IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2011/095

BETWEEN:

NICK INNES

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BUCKINGHAMSHIRE COUNTY COUNCIL

Second Respondent

Decision and Reasons

Heard By:
Alison McKenna, Tribunal Judge
Mike Jones, Tribunal Member
Nigel Watson, Tribunal Member

On 15 August 2011 at Field House, Breams Buildings, London

The Appellant requested an oral hearing but did not attend.

The First and Second Respondents did not attend the hearing, with the consent of the Tribunal.

Decision dated: 25 August 2011

Subject Matter:

S. 11 Freedom of Information Act – Means by which Communication to be Made
S.16 Freedom of Information Act – Advice and Assistance
Tribunal Practice and Procedure

DECISION

This appeal is hereby dismissed.

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Reasons

Background

1. This appeal concerns the Appellant's Freedom of Information Act ("FOIA") request to the Second Respondent for information concerning its 11+ examination system.

2. The First Respondent issued a Decision Notice FS50310802 dated 14 March 2011, which is now the subject of an appeal to this Tribunal. He concluded that the Second Respondent had supplied the requested information and required no steps to be taken. The Appellant has appealed to the Tribunal on the basis that not all of the information was supplied and, in any event, what was supplied was not in the form he requested.

Procedural Matters

3. The Appellant requested an oral hearing of this appeal in his Notice of Appeal. The Tribunal is bound to arrange an oral hearing unless all the parties agree to determination on the papers, by virtue of rule 32(1) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber Rules 2009 ("the Rules"). The First Respondent submitted in his Response to the Notice of Appeal that this matter, which concerns points of law rather than evidence, could most appropriately be dealt with on the papers.

(i) The First Respondent's Position

4. In Directions dated 7 June 2011, the Tribunal gave the First Respondent permission to make an application for permission not to attend the oral hearing of the appeal but to provide the Tribunal with written submissions. Such application was directed to be made as soon as possible after the submission of the hearing bundle to the Tribunal so that it would be clear to the Tribunal at that stage whether there was likely to be contested evidence or only legal argument. The Tribunal's Directions of 7 June also provided for the Appellant to be invited to comment on any such application by the First Respondent before the Tribunal ruled on it and in particular to indicate whether he considered that his case was likely to be prejudiced by the non-attendance of the First Respondent.

5. On 28 July 2011, the First Respondent applied for permission not to attend the oral hearing but to send written submissions. The reasons for this were explained as:

   - There is no witness evidence in this case, which will turn on argument only;
   - The First Respondent considers that he can deal with the Appellant's arguments adequately by way of written submissions;
   - It would be fair and just, and in conformity with the Overriding Objective, for the First Respondent not to have to attend in person.

6. On 4 August, the Appellant provided his comments on the First Respondent's application in accordance with the Tribunal's earlier directions. He submitted that the First Respondent had not yet made clear how it responded to the points made in his appeal documents and that it must explain its position on the key points for the benefit of the Tribunal. He added that it would be in the interests of justice

and the Overriding Objective for the First Respondent to explain its position to the Tribunal and that if the First Respondent were not required to explain his interpretation of section 11 FOIA he would be "let off the hook".

7. The Tribunal noted that the Appellant did not address the question of whether the issues were required to be addressed by the First Respondent at an oral hearing and if so why, or whether they could be addressed adequately in a written submission.

8. The Tribunal had listed this appeal for an oral hearing on 15 August 2011. A hearing bundle had been prepared by agreement between the parties and provided to the Tribunal Panel. None of the parties had adduced any witness evidence in support of their cases and the appeal therefore turned upon the presentation of argument only. The Directions provided for skeleton arguments to be filed with the Tribunal and to be served on the other parties no later than 7 days before the hearing date and the First Respondent was also directed to serve any submissions in reply to the Appellant's submissions by no later than 3 days before the hearing.

9. On 5 August, Judge McKenna issued a ruling giving the First Respondent permission not to attend the oral hearing. Her reasons are set out fully in that ruling and are not repeated here, save to say that she was satisfied that the Appellant would not suffer any injustice if the First Respondent were to be permitted to make written submissions only.

(ii) *The Second Respondent's Position*

10. On 4 August, the Second Respondent also applied not to attend the oral hearing. It supported the First Respondent's application and the reasons given for it. It informed the Tribunal that it relied entirely on the First Respondent's case and the Tribunal noted that it had not, during the case management stage of the proceedings, advanced any additional or alternative argument or filed any evidence.

11. The Appellant's comments on the First Respondent's application not to attend the hearing were sent to the Tribunal several hours after the Second Respondent's application had been sent to him, but he did not comment on the Second Respondent's application. The Appellant therefore did not raise any objection to the Second Respondent's application (neither had he previously applied for any direction that the Second Respondent should file evidence or argument or attend the hearing), however, not having heard from him on the point, Judge McKenna decided that she should assume for the purposes of her ruling that the Appellant <u>did</u> object to the Second Respondent's application. She concluded, however, that as the Second Respondent had relied entirely on the First Respondent's submissions and in circumstances where there was no material evidential dispute before the Tribunal, there was no reason to treat the Second Respondent any differently from the First Respondent with regard to the issue of its attendance at the oral hearing, even on the assumption that the Appellant would be likely to oppose the Second Respondent's non-attendance.

12. Judge McKenna concluded in all the circumstances that the Appellant would not be prejudiced and that it would be fair and just for the Tribunal to proceed to

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determine this appeal on the basis of written evidence and submissions only from both Respondents at the hearing on 15 August. She directed, pursuant to rule 15(1)(g) of the Rules, that the First and Second Respondents need not attend the hearing in person. She also directed that the First Respondent must provide written submissions to the Tribunal in accordance with paragraph 11 of her earlier Directions and further that, pursuant to rule 15 (1) (c) of the Rules, such submissions must address the issues raised in the Appellant's e mail of 4 August so that its case in relation to the points made in that e mail were made quite clear both to the Appellant and to the Tribunal. She also gave the Second Respondent permission to file written submissions also, should it wish, no later than 7 days prior to the hearing and to reply to the Appellant's skeleton argument.

(iii) The Appellant's Position

13. On 8 August the Appellant e mailed the Tribunal in response to the 5 August ruling, stating that "*the Ruling is …appealed*". He said this was because he had not been invited to respond to the Second Respondent's application, and because the Second Respondent had not been directed to file any submissions, and that his case would be prejudiced if the Second Respondent did not answer his questions. He did not make a formal application for permission to appeal and he did not identify any error of law upon which such an application could be made, as required by the Rules. Judge McKenna responded that the hearing would go ahead and that, if he were unsuccessful, he could include this procedural matter in his post-determination grounds of appeal, but that she was not prepared to abandon the hearing listed for 15 August in order to allow him to seek permission to appeal her interlocutory ruling.

14. On 10 August the Appellant informed the Tribunal by email that he would not be attending the hearing on 15 August because the Tribunal had not "*responded to*" his "*appeal*" against the ruling of 5 August. He sent the Tribunal written submissions which had not been provided for in the Tribunal's earlier directions and asked the Tribunal to consider them in lieu of his attendance. The Tribunal informed him that it would consider (a) whether to proceed in his absence and (b) whether to accept his submissions, when the Panel met on 15 August.

(iv) *The Hearing of 15 August*

15. At the hearing on 15 August, the Appellant did not attend. The Panel considered whether to proceed in his absence, having regard to rule 36 of the Rules. The Tribunal noted that the Appellant was clearly aware of the hearing date and the reason he had given for not attending was his disagreement with the ruling of 5 August and the Tribunal's alleged failure to "respond to" his "appeal". The Tribunal further noted that the Appellant had in fact received a response to his e mail mentioning an appeal, to the effect that the hearing would go ahead and that he could exercise his right of appeal later if he still wished to. The Tribunal also noted that no formal application for permission to appeal had in any event been made by the Appellant so there was no application for permission to appeal before the Tribunal, only an expression of disagreement with a ruling. In the circumstances, the Tribunal concluded that it was in the interests of justice to proceed with the hearing in the Appellant's absence.

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16. The Panel also considered whether to take into account the additional written submissions that the Appellant had made. The Tribunal noted that these had been served on the Friday preceding the hearing date and that the Respondents had not therefore had an opportunity to comment on them. Furthermore, the Appellant had written to the Tribunal stating that the hearing was now a "paper hearing", whereas in fact the Appellant has no standing to alter unilaterally the status of a hearing, which is a decision for the Tribunal pursuant to rule 32(1)(b) of the Rules. The Tribunal further noted that the Appellant's request for an oral hearing had caused HMCTS to incur the expense of organising a hearing room in central London whereas the Panel could have met in less formal and less expensive surroundings if the Tribunal had directed a paper hearing in accordance with the Rules on the basis of a request from the Appellant. The Tribunal noted that, in some circumstances, the Appellant's behaviour could cause a costs order to be made against him. On the other hand, the Tribunal noted that the Appellant had sent these submissions in lieu of attending, that he would have been able to make these points in person if he had attended, and in any event there was nothing new in the submissions. In the circumstances the Tribunal decided that, taking into account that the Appellant is a lay person and without the benefit of legal advice, the Tribunal should, in accordance with the Overriding Objective, assist him to make his best possible case and that this required the Tribunal to consider all the arguments he wished to present, providing that no injustice to the other parties arose. In the circumstances the Tribunal concluded that it should consider his late submissions on this occasion.

The Substantive Appeal

The Information Requests

17. The Appellant has made a series of information requests regarding 11+ testing in his Local Education Authority area, however the Decision Notice here appealed is one dealing with requests dated 29 October 2009 and 20 January 2010 only. The requests were made as part of a longer correspondence regarding the 11+ data held on the Second Respondent's database ("DB") as follows:

    Request 1, made 29 October 2009:

    "I think it best if you just provide me with all of the headers in this DB table – please can you do that?

    Also

    If there are links to other tables from this table would you also explain what these tables are as that data may be useful also.

    So I confirm that if data exists in relation to children that have taken (or eligible for) 11+, beyond that contained in the table already requested above, I'd like to know what that data is (Table/Headers/Data description)."

    Request 2, made 20 January 2010:

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"Please provide the following 11+ information:

1) *School*
2) *VRTS Score*
3) *Attitude to Work*
4) *Academic Recommendation*
5) *1st Test Score*
6) *2nd Test Score*
7) *Both Test Dates*
8) *Plus, if tested by us other than at a school, the test venue and time for each test*
9) *Plus, if there has been an application for test modifications, there is a more detail just to record the application process and outcome*
10) *Appeal data – Success/Fail*

For 2007, 2008, 2009.

Also it is not clear to me what all the headers of the 2 databases actually are and what is available to me. (I did not deduce that ATT and HTR correspond to the headers you described) Since there may well be others, can you simply list all the headers please?".

On 7 February 2010 the Appellant sent a further e mail in which he requested that items 1 – 10 in this request should be provided to him in Excel format.

The Public Authority's Response

18. In relation to the first request, the Second Respondent supplied the Appellant with screenshots from the databases concerned with 11+ admissions and appeals. It had also annotated some of the screen shots and offered to explain further any fields or abbreviations which the Appellant did not understand. In relation to the second request, the Second Respondent provided the Appellant with a .pdf document showing 184 pages of Excel spreadsheet. It did not consider that it had an obligation to create a separate list of headers for the Appellant when he had the information he had requested in the screenshots. It did not consider that it had an obligation under section 11 FOIA to provide the information in a particular electronic format and pointed out that, in any event, the preference expressed was not made at the time the Appellant made the request. The Appellant requested an internal review which was responded to on 13 August 2010 to the effect that his information requests had been complied with.

19. The Appellant complained to the Second Respondent that he had not been supplied with all the information that he had requested; that the information should have been supplied in Excel format, as he had requested, rather than as a .pdf; and also complained about the delay in conducting the internal review.

The Information Commissioner's Decision Notice

20. Following his enquiries, the First Respondent issued a Decision Notice in which he concluded that the Second Respondent had supplied the Appellant with all of the disputed information (paragraph 26). He found that s. 11 FOIA did not require

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the Second Respondent to provide the information in a particular electronic format (paragraph 34). He commented on the delay in conducting the internal review but required no steps to be taken (paragraph 36).

The Grounds of Appeal and Appellant's Submissions

21. The Appellant appealed to the Tribunal by way of Notice of Appeal dated 5 April 2010. His grounds of appeal, as set out in the Notice of Appeal and supplemented in his written submissions, were to the effect that there were four errors of law in the Decision Notice, as follows:

Ground 1
This ground argued that s. 11 FOIA required the Second Respondent to comply with his stated preference for the information to be supplied in Excel format. The Appellant acknowledged that there were no Information Tribunal judgements on this issue and argued in favour of his own textual interpretation of section 11, which was that the ability to express a preference for the "form" of material included its "format". He characterised the First Respondent's contrary view as "wordplay". He argued that the First Respondent had misinterpreted section 11 FOIA in the Decision Notice and had ignored his arguments.

Ground 2
This ground argued that the Decision Notice was wrong to state that he had not specified the "form" he preferred at the time of making his request, as required by section 11 FOIA. Although he accepted that the original request did not include reference to the software format, he argued that the Second Respondent had not commenced work on responding to his request and so could not have been inconvenienced by his subsequent clarification as to the format required. Again, the Appellant argued that the First Respondent had misinterpreted section 11 FOIA in the Decision Notice and had ignored his arguments.

Ground 3
This ground was that the Appellant had made a request to the Second Respondent dated 17 August 2010 which included a specific reference to excel format and that it was an unreasonable exercise of discretion by the First Respondent not to have included that request in the Decision Notice in this case.

Ground 4
This ground was that the Second Respondent had not provided all the information requested. The Appellant argued that the Decision Notice reached the wrong conclusion on this point and further that it should have concluded that the First Respondent was in breach of its duty to give advice and assistance under s. 16 FOIA in that it had not provided him with assistance consistent with paragraph 10 of the Code of Practice.

The First Respondent's Response

22. The First Respondent resisted the four grounds of appeal in his Response and in subsequent written submissions on the following basis:

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Ground 1

(a) The First Respondent argued that the Appellant has mis-interpreted s.11 FOIA, which is intended to deal with a "form" of communication e.g. paper or electronic – and not to allow specification of the electronic format. He argued that, not only is this clear from a straightforward textual interpretation of section 11, but that this view is supported by the proposed amendment to s. 11 FOIA by clause 98 of the Protection of Freedoms Bill 2010 -11[1] which amendment would require the provision of information in an electronic form which is capable of re-use. Whilst this proposed amendment represents an enlargement of citizen rights (and suggests that the more restrictive interpretation of s. 11 is correct, or else it would not be necessary to amend it) the First Respondent noted that even this amendment would stop short of permitting the requester to express a preference for a specific software format.

The Tribunal cannot of course know whether (a) this provision will be enacted so as to amend s.11 and (b) whether the Parliamentary draftsman's interpretation of s. 11 as one needing such amendment is correct. In the circumstances it does not seem to the Tribunal that this is a persuasive argument.

(b) The First Respondent also referred the Tribunal to the decision in *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73[2] in which the Inner House of the Court of Session considered the equivalent provision in the Freedom of Information (Scotland) Act 2002 and reached an interpretation consistent with that of the First Respondent at paragraph 57. This is a persuasive authority supporting the First Respondent's interpretation of s.11 FOIA.

(c) Both the First Respondent and the Appellant referred the Tribunal to the content of Parliamentary debates about the Freedom of Information Act 2000 prior to its enactment, however the Tribunal takes the view that, following the rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, the Tribunal should have no regard to extraneous materials in construing a statutory provision unless it is satisfied that the provision in question is "*ambiguous, obscure or led to absurdity*". Even if the Tribunal were so satisfied, the Tribunal notes that it could only consider materials falling within the strict conditions set out in *Pepper v Hart*, namely a clear statement, directed to the ambiguity in question, made by or on behalf of the Minister promoting the Bill, and which discloses the otherwise ambiguous legislative intention. The Tribunal is not satisfied that the wording of s. 11 FOIA is ambiguous, obscure or absurd so as to require the consideration of extraneous materials to construe it, and notes that the materials the Tribunal was referred to by the parties would in any event be inadmissible for the purposes of construction.

Ground 2

The First Respondent argued that if the Tribunal finds in his favour in relation to ground 1, then ground 2 is of no consequence because the preference expressed was not within the meaning of the section.

It was argued that s. 11 FOIA clearly refers to the expression of a preference "*on making his request for information*" which, as the Appellant accepts, he did not do. Accordingly, the evidential question of whether the Second Respondent had

[1] http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html

[2] http://www.bailii.org/scot/cases/ScotCS/2009/2009CSIH73.html

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commenced and/or completed work on responding to the Appellant's request at the point when he when he expressed the preference is immaterial.

Ground 3
It was submitted that the Tribunal has no jurisdiction in relation to a matter which had not been adjudicated upon in the Decision Notice.

Ground 4
It was submitted that the Appellant had been provided with screenshots which showed all the headings under which information was recorded. Some of the screenshots had been annotated and the Second Respondent had offered to explain others to the Appellant. There was no independent list of headers and no obligation to create one for the purposes of responding to the information request. There is no obligation under s. 16 FOIA or under the Code of Practice to provide advice and assistance so as to help the Appellant understand the information he has received pursuant to his request. This had already been made clear to the Appellant by the Tribunal in its decision on another appeal[3].

The Second Respondent's Response

23. As noted above, the Second Respondent confirmed that it supported the First Respondent's case in relation to each of the grounds of appeal and it did not provide any separate submissions.

The Law

24. The sections of the FOIA which are engaged by this appeal are as follows:

Section 11: Means by which communication to be made.

(1)Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—

(a)the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

(b)the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

(c)the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

(2)In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3)Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4)Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

Section 16: Duty to provide advice and assistance.

(1)It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2)Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

[3] EA/2009/0064

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Sections 57 & 58

57 Appeal against notices served under Part IV.

(1)Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2)…

(3)…

58 Determination of appeals.

(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 involved 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.

The Appellant also referred the Tribunal to paragraph 10 of the Code of Practice [4] which falls under the sub-heading "*Clarifying the Request*" and reads as follows:

10 Appropriate assistance in this instance might include:
Providing an outline of the different kinds of information which might meet the terms of the request;
Providing access to details catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
Providing a general response to the request setting out options for further information which could be provided on request.
This list is not exhaustive and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant".

The Tribunal's Conclusions

Ground One

25. The Tribunal notes that the parties have adopted opposing interpretations of s. 11 FOIA. For the reasons stated at paragraph 22 above, the Tribunal has not been assisted by the parties' references to parliamentary debates. The Tribunal has also not been assisted by the First Respondent's reference to proposed legislation. The Tribunal finds that the meaning of s. 11 is clear and that on a straightforward reading it does not include the ability to express a preference for the electronic format in which information should be provided. The Tribunal agrees with the First Respondent that the distinction made in s. 11 is one between "permanent form" or "another form" i.e. paper or electronic forms. This view is supported by the persuasive authority of the Scottish Court's decision referred to at paragraph 22 above. Accordingly, the Tribunal finds against the Appellant on this ground.

[4] Secretary of State for Consitutional Affairs' Code of Practice, issued pursuant to s. 45 FOIA 2000.

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Ground Two

26. As noted above, if the Tribunal finds that the electronic format of the information does not fall within the right to express a preference for "form" under s. 11, then the issue as to the timing of the Appellant's request is a moot point. In any event, the Tribunal finds that the wording of s. 11 FOIA is quite clearly to the effect that the expression of a preference must be "*on making his request*" and, as the Appellant has accepted, his request for information in Excel format was made on 7 February, when he had made his information request on 20 January. The Tribunal is supported in this interpretation of s. 11 by the leading textbook on Information Rights law, at page 436, where it is noted that "*it would seem that the obligation only arises if the applicant expresses his preference at the time when he makes his request for information and it does not arise if the preference is expressed only subsequently*" [5]. The Tribunal does not, accordingly, consider it relevant to reach a formal finding on the Appellant's point as to whether the Second Respondent had or had not commenced or completed its work on answering his information request when the request for Excel format was made. The expression of a preference was made subsequent to the information request and, accordingly, the Tribunal finds against the Appellant on this ground.

Ground Three

27. The Tribunal has considered sections 57 and 58 of FOIA carefully. It has concluded that it agrees with the Appellant that the exclusion of a complaint from a Decision Notice is, in principle, capable of appeal to the Tribunal. This is because the inclusion or exclusion of a complaint from a Decision Notice constitutes an exercise of discretion by the Information Commissioner and the Appellant is entitled to argue that he should have exercised his discretion differently.

28. The Tribunal has not heard argument from the First Respondent as to why his discretion was exercised in the manner that it was. Neither has it received argument from the Appellant directed to the question of why he says that the First Respondent was not entitled to exercise his discretion in the manner that he did: he merely points to an "omission" from the Decision Notice. The Tribunal notes that the First Respondent has wide discretion as to the terms of his investigation into a complaint and takes the view that the Appellant (on whom the burden of proof rests) would need to make a strong case as to why the exercise of that discretion should be overturned by the Tribunal. The Tribunal also notes that, when advised that he could make a separate complaint to the First Respondent about the excluded request, the Appellant commented in his Reply that the Tribunal's decision on ground one in this appeal would answer the point raised in that complaint so it would not be necessary to do so. In the circumstances, the Tribunal finds that the Appellant has not discharged his burden of proof in relation to the alleged inappropriate exercise of discretion and finds against the Appellant on this ground.

Ground Four

29. The Tribunal notes that the Second Respondent offered to assist the Appellant in interpreting the information provided in response to his first request. The

[5] P Coppel, *Information Rights Law and Practice* 3rd edition.

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Appellant now argues that the Second Respondent had a duty, arising from section 16 FOIA and the accompanying Code of Practice, to provide advice and assistance to help him with interpretation. The Tribunal notes that paragraph 10 of the Code refers to circumstances in which a request is "*clarified*" and not to a request for assistance after the provision of the requested information. The Tribunal concurs with the decision of a differently constituted Tribunal in another appeal by the Appellant, in which it was stated that "…*paragraph 10 of the Code is aimed at assisting Appellants in indentifying the information that they wish to request and not at explaining the information that they have requested*".[6]

30. The Appellant has also argued that the First Respondent erred in finding that all the information covered by the first information request had been disclosed to the Appellant. This seems to be on the basis that he suspects that there is a list of headers which could also have been provided to him. The Appellant has not advanced any grounds upon which the Tribunal could make this finding of fact and the Tribunal notes that it could only overturn this aspect of the Decision Notice if it were satisfied that the First Respondent had erred in concluding on the balance of probabilities there was no more information which could have been disclosed to the Appellant. The burden of proof in persuading the Tribunal that this state of affairs was more likely than not to exist rests with the Appellant and the Tribunal finds that he has not discharged that burden. The Tribunal accordingly finds against the Appellant on this ground.

Alison McKenna **Dated: 26 August 2011**
Tribunal Judge

[6] EA/2009/0064

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

Appeal No: EA/2010/0095

BETWEEN:

NICK INNES

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BUCKINGHAMSHIRE COUNTY COUNCIL

Second Respondent

RULING ON APPLICATION FOR PERMISSION TO APPEAL

DECISION

Permission to appeal is hereby granted.

REASONS

1. This case concerns the Appellant's Freedom of Information Act ("FOIA") request to the Second Respondent for information concerning its 11+ examination system.

2. The First Respondent issued a Decision Notice FS50310802 dated 14 March 2011, which was the subject of an appeal to this Tribunal. In his Decision Notice he concluded that the Second Respondent had already supplied the requested information and therefore required no steps to be taken. The Appellant appealed to the Tribunal on the basis that not all of the information had been supplied and, in any event, the information which had been supplied was not in the form he requested.

3. The Appellant requested an oral hearing. The other parties submitted that the hearing should be on the papers as the appeal concerned legal arguments only and there was no disputed evidence before the Tribunal. The Appellant did not agree to a paper hearing. The Tribunal directed that the First and Second Respondent had permission not to attend the hearing but to make written submissions only. The reasons for that direction were set out in a ruling dated 5 August and are not repeated here. The Appellant later decided not to attend the oral hearing which had been arranged by the Tribunal and sent the Tribunal written submissions instead. The Tribunal proceeded to hear the appeal in the Appellant's absence but took his written submissions into account in reaching its Decision.

4. The Tribunal unanimously dismissed the appeal and issued its decision dated 25 August 2011 in which it found that:

    (i) Ground one - the meaning of s. 11 FOIA is clear and on a straightforward reading it does not include the ability to express a preference for the electronic format in which information should be provided;
    (ii) Ground two - the wording of s. 11 FOIA is to the effect that the expression of a preference must be "*on making his request*" and it was not in dispute that the Appellant expressed his preference some weeks after making the original request;
    (iii) Ground three - the Appellant had not discharged his burden of proof in relation to the alleged inappropriate exercise of discretion by the First Respondent in drawing the ambit of his investigation so as to exclude a separate complaint; and
    (iv) Ground four - the Tribunal could overturn the Decision Notice if it were satisfied that the First Respondent had erred in concluding on the balance of probabilities there was no more information which could have been disclosed to the Appellant. The burden of proof in persuading the Tribunal that this state of affairs was more likely than not to exist rested with the Appellant, who had not discharged that burden. There was no continuing duty to advise and assist the Appellant after the requested information had been released to him.

5. The Appellant now applies for permission to appeal to the Upper Tribunal (Administrative Appeals Chamber) pursuant to rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). He has provided the Tribunal with Grounds of Appeal dated 22 September 2011. By virtue of rule 42 (5), an application for permission to appeal to the Upper Tribunal must identify the alleged error or errors of law in the Decision and state the result the party making the application is seeking. The Grounds of Appeal dated 22 September do not state the result the Appellant is seeking but it seems likely that he wishes for the Tribunal's decision dated 25 August to be quashed and remitted for re-hearing by a differently constituted Tribunal.

6. The Appellant's Grounds of Appeal, in summary, are:

    - *In relation to Ground one:*

The Tribunal mis-applied the rule in *Pepper v Hart* and should have paid regard to the Parliamentary debates preceding the enactment of the Freedom of Information Act 2000 for the purpose of interpreting s. 11 FOIA;

The Tribunal placed too much emphasis on the ruling in *Glasgow City Council v Scottish Information Commissioner* which was, in relation to the interpretation of s. 11 FOIA, strictly *obiter;*

- *In relation to Ground four:*

  The Tribunal mis-applied s. 16 FOIA because the information the Appellant had received was not that originally requested. Therefore, the Council still had a duty to clarify his request and offer him assistance under s. 16 and the Code.

- *In relation to other matters:*

  The Tribunal has fabricated evidence and/or lied about the Appellant's reasons for not attending the Tribunal;

  The behaviour of the Tribunal in this appeal was "offensive and disgusting" and the Appellant has been defamed by the Tribunal's Decision;

  The Tribunal did not treat all parties even-handedly in its case-management;

  The case was mismanaged by the Tribunal.

7. On receiving an application for permission to appeal, the Tribunal must first consider whether to undertake a review of its decision pursuant to rule 44 of the Rules. The Tribunal may review its original decision if it is satisfied there was an error of law in it.

8. I am not satisfied that the Grounds of Appeal identify errors of law so as to permit me to review the decision in this case. However, I do consider that the Appellant raises arguable points of law in relation to grounds one and four of the Tribunal's Decision of 25 August, and accordingly I hereby give him permission to appeal in relation to those grounds. In relation to the other grounds concerning case management, I do not consider that they raise any arguable point of law, especially as the Appellant does not specify how it is said that the matters complained of impacted upon the outcome of his appeal. I accordingly refuse permission to appeal in relation to those aspects of the grounds which concern case management.

9. Under rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Appellant now has one month from the date this ruling is sent to him to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane, London, WD2A 1DD. Further information about the appeal process is available on the Upper Tribunal's website at http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/aa/index.htm

Alison McKenna
Tribunal Judge

Dated: 11 October 2011