



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

Appeal No. EA/2011/0120

BETWEEN:-

IAN BENSON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE GOVERNING BODY OF THE UNIVERSITY OF BRISTOL

Second Respondent

DECISION AND REASONS

Determined on the papers by:

Alison McKenna, Tribunal Judge
Gareth Jones, Tribunal Member
David Sivers, Tribunal Member

On 4 November 2011 at Salisbury Law Courts

Decision dated: 10 November 2011

Subject Matter: Section 21 of the Freedom of Information Act 2000

DECISION

This appeal is hereby dismissed.

REASONS

Background

1. This appeal concerns the First Respondent's Decision Notice FS50310776 dated 20 April 2011.
2. The Appellant made an information request under the Freedom of Information Act 2000 ("FOIA") to the Second Respondent for the workplace e mail addresses of all the University's staff. The Second Respondent confirmed that it held the requested information but asserted that the information fell under s. 21(1) FOIA because it was reasonably accessible otherwise than under FOIA.
3. The First Respondent concluded in his Decision Notice that the Second Respondent had correctly applied s. 21(1), with the exception of two e mail addresses which fell outside the scope of the request and one which had been omitted in error and was supplied to the Appellant. The Tribunal is not concerned with those matters. The Tribunal is also not concerned with the dispute between the Appellant and the Second Respondent concerning events which occurred subsequent to the information request. The First Respondent's Decision Notice noted that the Second Respondent had adopted a publication scheme pursuant to s. 19 FOIA. He stated at paragraph 36 that: "*The Commissioner...is satisfied that the contact directory was available via the scheme at the date of the request and remains so now*". He concluded that s. 21(3) of FOIA operated so that information made available under the terms of a publication scheme was to be regarded as reasonably accessible to the applicant.

4. The parties agreed that this appeal should be determined on the papers and the Tribunal concluded that this was an appropriate mode of hearing in this case. There was no closed material before the Tribunal. The Tribunal considered an agreed hearing bundle consisting of over 150 pages of evidence and argument. The Tribunal was referred to a decision of the Information Tribunal (as it then was) in *Ames v Information Commissioner and Cabinet Office EA/2007/0110*. The Tribunal notes that this is a first instance decision which turns on its own facts and has no precedential value.

The Role of the Tribunal

5. This appeal is brought under s.57 FOIA.
6. The powers of the Tribunal in determining an appeal under s.57 FOIA are set out in s.58 of FOIA, as follows:

“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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The Issues for the Tribunal

7. The issues for the Tribunal in this appeal are
 - (i) whether the First Respondent erred in law in concluding that the information requested by the Appellant was reasonably accessible by means other than FOIA so that it had no duty to disclose it;
 - (ii) if the s. 21 exemption is not available, whether the information requested is exempt under s. 40(2) FOIA (data protection).

The Appellant has suggested that the Second Respondent is covertly running an argument that the information is exempt under s. 36 FOIA (prejudice to the effective conduct of public affairs). The Second Respondent has denied this and the Tribunal has not therefore considered this exemption.

The Parties' Submissions

8. The Appellant's sole ground of appeal in his Notice of Appeal dated 8 May 2011 was that the First Respondent had misinterpreted s. 21 of FOIA. He argued that the First Respondent had taken insufficient account of the degree of difficulty in collating the information requested from across the University's website. He estimated that it would take him over 20 hours to compile a comprehensive list of staff e mail addresses. He cited a decision of the Scottish Information Commissioner in support of his arguments and argued that the First Respondent had taken insufficient account of the fact that he suffers from keyboard strain. He also presented argument concerning events subsequent to the Decision Notice in respect of which the Tribunal has no jurisdiction.

9. The First Respondent filed a Response dated 13 June 2011 in which he argued that, as the University had adopted a publication scheme and the information requested was available in accordance with it, then the effect of s. 21(3) was that the information must be regarded as reasonably accessible, there being no discretion in the matter. The First Respondent accepted that there could be occasions when the applicant's difficulties in accessing the information could mean that it is not reasonably accessible notwithstanding s.21(3), however the Appellant was not in this case arguing that he could not access the information, merely that it would be time consuming to do so. He argued that both he and the Second Respondent had taken information about the Appellant's condition into account. The First Respondent also submitted that the decision of the Scottish Information Commissioner referred to by the Appellant was not binding on the Tribunal, did not concern the same legislation and did not involve information available under a publication scheme in any event. It therefore added nothing to the Appellant's arguments.

10. The Second Respondent was joined to the appeal and filed a Response in accordance with the Tribunal's directions. It supported the First Respondent's arguments. It raised an additional exemption under s. 40(2) FOIA (data protection) but invited the Tribunal to consider this exemption only if it were not satisfied on the s. 21 arguments.

11. In replying to the Responses, the Appellant repeated his argument that s. 21(3) does not in his view operate to dis-apply s. 21(1) where there is a publication scheme. He argued that the important criteria for the Tribunal to address in considering whether the information was reasonably accessible were (i) a comparison of the time and difficulty for the applicant in accessing the information requested, compared with the time and difficulty for the public authority in complying with the request and (ii) what a typical member of the public would have to do to access the information. He raised an alternative argument that as he had requested a "list" of e mail addresses, and the publication scheme covers individual e mail addresses on different web pages, the information he had requested was not covered by the publication scheme in any event.

12. The Appellant and the Second Respondent submitted written submissions in advance of the hearing which helpfully summarised their cases and did not raise any new material issues. The First Respondent did not provide additional submissions but referred the Tribunal to its Decision Notice and Response in support of its case.

The Tribunal's Conclusions

13. The Tribunal accepts the submissions of the First and Second Respondents that information which is available under the terms of a publication scheme is to be regarded as reasonable accessible. This is essentially a question of the interpretation of the statutory provisions of s. 21(1) and s. 21(3) of FOIA. The Tribunal has not been referred to any binding authority in this regard, but notes that the leading text book on Information Rights edited by Philip Coppel takes this approach.

14. The Tribunal rejects the Appellant's alternative argument that a "list" of the e mail addresses does not fall within the publication scheme, which covers individual e mail addresses only. This argument would run counter to Parliament's intention in providing public authorities with a clear incentive to adopt a publication scheme by allowing applicants to avoid s. 21(3) with differently worded requests for the same information.

15. In view of the Appellant's arguments that s. 21(3) should not be relied upon by the Tribunal in considering whether s. 21(1) was satisfied, the Tribunal has considered what view it would take if s. 21(3) did not apply. It has concluded that even without the publication scheme, the information was "reasonably accessible to the applicant" within the terms of s. 21(1) of FOIA. In reaching this conclusion, the Tribunal notes that the information requested was not said by the Appellant to be difficult for him to find on the website, merely that it was spread across a number of web pages so that he found it inconvenient to harvest and re-use the information. The Tribunal finds that this is not a relevant consideration in relation to the question of whether the information requested was "reasonably accessible" to the Appellant in this case. The Tribunal further notes that the Appellant's arguments in relation to the special circumstances of his keyboard strain appear to relate to the process of collation and re-use of the information rather than to his ability to access it.

16. In view of the Tribunal's findings in relation to the s. 21 (1) exemption, it has not considered whether the exemption under s. 40 (2) of FOIA was engaged in this case. For the reasons above, the Tribunal dismisses this appeal and upholds the Decision Notice.

Signed:

Dated: 10 November 2011

Alison McKenna
Tribunal Judge