



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2015/0005**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50534860

Dated 8th December 2014

BETWEEN

Mr Patrick Marcus O'Hagan

Appellant

And

The Information Commissioner

Respondent

Determined at an oral hearing at Sheffield on 21st April 2015 and upon written submissions thereafter.

Date of Decision 14th September 2015

BEFORE

Fiona Henderson (Judge)

Jean Nelson

And

Dave Sivers

Representation

The Appellant represented himself

The Commissioner was represented by Ms Kerr-Morrison of Counsel

Subject matter:

s8 FOIA – information request

Case Law: *OGC v Information Commissioner and HM Attorney General on behalf of the speaker of the House of Commons [2008] EWHC 737 Admin*

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice dated 8th December 2014 which held that the Council correctly declined to deal with the request under FOIA.

Information Request

2. The Appellant wrote to the Council on 8th January 2014 advising that he wished to submit the following questions for the full council meeting that day. The questions were as follows:

Question for full council meeting 8-1-14 Libraries issues:

I would like to submit the following question(s) at the above meeting. I have attached a separate .rtf document with the following text: -

Question for Council Meeting on 8 January 2014 from Mr O'Hagan.

Costs and Savings

*1. The Council alleges it has calculated the **savings** that they wish to be made by reducing the number of libraries in the city.*

*Has the Council calculated the **COST** to the city of those closures, when was this cost calculated, by what method and by whom and where are the results publicly available?*

If I might explain. A recent study in a major city in Canada has shown that for every \$1 spent on libraries there is a return to the city of \$5.6.

[web reference given]

It is reasonable to conclude that the consequence of the proposed savings of £1.6M as given by [named Councillor] at a public meeting in Upperthorpe is that there is a concealed cost to the people of Sheffield of £8.96M? How does the Council justify this?

2. Where, when and by whom was the decision to consult on the closure of libraries made? Where are the minutes of those meetings published and where can the consideration of feedback from earlier consultations be found and can it be demonstrated that the council has been materially influenced by any consultation process?

3. Would the council be happy with a judicial review of the process surrounding the library “consultation” and decision-making process?”

3. The Appellant explained in that letter that he intended to record the answers at the meeting on 8th January. The questions were answered verbally at the full Council meeting on 8th January 2014.
4. On 9th January 2014 the Appellant wrote to the Councillor who had addressed his points verbally at the Council meeting and asked him to review his replies. He received no reply and on 10th February 2014 he complained to the Commissioner.
5. The Commissioner clarified that the request was submitted in writing and contained the Appellant's name and email address, his initial position was that this was a valid request under s8 FOIA in that it was in writing and contained an address for reply. He wrote to the Council recommending that they provide him with a written response to his initial request (as the response at the Council meeting was verbal) within 10 working days. However, following representations from the Council he concluded that they were entitled to decline to treat it as a FOIA request. The Council argued:

- a) The Appellant was utilising a separate procedure outside FOIA as part of the local democratic structure,
 - b) Treating these as FOIA requests would stifle the open approach which permits questions to be asked orally at Council meetings,
 - c) The request for the internal review was directed to the Councillor and not the Council.
 - d) The heading of the request was such that it should have been apparent that he was using a distinct mechanism for raising questions at the meeting.
 - e) If the Council were required to treat the request as a FOIA request, the Commissioner could challenge verbal answers given by Councillors at public meetings – it was not parliamentary intention to oversee a democratic process in that way.
6. The Commissioner compared the case to Parliamentary Questions, which is a mechanism for asking questions outside FOIA – and observed that the resolution was to write the request without reference to the oral meeting.

The Appeal

7. The Appellant appealed on 5th January 2015 on the grounds that:
- i. The Commissioner did not give the Appellant the opportunity to address the arguments raised by the Council which breaches its own procedure as stated in paragraph 14 of the decision notice.
 - ii. It was the custom and practice of the Council to answer these questions under FOIA.
 - iii The Council's arguments relating to the policy reasons why the request ought not to be considered under FOIA are ill considered.
 - iv Failure to treat the request as FOIA is antithetical to FOIA.

8. The Council did not apply to be joined and are not a party to this appeal. The Commissioner resists this appeal relying upon his decision notice.
9. The case was heard at an oral hearing where evidence was heard from Mr Martin Brighton (a member of the public who has over a decade of experience of asking questions at full Council, cabinet, scrutiny and housing committee meetings). Following the conclusion of the evidence the parties had commenced closing submissions. Lack of time meant that these were not concluded orally and directions were issued to enable both parties to conclude their submissions in writing. Both parties consented to this process. The Tribunal has taken all the material before the Tribunal at the oral hearing and the written submissions from the parties into consideration in determining this appeal (although it will not all be referred to directly in this determination). During the period allowed for written submissions, Mr Brighton (who was a witness but not a party to the case) submitted further evidence in writing on 2 occasions. The Tribunal has not taken this material into consideration for the reasons set out in the written rulings dated 21st May and 21st July 2015.

Scope

10. The Appellant argues that the Commissioner did not give the Appellant the opportunity to address the arguments raised by the Council. He maintains that this breaches its own procedure as stated in paragraph 14 of the decision notice.
11. The Tribunal has regard to the following chronology from the documentation in its bundle. In April 2014, the Appellant was told by the Commissioner that they had asked the Council to issue him with a written response within 10 working days, the case was closed and the Appellant was at liberty to bring it back to the Commissioner if he was not satisfied. Following this it is apparent from the email history that the Council provided the Commissioner with their arguments as to why they did not believe they should be expected to respond under FOIA. They chased the ICO a number of times and there was telephone contact between the Council and the Commissioner.¹

¹ The ICO caseworker has left and the ICO has been unable to find any notes of these conversations.

12. The Appellant chased the Council for a response and received a letter dated 19th September 2014² in which they stated the reasons why they maintained FOIA was not applicable and explained that the ICO was considering their interpretation. On 17th October 2014 the Commissioner wrote to the Appellant stating, “*your case will be allocated to an officer they will contact you to explain how your complaint will be progressed.*

If you wish to send any further documentation while the case is waiting allocation, please quote reference number []... ”³

13. The next contact was on 26th November 2014 when the Commissioner informed the Appellant:

*“... I am writing to advise you that a decision notice in this case has been prepared.
... ”⁴*

14. The Tribunal agrees with the Commissioner that he may form a preliminary view of a case and that following the submission of evidence or arguments he is entitled to change his view. We are also satisfied that the Appellant was aware (from the Council’s letter of 19th September), that they had made submissions to the Commissioner arguing that the request should not be processed under FOIA. In the letter of 17th October the Appellant had been notified that he could submit any further documentation whilst the case was waiting allocation. The Appellant has explained that he understood this to mean that when the case was allocated he would be told at that stage what further input was required from him, whereas the letter informing him of the progression of the case told him that the decision had already been made.

15. The Commissioner argues that he is not required to disclose submissions from one party to another or to solicit responsive submissions prior to reaching his final determination. The ICO’s position was that all parties had had the opportunity to

² P64 bundle

³ P85 bundle

⁴ P87 bundle

comment even if they had not been prompted to take up that opportunity. The Tribunal notes that section 50 FOIA is silent as to the process that the Commissioner should follow in reaching a determination. We accept that the letter of 17th October was ambiguous and that the Appellant's belief that he would be given a timetable for further participation was not unreasonable. In light of the Commissioner's change of approach and the time that had elapsed between the complaint and the allocation of a case officer in October, we observe that it would have been helpful had the Commissioner provided more information to the Appellant, however, it is not in our view an error of law. From the reasoning set out in the decision notice we are satisfied that the Commissioner took into consideration all the material before him and as set out above there is no obligation to ask for response submissions. We are satisfied that the appeal process provides a complete rehearing and the Tribunal is not bound by the Commissioner's findings of fact.

- 16.** The Tribunal observes that this case appears to have stalled during the investigation stage, there appears to have been different reactions from caseworkers as to the appropriate response to the case and delay arising from a change in personnel. It is also unfortunate that no notes of telephone calls between the original ICO caseworker and the Council could be found. The Appellant has corresponded with the Council relating to their failure to provide the written response as initially provided for by the Commissioner. In particular he objects to the Council's assertion in their email of 30th September 2014 that the ICO had "instructed" them not to process his requests for review so they were simply complying with this instruction.⁵ He has asked subsequent oral questions of the Council on this matter and included representations on this issue within the appeal bundle, however, these later oral questions are not the subject of this appeal. Nevertheless, the Tribunal would observe from the email correspondence in the bundle that this would appear to reflect the exchange wherein the ICO indicated that they were having discussion on the Appellant's case and would let the Council know the outcome, the Council asked if they should "hang fire" whilst they awaited the outcome to which the Commissioner's response was "yes please".

⁵ P81 bundle

Whether the request should be treated as a FOIA request

17. The Council rely upon their Constitution which provides:

15 Public Question Time and Petitions

15.1 At Council meetings

a) A period of up to one hour shall be allocated at each ordinary meeting of the Council for the presentation of ordinary petitions and for written or oral questions submitted by members of the public on matter relating to the City of Sheffield or the services provided by the Council to be answered by the Leader of the Council or the appropriate Cabinet Member..{Restrictions upon employees asking questions relating to their employment}...

b) Where a submitted question cannot be answered because time does not allow, or where a Cabinet Member undertakes to provide a written answer, the written answer will be provided within ten working days of the Council meeting and will be published on the Council website.

...

d) On the advice of the Chief Executive, the Lord Mayor may⁶ not accept questions which relate to:-

i) Matters not being within the responsibility of the Local Authority or which affects the City or its inhabitants,

ii) judicial or quasi-judicial matters,

iii) individual planning/licence/grant applications or appeals,

iv) named officers or Members of the Council,

v) confidential matters of the type referred to in Schedule 12A to the Local Government Act 1972; and

vi) matters of an irrelevant, repetitious, defamatory, frivolous or offensive nature or a general misuse of the opportunity.⁷

⁶ The Tribunal understands this to mean that following advice from the Chief Executive the Lord Mayor will exercise his/her discretion as to whether to permit questions on these topics.

⁷ p58 bundle email 8th April 2014

Mr Brighton's evidence was that this opportunity for the public to ask questions at Council meetings started around 1998/9 and continued notwithstanding the introduction of FOIA in 2005.

18. From Mr Brighton's evidence the Tribunal accepts that when a question is asked orally at a meeting the questioner can expect that either:

- a) The question will be answered orally at the meeting by an elected official,
- b) The question will be referred to a Council officer for a detailed response in writing, or
- c) The official will promise a personal answer after the meeting.

19. In their letter to Mr O'Hagan from the Interim Director of Legal and Governance and Monitoring Officer dated 19th September 2014 the Council sought to distinguish this procedure from the FOIA procedure stating:

- Questions asked at a public meeting are "business as usual" and are designed to facilitate a verbal exchange with elected members,
- Questions can be submitted in advance,
- Often questions are received verbally at the meeting,
- Previously submitted questions are altered by the questioner at the meeting,
- These are a question to a politician in a public forum,
- The response may have a political element to it.
- Questions are answered by elected members.
- When considering a FOIA request the Council assesses the request and identifies which officer or department is best placed to provide the most accurate response.

20. S 8 FOIA provides that:

(1) In this Act any reference to a "request for information" is a reference to such a request which –

a) is in writing

- b) states the name of the applicant and an address for correspondence, and*
- c) describes the information requested.*

Whilst the Commissioner accepted that the request complied with s8 FOIA in his decision notice (in that it was emailed to the Council and had Mr O'Hagan's email address for correspondence), having heard oral evidence on the point, the Tribunal is not so persuaded.

21. Mr Brighton's evidence was that although an experienced questioner might submit the question by email earlier in the day (as in this case) to enable time to prepare the answer, the majority of questions are provided half an hour before the meeting albeit that they are written on a slip of paper provided for that purpose. The Council's evidence to the Commissioner was that these questions can be varied when they are spoken orally. Mr O'Hagan confirmed this, although his recollection was that unless there was a substantial change, the question minuted is the written one. Mr Brighton said that people do ask different questions and supplementary questions with permission at the meetings in which case this is only oral and not written down (apart from in the minutes as the question and answer forms part of the public record).
22. Mr Brighton's evidence was that if the questioner did not attend to ask the question, the question falls in their absence (although there have been cases with the discretion of the Chief Executive when a question is asked in the questioner's absence, however, when this happens there has been supplementary communication and the question is read out on the questioner's behalf). If the member of the public does not show up and there is no proper explanation, it is not read out and not answered. What activates the question is the question being spoken, there is no expectation of a written answer (unless a questioner is told so on the day). Written answers are not placed online or attached to the minutes. Mr Brighton cited situations where there had been insufficient time for him to read out his question in which case it would not be dealt with in writing following the meeting, but it would be deferred to the next meeting when he would attend again to ask it orally.

23. The Commissioner seeks to provide an analogy with Parliamentary questions which provides a separate system from FOIA. He draws parallels with *OGC v Information Commissioner and HM Attorney General on behalf of the speaker of the House of Commons [2008] EWHC 737 Admin*. In this case Mr Justice Stanley-Burnton observed⁸ that in response to a Parliamentary Question, a Minister:

- May choose to disclose information notwithstanding it is exempt under FOIA,
- May disclose information to a Member of Parliament on terms of confidentiality that are not available if disclosure is made under FOIA,
- May refuse to disclose information disclosable under FOIA.
- FOIA rulings are judicially challengeable by Tribunal – bringing Parliamentary Questions within FOIA risked breaching parliamentary privilege.

The Tribunal is not satisfied that the analogy is particularly helpful. Councillors do not enjoy the benefits of Parliamentary Privilege and are not entitled to give answers which are e.g. defamatory, sub-judice or which breach other laws e.g. the Data Protection Act. However, it does appear from the evidence of Mr Brighton that answers given are not necessarily on the same terms as a FOIA response (ie without restriction and for public dissemination) because he states that on occasion a personal answer is given after the meeting. It does not appear that personal answers are minuted (as the evidence was that written responses are not included in the minutes) however, whether there is any mechanism for restricting the public dissemination of such an answer is not apparent. In light of the rest of our findings we are satisfied (having regard to the overriding objective as set out in rule 2 of the GRC rules) that it is not necessary or proportionate to adjourn to clarify this issue. The Commissioner argued that it was not Parliamentary intention that the Commissioner could challenge verbal answers given by Councillors at public meetings. The Tribunal is not assisted by this argument as verbal answers given by Councillors at public meetings are already subject to judicial scrutiny as unlike MPs⁹ they have no immunity from criminal or civil law.

⁸ Paragraph 51

⁹ When they are exercising Parliamentary Privilege.

24. We are satisfied that the submission of the email was conditional, it was not itself the information request and there was no expectation that it would be responded to unless it was asked orally at the meeting. As such we are satisfied that the minutes of the meeting and the email pre-notification of the request constitute a written record of an oral request.
25. Mr O'Hagan's submission was that if a member of public was happy with the response or could not be bothered to pursue an inadequate answer, FOIA would not come into play. He argued that it was fully engaged when a questioner wanted a review; whether FOIA was fully engaged would depend upon the gravity of the question and the importance of the request, which is why he had persisted with his question. He confirmed that he did not have FOIA specifically in mind when he made his request but at the back of his mind that he believed that he would be able to use the FOIA process.
26. The Appellant's arguments seem to amount to the expectation that a question will be processed under FOIA if a request for a review is received. However, there is only the right for a review under FOIA if the request was itself a FOIA request. Choosing to designate something as a FOIA request after it has been answered is not FOIA compliant.
27. Before the Commissioner, the Council argued that the request for an internal review was directed to a Councillor and not the Council. We do not accept that this would be a valid reason for failing to process a compliant request for recorded information. The terms of the request are clearly asking for information relating to the Council and as a member of the Council, the Councillor would be expected to refer any compliant request to the relevant department.
28. The evidence was that on occasion a questioner would write to the Council challenging an answer, or chasing a reply. Mr Brighton's evidence was that this was a review under FOIA, and that the letter would usually restate the request. His evidence was that he used to receive responses to these which would reference FOIA.

As set out below we are not satisfied that the Council was treating the oral requests as FOIA requests but we observe it may be that the receipt of a letter following on from a Council meeting may (depending upon its terms) have been treated as a fresh FOIA request and responded to as such. However, this is not the same as an internal review under FOIA of an existing FOIA response.

29. Mr Brighton asserted that the Council had always treated oral questions at meetings since 2005 as being made under FOIA until recently when it had become less helpful and changed its approach, however, from the evidence before us we are not satisfied that this was the expectation or practice of the Council:

- i. Under FOIA only recorded information that is held by the Council could be provided, ie not opinions, explanations, advice or political answers (unless already recorded),
- ii. FOIA responses require an applicant to be told of their right to an internal review and appeal to the Commissioner, there was no evidence provided at the hearing that this process had ever been followed in answering oral questions. The Constitution is silent as to the process to be followed if a requestor is not happy with the answer, and the evidence was that there was no formal process that the public were invited to follow by the Council. Indeed this appeared to be reflected in Mr Brighton's evidence which was that questioners had to work out their own approach; there was no universal procedure that was followed.
- iii. Refusal to provide information under FOIA requires the relevant exemption to be provided. Whilst Mr Brighton's recollection was that FOIA exemptions were given as the reason for refusing to provide information, this was not in oral answers given at the meeting but in correspondence. As set out above we are satisfied that it is more probable that this was in the context of "chaser letters" in which the requests were restated. We have had regard to paragraph 15 of the Constitution and the partial overlap between reasons why Councillors can refuse to answer questions (e.g. it is legally privileged) and FOIA exemptions. We are satisfied that just because a similar reason is given

for a refusal to answer questions to an exemption under FOIA does not mean that the FOIA exemption has been engaged and relied upon.

- iv. Some FOIA exemptions require a consideration of the public interest test pursuant to s2(2)(b) FOIA, there was no evidence before us that there was reference to or consideration of the balance of public interest in refusing to provide the information in response to oral questions at meetings.

30. During the hearing¹⁰ we were not pointed to any documentary evidence of a case where the Council could be shown to have treated an oral request at a Council meeting within the terms of FOIA, despite the fact that all answers appear in the public minutes.

31. We are satisfied that in referencing the Council meeting in his email, the Appellant is specifically taking himself outside of the FOIA provisions by invoking a different process which by its terms (as set out in the constitution) is not FOIA compliant. The Council procedure is often addressed to and answered by a named individual (who may not be the person best placed to answer it under FOIA), it has different time lines endeavouring to provide an “immediate” response, different exemptions many of which are more restrictive than FOIA (ie the restrictions on requests relating to individual planning and questions from employees about their employment) and it does not purport to be comprehensive. From the evidence we are satisfied that the process is not just used for requests for recorded information but asks for opinion, advice, political comment and to have a “gripe”, give a view point, or request provision of a service (the example given in evidence was: “Can we have a lollipop lady?”). Questions can be hybrids and can be clustered and responded to with a rolled up answer. Indeed the Appellant’s request contains 2 requests for recorded information and 2 requests for a subjective response which would not be within the scope of FOIA in any event. In providing the oral response (although it is minuted and thus it can be argued it has been provided in writing) the evidence was that there is no reference within the answer to the right to ask for a review or the right of an

¹⁰ As indicated above the Tribunal has confined its consideration to the information provided during the hearing.

appeal to the Commissioner. Whilst we accept that a FOIA request does not have to state that it is a FOIA request, we are also satisfied that where a request specifically invokes a different and parallel non FOIA compliant process the Council is entitled to rely upon the Applicant's categorisation of the request and deal with it within those parameters and thus being outside FOIA.

32. The Appellant argues that failure to treat his request as a FOIA request is antithetical to FOIA. He maintains that there is no explicit exclusion of the request under FOIA and no legal basis for the Council to allow their separate procedure to "take precedence" over FOIA. The Tribunal does not find that the Council have allowed their procedure to take precedence over FOIA or that the Council has circumvented FOIA. In our judgment the oral questioning opportunity is an additional process which operates outside FOIA. There is nothing to prevent the Appellant from making the request a FOIA request by submitting it without reference to the Council meeting process.
33. The Commissioner argues that transparency and accountability would not be served by turning all forms of engagement between the public and public authorities into FOIA requests that have to be processed in accordance with the Act. The opportunity to ask questions orally at meetings provides direct access to their Councillors who provide prompt on the spot verbal or written answers which promotes civic engagement and accountability. We accept the Commissioner's arguments and that were it to be FOIA compliant each request would merit the full rigour of a FOIA analysis of any information falling within its scope. There are numerous opportunities to ask questions orally: at the full Council meeting monthly, at Cabinet every 2-3 weeks, at scrutiny committees (which are each subject specific and each meet every 2 months). The Council would have to locate, retrieve and review all relevant recorded information and decide what was within scope and disclosable. We accept that this would have resource implications, and would not be feasible within the timescale envisaged under the oral questioning process. This supports our conclusion that the process fulfils a different purpose and is an additional democratic opportunity to engage with the public authority which is intended to operate alongside FOIA.

Conclusion

28. For the reasons set out above we refuse the appeal and uphold the decision notice.
Our decision is unanimous.

Dated this 14th day of September 2015

Fiona Henderson

Tribunal Judge