First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0217

Before

Judge

David Farrer Q.C.

Tribunal Members

Anne Chafer

and

Alison Lowton

Between

Brian Maloney

Appellant

and

The Information Commissioner ("The ICO")

Respondent

Mr. Maloney appeared in person

Michael Armitage appeared for the ICO.

Decision and Reasons

The Tribunal finds that the request for information did not comply with FOIA s.8(1)(b) and that, having regard to FOIA s.11(1) and without prejudice to that finding, it was not reasonably practicable for Dulverton Junior School ("the School") to provide a response in the requested format. It was, therefore, not required to disclose to Mr. Maloney the disputed information. So the Decision Notice ("the DN") was, in accordance with the law. This appeal is therefore dismissed. The School is not required to take any steps.

References in the form "s.8(1)(b)" are to that section/ subsection/paragraph in the Freedom of Information Act, 2000.

The Background

1. The first issue in this appeal, arising from the wording of s.8(1)(b) is – what is "an address for correspondence"? The second is whether the request for information, to which this appeal relates, stated such an address. If the answer to the latter question is "yes", then the third (contingent) issue is whether it was reasonably practicable for the School, the recipient of the request, to comply with Mr. Maloney's request as to the format in which the requested information should be provided (see s.11(1)).

2. Mr. Maloney undertook a survey of the way in which schools handled the problem of equal treatment of separated parents. He is a very experienced and skilled user of web – based communication. His scheme involved sending Emails from a No Reply address to a very large number of schools. It contained a substantial number of questions on the subject referred to above, the content of which is immaterial to this appeal.

3. The Email asked them not to reply to the Email but to respond by clicking on a response button to access a website or to refuse or seek clarification. If the respondent's finger hovered over the response button, the website address became visible.

4. The website page to which the response button gave access was pre – populated with the name and Email address of the School but no Email address at which Mr. Maloney could be contacted. It included a "Submit Response" button to trigger the transmission of the requested data to a further destination, presumably a database. Mr. Maloney stated in evidence that, after the initial response, the same link could be used for further communications with him, if necessary.

5. The School received a request in this form on 23rd. February, 2017. It refused it on the following day on the ground that the Email request contained no address for correspondence. A "No Reply" email address" is just that. Hence there was no request for the purposes of s.1. If there is in law no request, then, plainly no duty arises under either s.1(a) (informing the requester whether the public authority holds the requested information) or 1(b) (communicating that information).

6. It stood by that decision following an internal review.

7. Mr. Maloney complained to the ICO. The Decision Notice ("the DN") upheld the School's refusal. It concentrated largely on the last issue, practicability, concluding that the School was entitled to decline the request to use the response button on the ground that it would breach reasonable cyber security, as reflected in advice and guidance to staff. It also found that the response button was not "an address" within s.8(1)(b). Mr. Maloney appealed to the Tribunal.

8. His grounds of appeal were expanded in later written submissions and illustrated with a range of documentary exhibits, including examples of communications from government departments which used website addresses and summaries and examples of other schools' responses to the same request.

9. In summary he submitted-

   (i) His website was an "address for correspondence". It was no different from the addresses used by Twitter and whatdotheyknow.com ("WDTK") for requests for information. Government departments and other public authorities routinely used responses to their websites to communicate with the public. Email servers and websites are both URLs.

   (ii) His website was secure. He described how it functioned. Websites provided less unauthorized access to data than mail servers which store Emails

   (iii) It was reasonably practicable for schools to use the hyperlink to his website, given the protection against malware which their computer systems provide and the instruction available to staff and pupils.

   (iv) Many schools which initially refused to use the Email response button nevertheless subsequently visited Mr. Maloney's website via the response button, evidently with no further concerns as to security.

10. The ICO argued that the requesting Email contained nothing resembling an address and that an initially invisible website address which was revealed by hovering over the link did not satisfy the s.8(1)(b) requirement. Furthermore, a website address, which received communications from those who used the response link, could not reply and was not "an address for correspondence". Anyway, if Mr. Maloney's system complied with s.8(1)(b), it was not reasonably practicable for the School to use it, since it could not know in advance whether using the hyperlink might expose its systems to some kind of malware nor where its information was going.

11. Dr. Nigel Houlden, the Head of Technology Policy for the ICO, gave expert evidence at the hearing as to the ways in which Emails and URLs are used for communications. He demonstrated the incompatibility of Email and URL addresses. He emphasized the impossibility of sending an Email to a website or obtaining any direct response from a website, whether to an Email or a completed message on a webform, such as Mr. Maloney used here. He stated that a webform is not itself an

address, rather a means of delivery of the submitted data to a database. He distinguished the means of sending requests used by Twitter or by WDTK. Twitter enabled users to exchange information much like Email users; WDTK transmitted requests received on its website by Email to the public authority and received Emails in response. He dealt in detail with the security issues involved in the use of hyperlinks, especially for a public authority like a school which held a large amount of personal data, including sensitive personal data.

12. Mr. Maloney provided a detailed written critique of Dr. Houlden's statement before the hearing and cross – examined him at the hearing. The broad thrust of his approach was as summarized above. The Tribunal studied his response with care. The factual disputes were limited. The significant differences lay in the assessments of what amounted to "an address for correspondence" and what a school might reasonably be expected to do or to know when confronted by a request for information on the terms proposed by Mr. Maloney.

The reasons for our decision

13. Section 8(1)(b) reads-

"In this Act any reference to a "request for information" is a reference to a request which-

. . . .

(b) states the name of the applicant and an address for correspondence.

14. The Tribunal finds that this appeal falls at the first hurdle. "An address for correspondence" requires, we find, a reciprocal facility, because "correspondence" implies a two – way dialogue. The Oxford Dictionary defines this use as "communication by exchanging letters". The prefix "co" denotes an activity involving two parties. It means, in the FOIA context, a postal or electronic address to which the public authority can send a response and any subsequent related communications and from which it can expect the requester to reply. An Email address plainly fulfils that requirement and was certainly within Parliament's

contemplation in 2000. (see, for example, the reference to a request *"transmitted by electronic means"* in s.8(2)(a)).

15. A website is an address but not an address for correspondence because it does not provide reciprocity. The webform used by Mr. Maloney was simply a vehicle for transmission of data to an unidentified website. The fact that Mr. Maloney replied to any submitted data by Email makes the point of itself.

16. If, contrary to our finding, a website could constitute an address for correspondence, the response button did not state the required address. The statement must be legible without the need for any form of manipulation by the receiver, of the need for which he/she may be quite reasonably unaware.

17. The address must be stated on the request. Its inclusion on a webform, accessible via a hyperlink does not suffice. There is, in any event, nothing in the webform amounting to such an address.

18. Comparisons with the practice of government departments in handling requests and otherwise are irrelevant. They are not requesters of information, subject to s.8.

19. If Facebook, Twitter or WDTK had been successfully flouting the requirements of s.8, that would not avail Mr. Maloney. However, we are satisfied by Dr.Houlder's evidence that they were not. All were providing addresses for correspondence which could carry two – way traffic.

20. The construction of "an address for correspondence" is not simply a pedantic literal reading of s.8(1)(b). A public authority is entitled to know the destination of information or other communications that it is sending or transmitting and, especially where electronic messages are involved, the source of related replies

21. Furthermore, what is concealed, is not "stated". That it may easily be exposed, if you know how, is immaterial.

22. It is self – evident that the provision of a "No Reply" Email address does not satisfy s.8(1)(b).

23. These findings determine this appeal. Nevertheless, we proceed to deal briefly with the s.11 point, which raises an issue of some importance.

24. Notwithstanding our findings as to s.8(1)(b), we assume, for the purposes of considering s.11, that there was a valid request so that the School was under a conditional obligation to give effect to Mr. Maloney's preferred means of response.

25. The condition is that it should do so *"so far as reasonably practicable"*. Section 11(2) provides that, in assessing what is reasonably practicable the School may *"have regard to all the circumstances"*.

26. In 2018 a most important circumstance is the preservation of cyber security, having regard to the prevalence of multiple malware threats involving ransomware, disruption or destruction of data and the unlawful acquisition of personal data.

27. It is entirely reasonable that a school should maintain a policy of never operating hyperlinks to unknown websites and should instruct staff accordingly. The exact level of risk, even if it could be reliably assessed, is not the test of what is reasonable in this context; one incautious click can have catastrophic results. By contrast, requests for information do not have to adopt Mr. Maloney's means of communication, even though more convenient for the requester. There is no difficulty, still less any significant risk, in making a request by post or Email.

28. That Mr. Maloney's website is unquestionably benign and designed for a lawful purpose is neither here nor there. The School cannot know that on receipt of the request Email and cannot sensibly be expected to undertake research to discover whether his website can be safely accessed. Instruction of staff or students as to how to use hyperlinks without risk (if such instruction is available, effective or even

credible) is no answer. It could not guarantee security. That other schools which refused to use the hyperlink subsequently visited the website is of no consequence. We do not know whether they had carried out a security check before doing so or had simply abandoned sensible security precautions.

29. We judge that it was not reasonably practicable for the School to use the response button on the request Email. Indeed, it would have been most unwise to do so.

30. For all these reasons we dismiss this appeal.

31 This is a unanimous decision.

D.J. Farrer Q.C.,
Tribunal Judge,
22nd. March, 2018