



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0099**  
**Information Commissioner's Ref: FS50124420**

**Heard at Tax and Lands Tribunal, London WC1**  
**On 2 June 2009**

**Decision Promulgated**  
**On 22 June 2009**

**BEFORE**

**CHAIRMAN**

**ROBIN CALLENDER SMITH**

**and**

**LAY MEMBERS**

**DAVE SIVERS**

**PAUL TAYLOR**

**Between**

**ERIC JENNINGS**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:**

- Rule 10

**Cases:**

***Billings v Information Commissioner [EA/2007/0076]* and *Tanner v Information Commissioner and Commissioners for Revenue and Customs [EA/2007/0106]*.**

**Representation:**

For the Appellant: in person.

For the Respondent: Mr James Boddy (Counsel on behalf of the Information Commissioner).

**Decision**

1. The Tribunal dealt with this matter under the provisions of Rule 10 of the Information Tribunal (Enforcement Appeals) Rules 2005. This appeal has been disposed of summarily.

2. This followed an oral pre-Directions hearing on 1 April 2009 involving all parties and a full oral hearing in respect of the application for summary disposal – again involving all parties – heard on 1 June 2009.

**Reasons for Decision**

**Introduction**

1. Mr Eric Jennings requested OfSTED to provide information concerning a reference in a school inspection report to the phrase that a particular school's governing body had "effectively addressed some difficulties".
2. OfSTED's original response to this request for information came in a letter dated 30 March 2006 and stated that it did not hold the information. Mr Jennings responded to this letter by having telephone conversations with OfSTED and – as a result – wrote again on 25 May 2006 to OfSTED with a more detailed request for information. This letter included a further and different request for information which was not referred to the Information Commissioner and is not part of the Decision Notice or this appeal. OfSTED responded to the second letter by stating that it was the same as the original request and repeating that it did not hold the requested information.

3. Mr Jennings then sought an internal review of the decision. This ultimately provided Mr Jennings with a copy of the notes taken by the Inspector of the interview with him. It also provided a quote from the interview notes with the Chair of Governors of the school that the governing body “has had to deal with considerable problems over the last six years – only resolved in the last two years”. This information was provided to demonstrate the lack of information held. OfSTED maintained it did not hold the information subject to the request.
4. At this stage Mr Jennings complained to the Information Commissioner on 28 June 2006 about those responses.
5. Subsequently – and outside of the Act – Mr Jennings was provided by OfSTED with an entire copy of the interview notes from the meeting with the Chair of Governors. There were no further references in the notes to any “difficulties” faced by the school. The Tribunal has seen that document in the closed evidence it has considered in this appeal.
6. In a Decision Notice dated 8 December 2008 the Commissioner concluded that OfSTED had supplied Mr Jennings with the information, did not hold any further information within the scope of the request and that OFSTED had breached section 10 (1) FOIA by not providing the information within 20 working days. The Decision Notice also contained consideration of whether there had been a breach of section 16 (something which is not the subject of this appeal).
7. In the "Other Matters" section of the decision notice the Commissioner commented about the Appellant's concern that OfSTED had deliberately delayed or avoided providing the information requested in the following terms:

"Finally, the Commissioner notes that the complainant seems to feel that the PA deliberately delayed or avoided providing the information requested. Such an issue, if found to be the case, would have been a breach of section 77 of the Act. The Commissioner is satisfied that there is no evidence of his having taken place. Although it later (when requested to do so by the Commissioner) provided the complete evidence form document, (from the meeting between the Inspector and the Chair of Governors) to the complainant, it does not appear that the rest of the documents beyond the quota provided at internal review stage is relevant to the

request. The pertinent information therefore was disclosed, albeit not until review stage. No deliberate delay appears to have occurred."

### The appeal to the Tribunal

8. The single ground of appeal contained in the Notice of Appeal was that "OfSTED deliberately held information. See attached\*". Background was expanded on in a handwritten attachment to the Notice of Appeal where reference was made to copies of correspondence attached to the Notice of Appeal.

### The questions for the Tribunal

9. The Tribunal had to consider Rule 10 which states:

*(1) Where, having considered –*

*(a) the notice of appeal, and*

*(b) any reply to the notice of appeal,*

*the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may, subject to the provisions of this rule, so determine the appeal.*

...

*(5) Where an appellant requests a hearing under paragraph (4) (b) above the Tribunal shall, as soon as practicable and with due regard to the convenience of the appellant, appoint a time and place for a hearing.*

10. The Tribunal has previously concluded (*Tanner v Information Commissioner and the Commissioners for Revenue and Customs EA/2007/0016*) that the appropriate test for summary dismissal under rule 10 is similar to the test under Part 24 of the Civil Procedure Rules 1998.

11. Part 24 makes provision for a claim which has no real prospect of success to be summarily dismissed. In the case of *Tanner* the Tribunal adopted guidance on the meaning of the test as provided in ***Swain v Hillman [2001] 1 All ER (CA)*** by Lord Woolf MR. In particular the words "*no real prospect of being successful or*

*succeeding" spoke for themselves and meant that the Tribunal had to decide whether there was a "realistic" as opposed to a "fanciful" prospect of success (at para 4).*

### Evidence

11. Mr Jennings submitted a three-page letter in support of his appeal which he adopted as his evidence. He did not add to it further in his oral evidence to the Tribunal beyond saying that he remained dissatisfied with the way OfSTED had dealt with the matter.

12. The core of his complaint is summarised at the end of this letter. It reads:

"OfSTED has stated, in trying to conceal the fact that they deliberately withheld information, in correspondence that I have obtained from the Information Commissioner, using the Freedom of Information Act, that my Freedom of Information request was either, not recorded, when clearly the information I requested was there, e.g. Evidence Forms one and two. Or, OfSTED stated that, because I had requested information from OfSTED using the Freedom of Information Act, at the same time that I contacted the Independent Complaints Adjudicator, I must have confused myself owing to the fact that the Information Commissioner and the Independent Complaints Adjudicator have different procedures. I have had dealings since 2001 [and] there is no way I have confused myself. I know/knew exactly what I was doing. OfSTED even went so far as to state, when they sent the Independent Complaints Adjudicator their OfSTED school inspection file containing the information that they told me did not exist, that the Independent Complaints Adjudicator had her own disclosure regime. What the Independent Complaints Adjudicator's disclosure regime has to do with regard to a Freedom of Information Act request to OfSTED, I have absolutely no idea. The letter dated 27 February 2008 from OfSTED to the Commissioner is a vital piece of evidence that proves OfSTED knew what I wanted, knew what they had, knew what took place at the meeting, and deliberately withheld [this]."

### Legal submissions and analysis

13. Mr Boddy, Counsel for the Commissioner, drew the Tribunal's attention to *Tanner and Billings v The Information Commissioner (EA/2007/0076)*.

14. He also drew the Tribunal's attention to Mr Jennings' allegation in the grounds of appeal that OfSTED "deliberately held" information. That was an allegation under section 77 for FOIA. Section 77 provides:

*77 (1) Where –*

*(a) a request for information has been made to a public authority, and*

*(b) under section 1 of this Act... the applicant would have been entitled... to communication of any information in accordance with that section,*

*any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.*

....

*(4) No proceedings for an offence under this section shall be instituted –*

*(a) in England and Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions.*

15. He submitted that the Tribunal did not have jurisdiction to consider issues relating to section 77 and invited the Tribunal to dismiss the Appeal under Rule 10.

### Conclusion and remedy

16. The Tribunal notes the extensive background to this appeal, the matters in relation to OfSTED and the education issues in relation to Mr Jennings' son that have so understandably exercised Mr Jennings.

17. The Tribunal also notes that Mr Jennings has been able to obtain, from OfSTED, outside FOIA, disclosure of the information he had been seeking all along.

18. The Tribunal clearly has no jurisdiction to consider issues relating to section 77 and potential prosecutions under FOIA. Those are properly and correctly reserved to the Commissioner and the Director of Public Prosecutions in the statutory legislation.
19. In terms of the “Other Matters” section of the Commissioner’s Decision Notice in this case, the Tribunal finds the *Billings* case useful and informative. In particular, at paragraph 8 in *Billings*: “As the “Other Matters” section did not form part of the reasoning by which the Information Commissioner reached his decision, there is no basis upon which the criticism may be said to demonstrate that the Decision Notice did not comply with the law. This is not therefore a ground of appeal that we can contemplate.”
20. In the appeal before this Tribunal Mr Jennings makes no challenge to the conclusion reached by the Information Commissioner. Mr Jennings is seeking to have the Tribunal consider a matter relating to the conduct of the public authority, not whether the Commissioner’s decision was in accordance with the law.
21. Such a situation means that the operation of Rule 10 is appropriate to dispose of this appeal. The Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith. Applying the test in *Swain v Hillman* there is no realistic prospect of it being successful or succeeding.
22. There is no order as to costs in this appeal.
23. Our decision is unanimous.

Signed

Robin Callender Smith

Deputy Chairman

21 June 2009