



Case Reference: EA-2021-0016

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers
Heard on: 27 June 2022
Decision given on: 29 June 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
PANEL MEMBER NAOMI MATTHEWS

Between

JON AUSTIN

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) METROPOLITAN POLICE SERVICE

Respondents

Substituted Decision Notice (original Decision Notice IC-40052-X4Y7 OF 30 NOVEMBER 2020):

Public Authority: Metropolitan Police Service
Complainant: Mr. Jon Austin

1. For the reasons set out in the decisions of the first tier tribunal (FTT) promulgated on 4 August and 4 November 2021 the public authority was not entitled to rely on s 30(3) or 31(3) of the Freedom of Information Act 2000 (FOIA) to neither confirm nor deny that it held the requested information.
2. As the public authority has now issued a fresh response the tribunal does not require the public authority to take any steps.

CONSENT OF PARTIES TO PROCEEDING IN THE ABSENCE OF ONE MEMBER
Schedule 4 para 15(6) Tribunal, Courts and Enforcement Act 2007 (TCEA)

All parties provided their consent for the matter to be decided in the absence of one of the members chosen to decide the matter.

REASONS

Background

3. The parties consented to the matter being heard on the papers and by a panel of two.
4. These reasons are additional to and should be read in conjunction with the interim decision and reasons promulgated on 2 July 2021 ('the interim decision') and the final decision and reasons promulgated on 4 November 2021 ('the final decision').
5. In those decisions the tribunal concluded that the Metropolitan Police Service ('the MPS') was not entitled to rely on s 30(3) nor on s 31(3) of the Freedom of Information Act 2000 (FOIA) to neither confirm or deny that it held the requested information.
6. Following the final decision the tribunal issued an order dated 4 November 2021 which included the following:
 1. By **17 December 2021**:
 - 1.1. The second respondent shall write to the tribunal and the other parties confirming that it has disclosed the requested information, or
 - 1.2. if the second respondent claims it is not obliged to comply with the request for information (other than under s 31(3) or s 30(3)), it shall provide a notice to the appellant, copied to the tribunal and the , that complies with s 17 FOIA.
 - 1.3. If the second respondent relies upon further exemptions in that notice it must also provide any evidence (not already in the bundle) or submissions relevant to those exemptions upon which it will rely before the tribunal.
7. The order was suspended by the Registrar on 9 December 2021 pending confirmation of whether or not the Commissioner intended to make an application for permission to appeal. The Commissioner confirmed that he was not seeking permission to appeal, the suspension was revoked and the deadline for compliance was extended to 28 February 2022 by the Registrar by order dated 11 February 2022.
8. By letter to the claimant dated 23 February 2022 the MPS informed the claimant that the requested information was not held at the time of the request, although

it provided some information in any event. This letter does not, as far as this tribunal is aware, appear to have been copied to the tribunal. On the same date the MPS wrote to the tribunal by email stating:

I can confirm that, in compliance with para 1.1. of the case management directions of 11 February 2022, my client has today disclosed the requested information.

9. The Registrar then issued a case management direction dated 12 April 2022 requiring Mr. Austin to state whether the appeal was withdrawn or provide reasons why the matter should proceed further by 6 May 2022.
10. Mr. Austin wrote to the tribunal on 27 April 2022 querying why he had been asked to state whether the appeal was withdrawn when the appeal had succeeded and raising further questions. The matter was referred to Judge Buckley, and as a result the administrative staff wrote to Mr. Austin on 28 April as follows:

I have referred the matter to Judge Buckley who has asked me to write to you as follows.

The Appellant is correct that the appeal has been allowed.

In order to comply with the direction the Appellant should inform the tribunal by no later than 6 May 2022 whether or not he is satisfied that the Second Respondent has disclosed the requested information.

If the Appellant is satisfied that the requested information has been disclosed the tribunal is likely to issue a substitute decision notice to the effect that the Second Respondent was not entitled to rely on s 31(3) and that the Second Respondent is not required to take any further steps because the requested information has now been disclosed. If the Appellant is not satisfied that the requested information has been disclosed, he should explain why and the tribunal will consider the appropriate next steps.

11. Mr. Austin replied by email dated 6 May 2022 providing a copy of the letter of 23 February 2022 to the tribunal.
12. Mr. Austin raised a number of concerns in his email dated 6 May 2022 that the disclosures 'do not meet the requirements of the tribunal decision'. Mr. Austin continued as follows:

To satisfy its disclosure requirements from the tribunal, perhaps the MPS could be asked to identify and provide the source of the names of the it has provided, bearing in mind it has confirmed that it has no record of the names of the dogs on the search, where they were sent from or the time they were sent?

Perhaps it could also be asked to explain exactly what it meant by "the relevant information" and "not held under FOIA" when it said "Whilst the Police Dog names were not recorded within the relevant information and therefore not held under FOIA?"

13. The MPS provided a response to the above email on 9 May 2022 in which it provided some further clarification but in essence submitted that the matters raised by Mr. Austin were outside the jurisdiction of the tribunal.

14. The matter was then listed for a hearing on the papers for the tribunal to determine:

1. Whether or not the tribunal had any further jurisdiction to consider whether or not the public authority had complied with s 1(1) FOIA, and if not,
2. Whether and in what terms to issue a substitute Decision Notice on the basis of decision the tribunal's decision that the public authority was not entitled to rely on s 301(3) or 31(3) to neither confirm nor deny that it held the information.

15. The parties were given the opportunity to provide submissions on the jurisdictional issue. The MPS and Mr. Austin provided short submissions. The Commissioner did not provide any submissions.

16. In essence, the MPS submitted that:

1. The FTT has no jurisdiction to consider anything arising from the disclosure of information to Mr Austin that was not made under FOIA. Whether or not Mr Austin believes what the MPS has disclosed to him, or what inferences might be drawn from it, are matters which are not relevant. It does not affect the substantive response under FOIA: at the time of his request, the information was not held.
2. The MPS accepts that if Mr Austin were challenging whether the MPS in fact did hold the requested information at the time of his request, the FTT would have jurisdiction to determine that question. But Mr Austin's position is not that the MPS' response was inaccurate, but that (in conjunction with the non-FOIA disclosure), it 'raises new questions'. That does not mean that the response to the request under FOIA is incomplete or defective or not in accordance with the law.
3. If Mr Austin wishes to obtain further information, it would be open to him to make a further request under FOIA, or to ask the MPS to disclose further information to him outside FOIA: he has not taken either course. But this is outside the scope of his appeal in respect of this request.
4. For those reasons, the MPS position is that the FTT has no jurisdiction to consider Mr Austin's further complaint about the MPS response to his request. There is no live issue over whether or not the MPS has complied with s.1 FOIA.

17. Mr. Austin submitted that the tribunal may have jurisdiction to determine if the MPS notice complied with s.17 FOIA and s.1(1)(a) FOIA. This is because:

1. The MPS response was ambiguous and included details of a later separate search of the unit (which it referred to as 'the search' - 'The search was conducted on the 11th August 2014 and the items found at

18:10hrs.) said to have been identified by the dogs during the earlier separate 'dog search.' Referring to this later separate search as 'the search' in respect of the specific request, could have been taken as the MPS suggesting it had held a record of only the time of the dog search at the date the request was made. Yet, its submission of today confirms this was not the case.

2. Mr Austin submits that he has, 'in a sense', suggested that the response was inaccurate in that it included details of a search outside of the request that could confuse the recipient as it was referred to as 'the search'. The Tribunal may be able to reach a decision on whether this aspect of the notice was accurate and whether the notice complied with the act as it included details of an event that was not requested (this later separate search), particularly if by being called "the search" it could have been confused with the time of the dog search that was requested and potentially changed the interpretation of the response.
3. Also, Mr. Austin believes that the Tribunal may be able to determine if it was right for the notice (excluding the ambiguity over the time of the search) to confirm that the requested information was not held at the time of the request, but then go on to provide, outside of the FOIA, some of the requested information (dog names) from an unconfirmed source, as was done. This is because, as said in Mr. Austin's earlier submission of May 16 2022 it could set a 'bad precedent'.

Discussion and conclusions

18. The tribunal has already determined that the MPS was not entitled to 'neither confirm nor deny' that the information was held.
19. In anticipation that the MPS would then confirm that it held the information, but might wish to raise substantive exemptions, the tribunal determined that it would deal with any substantive exemptions before issuing a Decision Notice rather than remit the matter to the public authority.
20. The MPS has confirmed that it did not hold the requested information at the date of the request. Mr. Austin, although he has raised various issues and concerns about the MPS' response, does not fundamentally assert that the MPS did hold the requested information at the date of the request. In those circumstances we do not need to decide if we have jurisdiction to determine whether or not the MPS held the information at the date of the request.
21. The specific matters raised by Mr. Austin are more clearly outside our jurisdiction. We cannot make a ruling on the points raised by Mr. Austin about the reference to what he asserts to be a different search, and the consequent ambiguity. Nor can we make a ruling on whether or not it was right for the notice to confirm that the requested information was not held at the time of the request, but then go on to provide, outside of the FOIA, some of the requested information.

22. For those reasons, we determine that the appropriate course of action is to issue a substitute decision notice to the effect that the MPS were not entitled to rely on s 30(1) or s 31(1) FOIA. As the MPS have now issued a response to the request under s 1(1)(a) FOIA it is not appropriate to order the MPS to take any steps.

Signed Sophie Buckley

Date: 27 June 2022

Judge of the First-tier Tribunal