



Appeal number: EA/2018/0267

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

ANTHONY GALLAGHER

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE ALEXANDRA MARKS CBE

ANNE CHAFER

DAVID WILKINSON

SITTING IN CHAMBERS IN LONDON EC2 on 31 MAY 2019

Neither party appeared as, by consent, this case was considered on the papers

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DECISION

1. For the reasons set out below, the Tribunal allows in part the appeal against Decision Notice FS50788702, and issues the following substitute Decision Notice.

SUBSTITUTE DECISION NOTICE

Organisation: Hampshire County Council

Complainant: Anthony Gallagher

The Substitute Decision – FS50788702

- I. For the reasons set out below, Hampshire County Council ('HCC'), breached section 10 of the Freedom of Information Act 2000 ('FOIA') because the information requested by Anthony Gallagher at part 4 of his request dated 9 July 2018 was, on the balance of probabilities, held by HCC yet HCC did not provide such information within the timescale required by FOIA.
- II. HCC did not breach section 16 FOIA because – in view of the above finding that HCC *did* hold the information Mr Gallagher requested – it was not reasonable to expect (and indeed there was no need for) HCC to provide Mr Gallagher with advice and assistance to make a request for that information.
- III. However, once HCC had (erroneously) concluded that it did not hold the information requested, if HCC had gone on to consider its section 16 FOIA duty to provide advice and assistance as well as the Commissioner's guidance on holding information, on the balance of probabilities HCC would have realised that it did after all hold the information requested.
- IV. As Mr Gallagher has since received information from HCC (in response to his subsequent request for information dated 6 August 2018) - such information being in the form of the 'building blocks' which would enable him to calculate for himself the information he originally requested - no purpose would be served by requiring HCC to take any further steps.

REASONS

Background to Appeal

Request, Internal Review, Decision Notice and Appeal

2. On 9 July 2018, Mr Gallagher made a request for information to HCC. The request comprised four questions.

3. On 6 August 2018, HCC provided information in response to the first three questions.
4. HCC stated that it did not hold the information requested by Mr Gallagher's fourth question which was:

"4. What is the average time delay for a Stage Two [investigation] to commence each year for the last three years?"

5. Having received HCC's response, on the same day - 6 August 2018 - Mr Gallagher emailed HCC asking:

"Could you therefore provide the number of Stage Two investigations that commenced during each of the three years together with the length of time each was delayed?"

and stating his belief that this information should have been supplied under section 16 FOIA.

6. HCC logged this correspondence as a fresh request.
7. Mr Gallagher emailed HCC the following day to ask for an internal review into the handling of his original request. HCC carried out such a review but only in respect of the timeliness of its response. HCC informed Mr Gallagher of the outcome of its review on 21 August 2018.
8. On the same date, Mr Gallagher emailed HCC, arguing that HCC had failed to explain why all the information he had requested had not been provided, and claiming that HCC had breached its section 16 FOIA duty.
9. HCC carried out a further internal review, covering both question 4 of Mr Gallagher's original request dated 9 July and his follow-up request dated 6 August 2018.
10. On 21 September 2018, HCC informed Mr Gallagher that *"while the answer to your question could have been determined by interrogating each case, because this was not routinely reported on or already held in the format requested, complying with your request would have required creating information that was not already held"*. However, HCC went on to state that it had recently compiled information about Stage Two complaints as part of a separate project. HCC therefore now held information within the scope of the second request – and had disclosed that information to Mr Gallagher which would allow him to answer question 4 of his original request.
11. On 24 September 2018, Mr Gallagher complained to the Information Commissioner ('the Commissioner') about the way HCC had handled his request for information.
12. Mr Gallagher asked the Commissioner to consider whether HCC had met its responsibilities under sections 10 and 16 FOIA.

13. The Commissioner found that HCC had not breached its duties under either section 10 or section 16 FOIA, and on 14 November 2018 issued Decision Notice FS50788702 to that effect.

14. On the same date – 14 November 2018 – Mr Gallagher appealed to the Tribunal, seeking a fresh Decision Notice covering FOIA sections 10, 16 and 77.

Commissioner's response and Mr Gallagher's reply

15. On 11 January 2019, the Commissioner responded:

(a) She does not oppose the appeal to the extent it relates to section 10 FOIA. She accepts Mr Gallagher's argument that, contrary to HCC's original response, HCC *did* at the time of the original request, hold the information requested at part 4, and that HCC failed to provide that information within the statutory timeframe. While HCC did not apparently hold the 'average' value as Mr Gallagher had requested, it did hold the 'building blocks' (i.e. the raw data) which would have enabled it to provide, without a great deal of additional work, the information requested. According to the Commissioner's (non-statutory) guidance even if the 'building blocks' need to be manipulated to a reasonable level of judgement and skill, the information will sometimes be held. The Commissioner concedes that this was such a case, and the information was held but not provided within the statutory timescale.

(b) There was no breach of section 16 FOIA because, had the Commissioner found a breach of section 10 FOIA in her Decision Notice, she would not have gone on to consider section 16. HCC should have confirmed that the information was held, and either provided it or (if it were exempt from disclosure on some basis) refused to provide it. However, no section 16 FOIA duty would have arisen, and there could therefore have been no breach.

(c) As for an offence arising under section 77 FOIA, the Commissioner considered that there was no evidence to suggest that a criminal offence had occurred – but in any event, the Tribunal does not have the power to investigate, or order an investigation into, matters arising under section 77 FOIA. Only the Commissioner, or the Director of Public Prosecutions, can institute proceedings under section 77 FOIA. In light of her changed position on section 10 FOIA, however, the Commissioner said she would look afresh at the section 77 FOIA issue, separate from the appeal proceedings.

(d) It may be possible to dispose of the appeal by way of a consent order, a draft of which the Commissioner attached to her response.

16. Mr Gallagher replied on 15 January 2019 that, in view of the Commissioner's proposal to reconsider section 77 FOIA, he had no issue with that aspect of his appeal being removed from these proceedings.

17. However, on 5 February 2019, Mr Gallagher emailed the Tribunal that he objected to the draft consent order, and if a fresh investigation by the Commissioner was not acceptable, the Tribunal should consider whether the Decision Notice complied with

sections 10 and 16 FOIA. Mr Gallagher stated that HCC had still not released information in response to his original request, and argued that responses to any other FOIA requests should not have any bearing on whether information should be released in response to his original request.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

18. The duty of a public authority to disclose requested information is set out in s.1(1) FOIA as follows:

(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.

Section 10 FOIA: time for compliance with request

19. Section 10 FOIA provides:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

20. Section 84 FOIA (Interpretation) provides that “information” (subject to sections 51(8) and 75(2)) means information recorded in any form.

21. When deciding whether a public authority has provided requested information, the normal civil standard of proof applies – namely the balance of probabilities (*Linda Bromley v. the information Commissioner and the Environment Agency (EA/2006/0072)*).

Section 16 FOIA: Duty to provide advice and assistance

22. Section 16 FOIA provides:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

....

The powers of the Tribunal

23. The powers of the Tribunal to determine appeals are set out in section 58 FOIA:

58. Determination of appeals

(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.

...

The burden of proof

24. The burden of proof rests with the appellant (in this case, Mr Gallagher) in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Discussion and reasons

25. Mr Gallagher does not suggest that the Commissioner should have exercised her discretion differently.

26. Mr Gallagher was correct not to challenge the Commissioner's exercise of discretion, because this is not a case where the Commissioner's discretion was engaged. The exercise of discretion does not apply to breaches of section 10 or section 16 FOIA.

27. As for section 10, the Commissioner concedes that her Decision Notice *was* wrong in law for the reasons set out in paragraph 15(a) above.

28. We agree that on the balance of probabilities, the information Mr Gallagher requested by question 4 of his request on 9 July 2018 *was* held by HCC at the time of his request – albeit in the form of raw data “building blocks”. We reach this conclusion because this information *was* provided to Mr Gallagher in response to his follow-up request on 6 August 2018, made very soon after his original request.

29. The Commissioner's non-statutory guidance on determining whether information is held states at paragraph 23:

“...a public authority will hold the information if it holds the necessary building blocks and they can be identified, retrieved and manipulated using only a reasonable level of judgement.”

30. We believe that, had HCC – or the Commissioner – followed that guidance, both HCC and the Commissioner would have concluded that the degree of skill and judgement needing to be applied to the ‘building blocks’ to provide the information Mr Gallagher requested was not such as to constitute the creation of new information. Thus, we are satisfied that, in accordance with the guidance, the information *was* held by HCC at the time of Mr Gallagher’s original request.

31. We therefore conclude that HCC’s failure to provide such information in response to Mr Gallagher’s original request (though HCC did provide it a short time thereafter in response to his follow-up request), means that HCC did not respond to the request within the timescale required by section 10 FOIA.

32. We therefore find HCC did breach section 10 FOIA.

33. As for section 16, in our view, had HCC responded to Mr Gallagher’s original request as it should have done, no duty to provide advice and assistance to Mr Gallagher would have arisen.

34. However, we consider that HCC should have been aware that Mr Gallagher would not know how their records were structured and whether or not they would have already calculated an ‘average time delay’ for Stage Two investigations.

35. To assist public authorities, a Code of Practice provides guidance which it is desirable for them to follow in the discharge of their duties under section 16 FOIA. The Code current at the time of Mr Gallagher’s request said section 16 FOIA includes providing ‘assistance to the applicant to enable him or her to describe more clearly the information requested’. If HCC had explained in their response to Mr Gallagher’s question 4 why the information was not held, we consider that HCC would then have realised that due to the small number of records, they should follow the Commissioner’s guidance on holding information because the average value could easily be calculated.

36. We note that Mr Gallagher stated in his Grounds of Appeal that he “*only asked for averages as I thought it may minimise the data that HHC needed to provide*”. As the Commissioner states in her response to this appeal, Mr Gallagher now has the ‘building blocks’ to enable him to make the calculation for himself. In all the circumstances, we agree with the Commissioner that it would be a disproportionate use of resources for a public authority now to have to undertake this calculation itself.

37. We do not agree with Mr Gallagher’s conclusion that HCC was in breach of section 16 FOIA, nor do we accept his proposition that - notwithstanding HCC’s later provision of information in response to his follow-up request - HCC should *also* be required to answer question 4 of his original request.

38. For the reasons set out above, Mr Gallagher has not satisfied us that the Commissioner’s Decision Notice was wrong in law as regards section 16 FOIA or in not requiring HCC to take any further steps, notwithstanding its breach of section 10 FOIA.

Conclusion

39. We allow this appeal to the extent that the Commissioner's Decision Notice was wrong in law with regards to section 10 FOIA.

40. However, we uphold the Commissioner's Decision Notice with regard to section 16 FOIA, and her decision not to require HCC to take any further steps - and dismiss the appeal to that extent.

41. We accordingly issue a substituted Decision Notice in the terms set out in paragraph 1 above.

ALEXANDRA MARKS CBE

(First Tier Tribunal Judge)

DATE OF DECISION: 24 June 2019

DATE PROMULGATED: 25 JUNE 2019