



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2011/0100

B E T W E E N:-

TONY WISE

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

RULING

RULING in relation to the Information Commissioner's Decision Notice No: FS50375931 Dated: 14th March 2011

1. The Information Commissioner in his amended response dated 20th April 2011 to the Notice of Appeal dated 26th May 2011 applies for the appeal to be struck out because, in his view, it has no reasonable prospect of success.
2. Under rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009:
"the Tribunal may strike out the whole or part of the proceedings if ... (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

3. Pursuant to rule 8(4):

“the Tribunal may not strike out the whole or part of the proceedings under paragraph ...

(c) without first giving the appellant an opportunity to make representations in relation to the proposed strike out.”

4. The Tribunal indicated that it was of the preliminary view that the application had merit and the Appellant was given the opportunity to make representations in reply to the Response pursuant to rule 8(4) which he did on 20th June 2011.

Background

5. The background to the appeal is set out briefly in the amended Response, and can also be derived from the supporting documents that accompany the grounds of appeal and related cases that have been before the Tribunal.

6. Approximately five years ago Mr Wise was the subject of unfounded allegations made to Lancashire County Council (LCC) and also the police. In the course of a complaint that he had made to the Independent Police Complaints Commission, Mr Wise became concerned about the way in which LCC was sharing personal information relating to his family that it held. When he sought to establish what information had been passed on, the Council initially denied that any contact had taken place, although this was subsequently established to be wrong. As a result of information obtained from the Council and other public bodies Mr Wise formed the view that the Council had lied about this and sought to cover up their conduct. He complained about this matter to the Local Government Ombudsman in 2009.

7. Mr Wise made a number of requests for Information to LCC from June 2007 until they (relying on s14 FOIA) refused to provide information requested on 5th May 2008 asking for:

all the Lancashire County Council’s written procedures, protocols and policies in relation to information sharing with other public authorities- This decision was upheld first by the Commissioner and then the Tribunal in case EA/2009/0080.

8. The Council applied s14 FOIA to another request dated 12th March 2009 for LCC's Privacy/Confidentiality statement (or the Council's relevant/similar document), their Fair Processing Notice, 'Consent' documentation and any other relevant documents that LCC felt were applicable under 'Privacy/Confidentiality' consent for service users.

9. This decision was upheld first by the Commissioner and then the Tribunal in decision EA 2010/0166. In relation to this request the Council indicated that they would in future be relying on s17(6) FOIA namely that:

(6) [There is no requirement to serve a refusal notice under s17(5) stating that s 14 is relied upon] where —

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

10. On 22nd November 2009 Mr Wise requested:

“all internal or other documentation that Lancashire County Council (LCC) has in its possession or created in relation to any contacts, discussions or dialogue with the Local Government Ombudsman (LGO) between 17th February 2009 and the date of my final response letter... dated 12th May 2009”.¹

The Council sent an automated acknowledgement of the request the next day, but no further response, they confirmed to the Commissioner during his investigation that this was because they considered the request vexatious and were relying upon s17(6) FOIA in not issuing a refusal notice. It is this request for information with which this appeal, is concerned.

The Commissioner's Decision Notice

¹ This request was amplified and further particularized in the letter of request.

11. The Commissioner issued a Decision Notice FS50375931 dated 14th March 2011 in which he upheld the Council's reliance upon s17(6) and noted that in future he would consider whether to rely upon s 50(2)(c) FOIA whereby he can exercise his discretion not to make a decision on the grounds that the request is vexatious.

The notice of appeal

12. The Appellant appeals by way of a Notice of Appeal dated 14th March 2011 on the grounds² that the Commissioner was wrong to uphold the Council's decision to withhold the information pursuant to s14 and to find that the Council did not need to issue a refusal notice because s17(6) applied.

13. It is a matter of fact that LCC confirmed to the Commissioner that they are relying upon s14 in this case (as they have on 2 previous occasions) and there is no dispute that in relation to the information request of 12th March 2009 LCC notified Mr Wise that they would in future be relying upon s17(6). Mr Wise does not challenge either of these facts however, he argues in lengthy grounds of appeal and his submissions dated 20th June 2011 that the request was not vexatious and s17(6)(c) is not fulfilled because:

- i. This request is different from the earlier requests and does not form part of the same series of requests,
- ii. The Council were wrong to treat the earlier requests as vexatious,
- iii. This request is not vexatious because it has a serious purpose,
- iv. In concluding that the request was vexatious the Commissioner cannot have taken sufficient account of the evidence provided by Mr Wise,
- v. The ICO has been consistently biased against him for a number of years purely because, in Mr Wise's view, it wishes to protect its own position.

14. In *Southworth v Information Commissioner (EA/2010/0050)*, the Tribunal considered that the tests developed by the Tribunal under the previous set of rules (which were applicable prior to 18 January 2010) to be a useful starting point for considering rule

² Pursuant to his submission dated 20th June 2011 the Appellant makes clear that he does not make a substantive appeal point based on the Commissioner's comments about the future use of s50(2) FOIA.

8(3)(c) of the Tribunal Rules. One of those cases was Tanner v Information Commissioner and HMRC (EA/2007/0106) where the Tribunal adopted a similar test to that provided for in rule 24 of the Civil Procedure Rules, namely whether there is a realistic as opposed to fanciful prospect of success and apply it to each of these grounds. I apply this test to each of the Appellant's grounds of appeal.

15. Mr Wise argues that this request is independent of the other requests which only involved the disclosures made by LCC whereas this relates to LCC's dealings with another public authority. However he also stated in the letter requesting the information that it was made in the context that FOIA was created *"to attempt to expose misconduct or wrong doing at public authorities"*.

In his submission dated 20th June 2011 he stated:

"This request only surrounded my legitimate concerns involving the conduct of LCC and the LGO. My complaint to the LGO was in relation to the unbalanced nature of the disclosures with all of the untruthful negatives being disclosed but absolutely none of the truthful positives".

And

The matter in this request is related to the misconduct as enacted by LCC to the LGO during a formal complaint and not in relation to the original disclosures. It is a completely separate factual matter to the issue involving the initial disclosures

16. However, in Decision Notice FS50250070 relating to the March 2009 request he states:

"The evidence that came to light on 26 March 2008, 06 October 2008 (sent to ICO on 10/10/08) and that which came to light on 19 October 2009 demonstrate that my request had a serious purpose and value when viewed in terms of FS50204940. All of these items of evidence demonstrate blatant and wilful misconduct and dishonesty from LCC during the actual disclosures and beyond between February and June 2007 and further dishonesty in March/April 2009. LCC were lying to the LGO at around the same time as the request was made in FS50250070".

17. From the supporting documents relied upon and the thrust of his approach in argument it is clear that the original dispute is at the root of this request, it has

expanded to include challenges to LCC's response to being investigated but it is the continuation of the same campaign.

18. In relation to ground ii Mr Wise is seeking to re-litigate arguments that have already been determined by the Tribunal, this is not the appropriate forum to seek to overturn these findings.

19. In ground iii Mr Wise argues that this request is not vexatious because it has a serious purpose namely:

“seeking evidence in order to prove serious misconduct and potentially criminal behaviour from the Council”.

20. During the course of this dispute with LCC:

- the Commissioner was approached for his view as to whether the sharing of this data was criminal.
- 3 named social workers were reported to the General Social Care Council (GSCC).
- Mr Wise appealed to the Local Government Ombudsman, in 2009³.

21. None of these investigations have provided adequate redress in Mr Wise's opinion and none have upheld Mr Wise's contention that the Council's conduct was deliberately dishonest or illegal. Mr Wise has made more than 10 separate information requests of LCC, 2 of which have been refused as vexatious and investigated by the Commissioner and ruled upon by the Tribunal. In assessing whether this ground has a realistic prospect of success I take into consideration that the serious purpose relied upon here is the same as that argued in the 2 earlier Tribunal cases where this argument was unsuccessful and that the 2009 disclosures were before the Tribunal in case EA/2010/0166.

22. In concluding that the Commissioner was right to find that any serious purpose is outweighed by the history and context of the case I adopt the approach set out in *Welsh v IC EA/2007/0088*

³ Which has now given rise to this information request.

“There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested.”

23. Additionally in the Commissioner’s guidance it states that: *“if the request forms part of a wider campaign or pattern of requests, then the purpose or value must justify both the request itself and the lengths to which the campaign or pattern of behaviour has been taken”.*

24. In relation to ground iv Mr Wise states in hi submission dated 20th June 2011:

“...the ICO has a legal duty to make proper and reasonable enquiries, a duty to ask the right questions, a duty to consider all relevant material, a duty to consider all relevant evidence and a duty to consider evidence of a probative value.”

He further adds

“I don’t request that the tribunal considers the allegations made related to misconduct or anything else... But I do require the regulator and this tribunal to consider my requests in the context of the available evidence that serves to prove highly dubious and dishonest conduct from LCC. I also require the tribunal to consider the allegation that the ICO has always denied the existence of material factual evidence, ignored the relevant evidence so as to not assign it the correct weight, failed in its lawful duties as a regulator and has been fundamentally biased in its approach.

25. This Tribunal has no jurisdiction in relation to how the Commissioner fulfils his regulatory Data Protection functions, neither is this the right forum to appeal earlier decision notices. Notwithstanding Mr Wise’s assertion to the contrary it is clear that he does expect the Tribunal to consider the misconduct allegation:

“ Nothing has to be investigated by the ICO or this tribunal because the evidence in this case proves beyond doubt the substance of the allegations”.

26. In terms of this decision notice wrongdoing or misconduct are not within the Tribunals jurisdiction. Nor can the Tribunal make any findings about the appropriateness of any information sharing that may or may not have occurred. In

assessing the evidence, the Commissioner is entitled to look at the context and history of the request in determining whether a request is vexatious, whether it forms part of a series of requests and whether it would be unreasonable to expect a public authority to issue a refusal notice

27. In relation to ground v, bias is a serious allegation, however it is only relevant if it informs an erroneous finding of fact or has led to a decision being made that is wrong in law. Mr Wise's basis for this allegation is that the Commissioner has not drawn the conclusions from the evidence that Mr Wise would wish. This appeal is not an opportunity to re-litigate other cases which in any event have been upheld by the Tribunal. In this case there is no evidence that the Commissioner has adopted the wrong approach in his consideration of the evidence, as such this ground must also fail.

28. For these reasons I find that the Appellant has no reasonable prospect of succeeding before this Tribunal and I strike out the appeal.

Fiona Henderson
Tribunal Judge

Dated this 8th day of July 2011



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) GENERAL REGULATORY CHAMBER**

Appeal No: EA/2011/0100

BETWEEN:

TONY WISE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

1. On 8th July 2011 Mr Wise's appeal was struck out pursuant to rule 8(3) of the *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (the GRC Rules) on the grounds that it had no reasonable prospect of success.

2. Mr Wise now appeals against that ruling by application dated 3rd August 2011.

3. Mr Wise's grounds of appeal are lengthy, discursive and repeat: the history of the case, much of the evidence before the Tribunal and the Commissioner and the arguments that he made in support of his appeal. He lists 12 points of appeal, which he argues arise from the Decision Notice, and are not fanciful and should not therefore have been struck out. He argues they should be considered by the full Tribunal. They are summarized below:

i. (and iv) The request is not a continuation of previous requests in terms of content and purpose, because it does not involve the disclosures made, but the conduct of the Council towards the Local Government Ombudsman (LGO), and in terms of timing being made 9 months after the request in EA/2011/0166

- ii. In striking out the appeal under rule 8(3) the Tribunal Judge paid insufficient regard to the overriding objective rule 2(2) GRC rules.
- iiia. The Appellant has been disadvantaged because the Tribunal Judge relied upon *Southworth v Information Commissioner (EA/2010/0050)* which is not promulgated on the Tribunal website.
- iii (and v) The Appellant has raised issues that are properly for the Tribunal to determine, namely, whether the ICO has carried out a proper investigation so that, on the basis of the investigation, he was entitled to make the findings of fact on which he relied in reaching his conclusions. He accepted bare assertions by LCC, this contradicted the evidence provided by the Appellant and the Commissioner has provided no evidence to undermine the Appellant's evidence.
- iv (see ground (i))
- v. The Appellant did not want the Commissioner or the Tribunal to determine whether there was misconduct by the LCC, but to place the application in the context of the allegations and the strength of the evidence in support.
- vi The ICO has been in denial of the evidence presented and denied that it actually exists, it has not afforded the evidence its correct weight.
- vii The evidence was before the Tribunal in EA/2009/0080 and EA/2010/0166 but escaped real scrutiny. The ICO has always denied the existence of material factual evidence, ignored the relevant evidence so as to not assign it the correct weight, failed in its lawful duties as a regulator and has been fundamentally biased in its approach by way of the denial of this evidence.
- viii The Commissioner's behaviour breaches the Appellant's legitimate expectation as to the ICO's public performance.

- ix. The Tribunal Judge was wrong to assert that the Appellant's ground of appeal was that the Commissioner had not drawn the conclusions the Appellant wanted from the evidence, it was that the Commissioner denied the existence of the evidence and was therefore biased and dishonest. These allegations are for the full tribunal to determine.
- x. The Tribunal Judge should not have presided over the strike out in light of her remarks relating to *EA/2009/0080* which might have led to the appearance of bias and failed the *Locobail UK v Bayfield Properties 1999 EWCA Civ 3004* test.
- xi. The strike out relied upon the LGO investigation without providing any counter evidence to weigh against the facts and evidence.
- xii. The Tribunal was wrong to rely upon the GSCC determination as this was not sufficiently rigorous.

4. Additionally the Appellant argues that the cases he has seen and that are cited relating to rule 8(3)(c) do not resemble his case in fact or strength of evidence.

5. Taking each of these grounds in turn:

Grounds i, iii, iv-viii, xi and xii.

These grounds do not identify an error of law associated with the strike out decision and are an attempt to re-argue the facts of the case.

ii. The overriding objective: The evidence in this case is documentary, it is not the facts that are in dispute (in the sense that it is not denied that certain letters were sent), it is the conclusions that are drawn from the facts that are not agreed. The appeal was struck out because I was of the view that Mr Wise had no reasonable prospect of success in persuading the Tribunal that his conclusions were correct. In reaching that conclusion I had regard to all the material in front of me and the overriding objective. I make the observation that dealing with the case fairly and

justly must take into consideration the interests of the Commissioner and the Appellant:

- having regard to the Commissioner’s resources as well as the Appellant’s when deciding whether it is just to hold a full hearing (rule 2(2)(a),
- that ensuring that an Appellant is able to participate fully in the proceedings includes participation in the strike out process (and is not a requirement that a full hearing be held if the terms of rule 8(3)(c) are met).
- Additionally holding a full hearing when the case ought to be struck out under rule 8(3)(c) would breach the requirement to avoid delay (rule 2(2)(e).

ii. *Southworth v Information Commissioner (EA/2010/0050)* was relied upon not because of any factual similarity, but as an example of a case where the Tribunal has adopted the approach that the cases under the old rules were of assistance in interpreting the GRC rules. I am not bound by this decision but have chosen to adopt a similar approach. It is unfortunate that *Southworth* does not appear upon the Tribunal website, and a copy is attached herewith for the Appellant’s information, however, this does not constitute an error in law and as such this ground fails.

ix For the avoidance of doubt, the Tribunal Judge does not consider the Commissioner’s submission in case *EA/2010/0166* on 2nd November 2010 to be a denial that certain documents exist but that the documents show “deliberate” misconduct or “cover up”. The Tribunal is satisfied that the Commissioner has received them in this case and on the account of the Appellant they have been sent in relation to earlier cases. Consequently, I am satisfied that there is not a material evidential dispute, but a difference in the conclusions to be drawn from that evidence.

x. I have had regard to paragraph 25 of *Locabail UK v Bayfield Properties [1999] EWCA Civ 3004*. Which provides that:

“... The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.”

And am satisfied that there is no impropriety in my presiding in this case. As such this does not disclose an error in law.

6. Additionally the Appellant argues that the cases he has seen and that are cited relating to rule 8(3)(c) do not resemble his case in fact or strength of evidence. The First Tier Tribunal is not bound by other decisions of the First Tier Tribunal. Each case turns on its own facts. The applicable rule to be applied when considering a strike out is rule 8 of the GRC Rules and this is what was applied in relation to Mr Wise's appeal.

7. Under rule 41 of the GRC Rules, the Tribunal may set aside its Decision if it considers that it is in the interests of justice to do so and one of the following conditions is met:

(2)(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

8. The Appellant does not argue that 41(2)(a-c) applies and for the reasons set out above I am satisfied that there has been no procedural irregularity in the proceedings, consequently this application must fail.

9. Under rule 44 of the GRC Rules, the Tribunal may undertake a review of a decision if (a) it has received an application for permission to appeal and (b) it is satisfied there is an error of law in the original decision. I have considered whether Mr Wise's grounds of appeal identify an error of law in the First-tier Tribunal's ruling. As set out in the consideration of grounds above, I am satisfied that Mr Wise has not raised any points of law. I conclude, therefore, that there is no power to review the decision in this case.

10. Finally, I consider whether permission to appeal to the Upper Tribunal should be granted. For the reasons given above, having considered the grounds of appeal as set out above, I am satisfied that they do not identify an error of law in the ruling of 11th July 2011, as required by rule 42(5)(g) of the GRC Rules, consequently, permission to appeal is also refused.

11. Under rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended the Appellant has one month from the date this Ruling was sent to him to lodge the appeal with the Upper Tribunal (Administrative Appeals Chamber).

Dated this 25th day of August 2011

Fiona Henderson
Tribunal Judge



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

UPPER TRIBUNAL CASE NO: GIA/2560/2011

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Appellant: Tony Wise
Respondent: Information Commissioner
First-tier Tribunal no: EA/2011/0100
Date of hearing: 8 July 2011

DECISION

Permission to appeal is refused.

REASONS FOR DECISION

A. INTRODUCTION

1. This was one of two applications that I heard on 31 January 2011 at the Civil Justice Centre in Manchester. The other application bore reference number *GIA/1871/2011*. Mr Wise attended the hearing on his own. The Information Commissioner was not represented. I am grateful to Mr Wise for the patience and courtesy with which he presented his case and responded to my questions.

B. THE LAW

2. An appeal to the Upper Tribunal lies on 'any point of law arising from a decision' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). I have a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538).

C. BACKGROUND

3. The history of this case dates back to allegations that were made, to the police and to the local authority's social services Department, about Mr Wise's care of his daughter. Those allegations were unsubstantiated and were subsequently proved to be so, to the satisfaction of both the police and the Department. As part of their investigations, the police took the daughter's mother to the school. Mr Wise told me that she was drunk and frightened her daughter, who ran off home and hid in a cupboard. This led Mr Wise to complain to the police and, when they did not respond, to the Independent Police Complaints Commission. The

course of the Commission's investigation caused him to become concerned about the disclosure of information that the social services Department had made to the Commission. This led to freedom of information requests from the local authority and a complaint to the Local Government Ombudsman.

D. THIS CASE

4. This case concerns the complaint to the Ombudsman. Mr Wise considered that it was going well, but it was then (in his words) summarily dismissed. He became suspicious about why that had happened. On 22 November 2009, he asked the local authority to disclose all information about its contacts with the Ombudsman between specific dates. The response from the local authority was an automated acknowledgement and nothing further. Mr Wise complained to the Information Commissioner, who decided that the authority was entitled to deal with the request in that way.

5. Mr Wise exercised his right of appeal to the First-tier Tribunal. Judge Henderson struck out the appeal as having no prospect of success under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. She dealt with each of Mr Wise's representations.

E. ANALYSIS

6. I can deal with one of Mr Wise's representations to the First-tier Tribunal very briefly. He alleged that the Information Commissioner was biased against him. There was, and is, no evidence to support that allegation. Mr Wise's only ground for so believing is that the Commissioner has rejected his complaints. That is not enough to raise even a suspicion of bias.

7. The other four representations all related in various ways to whether or not the request to the local authority had been vexatious. I have already refused Mr Wise permission to appeal against the decision of the First-tier Tribunal that a request to the local authority made in March 2009 was vexatious – *GIA/1871/2011*. Previously, in *GIA/1499/2010*, I refused permission on an earlier application. In the course of my reasons in that decision, I referred to one document that had contained 100 questions and to another that had contained 16. Mr Wise has pursued numerous questions with the local authority over a number of years. There is little I can usefully add to my reasons in *GIA/1871/2011* to explain why the tribunal was entitled to decide that this latest request was vexatious. I will, though, comment briefly on a few points that he made in his representations to the First-tier Tribunal.

8. First, there is no doubt from any objective point of view that the request in this case was part of an ongoing series of requests. I have set out above how Mr Wise has progressed from one public body to another since the allegations about the care of his daughter. The complaint to the Ombudsman was the latest in an unbroken line of complaints since then and the request to the local authority arose directly from the Ombudsman investigation.

9. Second, I do not doubt that Mr Wise has a serious purpose in pursuing his requests. However, as I have said in *GIA/1499/2010* and *GIA/1871/2011*, vexatiousness involves a lack of proportion, pursuing issues to an extent that is out of proportion to the original issue that caused concern. That is what has happened here.

10. Third, Mr Wise said that the Commissioner would not have found his request vexatious if he had taken sufficient account of his evidence. That is not so for the reasons I have just explained and those I gave in *GIA/1871/2011*.

11. For these reasons, I have refused permission to appeal. There is no realistic prospect that the decision involved the making of an error on a point of law and there is no other reason for giving permission.

**Signed on original
on 6 February 2012**

**Edward Jacobs
Upper Tribunal Judge**