



Tribunals Service

Information Tribunal

Information Commissioner's number **FS50177655**

Information Tribunal Appeal Number **EA/2008/0039**

Determined

Heard on the papers
On 13th October 2008

Decision Promulgated
On 20th October 2008

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BEFORE

DEPUTY CHAIRMAN

Peter Marquand

and

LAY MEMBERS

Jenni Thomson

Dave Sivers

B E T W E E N

ARNOLD JOSEPH MARTYRES

Appellant

AND

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

Information Tribunal (Enforcement Appeals) Rules 2005 as amended –
Application for striking out, Rule 9 – Summary Disposal of Appeals, Rule 10.

Cases:

Tanner v Information Commissioner and HMRC (EA/2007/0106)

Representations:

For the Appellant: In person
For the Respondent Geraldine Dersley

DECISION

The Tribunal dismisses this appeal on the basis that the Notice of Appeal discloses no reasonable grounds of appeal.

Reasons for Decision

Summary Background

1. Mr Martyres has made complaints about a local authority and decisions about various pieces of land. He has also complained to the Commission for Local Administration in England (CLAE) and subsequently made various requests for information under the Freedom of Information Act (FOIA), Environmental Information Regulations (EIR) and Data Protection Act (DPA).

The request for information

2. On 11th September 2007 Mr Martyres made the following request for information from CLAE:

“Please provide me with the copies of the legal guidance provided by the Department of Communities and Local Government and/or your external auditors, Baker Tilly and/or the Information Commissioner in relation to the handling of requests, by the Commission for Local Administration, under the provisions of the Freedom of Information Act 2000, the Environmental Information

Regulation 2004 and the Data Protection Act 1998 as amended.

What special research have these three bodies conducted in relation to the three information laws specifically for the Commission for Local Administration?

Should you require me to refine or further clarify my request please contact me by email."

3. The CLAE, responded on the 13th September 2007 in the following way:

"The Commission has not received any specific legal guidance on the handling of requests under the Freedom of Information Act 2000, the Environmental Information Regulations 2004 or the Data Protection Act 1998 as amended from either the Department of Communities and Local Government or from our external auditors, Baker Tilly, or from the Information Commissioner.

The published advice to public bodies from the Information Commissioner (IC) is available on the IC website. We do hold some of this in our files and electronically, but doubt if this is accessible to you by other means, and the exemption in section 21 of the Act applies,

No special research has been conducted into our FOI practice by any of the above bodies."

4. In other words the CLAE denied that it had any of the information requested or where it did, it said that information was already available to members of the public by other means. On 17th September 2007 Mr Martyres requested an internal review by CLAE, which was concluded on the 31st October 2007. That review upheld the original decision, albeit providing Mr Martyres with some clarification.
5. The Information Commissioner ("the Commissioner") investigated CLAE's response following a complaint by Mr Martyres. A Decision

Notice was issued on the 25th March 2008 and concluded that the exemption in section 21 FOIA had been correctly applied and that CLAE held no information of the type requested by Mr Martyres, other than that which is also publicly available. In particular, the Commissioner confirmed that he had not provided any “legal guidance” to CLAE.

Appeal to the Tribunal

6. Mr Martyres appealed to the Tribunal by Notice dated 17th April 2008. The Commissioner served a Reply dated the 12th May 2008. In the Reply the Commissioner asked the Tribunal to first, strike out the appeal under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 (“the Rules”) on the basis that the Notice of Appeal discloses no reasonable grounds of appeal. Secondly, the Commissioner invited the Tribunal to strike the appeal out under Rule 10 of the Rules, on the basis that the appeal did not have any realistic prospect of success.
7. The Tribunal having considered the Notice of Appeal and Reply issued a direction that it would consider the Commissioner’s applications and Mr Martyres was given permission to make written representations objecting to the Commissioner’s application and to request an oral hearing if he wished. Mr Martyres served written objections, dated 18th July 2008 and did not request an oral hearing.
8. The full Tribunal considered the applications under Rule 9 and Rule 10 on the 13th October 2008 on the papers.

The Tribunal’s jurisdiction

9. The Tribunal’s remit is governed by the FOIA and in particular section 58. Section 58 is set out below:

“58- Determination of Appeal.

(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 involves 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.”

As can be seen from section 58 the jurisdiction arises out of the Decision Notice issued by the Information Commissioner.

Rule 9 and Rule 10

10. The Tribunal procedure is governed by the Rules, made under section 67(2) and paragraph of Schedule 6 to the Data Protection Act 1998. Rule 9 is relevant here and is as follows:

“(1) Subject to paragraph (3) below, where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal.

(3) This rule does not apply in the case of an appeal under section 48(3) of the 1998 Act.”

Section 48(3) is not relevant here.

11. Rule 10 provides (in so far as it is relevant):

“(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.”

12. The Tribunal can only determine those matters that fall within its jurisdiction, as Rule 9 above makes clear. If the appeal does not fall within its jurisdiction, then Rule 9 allows the Tribunal to strike out the appeal. In addition, the Tribunal may strike out an appeal if, within the Notice of Appeal, there are no “reasonable grounds”. For example, if there is no indication of what the claim is about.
13. In Tanner v Information Commissioner and HMRC (EA/2007/0106) the Tribunal (differently constituted) concluded that the appropriate test in Rule 10 for a claim to be summarily dismissed if it had no real prospect of success. It must be decided whether there is a "realistic", as opposed to "fanciful", prospect of success.

The grounds of appeal

14. The Tribunal has carefully considered the Notice of Appeal in this matter and also Mr Martyres’ written objections. The grounds of appeal are set out by Mr Martyres in a four page document which is divided into sections in the form of “background”, “key issues of concern”, “approach by the Commission for Local Administration for England”, “conclusion” and “matters stayed in the High Court”. This document sets out the history commencing on the 7th April 2003 of Mr Martyres involvement with a local authority, CLAE and various members of staff who have dealt with him and his correspondence. It is clear from this document that Mr Martyres has made various requests for information under FOIA, EIR and the DPA and that he has not been satisfied with the responses that he has received.
15. The Tribunal has been careful to try and identify any issues that might be said to relate specifically to the Decision Notice and has identified the following:

- a. The Commissioner failed to provide decision notices on earlier EIR and DPA complaints, without which it would be impossible for this Tribunal to conduct any appeal fairly.
 - b. There are other outstanding requests that have not been dealt with.
 - c. CLAE relies upon section 44(1)(a) FOIA and section 32(2) of the Local Government Act 1974 to deny disclosure of EIR information.
 - d. The Commissioner has had reason to remind CLAE of their responsibilities in handling his FOI, EIR and DPA requests.
16. Mr Martyres' submissions against the striking out of his appeal may be summarised as follows:
1. He has not been dealt with fairly by CLAE. CLAE and the Commissioner are unduly influenced by the history of complaints that he has made.
 2. The Commissioner is aware that CLAE does not follow the correct definition of personal data.
 3. Previous complaints have not been taken into account.
 4. Absolute exemptions, gaps in the regulatory and information law framework are used to withhold information.
 5. CLAE is not complying with Ministry of Justice guidelines on records management.
 6. There has been no censure on CLAE for failing to provide advice and assistance.
 7. The Commissioner was wrong in law to find that CLAE had no information to respond to his request
17. The Tribunal's conclusion is that the Notice of Appeal does not disclose any reasonable grounds of appeal and must be struck out. Even bearing in mind that Mr Martyres is acting in person, and extracting the points above, they do not give rise to an appeal arising out of this Decision Notice. The Tribunal's jurisdiction arises out of the Decision Notice itself and that in turn arises from the original specific request for information and the public authority's response to it. The fact that there may be other requests for information or other Decision Notices that are outstanding in relation to other application for information is not a justification for this Appeal. Furthermore, the fact that in other

circumstances CLAE has relied on different exemptions than it did in this particular case, does not justify an appeal against this Decision. Furthermore, complaints about how the Commissioner has responded or how CLAE manages its information requests is not a matter that is connected to this appeal.

18. However, again because Mr Martyres is acting in person we have carefully considered the objections that he has raised. In particular points 6 & 7 from paragraph 16 above might be considered as grounds of appeal.
19. In order for points 6 and/or 7 from paragraph 16 to be considered as grounds of appeal the Tribunal would have to give permission in accordance with Rule 11 of the Rules, which states as follows:

“(1) With the leave of the Tribunal, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal.”

20. The Tribunal’s approach in the circumstances of this case is to decide, if permission to add additional grounds was given, whether there would be a realistic prospect of success for the Appellant at any final hearing. If the answer is “no” then leave to amend should not be given. For the purposes of coming to a conclusion on this point, we have proceeded on the assumption that what Mr Martyres has said about the relevant facts is correct.
21. Dealing with point 6 first, namely should the Commissioner have “censured” CLAE for not providing advice and assistance? The Tribunal does not view this as a case where there is an obligation on CLAE to provide advice and assistance under section 16 FOIA. The obligation under section 16 is to *“provide advice and assistance, so far as it would be reasonable to expect the authority to do so ...”*. In our view, the request of the 11th September was perfectly clear and it does not trigger the obligation on CLAE to provide advice and assistance. There is no realistic prospect of success in relation to such a ground and accordingly we do not give permission to amend the Notice of Appeal to include it.

22. Point 7 is that the Commissioner was wrong to conclude that CLAE did not hold the information that had been requested by Mr Martyres. In his written objections, Mr Martyres sets out the correspondence between him, the Commissioner and CLAE. He does state that on the 11th September 2007 he contacted the Commissioner to complain about CLAE's conduct in relation to three other requests for information and a subject access request, which has also been made to CLAE. Mr Martyres states that on the 16th October 2007 the Commissioner responded to his complaints stating that it had advised the public authority about Mr Martyres rights under section 7 of the DPA. Mr Martyres also states that on the 16th October 2007, the Commissioner wrote to CLAE "*providing that public authority with specific legal guidance on the nature of personal data as defined by Article 29 working party and providing them with best practice advice on the handling of information held in the CLAE complaints file*". The Tribunal has not seen the letter of the 16th October but, even if it does contain information that is specific legal guidance of the kind referred to within the request for information that Mr Martyres had made on the 11th September, such information would have been created substantially after the request had been responded to. As such there is no realistic prospect of succeeding on such ground of appeal, if we were to give leave to include it. Therefore, we do not give permission to add it as a ground of appeal.

SUMMARY

For the reasons given above, the Tribunal dismisses the appeal on the grounds that the Notice of Appeal discloses no reasonable grounds of appeal. The Decision of the Tribunal is unanimous.

Signed:

Peter Marquand
Deputy Chairman

Dated: 20 October 2008