



Neutral Citation Number:

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

Appeal No: EA/2015/0295

ON APPEAL FROM:

The Information Commissioner's Decision Notice

No: FS50590290

Dated: 26th, November 2015

Appellant: Andi Ali (AA)

Respondent: The Information Commissioner

Heard on the papers

Before

David Farrer Q.C.

Judge

and

Melanie Howard

And

Dave Sivers

Tribunal Members

Date of Decision: 20th. May, 2016

Subject matter: FOIA s.1(1)(b)

Whether the ICO communicated to AA the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed. The ICO communicated the requested information to AA before his complaint to the Commissioner. The Tribunal does not require the ICO to take any further steps.

Abbreviations

The DN

The Commissioner's Decision Notice relating to this appeal.

FOIA

The Freedom of Information Act, 2000.

The ICO

The Information Commissioner in his capacity of public authority subject to FOIA

The Relevant Statutory Provisions

FOIA 2000

1.— General right of access to information held by public authorities.

(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.

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(1) Information which is reasonably accessible to the applicant otherwise than under s.1 is exempt information.

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

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him –

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45.

(b) that there has been undue delay in making the application.

(c) that the application is frivolous or vexatious or

(d) that the application has been withdrawn or abandoned.

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All references in the form “s.21” are references to provisions of FOIA.

REASONS FOR DECISION

The Background

1. This appeal seems to raise questions of terminology rather than of the right to information.
2. The public authority to which the relevant request was addressed was the ICO. That made him both the object of the complaint and the initial

adjudicator. In this decision we refer to him in the former role as the ICO and in the latter as “the Commissioner”.

3. The ICO is included in Part VI of Schedule 1 to FOIA as a public authority to which FOIA applies. Parliament must therefore have foreseen the possibility of requests for information made to him, of his refusal and of a complaint against such refusal being made to him. It did not provide for any special procedure in those circumstances.
4. The absence of any such provision may reflect the limited nature of the Commissioner’s quasi – judicial powers. He may issue decision notices (s.50(3)(b)), information notices (s.51(1)) and enforcement notices (s. 52(1)) requiring a public authority to take prescribed steps. He has, however, no direct power of enforcement in the event of a failure to comply but has the power to certify such failure to the court which may then proceed as for an alleged contempt of court (s.54(1) and (3)). His investigation is not a judicial function; ECHR Article 6 is not engaged. His decision can be tested before the Tribunal as a rehearing, not a form of judicial review.
5. We are bound by the provisions of FOIA anyway. FOIA implicitly provides that the Commissioner is under a statutory duty to investigate a complaint against his own office as against any other public authority. His office is well able, at a practical level, to separate the functions of public authority from those of investigator. It clearly did so here.

The Request

6. On 12th. May, 2015, AA requested the following information from the ICO:
“(1) Between 2012 and 2015, how many complaints were made against the Civil Service Commission for failure to release information under the Freedom of Information Act ?
(2) How many times did you find in the CSC’s favour that they did not need to release this information ?
(3) How many times did you force the CSC to release this information?”
(4) If the answer to question 3 is one or more, then please provide the Decision Notice/Notices showing you forced the CSC to release the information.”

The ICO, subsequent to his initial response, interpreted references to “forcing” the CSC to disclose information as references to the ICO upholding a complaint against the CSC and ordering disclosure. So do we.

7. The ICO responded on 26th. May, 2015. He provided a spreadsheet identifying complaints against the CSC received from 2012 until the date of the request, including the outcome of each.
8. As to (1), he stated that there had been nine complaints.
9. As to (2), he replied that four complaints were recorded as “not upheld”.
10. As to (3), one complaint had been upheld.
11. As to (4), the ICO referred AA to the Commission website, where the decision in (3) was readily accessible. He stated that FOIA s. 21(1) therefore exempted the ICO from provision of a copy of the relevant decision notice.
12. The response also explained that not every complaint culminated in a decision notice.
13. On 31st. May, 2015, AA requested an internal review of this response. He complained that he could not locate any decision notice which upheld a complaint against the CSC and “forced them to release information” (Request (3)). He further inquired as to the outcomes of the other four complaints to the ICO (i.e., total of nine complaints, less one upheld and four rejected). The spreadsheet appeared to provide exactly that information.
14. Replying on 9th. June, 2015, the ICO explained that a complaint to the ICO may be upheld without a requirement that the public authority make any disclosure, e.g., where the authority has disclosed the requested information by the date of the decision notice. He identified the upheld complaint as being just such a case but proceeded to offer an amended answer to request 1 – namely that the ICO did not hold any information as to “How many times did you force the CSC to release this information”. This was evidently an incorrect answer but not one likely to confuse the requester as to the true position.

15. Any hopes of the ICO that this reply might avoid the need for an internal review were soon dashed. On 13th. June, 2015 AA demanded that the ICO “stop trying to avoid (the request) by hiding behind waffle”. He wanted the number of times that the ICO forced the CSC to release information under FOIA and provision of all the supporting documentation.
16. On 22nd. June, 2015 the ICO corrected his answer to request (3) with the figure “0”. That being so, the answer to (2) rose from four to five, even though the complaint was upheld. Request 4 did not arise.
17. On 10th. July, 2015 the ICO responded to the request for an internal review by maintaining that the answers that he had given were correct and answered the requests. He reviewed the exchanges since the request to justify his stance.
18. AA complained to the Commissioner under FOIA s.50, asserting that the ICO had refused to give the information that he had requested.
19. By the DN dated 26th. November, 2015, the Commissioner found that the ICO had provided the requested information and required no further action to be taken. He also found a breach of s.10, in that the information had not been provided within twenty working days. Nothing hinges on the latter finding.

The appeal

20. AA appealed on 17th. December, 2015. His grounds of appeal were that :

“The Information Commissioner has not given the information I asked for, neither have they given a valid reason under the Freedom of Information Act for doing so.”

21. The Commissioner responded on 19th. January, 2016. He referred to the spreadsheet, the subsequent explanations and corrections and submitted that the requested information had been provided.
22. AA replied to this response by arguing that, in the four cases variously designated as “closed - frivolous”, “closed Not s.50” and “closed – insufficient evidence”, the Commissioner had made findings in favour of the CSC and that his answers were therefore wrong, He knew that they were wrong and was attempting to deceive the Tribunal by using both the terms “concerns” and “complaints”. This involved an improper separation of formal from informal complaints made to the Commissioner, which resulted in the concealment from AA of informal complaints against the CSC, hence the true answer to request 1.
23. The emergence of this new issue led to a direction from the Chamber’s President that the Commissioner state whether the answer to request 1 included complaints against the CSC that might be regarded as informal in nature and, if not, whether any further complaints had been identified that were regarded as informal. The Commissioner confirmed in his response that he used the terms “concern” and “complaint” interchangeably and that the information provided included all complaints or concerns raised with the Commissioner in the relevant period. This was plainly a complete response to the direction and the Chamber’s President refused to make any further order. AA could challenge its accuracy, if he chose.

The reasons for our decision

24. A complaint, in the context of FOIA, hence of these requests, is a complaint to the Commissioner under s.50(1). The applicant for a decision from the Commissioner is referred to in s.50(1) as “the complainant”. The only reasonable interpretation of request (1) is as a request for the number of s.50 complaints made since 2012 in respect of refusals of information by the CSC. AA’s belated attempt to broaden the scope of his requests in his Reply must therefore fail in any event. However, the Tribunal accepts the accuracy of the Commissioner’s answer to the President’s direction, namely that there is only one category of complaint, whether termed “concern” or “complaint”; it is the s.50 complaint. This is fully born out by the use of the word “concern” in the spreadsheet; its further appearance at §34 of the Response clearly refers to s.50 complaints listed in the spreadsheet.

25. Subject to exemptions and other good reasons for refusal, the duty of a public authority to which a request for information is addressed is to communicate the responsive information that it holds in the form in which it is recorded (see s.1(1(b) and s.84). It is not required to answer a series of questions nor to interpret the information that it holds in accordance with the demands of the requester.
26. The spreadsheet, which we have carefully read, is evidently the record held by the ICO which contains the requested information. It was provided as soon as the requests were received. What followed was a pointless linguistic exercise, conducted by AA, dealing with whether a particular outcome amounted to a finding in favour of the CSC, apparently in the context of AA's suspicions that the CSC controlled the funding of the Commission and was threatening to withhold or reduce it if the Commissioner found against it.
27. If AA chose to regard closures of investigations without decisions ("closures") as findings in favour of the CSC and thus support for his suspicions, that was a matter for him. He had the information in the spreadsheet and the subsequent explanation as to why not all investigations led to a decision notice and why a complaint against a public authority could be upheld without a requirement to disclose information.
28. Whether the ICO was right or wrong in refusing to treat closures as findings is immaterial. In the context of request 2, it is a matter of mere terminology. AA got what he asked for – the information held by the ICO within the scope of his request.
29. However, the Tribunal has no doubt that the ICO was right, as a matter of law, to restrict the meaning of "findings" to formal findings in a decision notice giving rise to the decision. FOIA s.50(2) creates a clear distinction between applications requiring a decision and four classes of application that do not. They include applications which are frivolous or vexatious (s.50(2)(c)). None of those classes requires a decision, hence any finding. The Tribunal is satisfied that each of the four applications classified as "closed s.50" fell within s.50(2)(a) – (d).

30. For these reasons the Tribunal finds that the ICO fully answered AA's requests.

31. This appeal is therefore dismissed.

32. This a unanimous decision.

David Farrer Q.C.

Tribunal Judge

20th. May, 2016