



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

Case No. EA/2015/0201

ON APPEAL FROM:

Information Commissioner's

Decision Notice No: FS50572039

Dated: 10th August 2015

Appellant: Lee Johnson

Respondent: The Information Commissioner

Heard at: Alfred Place, London

Date of hearing: 3rd February 2016 [

Date of decision:

**Before
CHRIS RYAN**

Attendances:

The Appellant appeared in person

The Respondent did not appear and was not represented

Subject matter: FOIA: Whether information held s.1

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This is an Appeal against the Decision Notice issued by the Information Commissioner on 10 August 2015 (“the Decision Notice”). The President of the General Regulatory Chamber has directed that the Appeal is suitable to be decided by a Judge sitting alone, without the assistance of lay members.
2. I have decided to reject the Appeal because the Decision Notice from which it emanates was correct in concluding that the London Borough of Redbridge (“the Council”) had been entitled to reject the Appellant’s request for information dated 30 November 2014 (“the Request”). The Request had been made under the Freedom of Information Act 2000 (“FOIA”) which imposes on the public authorities to which it applies an obligation to disclose requested information which it holds in recorded form. The Council refused the Request because it said that it did not hold any such information and the Information Commissioner agreed.

Background Facts

3. In 2009 the Appellant brought a claim in the Employment Tribunal against his then employer, a school located within the Council’s area of local government, and the Council’s Education Service. The Council’s Legal & Constitutional Services department (“the Legal Service”) handled the claim on behalf of both Respondents. On 3rd June 2014 the Employment Tribunal dismissed the claim. The Council then intimated that it proposed to claim costs against the Appellant and a hearing of that issue was arranged for 26th September 2014. The Employment Tribunal decided that costs should be awarded against the Appellant on the grounds that he had pressed ahead with a claim that had no reasonable prospect of succeeding.
4. In advance of that hearing the Council provided the Appellant and the Employment Tribunal with a schedule of the costs it intended to seek from the Appellant. This is normal procedure and the schedule was in common form setting out:

- a. The sums which the Legal Service had paid out, in the course of defending the claim, to solicitors, barristers and an expert witness. These totalled approximately £237,000.
- b. The claimed value of the work carried out by the Legal Service's own staff in preparing the Council's defence. These notional charges were assessed by applying an hourly rate of charge to the time spent by various categories of employee. This produced a claim of approximately £54,000.

With the addition of VAT the claim came to approximately £344,000.

5. In the event the Council appears to have limited its costs claim to just £20,000. The Appellant explained at the hearing that the concession was made because the Employment Tribunal Judge indicated that any larger claim would not be summarily assessed at the hearing, but would be submitted to a separate detailed assessment. In the event the Employment Tribunal made an award of £20,000.
6. On 29th July 2013, at a time when the Employment Proceedings had been under way for several years, the Appellant had submitted a FOIA request to the Council in these terms:

"1, How many Employment Tribunal claims against the London Borough of Redbridge are currently in progress?"

2, What are the internal legal department costs for these Employment Tribunal claims that are in progress.

3, What are the external legal costs for these Employment Tribunal claims that are in progress.

4, What are the HR department costs for these Employment Tribunal claims that are in progress."

The Council replied on 29th August 2013 as follows:

"1. There are currently 49 claims in progress.

2. The Council does not hold the internal legal department's costs for current Employment Tribunal claims.

3. The external legal costs that are solely attributable to current Employment Tribunal claims is £145,262.26.

4. The Council does not hold the HR costs and expenses for current Employment Tribunal claims"

I will refer to the Council's response as "the August 2013 costs estimate".

The Request and the Information Commissioner's investigation into the Council's response to it

7. On 30th November 2014 the Appellant sent a request for information to the Council, which the Council refused in a letter from its Business Manager, Legal and Constitutional Services dated 24th December 2014. On 29th January 2015 the Borough Solicitor and Secretary wrote to the Appellant on the Council's behalf to inform him of the outcome of an internal review which he had carried out into the original refusal, at the Appellant's request. That letter set out each element of the Request, followed by the Council's original response with the further comments resulting from the internal review shown in bold text. It was in the following terms:

"A recent Employment Tribunal claim provided a Schedule of Costs by Redbridge for £344,000.

In your FOIA response of August 2013 to my "ET Claims in Progress" request you responded that the costs of 49 Employment Tribunal claims in progress was £145,000.

Questions:

1. *Why did you omit the costs of the claim from your August 2013 FOIA response?*

The Authority does not hold this information in any recorded form and therefore cannot provide this information pursuant to the Freedom of Information Act 2000.

I would further observe that the costs statement in question was compiled, as is usual practice in ET cases, at the point in the authority's litigation with you when it fell due.

2. *Did you at any time consider the benefit of pragmatically settling the claim, as opposed to incurring £344,000 losses with no prospect of recovery?*

The Authority does not hold this information in any recorded form and therefore cannot provide this information pursuant to the Freedom of Information Act 2000.

I would further observe that this is a request not for information held, but for a statement of opinion on the merits of the Council settling a claim that from the outset was perceived as, and turned out to be, meritless. The relevant costs order of the ET, which I attach, is clear in its findings (para 12ff) that costs were due on the basis that your claims were found at an early stage to have no prospect of success. The Council cannot

and does not settle claims that are devoid of merit to avoid the inconvenience of litigating them.

3. *Have your costs of £344,000 for this single Employment Tribunal claim been advised to your internal audit team, and to your external auditors?*

The Authority does not hold this information in any recorded form and therefore cannot provide this information pursuant to the Freedom of Information Act 2000.

I can add nothing to this response in FOIA handling terms. I would observe, however, that the Council is duty bound, under the discharge of its fiduciary duty to its Council tax payers, to seek full costs recovery orders in appropriate cases. You are already aware, from the Costs Statement, of the huge amount of time and expense that had to be invested by the Council and the Governing Body of your former employer in resisting your case in the ET.

4. *Have your internal and external auditors raised any concerns regarding this significant loss of £344,000 of public funds?*

No

I have nothing to add here.

5. *On which page of the council's account, and under which heading, are these wasted Employment Tribunal costs identified.*

The Employment Tribunal costs are not directly identified in the Council's accounts.

I would offer this observation. The Council's and the Governing Body's solicitors' costs in this case were, from the point that Legal Services assumed the conduct of the case, met through the terms of the annual recharge by Legal Services to its relevant client Service Area. No additional liability, in terms of actual sums paid out, was incurred in respect of these costs. Counsel's fees were, on the other hand, directly expended. The law is clear, however, that an authority is entitled to include its internal costs of in house legal staff time to no lesser degree than its disbursements on Counsel's fees when framing a merits cost claim at the end of a case."

8. The Appellant complained to the Information Commissioner about the response he had received to the Request. His complaint summarised the history of his dealings with the Council, in particular the response he had received to the information request he had submitted in August 2013. It then concluded:

“I make a renewed complaint that Redbridge have provided false responses to my valid FOIA requests, and, Redbridge have made false statements to the ICO in response to my assessments concerning their false responses.”

9. At the outset of his investigation the Information Commissioner clarified its scope in a letter to the Appellant. The relevant section of the letter read:

“...I will investigate whether the Council is correct when it says that it does not hold the information to questions 1-3 of [the Request]”

10. The Appellant did not object to that explanation, although some of the comments he has written from time to time (during the course of both the investigation and this Appeal) suggest that he has other issues on his mind. These have included:

- a. The Council may have disguised the relevant costs data and/or kept it from the Council's auditors by separating out the functions of its legal services division.
- b. Information previously provided by the Council had been incorrect.
- c. The Council had previously mishandled requests by the Appellant for his personal data in a way that breached the terms of the Data Protection Act 1998.
- d. The Council has wasted funds on Employment Tribunal claims and/or summonses for Council Tax arrears.

11. The Information Commissioner stated, on a number of occasions in correspondence and in the Decision Notice, that the FOIA, (which defines the functions he is authorised to perform in respect of freedom of information issues) does not give him authority to rule on the issues raised by the Appellant. In particular, he said, he does not have jurisdiction over questions of whether information disclosed by a public authority was accurate.

12. The Information Commissioner pursued his investigation into the issue which he had said he would focus on and on 7th July 201 asked the Council a number of questions. The key question, in light of the agreed focus of the investigation, was:

“What searches were carried out for information falling within the scope of this request and why would those searches have been likely to retrieve any relevant information?”

13. The Council's reply to that question, in an email dated 27th July 2015, read:

“Searches were made against Legal Services records for figures for final, crystallised, costs in ET cases at the date of Mr Johnson’s original FOIA request of August 2013. The crystallisation of the total costs in his proceedings came later. Hence no information in respect of costs in his case was included in the response to his request”

The Decision Notice

14. The Decision Notice recorded the agreed form of the Information Commissioner's investigation and stated, correctly, that his approach to any case where there is a dispute as to whether a public authority holds recorded information was to consider whether, on the balance of probabilities, it held such information and had not already disclosed it to the Appellant.
15. That test was then applied to each of the three elements of the Request still in dispute at that stage (parts 1-3 of the Request), taking into account the submissions made by both sides. The conclusions reached (ignoring some comments on the submissions summarised in paragraph 10 above, which were rightly regarded as irrelevant) were as follows:
- a. The Information Commissioner had found no evidence that would justify refusing to accept the Council's claim that it did not hold any further information.
 - b. The Information Commissioner accepted the Council's submissions regarding the searches it had said it had carried out. In this respect he recorded the Appellant's scepticism about the perceived discrepancy between the August 2013 costs estimate and the submission of a £344,000 claim to recover costs from him in September 2014. However, he characterised that as a complaint about the apparent inaccuracy of the information provided previously. He did not think it supported the Appellant's case that additional information was held by the Council and had not been disclosed in response to the Request.
16. On the basis of that reasoning the Information Commissioner concluded that the Council did not hold any further recorded information which was relevant to the Request.

The Appeal to this Tribunal

17. On 12th August 2015 the Appellant lodged an appeal against the Decision Notice with this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section I am required to

consider whether the Decision Notice is in accordance with the law. I may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. I may, in the process, review any finding of fact on which the notice in question was based. It follows that Parliament has given this Tribunal no powers to investigate the other issues which the Appellant raised during the Information Commissioner's investigation but which, rightly, did not feature in the Decision Notice.

18. The Appellant's Grounds of Appeal were quite short. They recorded, in short form, the history of the Council's rejection of the Request and then simply stated that the Council's case that it did not hold any information was "*absurd*". That was followed by:

"I do not agree with the ICO decision and I appeal to the Information Tribunal"

Later, the Grounds of Appeal record what the Appellant sought from his appeal as:

"I want LB Redbridge to respond to my FOI questions regarding the £344,000 Employment Tribunal costs, and why these costs were omitted from my previous FOI request."

19. The Appellant asked that his Appeal be determined at a hearing, rather than on the papers. He is entitled to that method of determination. However, the Information Commissioner opted to rely on his written Response and not to attend the hearing.

The arguments presented by the Parties

20. The Information Commissioner's Response argued that the apparent discrepancy between the August 2013 costs estimate and the September 2014 cost figures should be disregarded as a factor relevant to the issue in dispute. It arose, he argued, from a misunderstanding on the Appellant's part. The August 2013 costs estimate related to "*external legal costs*" attributable to Employment Tribunal claims (which I infer to mean the sums paid out to third parties) and would not have covered the notional charges attributed to individual employees for the work they had done. That figure, effectively a work in progress valuation, would only have come to be recorded when, at a later stage, the Council formulated the figure which it intended to recover from the Appellant.
21. The Information Commissioner also drew attention to the questions he had put to the Council about the searches it had undertaken and the responses which he had been given. He argued that he had been fully justified in concluding that, on the balance of probabilities, no further information was held.

22. On 31st October 2015 the Appellant filed a Reply to the Response, which did not contain any argument relevant to the issue I have to decide, but included a request that a particular employee of the Council should be required to provide a witness statement “*explaining how he has conveniently forgotten all details of a £344,000 costs schedule and how [the Council] has conveniently not found any documents concerning the £344,000 costs schedule that he personally had responsibility for*”. The Tribunal Registrar treated that part of the Reply as an application for an order requiring such evidence to be filed. The Tribunal Registrar rejected it on the ground that it would be inappropriate. The Registrar also gave directions for the preparation of a bundle of relevant documents for use at the hearing and gave the Appellant the opportunity to make further written submissions in advance of the hearing date. He did so, in the form of a three page witness statement, which complained about a number of issues which have, I am afraid to say, no relevance to the Appeal. However, it did include this passage:

“I believe that the Information Commissioner’s decision is incorrect;

- It is clear that the Local Authority does have the information.*
- It is absurd that the very same person who signed the Employment Tribunal Schedule of Costs for the London Borough of Redbridge, now states that the Local Authority has no knowledge of these Employment Tribunal costs.”*

23. The Appellant repeated, at the hearing, the points he had made in his written submissions and helpfully clarified some points which were not clear to me. In that connection I asked the Appellant to clarify a statement which appeared in an email he had sent to the Information Commissioner on 4th April 2015, during the course of the investigation. It read:

“In his FOIA response [named Council employee] states that ‘The Authority have no knowledge of these ET costs at £344,000’ ”

As I had been unable to find any document in the bundle containing such a quote I asked the Appellant to clarify whether it was a genuine quote (in which case I asked him to identify it) or whether it was his own précis of what he considered the Council to have said. He was unable to do either at the hearing and I therefore invited him to provide me with a copy of the document which was said to contain the words quoted. Mr Johnson subsequently wrote to the Tribunal explaining that he had not located any document containing the words quoted and that he thought they probably represented his own “*wording/phrasing of the Redbridge statement that they do not hold the information requested.*”

My conclusions on the issues raised by the parties

24. I have laid emphasis, in paragraphs 22 and 23 above, on the Appellant's interpretation of what he believes the Council to have said. I have done so because I believe that it is evidence of a misunderstanding of the Council's position. The Council does not say that it has no knowledge of the costs schedule, any more than it says that it has no knowledge of the August 2013 costs estimate. What it has said, consistently and clearly, is that its searches did not bring to light any documents, in either hard copy or electronic form, which recorded any decision to omit the costs incurred in the Appellant's Employment Tribunal case from the August 2013 costs estimate.
25. The difficulty facing the Appellant is that the first part of the Request did not constitute a request for information. It asked for an explanation. The Council and the Information Commissioner appear to have interpreted it as, in effect, a request for information recording any decision to omit from the August 2013 costs estimate the whole or part of the figures which subsequently appeared in the September 2014 costs schedule. I am not surprised that, interpreted that way, the first part of the Request generated a negative response. First, the Council has said that the apparent discrepancies did not result from a deliberate decision to "omit" anything, but from the Appellant's misunderstanding of what each of the estimates was intended to cover. And second, I would add, had such a decision been made it seems very unlikely that the reasons for reaching it would have been recorded.
26. Having said that, I can sympathise with the Appellant's concern about the apparent discrepancy. I have set out a breakdown of the September 2014 costs schedule in paragraph 4 above. Removing the notional value placed on the Legal Services work in progress, as well as the VAT figure, one is still left with sums paid to, or incurred with, third parties, which totalled £237,000. Some of those costs would have been incurred between August 2013 and September 2014, but it seems to me at least likely that a not insignificant portion would have been incurred (or, in the Council's term, been "crystallised") between the commencement of the Employment Tribunal case in 2009 and the date when the August 2013 costs estimate was provided. That throws a degree of doubt on to the assessment that a total of 49 claims had not given rise to more expense for the Council than the £145,000 figure mentioned in the August 2013 costs estimate. It may result from the Council's searches having been limited to completed cases (see the reference to "*final, crystallised, costs*" in the response to the Information Commissioner quoted in paragraph 13 above) although it is questionable whether that would have been an appropriate response to a request which had referred to cases that were "*currently in progress*".
27. I do not agree with the Information Commissioner that any discrepancy must be disregarded on the ground that it goes to the accuracy of the

August 2013 costs estimate and not the credibility of the Council's assertion that it does not hold any information. It seems to me that a large and unexplained discrepancy might well have undermined credibility. However, on the facts of this case, it seems to me that the questions raised, although throwing doubt on the accuracy of the August 2013 costs estimate, are not so serious or fundamental as to suggest that the Council's response to this part of the Request was wrong.

28. The second and third elements of the Request may be dealt with more succinctly, in part because the Appellant concentrated his efforts on the first part, as discussed above. The second part was, again, not really a request for information but a criticism of the Council's decision-making, disguised as such a request. The response received is therefore not surprising and no argument was put before either the Information Commissioner or this Tribunal suggesting otherwise. The response to the third part was equally credible – decisions on how expenditure and other liabilities are reported to internal or external auditors might well not be recorded in the sort of detail that would have generated hard copy or electronic documents identifying the costs relating to the Appellant's Employment Tribunal proceedings. In those circumstances the Information Commissioner was entitled to rely on what the Council had told him about the searches it had conducted and the negative outcome that had resulted.
29. In light of those findings I conclude that the Information Commissioner was not in error in concluding that the Council did not hold information, falling within any part of the Request, which it had not disclosed to the Appellant. The Appeal must therefore be dismissed.

.....

Judge
2016