include sections 50, 54 and 57 of FOIA, as set out above.

Grounds of Appeal

- (i) *Whether there was non compliance with the Environmental Code and/or the section 45 Code of Practice*
16. Firstly it appears that Mr Griffiths does not challenge the Commissioner's characterisation of the requested information as environmental information within the meaning of regulation 2(1) of the EIR. On the evidence before us we consider that he was correct not to challenge this characterisation. The request relates to the ownership and maintenance of a tree which is clearly caught by the definition of "environmental information" (in particular "land" and "landscape") under regulation 2(1) of the EIR.
17. Mr Griffiths raises a single ground of appeal, namely that the Commissioner was wrong to find that the School had complied with its obligations under the section 45 Code of Practice/Environmental Code in relation to the potential transfer of his Request.

18. The Commissioner considers this ground of appeal is fundamentally misconceived. He submits that compliance with the section 45 Code of Practice is not a matter which falls within the Tribunal's jurisdiction on an appeal under section 57 of FOIA (and by extension under regulation 18 of the EIR, which effectively incorporates the appeal provisions of FOIA in connection with requests for environmental information). This is because an appeal to the Tribunal under section 57 of FOIA is in respect of a "decision notice", which is defined (by the combination of sections 50(1) and 50(3)(b)) as a decision on whether "*a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I [of FOIA]*". Section 45 of FOIA does not appear in Part I of FOIA. Accordingly, the Commissioner argues, to the extent that the DN in this case dealt with the School's compliance with the section 45 Code of Practice, this was not a matter which was susceptible to an appeal to the Tribunal under section 57 of FOIA.

19. In addition the Commissioner contends that appeals to the Tribunal under section 57 of FOIA concern public authorities' compliance with the mandatory requirements of Part I of FOIA in respect of their general duties in section 1(1) of FOIA. The requirements of the section 45 Code of Practice, in contrast, are non-mandatory: as the wording of section 45 of FOIA itself makes clear, the section 45 Code of Practice is aimed at providing "*guidance*" to public authorities as to what constitutes "*desirable*" practice.¹ It is no part of the Tribunal's function, he argues, to determine whether such non-mandatory guidance has been complied with.² Also, the Commissioner contends, while it is one of the "*general functions of the Commissioner*" to "*promote the observance by public authorities*" of the provisions of the section 45 Code of Practice (see section 47(1)(b)), the Tribunal has been clear that it has no jurisdiction over such general functions: see *Cross v Information Commissioner* (EA/2011/0155) at §33. In that case, the Tribunal emphasised the non-binding nature of the section 45 Code of Practice, in holding that there was no requirement under FOIA for a public authority to conduct an "internal review" of a decision to refuse disclosure of information, notwithstanding

¹ Precisely the same is true of the Environmental Code of Practice, as is clear from the (substantively identical) wording of regulation 16(1) of the EIR.

² The Commissioner himself may issue a "practice recommendation" to a public authority whose practice does not, in the Commissioner's view, conform to that proposed in the section 45 Code of Practice (see section 48(1) of FOIA, which also applies, *mutatis mutandis*, to the Environmental Code of Practice: see regulation 16(6)(c) EIR). However, FOIA does not prescribe any consequences for failure to comply with the steps outlined in a practice recommendation (or provide for any right of appeal to the Tribunal in respect of such a failure).

the recommendation in the section 45 Code of Practice that such a procedure should exist.

20. By parity of reasoning, the Commissioner argues, any failure by the School to comply with the section 45 Code of Practice would not be the kind of failure which is within the ambit of an appeal to the Tribunal under section 57 of FOIA.
21. We are not bound by the decision in *Cross*. However we agree with the arguments of the Commissioner. The section 45 Code of Practice is issued by the Secretary of State as guidance as to desirable practice for public authorities to follow in connection with the discharge of the public authorities' functions under Part I of FOIA. They are something that the Commissioner will no doubt take into account when issuing a decision notice. They are not guidelines that the Tribunal is bound by in coming to its decision and the findings of the Tribunal in *Cross* do make sense to us. Therefore we adopt them in this case. This means, in effect, that we do not have jurisdiction to consider this ground of appeal. (Correction underlined).
22. Even if we are wrong the Commissioner considers that the School has complied with the section 45 Code of Practice/Environmental Code in relation to the possible transfer of Mr Griffiths' Request to another public authority.
23. The steps taken by the School in response to the Request are summarised at §23 of the DN, and they included instigating searches with other public authorities including Cumbria County Council. Moreover, as recorded at §29 of the DN, the School also made specific enquiries with Ms McEwan, the individual referred to in the Notice of Appeal as working at Cumbria County Council's Children's Services Department.
24. Mr Griffiths says Mrs McEwan had referred to documents in her office that showed how the tree had been managed and paid for in 2007. He also says there was a conversation between the Chair of Governors of the School and Mrs McEwan and that the former had later committed to writing that she had not bothered to seek those documents. There is no documentary evidence of this in the bundle of documents before us. Also we would point out that FOIA and EIR are only concerned with information "held" by a public authority and not with unrecorded oral information.
25. Mr Griffiths considers that the steps detailed in §§22 and 23 of the DN show that apparent extensive efforts were made by the school to trace documents

elsewhere than on their immediate premises, and suggest a preparedness to 'transfer' the Request to another authority. However the list in §23 contains no record of any effort to find the documents the School had been previously told, he says, were in Mrs McEwan's office. As a result he is concerned that the documents may no longer be in Mrs McEwan's office and that, if they have been lost, it is because a public authority failed to secure what it had been told was likely to be of importance. This appears to us as mere conjecture as there is no evidence of this before us.

26. However Mr Griffiths accepts, as explained in §29 of the DN, that the School (as part of the complaint process) spoke to Mrs McEwan, and no further documents were forthcoming. He is not satisfied with this position.

27. Notwithstanding the enquiries made, the School reached the view that the other public authorities did not hold information within the scope of the Request. As set out at §24 of the DN, the School explained that while Cumbria County Council may have had records helping to establish the ownership of the tree, it would not have records pertaining to its upkeep. Yet Items 1 and 2 of the Request related to the latter issue only.

28. In those circumstances, it is not at all clear to us why Mr Griffiths considers the approach taken by the School to be incompatible with the section 45 Code of Practice/Environmental Code on the transfer of requests between public authorities. As set out above, the relevant recommendations in the section 45 Code of Practice (and the materially identical provisions of the Environmental Code) on transfer only bite in cases where a public authority has "*reason to believe that some or all of the information requested...is held by another public authority*" (section 45 Code of Practice §17).

29. In the circumstances, even if compliance with the section 45 Code of Practice/Environmental Code were a matter which we had jurisdiction to consider on an appeal under section 57 of FOIA (which is plainly not the case), the Tribunal considers that the Commissioner was correct to conclude that the School did comply with the relevant guidance in the present case.

(ii) Other matters raised in the DN

30. The Notice of Appeal also refers to certain “[o]ther issues” in relation to the “*information actually provided by the public authority in accord [sic] with the Decision Notice*”. As set out above, the DN required the School to provide certain information which, on the balance of probabilities, the Commissioner considered to be held by the School (or serve a valid refusal notice explaining on what basis it would not disclose the information in question).
31. Mr Griffiths contends that the information he has subsequently been provided with has been defective. It is not clear whether he is actually asking the Tribunal to consider the question of the School’s compliance with the DN as part of the present appeal (given that he describes §§35 – 37 of the DN as being the “*only*” issue on the appeal). But in any event, such matters are outwith the Tribunal’s jurisdiction on an appeal under section 57 of FOIA, which is expressly confined to appeals against “*a decision notice*”, not an appeal in respect of compliance with the contents of a decision notice by the public authority to which the notice is addressed. This is clear from the available grounds of appeal in section 58 of FOIA, which are directed at defects in the decision notice, and not any matters of subsequent compliance.
32. As set out above, the issue of non-compliance with a decision notice is dealt with separately, under section 54 of FOIA³. This provides that the Commissioner may “certify” any non-compliance with the requirements of a DN to the High Court (or the Court of Session in Scotland), whereupon it will be dealt with as if it were hearing contempt of court proceedings.
33. Therefore the question of the School’s compliance with the DN is not a matter which falls to be considered by the Tribunal in the present appeal. It should be noted that the school has expressly stated that it does not hold any further information within the scope of Mr Griffiths’ request.

Conclusion

34. For the reasons set out above we uphold the DN and dismiss the appeal.
35. We would note that as has been pointed out to Mr Griffiths during the course of his Request and complaint to the Commissioner it is always open to him to make

³ Section 54 applies equally in relation to non-compliance with decision notices under the EIR, since it is one of the “enforcement and appeals” provisions of FOIA which are rendered applicable to such decision notices under regulation 18 of the EIR.

a new request to another public authority who he considers may hold the information he is seeking.

Signed:

Judge John Angel

Dated: 23 April 2015

Corrected 11 May 2015