



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2011/0033

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50314033

Dated: 10th January 2011

Appellant: Mr B Figg

Respondent: Information Commissioner

Second Respondent: Isle of Wight Council

Heard on the papers on 15th September 2011

Date of decision: 27th September 2011

BEFORE:

Fiona Henderson (Judge)

Roger Creedon

And

Darryl Stephenson

**Subject matter: FOIA - Whether information held s1
Time for compliance with request s10**

Appeal No. EA/2011/0033

Cases: *Billings v The Information Commissioner EA/2007/0076*
Bromley & others v the Environment Agency (EA/2006/0072)

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

Case No. EA/2011/0033

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal insofar as it finds that there was a breach of s10 FOIA, in all other regards it refuses the appeal for the reasons set out in main body of the Decision.

SUBSTITUTED DECISION NOTICE

Dated: 26th September 2011
Public authority: Isle of Wight Council,
Address of Public Authority: County Hall,
Newport,
Isle of Wight PO30 1UD
Name of Complainant: Mr B Figg

The Substituted Decision:

For the reasons set out in the Tribunal's determination, the substituted decision is that there was a breach of s10 FOIA in that the Council received the request on 23rd April 2011 but did not respond to it until 21st July 2011 having been prompted by the Commissioner.

Action Required:

The Tribunal requires no steps to be taken.

Dated this 27th day of September 2011

Fiona Henderson (Tribunal Judge)

REASONS FOR DECISION

Introduction

1. The Appellant has a history of correspondence with the Isle of Wight Council (IoW) which culminated in their deeming that he was unreasonably persistent. In accordance with Council policy he was informed on 13th May 2009 that emails he sent to the Council:

“will now be restricted to receipt by one officer who will review them on a weekly basis to see whether any new issues have been raised. If not, you will not receive a response to those emails which will however, be kept on file.”

2. The Appellant made a complaint to the IoW in relation to a public safety matter and received no response. He emailed the IoW’s customer services department on 23rd April 2010 to inform them of this and received an *“automated non delivery”* report from the Council’s email system including the phrase: *“discarded, sender blacklisted”*.

The request for information

3. On 23rd April 2010 the Appellant requested the following information by email:

“Under what Authority is the Isle of Wight council rejecting communications sent by Island residents and Council Tax payers?

I also require a statement of the legislation upon which you are basing this decision to reject direct communications to the Isle of Wight Council.”

4. In response the Appellant received another automated “non delivery” report from the Council’s email system dated 23rd April 2010 17:44 stating that the email had been “discarded” because the sender was “blacklisted”.

5. On 24th April 2010 the Appellant sent an email to an Isle of Wight Councillor in relation to another matter. He sent the FOIA request of 23rd April as an attachment as an example of an email which had been rejected without consideration. The Appellant received no response to this email and did not receive a rejection notification.

The complaint to the Information Commissioner

6. The Appellant complained to the Commissioner on 13th May 2010. In response to the Commissioner's involvement the IoW provided a formal response to the information request on 21st July 2010 in which they stated that they held no information relevant to the request because:
 - *“The Council was unaware that you had experienced any difficulty in contacting it, until the ICO contacted us on 13th July 2010”.*
 - *During the introduction of a new email filtering system in April 2010 “it seems that the security setting may have resulted in this email being rejected”*
 - *The Council was “not actively rejecting your or any other communication and we were not aware that the system was rejecting them”*
 - *The security settings have been re-set to ensure that your emails are directed to Customer Services.*
7. The Appellant had notified the Commissioner on 20th July 2010 that in response to a further email he had sent to the IoW regarding their decision to “blacklist” his emails¹, he had again received an automated “non delivery message”. The 20th July was the day before the formal “do not hold” notice was issued in relation to the 23rd April 2010 request, but after the IoW had been notified of the problem by the Commissioner and provided an explanation to the Commissioner.

¹ This asked for copies of all reports, background papers, and any further evidence which was considered prior to the decision to “blacklist” my email communications...” along with who authorised the decision, the date of the decision, when it came into force, why was he not informed of the blacklisting, was legal advice taken and copies, whether the emails were in fact discarded.

8. On 28th July the IoW confirmed to the Commissioner that they had received the email, and did not know why the non delivery message was still being sent but that they were contacting their system suppliers for an explanation.

9. On 29th July 2010 the IoW issued a “do not hold” notice in relation to the information request of 20th July in which they explained that they had not taken a decision to blacklist the Appellant’s emails, but that if he wanted information about the decision to restrict his email contact it constituted a subject access request and he should apply under the Data Protection Act 1998. They also confirmed that although the non delivery message had been issued they had received his email of 20th July. The letter added that the IoW ICT department had been asked to investigate the non-delivery response.

10. The Tribunal is satisfied that the request of 20th July 2010 was a separate information request. It is not the subject of Decision Notice FS50314033 and the Tribunal has no jurisdiction in relation to it. It is only relevant to the chronology of the case.

11. The Council refused to review its handling of the request by email dated 9th August 2010. The Appellant therefore again contacted the Commissioner asking that he consider the following:
 - The IoW’s assertion that they had no knowledge of the 23rd April 2010 request was wrong as he had emailed the same request to a Councillor (from a different email address) on the following day.
 - As a result of the IoW’s restricted email policy he has had to change his IP address, open a new email account and only include his address on a “heavily disguised image file”.

The Commissioner did not consider that these matters came within the remit of Part 1 of FOIA and dealt with it in the other matters section of the Decision Notice. He limited the scope of his investigation to considering whether the IoW did in fact hold information relevant to the request.

Findings

12. The Commissioner issued a Decision Notice FS50314033, dated 10th January 2011 in which he found that the IoW dealt with the request for information in accordance with the Act because, the emails were rejected as an unintended consequence of the new email security settings and no conscious decision was made to respond to them in this way, consequently the information was not held.²
13. Under the “other matters” part of the Decision Notice, the Commissioner noted that there was some confusion as to whether the IoW had received the request via the email to the Councillor of 24th April 2011, but that he did not consider it proportionate to consider it further as it was at most a procedural breach.
14. He also noted that IoW did not undertake an internal review into its handling of the request of 23rd April 2010, and considered that in line with Part IV of the Code of Practice issued under s 45FOIA the Council should have conducted an internal review.

The appeal to the Tribunal

15. The Appellant appealed to the Tribunal on 4th February 2011. The IoW were joined as second respondent on 10th March 2011 for the reasons given in the ruling of the same date. The Commissioner has summarised the Appellant’s ground of appeal as follows³:
- i. “The Commissioner erred in concluding, on the balance of probabilities that the Council did not hold the requested information”.*
16. The Tribunal notes that the Appellant’s grounds of appeal are discursive and is satisfied that the Appellant is raising the following additional issues to be determined by the Tribunal:
- ii. There was a breach of s 10 FOIA because the Council were aware of the FOIA request by way of the email to the Councillor on 24th April 2010.*

² See paragraph 17 et seq below

³ This summary of the grounds of appeal was also adopted by the IoW

- iii. The IoW refused to carry out internal review.
- iv. No public authority would put in place a system that discards pdf attachments.
- v. The Commissioner's investigation was flawed.

Ground i.

17. The Commissioner stated the test he adopted in determining whether the information was held or not in paragraph 17 DN and this approach is not disputed by the Appellant in his grounds of appeal. Consequently the Tribunal adopts the approach as set out in *Bromley & others v the Environment Agency (EA/2006/0072)*

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities⁴..."

this was because:

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records⁵".

18. The Appellant argues that the evidence is that the IoW had made a conscious decision to reject his emails in that Computers have to be programmed, they don't reject emails of their own volition, and he believes that the Council was aware that it was rejecting his emails.

19. The Tribunal notes the terms of the information request. Both limbs of the request presuppose that email correspondence was in fact being rejected by IoW.

20. The Tribunal acknowledges that the email notifications received by the Appellant on 23rd April and 20th July 2010 calls itself a "non-delivery report" and states:

- Your message could not be delivered;
- Discarded;
- Sender blacklisted

⁴ Bromley Paragraph 10

⁵ Bromley Paragraph 13

21. Additionally the Commissioner made a finding of fact at paragraph 20 of the Decision Notice stating :

“the new security settings resulted in the complainant’s emails of 23rd April 2010 being rejected”.

The Tribunal is satisfied that in reaching this conclusion the Commissioner is relying upon IoW’s response to the Commissioner on 14th July 2010 and the Appellant on 21st July 2010 which states:

*“it seems that the security settings **may**⁶ have resulted in this email being rejected...we were not aware that the system **was rejecting** them”*.

22. However, the Tribunal is satisfied that there was material before the Commissioner that ought to have alerted him to the fact that this issue needed clarification. The evidence from IoW to the Commissioner⁷ in relation to the 20th July 2010 request was that that email **had** been caught by the filtering system and re-directed to the Customer Support Team, but that the same non-deliverable message was nonetheless sent. This should have alerted the Commissioner to the fact that just because the non delivery notification was sent did not mean that the email had in fact been rejected.

23. Additionally the email to the Appellant dated 2nd August 2010 from IoW stated :

*“I have checked with colleagues in the IT department, who have confirmed that whilst you may have received a message stating that your email/s were “discarded” **they** were, in fact, received by the Council...”*⁸

24. From the evidence of Mr Sheath (a Senior ICT Security Officer at the IoW) the Tribunal is satisfied that none of the Appellant’s emails were ever in fact rejected. Mr Sheath’s evidence is that in April 2010 a new email filtering system (mailcritical) was implemented. The previous system had forwarded emails automatically from “restricted” senders such as the Appellant to customer services for review. The new

⁶ Emphasis added

⁷ By email dated 28th July 2010

⁸ That the emails had been received was repeated in the email to the Appellant dated 5th August 2010. The Tribunal presumes that these emails were before the Commissioner as they form part of the thread leading to the Council’s refusal to review their decision.

system did not have the facility to forward emails automatically consequently the system was configured to capture emails from the appellant using two separate rules:

- Emails were captured from specified email addresses and classified as spam;
- Emails containing “B A Figg” were captured and placed in a separate queue.

A process was set up so that these filtered emails were reviewed manually thrice daily by IoW IT department so that any from Mr Figg could be forwarded to Customer Services.

25. The email system provider confirmed to Mr Sheath that the mailcritical program code refers to denied senders (which the Tribunal understands to mean restricted senders) as “blacklisted”. The Tribunal accepts that “blacklisted” is the terminology used by the system provider and not the IoW⁹. They further clarified that if both the rules (referred to in para 24 above) were triggered simultaneously this automatically triggered the in-built notifications received by the Appellant. IoW accepts that these should not have been sent and it is not disputed that they were misleading.

26. Mr Sheath confirmed that:

- the original complaint and the information request of 23rd April 2010 were both received by the Council, and classified as spam. Unfortunately due to human error they were never forwarded to Customer Services and they were automatically deleted after 28 days.
- the email dated 24th April 2010 to the Councillor which contained the FOIA request as an attachment was also classified as spam, this was forwarded to customer services.
- The email dated 20th July 2010 containing the second information request was classified as spam and forwarded to Customer services.

⁹ The Tribunal also notes that the information request of 23rd April 2010 does not use the term “blacklisted”.

27. The Tribunal having found that none of the Appellant's emails were rejected, the Tribunal goes on to consider whether there is any evidence that any other emails were rejected by IoW. The Tribunal is satisfied that there is none. In reaching this conclusion the Tribunal takes into account the matters set out above and relies upon

- the IoW's response to the Appellant dated 21st July 2011 in which they state:
"The Council is not aware of any other emails being rejected..." and
"The council was not actively rejecting your, or any other, communications...".
- the IoW's response to a FOIA request by the Isle of Wight Chronicle on 17th June 2010 which was that whilst it has a restricted contact policy that it applies to a limited number of individuals, it does not "totally 'block' contact with the council".¹⁰
- In addition the Appellant has not provided any evidence or argument in relation to any case other than his own.

28. In light of the findings above the Tribunal is satisfied that the IoW were not rejecting communications and that consequently they held no information that fell within the terms of the request. Consequently whilst the Decision Notice contains an error of fact (that the emails were rejected) it was correct in its conclusion that no information was held. This ground of appeal therefore fails.

Ground ii

29. S 1(1) FOIA states:

- 'Any person making a request for information to a public authority is entitled –*
- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - b) if that is the case, to have that information communicated to him.'*

30. S 10. FOIA provides:

- ... a public authority must comply with section 1(1) promptly and in any event not later than the 20th working day following the date of receipt".*

¹⁰ Recorded in Commissioner's letter to Appellant dated 10th November 2010

As set out above, the Tribunal finds that the Decision Notice was wrong in fact in concluding that the IoW had not received the FOIA request dated 23rd April 2010. The Tribunal is satisfied that the request was received by the IoW and filtered into the spam queue, but that through administrative oversight it was not actioned appropriately and the request was deleted without being responded to. The Council responded almost 3 months after the request was received following the intervention of the Commissioner. Consequently the Tribunal is satisfied that there was a breach of s10.

31. The Appellant argues that there was an additional breach of s10 because he sent a copy of the FOIA request to a specific Councillor on 24th April 2010. The email was headed “Re Proposed amendment to the Dog Control Exclusion (Isle of Wight) Order 2008” and the attachment was entitled “Cloak and Dagger 5.jpg; Blacklisted.pdf”

32. In the body of the email he asked the Councillor:

“are you aware that following the Cabinet’s unanimous decision in this matter I have been put in the position of having my email account blacklisted by this Councils officers...”

“I have included an example of an email which has been returned to me because I used my “blacklisted” email account... as you can see this was a Freedom of Information request to the IW Council addressed to the CEO which has been unceremoniously bounced back to me without being actioned. ... I will be raising [this] with the Information Commissioner”.

The email was received by the IoW and filtered into the spam queue and then forwarded to customer services but not actioned as a FOIA request. When the email was saved the attachment was automatically stripped and not saved.

33. Whilst the Tribunal considers it unfortunate that having been sent to the department tasked with responding to the Appellant’s FOIA requests, there was no proactive approach and this did not trigger a FOIA response; the Tribunal is satisfied that this

email was not in fact a FOIA request. In reaching this conclusion the Tribunal takes into account:

- The title of the email,
- To whom it was addressed (an individual Councillor rather than customer services department whom he had been told would deal with his FOIA requests).
- The purpose stated for enclosing the FOIA request (as an example of a rejected email and not as a resubmission of the request).
- The fact that the Appellant stated he would be referring this matter to the Commissioner.

Ground iii

34. It is not disputed that the IoW refused to carry out an internal review. Under s50 FOIA a party may make an application for a decision as to whether the public authority has complied with part 1 of FOIA. There is no provision requiring an internal review within part I of FOIA.

35. Additionally s50(2) FOIA acknowledges that internal reviews are not mandatory in that they refer to “*any¹¹ complaints procedures which is provided by the public authority in conformity with the Code of Practice under s45.*” Consequently the Commissioner had no jurisdiction to make a Decision under s50 FOIA in relation to the lack of the review and neither does the Tribunal have the jurisdiction to make any decision upon this point. Consequently this is not a valid ground of appeal. However, the Tribunal does agree with the Commissioner’s assessment that the Council should have conducted an internal review. In particular as that might have helped clarify the issue that the emails were not in fact being rejected, at an earlier stage.

Ground iv

36. Insofar as the Appellant is asking the Tribunal to rule upon the validity of an IT system that discards pdf attachments the Tribunal observes that:

¹¹ Emphasis added

- The Tribunal must deal with systems as they exist not as they ought to exist.
- The matter is material only in relation to IoW's credibility as to its account of its handling of the email dated 24th April 2010. As set out above the Tribunal is satisfied from the terms of the email itself that this did not constitute a FOIA request.
- The Tribunal has no jurisdiction to rule on this matter as it does not fall within the terms of s50 or 58 FOIA

Ground v

37. The Appellant argues that the Commissioner's investigation was flawed. This is not in itself a ground of appeal. The Tribunal adopts the approach set out in *Billings v IC EA/2007/0076* where it was held that the Appeal process is intended only: "*to provide relief if the Decision Notice is found not to be in accordance with the law*".

Consequently it is the Decision Notice that is the subject of the appeal, and not the process leading up to it.

38. As set out in paragraph 30 above, the Tribunal has found that the Commissioner made an error of fact in relation to the receipt of the FOIA request which has led to an erroneous decision being made that is wrong in law (the failure to find that there was a breach of s10) and this is dealt with under ground ii. The conduct of the investigation is not within the remit of the Tribunal under s58 FOIA because the Tribunal can itself consider the evidence seen by the Commissioner and admit fresh evidence in order to reach its own conclusions on the facts. The Tribunal is not bound by the Commissioner's finding of fact.

Conclusion

39. For the reasons set out above, the Tribunal allows the appeal insofar as it finds that there was a breach of s10 FOIA but refuses the rest of the appeal.

Fiona Henderson (Tribunal Judge)

Dated this 27th day of September 2011