



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA-2022-0214

INFORMATION RIGHTS

Before

REGISTRAR BAMAWO

Between

DR TONY CUTLER

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

EQUALITY AND HUMAN RIGHTS COMMISSION

Second Respondent

DECISION AND REASONS

1. The Equality and Human Rights Commission's ('the EHRC') response dated 08 November 2022 makes an application for this matter to be struck out as having no reasonable prospect of succeeding in accordance with Rule 8(3)(c), The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
2. I am not required to conduct an oral hearing and proceed to consider this application in accordance with Rule 32(3), The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

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3. By reply in an email dated 19 December 2022 with a document titled '*strikeoutcritique*' the Appellant objects to the EHRC's strike out application.

Background

4. The background to this matter is disputed and I do not intend to rehearse it here but rely on what is said the Information Commissioner's ('the Commissioner') Decision Notice reference IC-113849-Z7S6 ('DN').

The Law

The Freedom of Information Act 2000 ('FOIA')

Section 1- (General right of access to information held by public authorities.

(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.

(2)Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

Section -2 Effect of the exemptions in Part II.

(1)Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

(a)the provision confers absolute exemption, or

(b)in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

Section 1(1)(a) does not apply.

(2)In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a)the information is exempt information by virtue of a provision conferring absolute exemption, or

(b)in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3)For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

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(a)section 21,

(b)section 23,

(c)section 32,

(d)section 34,

(e)section 36 so far as relating to information held by the House of Commons or the House of Lords,

(ea)in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,

(f)section 40(1),

(fa)section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,

(g)section 41, and

(h)section 44.

...

Section 44 Prohibitions on disclosure:

(1)Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a)is prohibited by or under any enactment,

(b)is incompatible with any retained EU obligation, or

(c)would constitute or be punishable as a contempt of court.

(2)The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

...

Section 57

(1)Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

...

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Section 58

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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Consideration

5. Where an appeal is brought under section 57 FOIA the Tribunal must consider whether the Commissioner's DN is not in accordance with law, or the Commissioner should have exercised any discretion differently.
6. The Commissioner concluded the EHRC did not hold, on the balance of probabilities, the information in relation to parts 1 and 2; and in relation to parts 3, 4, 5, 7 and 8 was entitled to rely on section 44 FOIA in withholding the requested information.

Decision and Reasons

7. The Appellant's Notice of Appeal and response to the application to strike out these proceedings do not state how or why the Commissioner's DN is not in accordance with the law, or any discretion exercised by the Commissioner should have been exercised differently.
8. The Commissioner's DN deals with part 1 of the Appellant's information request at paragraphs 14 to 18 and part 2 at paragraphs 19 to 23. The Appellant's Grounds of Appeal or his 'strikeoutcritique' do not state what error of law is made by the Commissioner; rather the Appellant proceeds to explain his interpretation of EHRC's report.
9. The Appellant's 'strikeoutcritique' seeks to question the Commissioner's consideration of the adequacy of a search as mentioned in the Commissioner's response. Paragraph 15 must be read in its entirety (indeed it is one sentence). It is clear that adequacy forms just one reason among any other reasons in the

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consideration of whether a public authority holds information which is the subject of an information request.

10. The Appellant does not address the Commissioner's conclusion that the EHRC was entitled to rely on section 44 of the FOIA in relation to parts 3, 4, 5, 7 and 8 of his request. In the absence of a submission on this point I consider that the Appellant takes no issue.
11. For the reasons given I hereby strike out this application as having no reasonable prospect of success in accordance with GRC Rule 8(3)(c).

Signed *Mr S Bamawo*

Registrar of the First-tier Tribunal General
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This decision was made by the Tribunal Registrar. A party is entitled to apply in writing within 14 calendar days of the date this document is sent for this decision to be considered afresh. If you apply later than 14 days you must explain why you are late.