Tribunals Service
Information Tribunal

Appeal Number: EA/2008/0007

Freedom of Information Act 2000 (FOIA)

Decided upon the Papers **Decision Promulgated 28th July 2008**

Adjourned hearing 12th July 2008

Reconvened hearing 24th July 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

Pieter De Waal

and

Anthony Stoller

BETWEEN

Mr Martin Paul Fowler

Appellant

And

Information Commissioner

Respondent

And

Brighton and Hove City Council

Additional Party

Decision

The Tribunal allows the Appeal. For the reasons set out below, it is the Tribunal's decision that Brighton and Hove City Council did not deal with Mr Fowler's request in accordance with Part I of the Freedom of Information Act 2000. **Decision Notice FS50111015 is amended to the following extent:**

- The first sentence of paragraph 15 is replaced with:
  "the Commissioner has concluded that elements A and B of the request are valid under the Act".

- Paragraph 17 is deleted.

- Paragraph 21 is renumbered paragraph 21a and should specify that it relates to Element B

- Paragraph 21(b) should be added as follows:

"'Element A' of the Appellant's request was a valid request for information under the Act.
By failing to confirm that it held information in relation to "Element A" of the request and by failing to communicate that information to the Appellant before the Appeal was lodged with the Tribunal, the Council breached the following provisions of FOIA
a) Section 1(1)(a) and (b) and
b) Section 10.

Action Required

- Paragraph 23 should be added as follows:
  "Brighton and Hove City Council has now communicated the information listed in paragraph 35 below, by way of case papers, and no further action is required".

Fiona Henderson Dated this 24th day of July 2008

Deputy Chairman

Reasons for Decision

The request for information

1. In an email to Brighton and Hove City Council (the Council) dated 20th November 2005 headed "The Alcohol Policy of Brighton and Hove Council", amongst other issues which are not the subject of this appeal, Mr Fowler asked:
   "I do not see that the Council has the legal right unilaterally to change the conditions of employment of a person who is already employed by the Council. By what legal authority does the Council seek to do so?"
   In the same email he specified that this (and other) information was requested *"in accordance with the provisions of the Freedom of Information Act 2000"*.

2. This request has become known as "element A" of the request, the remaining elements do not form part of this appeal.

3. The Council replied by email on 14th December 2005 stating in response to the information request that is the subject of the appeal:
   "All employers may alter contracts of employment. Brighton and Hove City Council don't regard this issue as contractual. Many employers have similar policies".
   The email also gave details of to whom a complaint should be addressed if Mr Fowler was not satisfied with the way in which his information request had been dealt.

4. Mr Fowler asked the Council to explain their reply by email dated 15th December 2006 stating:
   "Your answer does not explain why Brighton and Hove Council do not regard this as a contractual issue as regards existing staff. Will you please do so, citing the statutes or precedents involved?"

The Council responded on 18th January 2006 stating:
"I feel that we have answered your original questions sufficiently. FOI requests can only be made for actual information that is held by a Public Sector Body and not for views or interpretations or analysis of data".

5. On 18th January 2006 Mr Fowler complained to the Council stating:
"So that I may take this matter further, will you please invoke the Council's formal complaints procedures in respect of the Council's failure either to answer the questions I posed, or to provide the reasons why that information cannot be provided, within the timescale prescribed by the Freedom of Information Act 2000 (that is, by 19 December 2005)?"

6. The Council upheld their original decision on 13th February 2006 asserting amongst other matters that:
    - The email of 14th December 2005 was within the timescale prescribed by FOIA,
    - That email contained reasonable answers to the questions,
    - The request was not for specific items of information that the Council "can state whether or not they hold".

<u>The complaint to the Information Commissioner</u>

7. Mr Fowler appealed to the Commissioner on 2nd March 2006. A correspondence ensued between the Commissioner and Mr Fowler in which the Commissioner expressed the view that the Council had not refused access to information because:
    - "*It is not a request for specific, held information but is an enquiry which would require the Council to undertake research and to generate new information in order to provide a response".*
    - Mr Fowler had requested the Council's opinion,
    - This was not "information" as defined within the terms of FOIA,
    - FOIA does not require authorities to generate information in response to requests.

8. Mr Fowler's response as set out in his letter of 4th July 2006 was as follows:
"The answer to [my freedom of information request] can only be either:
- *"Details of the statutes, precedents, and/or obiter that give the Council the authority so to do, or;*
- *That the information is not held.*

Thus, the enquiry is for highly specific, readily identifiable information... Please note that only the details of the authorities are required, and not the opinion of the Council concerning the relevance or validity of those authorities: I am happy to research those authorities myself."

9. During the investigation the Council wrote to the Commissioner on 5th October 2007 stating inter alia:
"All employers may alter contracts of employment. Brighton and Hove City Council do not regard this as contractual. The Council does not hold any recorded information regarding this now or in the past and has no specific legal requirement to hold this information.

However, please see below some information on the legal authority to introduce a drug and alcohol policy from the ACAS website. Please also find enclosed the council's Drug and Alcohol Policy and Policy Guidance notes..."

10. The Commissioner issued a decision notice on 2nd January 2008 which recorded that the Council had written to the Commissioner with confirmation that it held no recorded information in relation to either element A or B of the request and analysed the request for information which is the subject of this appeal as follows:
"15. The Commissioner has concluded that element A of the request is not valid under the Act, whereas element B is. In reaching this conclusion, the Commissioner has had regard to section 8(1) of the Act, in which it states that a valid request for information is a request which among other criteria "describes the information requested". Information is defined in section 84 of the Act as "information recorded in any form"."

The Appeal to the Tribunal

11. Mr Fowler appealed to the Tribunal on 25th January 2008 in relation to the Commissioners findings in relation to element A. In responding to Mr Fowler's notice of Appeal, the Commissioner conceded in his reply on 20th February 2008 that he was in error and invited the Tribunal to substitute the Decision Notice as follows:
"Element A of the Appellant's request was a valid request for information under the Act. The public authority did not comply with section 1(1) of the Act in that it failed to confirm or deny whether it held recorded information falling within the scope of "element A" of the Appellant's request".

12. The Council were joined by the Tribunal as an additional party on 28th February 2008. In their amended reply dated 28th March 2008 the Council indicated that they did not intend to oppose the appeal insofar as it related to the Information Commissioner's findings in relation to the validity of "Element A" and joined in asking the Tribunal to substitute the Decision Notice in the terms suggested by the Commissioner as set out above.

13. In a submission dated 16th May 2008 the Commissioner amended his submission to take into consideration the Tribunal's decision in King v Information Commissioner and DWP EA/2007/0085 that a failure to comply with section 1(1) by the date of a complaint to the Commissioner should be properly categorized as a breach of section 1 FOIA and a breach of section 10 or 17 FOIA. Section 10 FOIA provides that section 1(1) FOIA must be complied with promptly and in any event not later than the twentieth working day following the date of receipt. The Commissioner consequently invited the Tribunal to find that there was an additional breach of section 10 FOIA as the Council did not deny that they held the information until after the complaint to the Commissioner. None of the other parties have sought to suggest that this is the wrong approach.

14. The only "live" issue that remains for the Tribunal to determine is whether any information was held at the date of the request which should have been disclosed. In relation to all material provided by the Council (all of which they assert falls outside the terms of the request) there is no suggestion that any exemption would apply to prevent disclosure.

Jurisdiction

15. The Tribunal is satisfied that their jurisdiction to hear this case is not excluded under the ruling in BBC v Sugar [2007] EWHC 905 (Admin) because of the unique circumstances of this case. No party is challenging the Tribunal's jurisdiction to hear this case. All parties now accept that the request was a valid request for information within the terms of FOIA and that consequently at the time of drafting his Decision Notice (in which he accepted the Council's assertion that the material was not held) the Commissioner had jurisdiction to issue a Decision Notice on this point. A Decision Notice dealing with the factual issue that remains to be decided by the Tribunal was issued, and it is against that finding of fact within that Decision Notice that this appeal lies.

16. The Tribunal therefore treats the Decision Notice as if it reads in the terms that the Information Commissioner and Council accept it should have read. The Tribunal is satisfied that this is a pragmatic and proportionate response and in the interests of justice. It would be a waste of time and money and arrive at the same result were the Decision Notice to be reissued incorporating the amendment and Mr Fowler to re-submit his appeal, in order to enable the Tribunal to adjudicate upon the substantive point that remains, the facts relating to which are dealt with in the existing Decision Notice.

17. The Tribunal considered the case without an oral hearing on the papers on 12th June 2008 adjourning for further information and reconvening on the 24th July 2008 having received further information from the Council.

The issues for the Tribunal to decide

18. The issues for the Tribunal to determine are as follows:

i) Did the Council hold information which fell to be disclosed under FOIA pursuant to Element A of the request at the date when the request was considered?

ii) If so has that information been disclosed in accordance with FOIA?

Pursuant to the directions dated 12th April 2008, all parties agree that the information which is the subject of this appeal is:

> "the legal authority (whether legal advice or details of statutes, precedents, and/or obiter) that give the Council the authority unilaterally to change the conditions of employment of someone already employed by the Council."

The Powers of the Tribunal

19. The Tribunal's powers in relation to appeals under section 57 FOIA are set out in section 58 of FOIA, as follows.

> *(1) If on an appeal under section 57 the Tribunal considers-*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

20. Whether the information is held is a mixed question of fact and law. The Tribunal may substitute its own view for that of the Commissioner on this issue if it considers that the Commissioner's conclusion was wrong.

The evidence before the Tribunal

21. The question of whether any information was held pertaining to the request, relies upon what is meant by :
"*has the legal right unilaterally to change the conditions of employment of a person who is already employed by the Council."*

22. The Council's case can be summarized as:
    - The drug and alcohol policy does not form part of the employment contract,
    - Neither does it form part of the terms and conditions of employment,
    - Consequently the "conditions of employment" have not been changed, and thus no material exists which falls within the terms of the request.

23. In support of this argument they relied upon:
    - an undated witness statement of Shaun Rafferty the Assistant Director, Head of Human Resources (a position which he has held since 16th July 2007) and
    - a legal opinion by Ian Yonge dated 21st April 2008 setting out the legal justifications for treating the policy as not forming part of the contract.

24. The statement of Shaun Rafferty:

    1. reiterated the position that the Council holds no recorded information in respect of "Element A" of Mr Fowler's request.

    2. explained that as part of the implementation process the Council "*researched the issue of drugs and alcohol, the legislative framework*

within which the policy would have to operate and examples of HR best practice in other public and private sector organisations."

3. From the research carried out, there was no evidence to suggest that [the introduction of the drug and alcohol policy] would contravene employment or Human Rights legislation.

4. No legal advice was sought in relation to the development and implementation of the Policy as, in the knowledge and experience of the Additional Party's Human Resources Managers, the Policy would not require any contractual changes to the employment contracts of the staff.

5. All employment contracts of the staff contain a clause which reads:
   "The terms and conditions of employment set out in this contract will reflect collective agreements negotiated by the National Joint Council (NJC) for Local Government Services (Commonly known as the "Green Book"). This National Agreement may be supplemented and/or varied by the Council's staffing decisions, regulations, policies and practices which include Standing Orders and collective agreements reached by negotiation and agreement locally with the Trade Unions recognised by the Council.
   The Council undertakes to ensure that any such future changes in these terms and conditions of employment will be recorded in documents which will be available for you to refer to in your Departmental HR Office or such changes will be notified to you within one month of the change being agreed".

6. The aim of the policy is "... to provide clear rules to staff so that they are aware of what is expected of them..".

25. The opinion of Ian Yonge post-dated the request and was information generated to explain the Council's assertion that they did not view the policy as forming part of the employment contract. Whilst it might be felt that this opinion most comprehensively answers Mr Fowler's request for information,

because of its date, (it did not exist and thus was not held at the relevant time) it could not have been material available for disclosure within the terms of this request.

26. The thrust of Mr Yonge's analysis of the law was that:

"Policies will normally be deemed not to be contractual and the courts will normally go along with this and there is a high burden on employees seeking to prove that policies are contractual". He quoted from the same contract term as Mr Rafferty adding that:
"The only Council policies which are stated to have contractual force and that is limited, are those relating to disciplinary and grievance procedures".

27. The case was adjourned on 12th June when the Tribunal sought further information arising out of the evidence provided by the Council. A response was received for the Council dated 4th July 2008 as follows:

1. No Council or Committee resolution or decision was ever obtained which enabled or authorised the Council to adopt and implement the drug and alcohol policy.

2. The explanation and source of Ian Yonge's assertion that:
"The only Council policies which are stated to have contractual force and that is limited, are those relating to disciplinary and grievance procedures"
was that the contract of employment was negotiated with the unions but the Drugs and Alcohol Policy was consulted upon...the unions are given no rights under the Policy to veto on changes..."

3. The Council confirmed that the research referred to in para 24.1 and 24.2 above was carried out by way of informal discussions with other local authorities who had themselves implemented a similar policy. They attached the South Downs Health Alcohol and Intoxicating Substances Policy Procedure (which beyond general mentions of the

drink driving laws and the illegality of possessing certain types of drugs has no legal references at all).

"Save for the enclosed policy, the Additional party has no recorded information of the research referred to".

28. The Tribunal was disappointed with this response. In relation to item 2, whilst the Council has explained the process by which different policies carried different weight in their view, they did not give the source of that assertion i.e. where it was stated that the only policies stated to have contractual force were those relating to disciplinary and grievance procedures.

29. In relation to item 3, the impression given by Mr Rafferty's initial evidence was that there had been proper research into "*the legislative framework within which the policy would have to operate and examples of HR best practice...*" This evidence, tested by the Tribunal's directions requesting further particulars, appears to have been an overstatement of the facts. The "research" amounts to no more than informal discussions with other local authorities without any notes or minutes being made. From the material before the Tribunal (letter 5th October 2007) it is clear that the ACAS website was consulted, although the Council did not rely upon this as part of their research in their adjournment evidence in answer to the Tribunal's directions. The ACAS website as printed out makes no reference to either Human Rights or employment legislation. Neither is there any consideration of employment or human rights issues in the South Downs Policy which was obtained. The Council was unable to produce any additional material in support of the assertion that it had conducted research on the matter.

"Conditions of Employment"

30. The Council's response to the information request rests upon its interpretation of the term "conditions of employment" and its assertion that the Drug and Alcohol policy is not contractual. For the purposes of this determination, the Tribunal does not find it necessary to decide the legal status of this particular policy. Mr Fowler made his request using ordinary English and did not

purport to be using a term of art in a technical setting. Mr Fowler used the phrase "conditions of employment", not "terms and conditions of employment" or "employment contracts".

31. "Condition" has an ordinary lay person's meaning. This Tribunal adopts the approach followed by the Tribunal (differently constituted) in Berend v Information Commissioner and London Borough of Richmond Upon Thames EA/2006/0049 & 50 at paragraph 46:

"The Tribunal is satisfied that the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. Indeed the section 45 Code at paragraph 9 specifically warns against consideration of the motive or interest in the information when providing advice and assistance. Additionally section 8 FOIA appears to provide an objective definition of "information requested".

> ***8.*** *- (1) In this Act any reference to a "request for information" is a reference to such a request which- ..*
>
> *(c) describes the information requested.*

There is no caveat or imputation of subjectivity contained within that section."

32. Consequently this Tribunal finds that the request should be read using the ordinary meaning of "conditions of employment" which could equally be termed "circumstances of employment" or "basis upon which someone is employed". In his statement Mr Rafferty specifically notes that *"The aim of the policy is ... to provide clear* ***rules*** *to staff so that they are aware of what is expected of them.."*

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33. Using this definition it is clear that the policy forms part of the conditions upon which someone remains employed. If an employee wishes to work for the Council, they have to abide by the drug and alcohol policy, to fail so to do can lead to disciplinary action and eventually dismissal. Abiding by the policy is not optional, it is mandatory and as such in the ordinary sense of the word it is a condition upon which the employee remains in employment.

34. That there has been a change is apparent from the fact that it did not used to be a requirement of employment that someone abide by the policy, but now it is.

What information was held.

35. From the evidence provided by the Council, the Tribunal is satisfied that there is no further potentially relevant material held by the Council which has not already been provided to the Tribunal. However, from the material before it, the Tribunal finds that some disclosures should have been made pursuant to the request namely:

    i) Material demonstrating that the Council had an over-riding legal obligation which necessitated their imposition of the drug and alcohol policy on all employees such as obligations under Health and Safety Laws. This encompasses the following parts of the ACAS print out (as sent to the Commissioner in the letter of 5th October 2007) :

    - The paragraph entitled "Alcohol and the Law,"
    - The whole of Appendix 4 (save the paragraph relating to the handling of personal data under the DPA 1998).

    Although the Tribunal has not received direct evidence that it was held in recorded form by the Council when they considered the information request, the fact that it was provided in response to the Commissioner's investigation of the information request satisfies the Tribunal on a balance of probabilities that it was held by the Council at the relevant time.

    ii) The contract term set out in paragraph 24.5 above which states inter alia "*This National Agreement may be supplemented and/or varied by the Council's ...policies"* should also have been disclosed pursuant to Element A of the request, as it is the part of the legal document where employees are told that their employment situation may be varied by the addition or variation of new policies.

The Council's handling of the information request

36. The Tribunal is concerned that the initial response from the Council was confused and apparently contradictory. In their original response they stated:
    - *All employers may alter contracts of employment.*
    - *Brighton and Hove City Council don't regard this issue as contractual.*
    - *Many employers have similar policies".*

37. This response appeared to indicate:
    - That the Council had legal authority to alter the contract of employment.

    Since it is now the Council's sole case that this was not necessary, the assertion that they have the right to alter the contract of employment in this context appears to give credence to the requestor's assumed belief that this is what has happened.
    - The Council did not consider that this was a contractual matter.

    At best this is a non-sequitur with the first assertion (which suggested that they were within their rights to alter the contracts) and no attempt was made to put the response into terms consistent with the first statement or in terms that a non-lawyer would understand.
    - Many employers have similar policies.

    On one view this might appear to be the legal justification (other employers do it, so we feel legally safe following suit). But in light of the Council's current stance, this information is misleading as it might be read as an acceptance that the contract had been amended.

38. Rather than taking a restrictive and technical approach to the request and then expending considerable effort in justifying their position, it would have been more helpful had the Council given a clear and unambiguous response, which would have enabled Mr Fowler to understand the position and reformulate his request in clearer terms that were likely to generate a search of the information that he was seeking.

Conclusion

39. In light of all parties' acceptance that Element A was a valid information request:

- The Tribunal finds that the request was not read objectively, but restricted by an unwarranted technical interpretation,
- In consequence material was withheld which fell within the request,
- Section 1(1)a FOIA was breached as this was not communicated to Mr Fowler.
- There was an additional breach of section 1(1)b FOIA as the information of the description specified in the request was not communicated to Mr Fowler until after he had lodged his appeal with the Tribunal.
- Section 10 FOIA was breached as the Council did not confirm or deny whether they held the information within the time allowed, neither did they communicate the information that was held to Mr Fowler within the time allowed.
- The Tribunal is satisfied that all the relevant information held by the Council pertaining to "Element A" has now been communicated to Mr Fowler.

Dated this 24th day of July 2008

Fiona Henderson
Deputy Chairman