



Tribunals Service

Information Tribunal

IN THE INFORMATION TRIBUNAL

Ref EA/2006/0067

BETWEEN:

JOHN JENKINS

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Additional Party

RULING

1. Pursuant to regulation 14.8 of the Information Tribunal (Enforcement Appeals) Rules 2005, and paragraph 23 of the directions dated 29th November 2006, I am in receipt of an application by the Department for Environment, food and rural affairs (Defra) concerning the contents of the agreed bundle in this case. I am asked to give a ruling on this point.
2. Defra submit that correspondence between the VMD and the Information Commissioner which was created during the original section 50 FOIA investigation ought not to be included in the bundle.

3. This application is resisted by the Information Commissioner, I have not received any submissions from Mr Jenkins on the point, neither have I seen the draft index of the bundle or the disputed correspondence that is the subject of this application.
4. Defra argues that given the nature of the review by the Tribunal and the fact that the full case will be put through witness statements and skeleton arguments, the correspondence between the VMD and the Commissioner is irrelevant to the appeal. They argue that the Tribunal will determine the case on the basis of the evidence submitted at the full hearing and there is no need to include the correspondence in the hearing bundle.
5. They further raise the point of principle that in many cases such correspondence would refer to withheld material which would require redaction and the preparation of separate bundles.
6. Defra rely upon the fact that the Tribunal is not limited to the question of whether the Information Commissioner's decision itself was reasonable, nor are they limited to the evidence that was before the Commissioner. Instead the Tribunal is able to substitute their judgement based upon all the evidence that they have heard.
7. In this case, the Commissioner submits that the correspondence in question is relevant and ought to be included in the bundle.
8. The Commissioner does not dispute that the Tribunal may substitute its own view if it considers that the Commissioner's decision was wrong and consider material that was not before the Commissioner. However, the Commissioner relies upon section 58(1) (b) of FOIA which deals with cases where the Tribunal must consider:
“to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently..”

9. The issues in the appeal have been limited by the directions dated 29th November 2006 to the following matters:
- i. Whether the public interest test was properly applied by the Information Commissioner (the Commissioner) in relation to the application of the Section 43 FOIA 2000 exemption,
 - ii. Whether the public interest test was properly applied by the Commissioner in relation to the application of the Section 41 FOIA 2000 exemption,
 - iii. Whether the Commissioner was correct to conclude that the costs limit under sec 12 FOIA had been reached.
10. These are clearly issues where the Tribunal is expected to consider whether the Commissioner should have exercised his discretion differently. I am satisfied that in order to determine these issues the Tribunal would need to understand the nature and depth of the investigation that took place and the state of the information before the Commissioner when he made his decision. This will be evidenced by the correspondence that was exchanged between VMD and the Commissioner, and consequently the correspondence is relevant to this appeal.
11. I therefore direct that this correspondence be included in the bundle.
12. In the event that withheld information is referred to in any of this correspondence, I hereby direct that such portion as it is alleged should be withheld is served in confidence upon the Tribunal, the Information Commissioner and Defra but not Mr Jenkins at the same time as the final version of the open document bundle.

Dated this 7th day of February 2007

Fiona Henderson
Deputy Chairman