IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0205
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50287970
Dated 30 November 2010

Appellant: Roger John

Respondent: (1) Information Commissioner

(2) Haringey Council

Date of telephone hearing: 16 May 2011

Date of decision: 18 May 2011

Before

HH Judge Shanks

Representation:

Appellant: In person

Information Commissioner: Unrepresented

Haringey Council: David Byrne

Subject areas covered:

Freedom of Information Act 2000:

Whether information held s.1

Request for information s.8

Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009:

Rules 10, 17, 40, 41 and 42.

Decision

The Appellant's application dated 19 April 2011 to set aside the Tribunal's decision of 22 March 2011 is dismissed. The Substituted Decision Notice is amended and re-issued in the form set out below under rule 40.

Amended Substituted Decision Notice

Public authority: **Haringey Council**

Name of Complainant: **Roger John**

The Substituted Decision

The first bullet point in paragraph 113 of the Information Commissioner's decision notice dated 30 November 2011 should now read:

The Public Authority failed to deal with the Complainant's request for information in accordance with Part I of the Freedom of Information Act 2000 in that it ought to have communicated the following information to him:

(1) the winning priorities of the applicants who were successful in their bids for properties for which the Complainant also applied where the closing date for bids for such properties was before 7 September 2009;

(2) the qualifying dates of those applicants;

(3) the total number of bids made in respect of each of those properties.

Action Required

No further action is required.

Dated 18 May 2011

Signed

HH Judge Shanks

Reasons for Decision

1. For reasons already recorded, on 22 March 2011 I issued a substituted decision notice in this appeal following a telephone hearing on 17 March 2011; my understanding based on what was said during that hearing was that all parties including Mr John consented to that course of action which disposed of the proceedings. On 31 March 2011 Haringey Council supplied Mr John with the information which it considered it was required to under the substituted decision notice. On 19 April 2011 Mr John applied to set aside my decision of 22 March 2011;[1] his application also asked that the substituted decision notice be corrected

[1] Although the notice of application was in form an application for permission to appeal the decision Mr John made clear at the hearing that it was an application to set aside the decision (which must be made under rule 41) and that he was not intending at this stage to seek to appeal; no objection to this was raised by Mr Byrne for Haringey Council.

and that there should be an oral hearing to resolve various issues.[2] On 28 April 2011 I issued directions fixing a telephone hearing for 16 May 2011; the directions made it clear that the hearing was designed to resolve all substantive issues between the parties and to fix a timetable for dealing with any costs application Mr John may seek to make. The hearing took place in the absence of the Commissioner who chose not to participate and was tape recorded at the request of Mr John.

2. In order to succeed in an application to set aside the decision of 22 March 2011 Mr John has first to establish that there was a procedural irregularity in the proceedings or that one of the other paragraphs in rule 41(2) applies. He pointed out, and I accept, that at the hearing on 17 March 2011 he had not seen the email from Haringey to which I refer at paragraph 3 of my earlier decision and he says that in those circumstances any consent he may have given (and he denied any) was not fully informed. I accept that those circumstances are sufficient to amount to a procedural irregularity. However, since Haringey were in that email effectively withdrawing their case and it would have been open to me to consent to that withdrawal under rule 17(2) and allow the appeal as it stood without Mr John's consent and then to issue an appropriate substituted decision notice, it seems to me that I should not allow Mr John's application unless he can show that there is some reasonable prospect of his appeal achieving a different and better result to the one he has already achieved in the substituted decision notice I have issued if it is set aside.

3. In paragraph 9 of his notice of application Mr John says that there are two mistakes in the substituted decision notice which he seeks to have corrected. One is agreed by Haringey to be an error although it reflects the wording used by the Information Commissioner in his decision notice at paragraph 32.2(ii): what Mr John was asking for (and what Haringey have now supplied him with) was not the registration dates of the individual bids made by other applicants but the "qualifying dates" when the applicants qualified to enter the Council's housing list. Although, as I say, the wording I used in my decision followed that in the Commissioner's decision notice and I had no reason to think he had misunderstood the position, since the parties

[2] See under heading OUTCOME SOUGHT at continuation page 7 of the application.

agree that that wording was wrong and based on an apparent misunderstanding by the Commissioner it seems to me that the right course is to simply correct it under "slip rule" contained in rule 40; paragraph (2) of the amended substituted decision notice reflects this decision. It does not require the decision of 22 March 2011 to be set aside under rule 41.

4. The second mistake relied on by Mr John in his notice of application is of more substance. He says that he is entitled to more than just the "winning" priorities (ie the points of those who were successful in getting properties for which he also bid) as stated in the substituted notice (which again reflects the wording used by the Information Commissioner at paragraph 32.2(i) of his decision notice) and that what he requested and was entitled to were "the priorities of all those bidders who were higher than [him] on the shortlist or at least of the top seven bidders".[3] However, he accepted in the course of the hearing that there is no evidence that this latter request was made in writing as required for very good reasons by section 8(1)(a) of the 2000 Act and it is not therefore a "request for information" to which he can be entitled under the Act. In the circumstances it is clear on the facts that he cannot hope to obtain a better result in this respect than he has already achieved. I also note that although the Commissioner in his decision notice at paragraph 32.2(i) identified the information which he understood himself to be concerned with Mr John did not raise this point in his notice of appeal and I would not have been inclined to allow him to amend it to raise this new point of appeal at this stage in any event.

5. In the course of the hearing on 16 May 2011 Mr John raised for the first time a third mistake which he alleges to have been made in the substituted decision notice, namely that it did not require and should have required Haringey to provide "the reasons why the property at [44, Rathcoole Av] had been withdrawn from the relevant web page".[4] However, the Commissioner in his decision notice at paragraph 44 expressly recorded that he considered that this request "had … been addressed" and that he would therefore focus on the other information requested by

[3] This wording is taken from his email sent at 12:38 on 11 September 2009; that email asks for such information in relation to 11 particular properties only but Mr John told me that he had spoken to Ms Nerbas-Maurice to whom it is addressed and made clear that if the information was not supplied timeously in relation to the 11 properties he wanted it in relation to all the properties for which he had bid.
[4] Wording taken from paragraph 32.1 of the Commissioner's decision notice.

Mr John. Again, this matter was not raised in Mr John's notice of appeal (nor, as I have indicated, was it raised in his notice of application dated 19 April 2011). In my view if this was a point Mr John wished to rely on it clearly should have been raised in the notice of appeal. Again, given the time that has passed and the course proceedings have taken I would not have allowed him to amend the notice of appeal to raise the point at this stage so Mr John would not, whether the Commissioner was right or not in his decision on the issue, be able to improve his position in this respect if the decision of 22 March 2011 was set aside.

6. In the course of the hearing Mr John also repeated his view that the Commissioner's decision notice was full of factual errors and defamed him and that there had been bad faith on the part of both Haringey and the Commissioner throughout the process and in his notice of application he asked for an oral hearing to consider the Respondents' conduct, the effect of the Commissioner's marginalisation of him and whether the Respondents behaved unreasonably.[5] As set out in paragraph 5 of my decision of 22 March 2011 and as I tried to explain to Mr John in the course of the hearing on 16 May 2011 these are not in themselves matters within the jurisdiction of the Tribunal and it would not be right to hold a hearing to consider them in isolation when Haringey have effectively conceded the appeal.

7. In the circumstances it does not seem to me that there is anything to be gained by setting aside my earlier decision: Mr John has effectively won the appeal and achieved all he can hope to. Accordingly as a matter of discretion I dismiss his application.

8. Mr John raised another point in the course of the hearing on 16 May 2011 which I should address. He complained that Haringey had failed to comply with the terms of the substituted decision notice because they had (admittedly) failed to supply him with the information requested in relation to seven properties where the closing date for bids came after the date of his request for information. This was a rather surprising complaint given that the whole basis of Haringey's concession that section 12 of the Act did not apply (and that the appeal should therefore be allowed) was that they had wrongly included those seven properties in the calculation of

[5] See continuation page 7 of the notice of application under heading OUTCOME SOUGHT.

what it would cost to comply with Mr John's request. It was clear that the information relating to the seven properties could only have come into existence after Mr John's request so that on the face of it he could not have been entitled to it but he referred me to section 1(4) of the Act which he said entitled him to the information. But that section does not, it seems to me, assist him: it refers to account being taken of "any amendment or deletion" of the relevant information between receipt of the request and the time the information is to be communicated; in this case we are dealing with the creation of completely new information relating to the bidding for properties that had not even closed at the date of the request. To make the position as to Haringey's obligations absolutely clear in this regard I have amended the wording of information category (1) in the substituted decision notice;[6] I do this under rule 40 since it is clearly something I ought to have done when I issued the original substituted decision but I overlooked it. I have also consequentially amended the "Action Required" section to reflect the current position which is that Haringey have now supplied all the information which in my judgment they were obliged to supply.

9. That leaves the question of costs. Mr John has now stated his firm intention to apply for costs against both the Commissioner and Haringey under rule 10(1)(b) but has yet to make a formal application. As I explained to him in the course of the hearing such an application will need to identify the conduct he claims to be unreasonable and identify the costs which he seeks, in particular the number of hours he says he was working on the case, what he was doing and when he was doing it. The following directions will apply:

    (1) Mr John must make a proper written application for costs complying with rule 10(3) by 1600 on 10 June 2011;

    (2) If he fails to comply with paragraph (1) he will be debarred from applying for costs;

    (3) The Commissioner and Haringey must respond to the application in writing by 1600 on 1 July 2011;

[6] The earlier version is in paragraph 1 of the reasons for decision dated 22 March 2011 after (i).

(4) The Tribunal will consider the application and any response thereto and issue a decision as soon after 1 July 2011 as possible.

10. I confirm that for the purposes of rule 42(2) the time for applying for permission to appeal against both this decision and that of 22 March 2011 runs from the date that the Tribunal sends this decision to the relevant party.

Signed

HH Judge Shanks

Dated 18 May 2011