First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0224P

Determined, by consent, on written evidence and submissions.
Considered on the papers on 20 April 2021

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Kate Grimley Evans
Mr Dan Palmer-Dunk

Between

Lesley Gallacher

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed, but no further steps can be required, as the decision notice was a nullity.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 186.

BACKGROUND

4. On 4 December 2019, the Appellant wrote to the Clarion Housing Group (CHG) and requested information as follows (original punctuation and capitalisation retained):-

> "…I am tenant of Clarion property at my current address [address redacted]. Please supply the details all of the data and policy held regarding Clarion's: Disability Policy in relation to tenants and Clarion Housing: This may include: Disabled coordinator/ team contact liaison person for tenants with Disabilities; Disability Policy in relation to The Equality Act 2010 and disability reasonable adjustments requests from tenant with disabilities; Disability Policy and guidelines Disabled Tenants receiving specific communication adjustments in relation to accessing information equally and fairly as per the Equality Act 2010; and Disability Reasonable adjustment requirements in relation to Health & Safety; Health & Safety Policy in relation to Disabled tenants; Disability Policy in relation to Decant forms and decant form Guidance in relation to Disabled self reporting of disability need; All information in relation to Staff training in Disability Social Model of Disability Awareness 2019 training in line with carrying out Health Assessments with Disabled tenants: Staff training in Data Protection and Confidentiality; Staff training in The Equality Act 2010; Staff training in relation to Disability Policy in all aspects; Policy and information available to the public and staff, specifically in relation to tenant's rights to not disclose Disability detail to landlord in line with current legislation DDA.
>
> As Per The Equality Act 2010 I request a readable digital format preferably in .doc format to enable me to make reasonable adjustments and read information and sent ONLY via email. Please can you acknowledge this Freedom of Information request and or Environment Information request on receipt via email. Please contact me if any issues arise in sending the info in .doc format or via email".

5. On 4 December 2019, CHG copied the Appellant into an email forwarding the request to its customer services and advising: "This is not a complaint and not within my remit to investigate". On 16 December 2019, having received no further correspondence, the Appellant chased a response. CHG responded on the same day advising that the Appellant would again be forwarded to its customer services. No further response has been received under the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004 (EIR).

6. The Appellant complained about this lack of further contact to the Commissioner, but on 28 January 2020 March, the Commissioner advised the Appellant that CHG was not a public authority and that she was therefore unable to require it to respond to the request. The Commissioner advised that the FOIA only applied to those bodies defined as 'public authorities' in section 3 FOIA, which did not include the CHG.

7. The Appellant then asked about the position in relation to the EIR and on 29 January 2020 the Commissioner responded:-

> The definition of 'public authority' is given in Regulation 2 of the EIR. It states that "public authority" means the vast majority of public authorities as defined in Section 3 of the Freedom of Information Act, any organisation or person carrying out a public administration function, or any organisation or person that is under the control of a public authority and:
>
> (i) has public responsibilities relating to the environment;
> (ii) exercises functions of a public nature relating to the environment; or
> (iii) provides public services relating to the environment.
>
> This organisation is not a public authority as defined by Regulation 2 of the EIR and, therefore, does not have a duty to respond to information requests. For this reason the Information Commissioner is unable to proceed with your complaint and has closed your case.

8. The Appellant responded by arguing that CHG 'do in fact carry [ ] out a public administration function and have responsibilities relating to (i), (ii) and (iii)'. The Appellant also queried why the Commissioner's response does not 'address Health and Safety matters in relation to tenants and environment nor any tenant with disability related matters as per The Equality Act 2010'.

9. The Commissioner then produced a decision notice dated 2 July 2020, set out the definition of 'environmental information' as contained in regulation 2 of the EIR and concluded that the information requested was not included because:-

> 17…any possible relationship between the requested information and matters affecting the environment is too remote to satisfy the definition of environmental information which is described by regulation 2 of the EIR.

10. Having decided that FOIA is the correct regime in relation to this request, the Commissioner re-iterated that CHG does not fall within the definition of 'public authority' under FOIA where there is a contained list of which bodies are included. Therefore, CHG is not required to respond to requests for information under FOIA. For the avoidance of doubt the Commissioner also said that if the request had been for environmental information it was likely that the same conclusion would have been reached in relation to whether CHG was a public authority for the purposes of the EIR.

LEGAL FRAMEWORK

11. Section 1(1) FOIA provides that:-

> '(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 than information communicated to him.'

12. Section 3(1) FOIA provides that:-

> '(1) In this Act "public authority" means –
>
> (a) Subject to section 4(4), any body which, any other person who, or the Holder of any office which –
>
> (i) Is listed in Schedule 1, or
>
> (ii) us designated by order under section 5, or
>
> (b) a publicly-owned company as defined by section 6'

13. Information is 'environmental information' and falls to be considered under the EIR if it meets the definition set out in regulation 2 of the EIR, namely:-

> "…any information in written, visual, aural, electronic or any other material form on-
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) reports on the implementation of environmental legislation;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

THE APPEAL AND SUBSEQUENT STEPS

14. The Appellant appealed against the decision notice, and the grounds essentially argue that the refusal of CHG to respond to the request is contrary to the Equality Act 2010 "because it minimises and dismisses my opportunity to have equal access to services on grounds of disability…".

15. The Commissioner filed a response dated 5 August 2020 in which it was re-stated that the Tribunal and the Commissioner do not have jurisdiction to make decisions regarding complaints under the Equality Act 2010, and that CHG is not a public authority within as defined in s.3(1) FOIA.

16. The Commissioner asked for the appeal to be struck out on the basis that the appeal has no reasonable prospects of success pursuant to rule 8(3)(c) of the Tribunal Procedure Rules 2009. Alternatively, should the appeal not be struck out, the Commissioner submitted that the appeal should be dismissed.

17. The strike out application was considered by the Registrar on 17 November 2020 and refused as follows:-

> I consider it appropriate for a Judge/Panel, applying to the facts about the body known as "Clarion Housing Group" to consider, in light of such authorities, whether the decision notice was right to conclude that Clarion Housing Group is not subject to the obligations of the Freedom of Information Act 2000.

18. However, on 27 November 2020, the Commissioner applied again to strike out the appeal, this under rule 8(2)(a) of the 2009 Tribunal Rules on the ground that the Tribunal does not have jurisdiction in relation to the proceedings. The essence of the application was as follows:-

> The right of appeal under section 57 is therefore contingent upon a decision notice under section 50(3)(b) having been served which is a decision concerning a request made to a public authority.
>
> In her 'decision' dated 7 July 2020, the Commissioner (having concluded that the appropriate regime was FOIA) found that the Clarion Housing Group were not a public authority for the purposes of s.3 FOIA. This was therefore a decision concerning whether the Commissioner had jurisdiction.
>
> The Commissioner accepts that she has no jurisdiction to issue a decision notice under FOIA in relation to an entity which is not designated as a public authority under FOIA.

19. On 1 December 2020 the Registrar refused the application and said:-

> 3.1 Even if the Information Commissioner's Office cannot issue a decision notice in respect of an entity which is not a public authority the fact remains that the Information Commissioner's Office did issue a decision notice, under section 50 of the Freedom of Information Act 2000, in this matter.
>
> 3.2 That decision notice is currently available on the Information Commissioner's Office website1 in a place which is headed "Action we've taken" and "Decision Notices".

> 3.3 I consider it unfair to strike out the appeal where it is quite clear to me that the Information Commissioner's Office currently considers that the document issued is a "Decision Notice".

20. Undeterred the Commissioner applied for the matter to be reconsidered afresh by a Judge pursuant to rule 4(3). On 18 January 2021, Judge Macmillan refused the application to strike out. Reviewing the relevant paragraphs in the Upper Tribunal (UT) cases of *Information Commissioner v Bell* [2014] UKUT 0106 (AAC) and *Information Commissioner v Malnick & ACOBA* [2018] UKUT 72 (AAC) she said that:-

> I am satisfied from the preceding paragraphs that Upper Tribunal has decided that a distinction is to be made between a decision notice that is a nullity, and once that is not in accordance with the law, but that in either case the FTT has jurisdiction to consider the case. The FTT may decide that a notice is a nullity where the Respondent has issued it without jurisdiction. In such a case it will allow the appeal, but no substituted notice will be required. If the decision notice contains an error of law, the FTT must allow the appeal and must substitute the notice.
>
> Neither am I persuaded that a decision that a notice is a nullity is inconsistent with the language of s.58. The outcome of such a decision is merely that the appeal will be allowed, pursuant to s.58(1).
>
> …
>
> In neither Bell nor Malnick does the Upper Tribunal suggest that the FTT does not have jurisdiction in relation to an appeal where the decision notice is a nullity.
>
> …
>
> The Upper Tribunal has confirmed, most recently in the case of *Dransfield -v- Information Commissioner* (Section 50(2): Jurisdiction) [2020] UKUT 0346 (AAC), that there are statutory limitations on the ways in which the Respondent may respond to a complaint made under s.50(1). However, on occasion the Respondent may also engage in correspondence with a complainant which does not meet the description of a decision notice set out by the House of Lords in Sugar v BBC [2009] UKHL 9 . This was the situation in the case of Kirkham v Information [2018] UKUT 6 (AAC), in which the Upper Tribunal decided that the FTT had no jurisdiction to consider the appeal.
>
> 17. In this case the Respondent has served a decision notice under to s.50(3)(b). This gives rise to a right of appeal to the FTT pursuant to s.57(1). Although the Respondent may, on reflection, consider the notice she has served to be a nullity, this does not mean that the Tribunal has no jurisdiction to consider the matter.

21. The Appellant has submitted a further document which concentrates on her rights and CHG's duties under the Equality Act 2010, but which does not further the matters with which this Tribunal is concerned. The Commissioner has not made any further submissions and we are not told that the Commissioner has appealed the rule 4(3) decision.

DISCUSSION

22. We do not disagree with anything which is said in the decision notice. It is our view that the information sought does not fall within any part of the definition of 'environmental information' in reg 2 of the EIR as set out above. Therefore, FOIA is the appropriate regime for considering this case.

23. It is also our view that the CHG does not fall within any of the definitions of a 'public authority' as set out in FOIA. We note that s1(1) FOIA only applies to 'a request for information to a public authority'. If the body to which a request is made is not a 'public authority' as defined in FOIA, then none of the rights to be told whether the body holds information of the description specified in the request, or to have the information communicated to requester applies. Equally none of the rights to complain to the Commissioner or for the Commissioner to issue a decision notice pursuant to FOIA apply. The effect of all that is, in our view, that the decision notice issued in this case was a nullity.

24. The question then arises as to whether this Tribunal has the jurisdiction to consider a decision notice that is a nullity and, if it has, how it should proceed.

25. As things stand the appeal in this case has not been struck out and it comes before us to be considered. However, it seems to us that we are not bound by the decision not to strike out by Judge Macmillan, and it would still be open to us to agree with the Commissioner that the fact that the decision notice is a nullity means that the Tribunal has no jurisdiction to hear the appeal.

26. However, having considered the matter afresh and looked again at the cases of *Bell* and *Malnick*, we find we agree with her conclusion that in 'neither *Bell* nor *Malnick*

does the UT suggest that the FTT does not have jurisdiction in relation to an appeal where the decision notice is a nullity'. Indeed, as Judge Macmillan points out in *Malnick* at paragraph 98 and 99 the three-judge UT panel commented as follows:-

> 98…Upper Tribunal Judge Jacobs at paragraph 23 of Bell identified one circumstance in which a notice may be a nullity, namely where there had in fact been no complaint. We agree that in such a case the FTT could not substitute another notice because it would have no jurisdiction to do so. In that case, it would be sufficient for the FTT to allow the appeal and declare that the notice was invalid. Of course, there would be no question of the IC making another decision in such an unusual case. The IC would have no jurisdiction to do so in the absence of a complaint under section 50.
>
> 99. We doubt, however, that the second example in paragraph 23 of Bell, where the notice was "so completely incoherent or unconnected with" the Commissioner's legal powers, is strictly speaking a case of nullity. The notice would simply not be in accordance with the law and so the FTT would allow the appeal and substitute another notice (see paragraph 103 below)…

27. In *Malnick* at paragraph 100 the UT was alerted to other cases where the notice might be a nullity and again commented that if the FTT were to find such a flaw, the correct response would simply be to find that the decision notice was not in accordance with the law and to substitute another notice.

28. The Commissioner has argued that in this case, as there was no valid complaint (because the complaint did not concern a public authority), then the case should be approached as if there was no complaint at all. But as Judge Macmillan found, taking that approach takes the Tribunal straight back to paragraph 98 of *Malnick* where we are told that 'it would be sufficient for the FTT to allow the appeal and declare that the notice was invalid'.

29. We recognise that in paragraph 103 of *Malnick* the UT said that where the notice is not in accordance with the law then '[t]he only way in which allowing the appeal can be given practical effect is if the FTT is also able to substitute a correct notice'. But we have to assume that, given the contents of paragraph 98 of *Malnick*, the UT was drawing a distinction between cases where the decision notice is a nullity, and those where the decision notice is 'not in accordance with the law'.

30. Indeed, that is exactly the conclusion reached by Judge Macmillan, and she goes on to state:-

> The FTT may decide that a notice is a nullity where the Respondent has issued it without jurisdiction. In such a case it will allow the appeal, but no substituted notice will be required. If the decision notice contains an error of law, the FTT must allow the appeal and must substitute the notice.

31. On that basis we find that as there was no request for information from a public authority as defined in FOIA, then the decision notice issued by the Commissioner was a nullity. However, on the basis of paragraph 98 of *Malnick* the Tribunal has jurisdiction to consider an appeal to the decision notice which was in fact issued.

32. Having found or declared in this decision that the decision notice was invalid we allow the appeal, but no substituted decision can be issued.

33. We need to make the effect of that decision clear for the Appellant. It does not mean that CHG must disclose the information requested, nor that the Commissioner was wrong to reach a conclusion that CHG is not a public authority to which FOIA applies – indeed we agree with that conclusion. It simply means that the Commissioner should not have issued a decision notice at all in this case.

34. While the Tribunal can see that it is frustrating that CHG has not provided information requested, the Tribunal is not requiring the Commissioner or CHG to carry out any further steps, because it has no power to do so. Further, the Tribunal has no jurisdiction at all in relation to the Appellant's complaints which relate to the Equality Act 2010.

35. However, for the reasons set out above, this appeal is allowed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 22 April 2021.