



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2011/0054

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50278216
Dated: 16 December 2010**

Appellant: Mr M Gardner
First Respondent: Information Commissioner
Second Respondent: Nottingham City Homes Limited
Heard at: Field House, London
Date of consideration: 4 July 2011
Date of decision: 4 August 2011

Before

Christopher Hughes OBE
Judge

and

Henry FitzHugh and Dave Sivers
Members

Appearances: This hearing was conducted on the papers.

Subject matter: FOIA S.14 whether the application is vexatious

Cases considered:

Durant v Financial Services Authority [2004] FSR 28, CA

Rigby v the Information Commissioner and Blackpool, Fylde and Wyre Hospitals

NHS Trust EA/2009/0103

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the appeal for the reasons stated.

Signed

Christopher Hughes
Judge
4 August 2011

REASONS FOR DECISION

1. The Appellant has been a tenant of Nottingham City Council for more than 30 years. He submitted a request for information to Nottingham City Homes (NCH - the corporate vehicle used by the Council to manage the property he rented) on 10 July 2009. The request was in three parts, however the second and third part were resolved prior to the decision of the ICO and the matter before the Tribunal was the first part of the request:-

“(1)... a breakdown of how much money has been spent by City Council/NCH on numbers x and y {place} since 1998 to the present and what, in particular has been done regards maintenance, i.e. replaced, improved, or restored at these properties since 1998 to present.”

2. The request was refused and on 11 December 2009 the Appellant, acting via his CAB, requested an internal review. The Appellant had, in the meantime, started the process of complaining to the ICO. The NCH response to this request was contained in a letter dated 17 May 2010. This noted that the request had been reduced to that set out above and stated:-

“I maintain the view that the information requested is the personal data of the tenants 1 and 6 ... and therefore the S.40 exemption under FOIA should apply.

It is my view that you are not making a general request as to expenditure in his area and the history of complaints you have raised with the Company, and the Ombudsman indicate that fact you focus your requests on particular tenants, tenancies or the way you believe those tenancies have been conducted i.e. immediate neighbours. This in my view would defeat any assertion that the details of the tenancy including expenditure are separate from the personal circumstances or data of the tenant(s) concerned.

The Company does not disclose details of tenancies of third parties unless a specific exemption applies or pursuant to a court order or the written authorisation of the data subject/tenant in order to ensure compliance with the principles of the Data Protection Act and to maintain the privacy of the individual Council tenants.

Your initial request for the repair records of your own property No.z {place} has been complied with.

Accordingly, in reviewing your request, I reiterate the application of the Section 40 FOIA exemption. Further or in the alternative, I apply Section 14(1) FOIA exemption in that this is a repeated request on issues previously raised with the Company.”

3. The Appellant pursued his request in a letter to the IC dated 18 June 2010. This stated:-

“As anticipated NCH/Council are saying nothing new and have more or less repeated what they previously have said which clearly has nothing to do with the costing and inventory of repairs, redevelopment and alterations carried out by the housing department and its contractors from Jan 1998 to the present.

I can well understand NCH reticence in not wishing this information made public, nevertheless this is public information concerning public money. [The Company Secretary] in typical pedantic legal jargon is quite incorrect in her assumptions, I have and had always requested the information concerning tenancies No.'s x,y and z. Singularly NCH/Council only own these properties, the rest in the block are all privately owned and therefore of no consequence.

Nottingham City Council Tenants do not pay for their own repairs or alterations.

Since 1998 there have been numerous tenants at both No's x and y {place}, all of whom are of absolutely no interest to me whatsoever. NCH have really no argument to put forward there is no conflict in my request concerning individuals personal data.

This is solely concerning NCC owned properties. I reiterate again, this is not information concerning individuals, this is public information concerning public money spent on repairs, alterations etc carried out by Nottingham City Homes/Council on public properties, names No.'s x and y {place}.

I therefore urge you to please continue with my request."

4. By a letter dated 25 August 2010 the Second Respondent in these proceedings maintained its position. It asserted that the current reduced application should be seen in the context of the previous, slightly wider application which mentioned a former tenant by name:-

"Accordingly in my view he is seeking personal data to which the Section 40 exemption applies. I have therefore construed the Complainant's request in terms of his wish to see what has been spent on his neighbouring tenants properties as compared with his property where he believes his ongoing complaints of alleged disrepair have not been attended to by the Company."

5. The letter went on to assert that the request was vexatious and that because of concerns about health and safety the Council had obtained an interim injunction against the Appellant concerning his conduct; this (the Council state) had however not been continued in the light of the Appellant's health. From the evidence and pleadings in the application to this Tribunal it appears that an Interim injunction was sought without notice and never came to a contested hearing on the merits.
6. Following an investigation the First Respondent issued his decision notice on 16 December 2010. This found that the request was a vexatious request and accordingly upheld the position of the Second Respondent. It did not address other issues raised by the Second Respondent during the course of the investigation.
7. The Appellant (by his solicitor) challenged this decision by an appeal dated 23 February 2011 supported by a witness statement of 1 June 2011. The First Respondent in his response of 23 March 2011 reaffirmed the position set out in his decision notice. While the Second Respondent was joined as a party to these proceedings it has not taken any active part and it appears to have been content to rely entirely on the position of the First Respondent.
8. In considering this appeal the Tribunal has been hampered by the failure of the Second Respondent to take an active role and in particular its failure to respond to the detailed arguments put forward by the Appellant in his correspondence and notice of appeal. In order to ensure the fair and proportionate resolution of this case the Tribunal has however considered the arguments advanced by the Second Respondent

in correspondence and replied to by the Appellant even though they are not addressed in the Decision Notice.

9. The Second Respondent initially relied on S40(2) of FOIA that the information sought was personal data (in this case relating to other tenants). The request however relates to expenditure on tenanted property over an extended period of time, not to the individual tenants. From the evidence of the Appellant (which was not contradicted or rebutted by the other parties) there have during that period been a number of tenants in both properties. The data requested is information about investment and expenditure on properties and not a request about individuals. In *Durant* the Court of Appeal held that personal data:-

“is information that affects [a person’s] privacy, whether in his personal or family life, business or professional capacity”.

10. The information requested does not have this characteristic and the Tribunal is satisfied that the First Respondent was correct to discount this argument.

11. In coming to his conclusion that the request for information was vexatious within section 14(1) of FOIA the First Respondent carried out a balancing exercise in accordance with his established practice of looking at five relevant factors; an approach which has been broadly accepted by the Tribunal: *Rigby v the Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103*. These factors are:-

- (1) Could the request fairly be seen as obsessive or manifestly unreasonable?
- (2) Is the request harassing the authority or distressing to staff?
- (3) Would complying with the request impose a significant burden in terms of expense and distraction?
- (4) Is the request designed to cause disruption or annoyance?
- (5) Does the request lack any serious purpose of value?

12. The Information Commissioner correctly identified the need to ensure that it was the request and not the requester that was assessed as vexatious, however in considering the applicability of S14 care must be taken to fairly assess the context in which the request is made. The Commissioner drew attention to complaints alleging anti-social behaviour by another tenant made by the Appellant in 2005-2006 which were not upheld by the Ombudsman in 2007, and a number of complaints made in 2003 -2008 about the conduct of another tenant, inappropriate allocation to that tenant and:-

“alleged housing disrepair of his own tenancy. The misallocation allegation is currently the subject of an investigation by the Audit Commission”.

13. The uncontested evidence of the Appellant is that he and several other residents complained about the conduct of a tenant which resulted in an ASBO and then an eviction. He has been without a gas supply for cooking and heating since 1997 but he continued to be charged with respect to it until 2004 and there has been no repayment. He has unsuccessfully asked for his heating and cooking to be switched over to electricity which would be more convenient for him. An agreement as to the behaviour of workmen coming to his flat (which was agreed under the Disability Discrimination Act as a reasonable adjustment) has not been implemented. From this evidence it is clear that, to put it at its lowest, there have been problems associated with the Appellant’s occupancy of his flat which have been caused, at least in part, by the actions of others.

14. At paragraph 36-38 of the Decision Notice the First Respondent concluded that by revisiting issues previously raised and indicating that he would seek to verify any information provided as a result of his request the Appellant “stepped over the fine line between persistence and a request being obsessive and unreasonable”. However the actual request for this information was first made some nine years ago; to repeat the request once the FOIA is in force is not unreasonable, the “revisiting of issues previously raised” on analysis (see paragraph 13 above) is dealing with the range of complex matters which have arisen over the years some of which have not been resolved and seeking verification of information is not manifestly unreasonable.

15. At paragraphs 39-41 of the Decision Notice the First Respondent addresses the factor of “harassing the public authority and causing distress to staff”. The test which he applied was whether a reasonable person would have regarded the request as harassing or distressing. He incorrectly relied on the length of time and nature of the request (see 13 and 14 above) and draws attention to “the threatening and intimidating nature of correspondence”. In a letter concerning the injunction dated 15 March 2010 the Appellant stated:-

“Nottingham City Council/Nottingham City Homes and others have been guilty of discrimination, victimisation, intimidation, harassment and neglect.

It is now my sworn duty to seek rightful Justice to find out and disclose the person or persons wholly responsible for the repugnant and offensive injunction and ensuing witch-hunt.

Beware the Ides of March, I will have my Retribution.”

This is intemperate language. It was written as a result of litigation which deeply distressed the Applicant. However experienced members of staff receiving such a letter would be unlikely to be significantly concerned by its contents.

16. At paragraphs 42 and 43 the Decision Notice addresses the issue of “burden and distraction”. Again the First Respondent erred by conflating the real, substantial and partially unresolved issues concerning the Appellant’s tenancy and neighbouring properties with the request. The Second Respondent had correctly conceded that the request was unlikely to be labour intensive. While there is a possibility of further correspondence as a result of complying with the request (and if necessary verifying the disclosed information) the Tribunal is not satisfied that the burden will be significant.

17. At paragraphs 44 and 45 the First Respondent correctly concluded that the request was not designed to cause disruption and annoyance.

18. At paragraphs 46 and 47 the First Respondent concluded, on the basis of the correspondence, that the Second Respondent had demonstrated that the request had no value or purpose and:-

“that the request has become a manifestation of the complainant’s substantive complaints. As such he has concluded that the request has no serious value or purpose in its context.”

19. The Tribunal finds this a surprising conclusion. In the correspondence upon which the First Respondent relies there are allegations of breach of statutory duty as a housing authority with respect to the tenancy and allegations of failure to accord the Appellant his rights under disability discrimination legislation. The original request in its third part

sought the same information with respect to the Appellant's own tenancy. This is a transparent attempt to obtain evidence that other properties have had more resources spent on them than the Appellant's; with a clear view to using that information to found a claim under discrimination or housing legislation. It is no part of this Tribunal's role to determine the substantive merits of such claims; however they are at least theoretically conceivable and in the context of the application, clearly apparent. The application therefore has a clear purpose and value.

20. The Tribunal is satisfied that in its response to the request for disclosure of information the Second Respondent has focussed too much on the history of its relations with the Appellant and has not considered the request on its merits.

21. The Tribunal is satisfied that the First Respondent has erred in finding that the application is vexatious and finds in favour of the Appellant.

Chris Hughes
Tribunal Judge
4 August 2011