



**Appeal number: EA/2020/0178/GDPR/V**

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

**HEIDI BENNETT**

**Applicant**

**- and -**

**INFORMATION COMMISSIONER**

**Respondent**

**Before:**

**JUDGE MOIRA MACMILLAN**

**Appearances:**

**The Applicant represented herself.  
The Respondent was not represented.**

**Determined at a remote hearing via video on 19 June 2020**

**DECISION**

1. The Respondent's application for the case to be struck out is refused.
2. The Applicant's substantive Application is also refused.

## MODE OF HEARING

3. The proceedings were held by video. The Applicant joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
4. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
5. The Tribunal directed that the proceedings would be conducted in private in accordance with rule 35(2) of the Chamber's Procedure Rules<sup>1</sup>. A recording of the proceedings is available on application.
6. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 60.

## REASONS

### *Background to the Application*

7. The Application relates to a complaint made by the Applicant to the Respondent on 12 December 2019. The complaint relates to the London Borough of Islington ('the Council'). The chronology of events is as follows:
  - (a) 29 October 2019: The Applicant makes a subject access request ('SAR') to the Council;
  - (b) 12 December 2019: The Applicant complains to the Respondent about both the lack of a response to her SAR and about a different, earlier data protection breach.
  - (c) 6 January 2020: The Respondent writes to the Council, requesting a response to the SAR within 14 days. The Respondent updates the Applicant.
  - (d) 20 January 2020: The Applicant informs the Respondent that she has still heard nothing from the Council.
  - (e) 21 January 2020: The Respondent contacts the Council again, and is told that the Council is prioritising the SAR response.

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<sup>1</sup><https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

- (f) 29 January 2020: The Applicant contacts the Respondent to say that she has still not received a reply from the Council. She receives no response.
- (g) 12 February 2020: The Applicant contacts the Respondent again, and again receives no response.
- (h) 19 April 2020: The Applicant complains to the Respondent about the handling of her complaint.
- (i) 18 May 2020: Having still received no response from the Respondent or the Council, the Applicant applies to the Tribunal under s. 166 of the Data Protection Act 2018 ('DPA').
- (j) 27 May 2020: The Respondent contacts the Council and the Applicant.
- (k) 28 May 2020: The Respondent upholds the Applicant's complaint about the Respondent's handling of her complaint. The Respondent explains that she mistakenly believed the Applicant to have received a response to her SAR.
- (l) Unknown date: The Applicant receives a response to her SAR, which she considers to be incomplete. She contacts the Respondent again.
- (m) 2 June 2020: The Respondent serves a rule 23 Response to this Application and invites the Tribunal to strike it out as having no reasonable prospect of success.
- (n) 4 June 2020: The Respondent addresses, for the first time, that part of the Applicant's complaint relating to the earlier data protection breach. The Respondent upholds this part of the Applicant's complaint.
- (o) 6 June 2020: The Respondent responds to the Applicant's concern that the Council has not provided a full response to her SAR. She asks the Applicant to raise the issue with the Council in the first instance, and to revert to the Respondent if it cannot be resolved.

*The Notice of Appeal and the Response*

- 8. The Notice of Appeal dated 18 May 2020 relies on the following grounds:
  - (a) The Council has ignored the Applicant's SAR;
  - (b) The Respondent has allowed the Council increasing time to respond to her SAR, and appears not to be compelling the Council to comply with its obligations; and
  - (c) The Respondent has not updated the Applicant on the progress of her complaint since 21 January 2020.
- 9. The Response dated 2 June 2020 relies on the following grounds of opposition:
  - (a) The Respondent has, since the Application was made, responded to the Applicant's complaint, and
  - (b) There is no longer a s. 166(2) DPA Order for the Tribunal to make.

*The Law*

10. The Applicant’s right of application is contained in s. 166 DPA:

*Orders to progress complaints*

*(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—*

*(a) fails to take appropriate steps to respond to the complaint,*

*(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or*

*(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.*

*(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—*

*(a) to take appropriate steps to respond to the complaint, or*

*(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.*

*(3) An order under subsection (2)(a) may require the Commissioner—*

*(a) to take steps specified in the order;*

*(b) to conclude an investigation, or take a specified step, within a period specified in the order.*

*(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a).*

11. The reference in s. 166(4) to s. 165(5) means that the “appropriate steps” which must be taken by the Respondent includes investigating the subject matter of the complaint “to the extent appropriate” and keeping the complainant updated as to the progress of inquiries. The extent to which it is appropriate to investigate any complaint is a matter for the Respondent, as regulator, to determine.

12. S.166, when read together with s. 165, requires the Respondent to (i) consider a complaint once made, and (ii) provide the person who made the complaint with a response, both within 3 months. Thereafter, if the Respondent has not sent a final response to the complainant, she must update them on the progress of her consideration of their complaint at least every 3 months.

13. This requirement is reflected in the Orders available to the Tribunal under s. 166(2). The Tribunal can make an Order requiring the Respondent to investigate or conclude an investigation of a complaint (the ‘appropriate steps’ referred to in s. 166(2)(a)), or to provide the complainant with an update (s. 166(2)(b)).

#### *Striking out an application*

14. The Upper Tribunal has provided guidance on the approach to be taken by this Tribunal when considering whether to strike out a case as having no reasonable prospect of success. In *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation) [2014] UKUT 0329 (TCC)*, the Upper Tribunal stated that:

*“...an application to strike out in the FTT under rule 8 (3) (c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a “mini-trial”. As Lord Hope observed in *Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all.*”*

#### *The Evidence*

15. There is no dispute between the parties as to the facts of this case.

#### *Submissions*

16. The Applicant submits that the Respondent has failed to respond adequately to her complaint. She contends that the Respondent has also failed to explain why she had previously concluded that the Council had responded to the SAR.

17. In her Notice of Appeal the Applicant requests sight of the correspondence between the Respondent and the Council, and asks whether either could be fined due to unwarranted delay she has experienced in receiving a response to her SAR. However, at the oral hearing the Applicant accepted that the Tribunal’s powers were limited to making an Order under s. 166(2).

18. The Respondent acknowledges that she previously failed to keep the Applicant updated on the progress of her complaint, but submits that she had now done so. She contends that there is no longer an Order for the Tribunal to make and that the Application should be struck out under rule 8(3)(c).

## *Conclusions*

### *Strike out*

19. I have considered in accordance with *HMRC v Fairford Group* whether the Applicant has put forward non-fanciful grounds in support of her Application. When doing so I have considered the current prevailing circumstances, rather than the circumstances that existed at the date of Application.

20. I note that, in response to this Application, the Respondent has reanimated her investigation and has updated the Applicant in respect of her complaint. However I also note that, at the date of the strike out application, the Respondent had not yet addressed the part of the complaint relating to the earlier data breach.

21. Having considered that circumstance, and the Respondent's poor handling of the complaint overall, I do not consider the grounds of this Application to be without substance, even in light of the Respondent's more recent activity. For example, given the history of this complaint it would be open to the Tribunal to make an Order, requiring the Respondent to inform the Applicant of the progress of her complaint within a specified period of time.

22. The Respondent's application for the Application to be struck out is therefore refused.

### *The Application*

23. I have considered whether an Order is required. I note that the Respondent has, since the date of Application, taken steps to inform the Applicant of the progress of her complaint. Provided she continues to do so, there is no requirement for an Order to be made pursuant to s. 166(2).

24. Disposal: The Application for an Order is therefore refused.

**Date: 19 June 2020**

**Judge Moira Macmillan  
(First Tier Tribunal Judge)**

**Date Promulgated: 22 June 2020**