IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0138**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50301030
Dated: 7 June 2011

Appellant: **J Oates**

Respondent: **Information Commissioner**

Second Respondent: **Architects Registration Board**

Date of paper hearing: **14 November 2011 & 17 January 2012**

Before
Melanie Carter
(Judge)

and

Richard Fox
Roger Creedon

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the Decision Notice save with regard to the matters set out in the Substituted Decision Notice below.

SUBSTITUTED DECISION NOTICE

Dated 07 June 2011

Public authority: Architects Registration Board

Address of Public authority:

8 Weymouth Street
London
W1W 5BU

Name of Complainant: John Oates

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice FS50301030 is upheld save that the Tribunal finds a breach of section 1(1) of Freedom of Information Act 2000 in that the Architects Registration Board should have concluded that it held further information relevant to the request, namely the formal records of decision dated 11 June and 4 August 2009.

As the information referred to above has already been disclosed to Mr Oates, this Tribunal does not order the public authority to take any further steps.

Dated this 25th day of January 2012

Melanie Carter

Tribunal Judge

REASONS FOR DECISION

Introduction.

1. This appeal arises from a request from the Appellant Mr John Oates, Chair of Church Lench Village Hall Management Committee, under the Freedom of Information Act 2000 ("the Act") to the Second Respondent, the Architects Registration Board ("the ARB"). ARB is the UK statutory regulator of architects. One of its functions is to deal with complaints made about the conduct or competence of architects. The Appellant made a complaint to the ARB about an architect that he had instructed in connection with work carried out on the village hall. The request form dated 28 January 2010 asked for the following information:

   "[1] Copies of 3 reports made by the Registrar accompanying our complaint to the Investigations Committee.

   Approx Dates Mid June 2008
   Mid Nov 2009
   Late Dec 2009

   [2]Copy of minutes or voice recording of Investigations Committee's investigation of our complaint SH\932"

2. On 23 February 2010 the ARB responded stating that "only one report has been produced on behalf of the Board to the Investigations Committee dated 5 February 2009. The Board holds a copy of this and this is enclosed. Further correspondence relating to the specified period in your request is also enclosed …. The Board does not hold any minutes or voice recordings in relation to the investigation". In response, Mr Oates challenged the statement that minutes were not held. The ARB further explained in a letter dated 16 March 2010 that "the Board holds no minutes or voice recording relating to the Investigations Committee's investigation of your complaint about [name of architect]. The minutes of the meeting do not record the details of all individual case decisions, as these are contained within the detailed decision documents issued by the Committee".

3. Mr Oates complained to the Information Commissioner ("IC") who, following an investigation, issued a Decision Notice dated 7 June 2011. The IC upheld the ARB's

decision. Mr Oates has challenged the lawfulness of the IC's Decision Notice with regard to item 2 of the request by way of this appeal.

The appeal

4. Mr Oates has argued in his Notice of Appeal that the IC was wrong to have accepted that further information was not held on the basis:

   a. that it is inconceivable that there would be no paper trail for their decision making in relation to his complaint against the architect;

   b. of a separate Freedom of Information request for information that he made to the ARB on 13 December 2010 for information relating to the cases considered by the Investigation Committee before and after his complaint. This was in the following terms –

      "All minutes, be they emails, letters or any other format, of the [Investigation Committee's] meetings leading to both the preliminary and final decisions of the five [Investigation Committee's] cases before and after our case (IC 369) – that is for cases 364, 365, 367, 368, 370, 371, 372, 373 and 374.

      All correspondence between the Professional Standards Manager and the [Investigation Committee] in the above ten cases".

   Mr Oates alleges that insofar as information relevant to that request has been withheld, this indicates that there must be further information in relation to the request that is the subject of this appeal. That information had been withheld on the basis that sections 40 (exemption for personal data) and 30 (regulatory action) of the Act applied. This subsequent request is not part of this appeal.

The Law

5. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

6. The starting point for the Tribunal is the Decision Notice of the IC but the Tribunal also receives evidence, which is not limited to the material that was before the IC. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the IC and come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

7. Under section 1 of the Act, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. The right to information is subject to a number of exemptions.

8. The applicable standard of proof to apply in determining whether a public authority holds any requested information for the purposes of FOIA is the normal civil standard, i.e. on the balance of probabilities (see *Linda Bromley & others v the Environment Agency* EA/2006/0072).

Evidence

9. The Tribunal had been provided with a bundle of documents. At the first date of hearing, the Tribunal concluded that it required further information from the ARB relating to other Freedom of Information requests made by Mr Oates. In consequence, the Tribunal were given both a) the information provided previously to Mr Oates under cover of a letter dated 30 March 2012 as a result of an earlier Freedom of Information request concerning the particular complaint ("the previously disclosed information") and also b) the information requested by Mr Oates, but withheld from disclosure in relation to the other cases referred to in paragraph 4(b) above ("the withheld information").

Consideration

10. The question before the Tribunal was as to whether the IC had been correct in upholding the ARB's conclusion that it did not hold any information in relation to point 2 of the request. This in turn required the Tribunal to consider whether the IC had acted appropriately in accepting the assertion of the ARB that it did not hold any further information or whether it should have investigated further.

11. As a general principle, the IC was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.

12. The Tribunal considered therefore whether the matters raised by Mr Oates called for further investigation by the IC. His first argument was that it was inconceivable that there would be no minutes or audit trail for the decisions taken.

13. The Tribunal took as its starting point the exact terms of the letter of request. Mr Oates had called for minutes or voice recordings of the Investigation Committee, not the internal communications between Investigation Committee members that he had asked for in his other Freedom of Information requests (that is, the requests referred to in paragraph 9 above). The Tribunal noted that the request which was the subject of this appeal was significantly narrower than both of those requests for information.

14. ARB had explained that there were no minutes of Investigation Committee meetings giving details of the complaint in question. Mostly decisions were made by exchange of email between Investigation Committee members although it appeared, from the Investigation Committee minutes, that sometimes individual cases were discussed in the closed session of the Committee meeting. It appeared further, from references in the open minutes, that the ARB did take minutes of the closed sessions. The ARB maintained however that there was no mention of the particular complaint in any of the formal minutes of the Investigation Committee meetings, which we understand to mean, whether in open or closed sessions. Thus although there were minutes in existence they were not relevant to the request as there were none concerning the actual complaint.

15. ARB had explained that the only record of the decisions taken by the Investigation Committee were the actual formal documents issued setting out the Investigation Committee's decisions and reasons for those decisions. In this case this was represented by documents dated 11 June and 4 August 2009, both of which had been

provided to the parties, including Mr Oates, in his capacity as complainant, and which had been published. It appeared to the Tribunal that if any document could be viewed as minutes of the decisions taken it would be these formal records. It would have been clear to the ARB that Mr Oates was trying to better understand the reasoning of the Investigation Committee and that the letter of request ought therefore to be construed as including the records of decision. The Tribunal concluded therefore that ARB should have found the two records to be information within the scope of request which it was liable to disclose under the Act (bearing in mind that disclosure under the Act is disclosure to the world and not just the person making the request). Failure to find that these records were disclosable was a breach of section 1(1) of the Act. For this reason there is a substituted notice at the start of this decision. This does not however specify any steps for the ARB to take as Mr Oates is already in receipt of a copy of this information.

16. In the absence of formal minutes detailing his complaint, Mr Oates argued that the email communications between Investigation Committee members should stand as the minutes. He was therefore arguing that the letter of request should be construed as covering any communications between the members of the Investigation Committee indicating their thought processes in agreeing their conclusions.

17. The Tribunal did not agree with this and was of the view that minutes could only be properly viewed as such, if the entity or persons concerned had intended them to be a formal record. Email exchanges between Investigation Committee members were in the nature of internal deliberations which the individual members and the ARB may or may not have chosen to disclose. It was clear from the ARB's practices that it was the formal records of decision which stood as the minutes of the Investigation Committee's 'virtual meeting' - virtual in the sense of their having 'met' online and taken the decisions via email. The fact that the ARB was prepared to disclose these email exchanges did not mean that they constituted 'minutes' as such.

18. The Tribunal noted that the previously disclosed information had included various emails between the Investigation Committee members who considered the complaint during 2009 and 2010. Mr Oates argued that these emails could not possibly represent the full set of communications between Investigation Committee members concerning his complaint. Whilst this may be so, the Tribunal came back to its

conclusion above that there was no reason to disbelieve the ARB in relation to the searches they had carried out.

19. In this regard, it was true that the ARB had not asked the Investigation Committee members to check that they had copied it in to all emails sent between them since this was established practice. During the course of this appeal one further email came to light. Committee members were asked to check whether there was any other correspondence relating to Mr Oates complaint and they confirmed there was not. Whilst this might have indicated an inadequate search initially, the Tribunal reminded itself that its interpretation of the request did not bring these emails within scope and in any event, this deficiency had now been remedied.

20. The Tribunal reviewed the information withheld in response to Mr Oates' subsequent request in relation to those cases that preceded and followed the Investigation Committee's consider of his own complaint (see paragraph 4 (b)above). It did so to see if there had been minutes as such above and beyond the formal records of decision. The Tribunal was able to reassure Mr Oates that there were not. As such, there was nothing before the Tribunal in relation to those cases which indicated any inconsistency of approach by ARB and therefore could be said to call into question the reliability of its assertion that it held no further information in relation to the matter under appeal.

Conclusion

21. For the reasons set out above, the Tribunal upholds the IC's Decision Notice save with regard to the formal record decisions (see substituted decision above). Our decision is unanimous.

Melanie Carter
Tribunal Judge
25 January 2012