



Tribunals Service

Information Tribunal

Information Commissioner's number

FS50086627

Information Tribunal Appeal Number:

EA/2007/0094

Determined on the papers

Decision Promulgated

20th May 2008

BEFORE

DEPUTY CHAIRMAN

Peter Marquand

and

LAY MEMBERS

Paul Taylor

David Sivers

B E T W E E N:

MR KEITH EDMUNDS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Written Representations:

For the Appellant:

In person

For the Respondent:

Akhlaq Choudhury, Counsel

DECISION

The Tribunal dismisses this appeal for the reasons set out below.

Reasons for Decision

Background

1. The Tribunal has already decided a preliminary issue in relation to this appeal and the date of that Decision is 19th November 2007. Mr Edmunds request for information was in three parts and it is only the third part that is the subject of the Appeal. The issue remaining to be decided is:

“Having established a breach of section 17(1)(c) FOIA was the Commissioner, as a matter of law, permitted to require “no steps” to be taken by the Ombudsman?”

2. This Decision is the final determination of the Appeal. The background may be summarised as follows: Mr Edmunds had complained to the Local Government Ombudsman (“the Ombudsman”) about a planning application considered by Portsmouth City Council (“the Council”). Mr Edmunds requested information from the Ombudsman, who claimed an exemption in section 44 of the Freedom of Information Act (FOIA), which states:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

- (a) is prohibited by or under any enactment,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

3. The Ombudsman did not set out why he had claimed section 44 of the Act i.e. specifically why subsection 1(a), (b) or (c) were engaged. An internal review by the Ombudsman did not result in any further explanation of why the exemption in section 44 FOIA had been claimed.

4. On the 16th August 2005 the Appellant complained to the Information Commissioner (“the Commissioner”), who carried out an investigation and issued a Decision Notice dated the 30th August 2007. In the course of the Commissioner’s investigations, the Commissioner accepted that the Ombudsman had claimed that section 32(2) of the Local Government Act 1974 acted as a statutory prohibition to the provision of the information that the Appellant was seeking. At paragraphs 25 and 26 of the Decision Notice the Commissioner included an explanation of why section 44 FOIA applied in the circumstances of section 32(2) to the Local Government Act 1974 and those paragraphs are as follows:

“25. The Commissioner accepts that section 32(2) of the Local Government Act 1974 acts as a statutory prohibition on information obtained in the course of or for the purposes of an investigation and that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2). The issue to be considered here is whether the information falling within the scope of part III of the request [this is the part relevant to this Appeal] was obtained in the course of, or for the purposes of, its investigation of the complaint against Portsmouth City Council.

26. The complainant has already been provided with the information which the public authority received from the Council. The only information which the complainant has not received is internal information; that is to say information generated by the public authority itself. As mentioned previously this typically comprises internal memoranda, emails and file notes. It is the Commissioner’s view that where such information draws upon or makes reference to the complaint against the Council or any information which has been obtained in the course of the investigation then this is covered by the statutory prohibition. Whilst the documents containing the information have been

generated by the public authority itself and have therefore not been physically obtained, it is clear that the information contained within these documents will have been obtained in the course of, or for the purposes of, the investigation into the complaint against Portsmouth City Council.”

5. Insofar as it is relevant to the issue that the Tribunal has identified set out in paragraph 1 above, the Commissioner’s Decision was

“The Public Authority breached section 17(1)(c) by failing to explain why section 44 applied to the information requested”.

However, under “Steps Required” the Commissioner stated:

“The Commissioner requires no steps to be taken.”

The Appeal

6. Having determined the preliminary issue and before the final determination of this Appeal the Tribunal wrote to the Ombudsman. The Tribunal invited the Ombudsman to make any submissions and applications in relation to the issue before the Tribunal. However, the Ombudsman declined to take part in this Appeal.
7. With the agreement of all the parties, the appeal has been determined without a hearing on the basis of the written submissions and the agreed bundle of documents. Although the Tribunal may not refer to every document in this Decision, we have considered all the materials before us.

The Tribunal’s Jurisdiction

8. The Tribunal’s remit is governed by section 58 FOIA and this is set out below:

“58- Determination of Appeal.

- 2. 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 involves 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.

3. *On such an Appeal, the Tribunal may review any finding of fact on which the Notice in question was based.”*
7. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence, may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been correctly applied.

The Relevant Law

8. Section 17 FOIA insofar as it is relevant to this appeal states:

“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies...”*

9. Section 50 FOIA covers the Commissioner's power to issue a Decision Notice following an application by an individual for a determination on whether or not a public authority has dealt with his or her request in accordance with the requirements of Part 1 FOIA. Section 50(4) provides:

“Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.”

The Parties' Submissions

10. The Appellant's submissions were that it was plain common sense that any Decision Notice must specify the steps to be taken by a Public Authority. The Commissioner failed to comply with the law by allowing “no steps” to be taken by the Ombudsman when it was clear that a failure to comply with section 17 had been identified.
11. Mr Choudhury, for the Commissioner, argued that section 50(4) imposed a duty on the Commissioner with regard to the specification of steps, which was limited to those that led or could lead to compliance with, in this case, section 17(1)(c) by the Public Authority. If the taking of those steps had become futile, then there was no obligation to specify any steps. Mr Choudhury submitted on behalf of the Commissioner that in this case, as the Decision Notice recorded the breaches and the explanation, there were no steps that could be taken to remedy the breaches. It was therefore appropriate to state that “no steps” were required.

The Tribunal's findings

12. Section 17(1)(c) creates an obligation on a public authority responding to a request for information to provide an explanation when an

exemption is claimed, when that would not be otherwise apparent. Claiming the exemption in section 44 FOIA would seem to be a good example of where it would not be apparent why the exemption had been claimed, unless further detail was given of the statutory or other prohibition which was being claimed under section 44(1)(a), (b) or (c) as appropriate. In this case the Ombudsman did not provide an explanation and the Commissioner identified this as a breach of section 17 (1)(c).

13. Section 50(4) FOIA specifically states that where the Commissioner has decided that a public authority has failed to comply with any of the requirements of section 17, then “... *the Decision Notice **must** [our emphasis] specify the steps which **must** [our emphasis] be taken by the Authority for complying with that requirement...*” There is no discretion here for the Commissioner and that is clear by the use of the word “*must*”.
14. In this case the Commissioner, in the Decision Notice, provided the explanation following his investigation (set out at paragraph 4 above) that would otherwise have been required of the Ombudsman. Mr Choudhury’s argument is that in such a circumstance, the section 17(1)(c) requirement has been met and there is nothing for the Commissioner to require the Public Authority to do.
15. The Tribunal’s conclusion is that the correct approach is, first, to consider what the “requirement” (referred to in section 50(4)) is in section 17(1)(c) which has not been met. In our view the requirement is for an explanation to be given. It is not part of the “requirement” in the context of this case for the Ombudsman, as the public authority concerned, to provide the explanation.
16. The Tribunal believes that looking at other requirements in section 17 supports this interpretation. For example, section 17(7) includes a requirement that any notice given under section 17(1), (3) or (5) must include information about first, any complaints procedure that the public authority has and secondly, the right to complain to the Information Commissioner. If, in a hypothetical case, a public authority had failed to include such information, but the applicant had in any case complained to the Commissioner, it would be, in our view, totally

pointless to oblige the Commissioner to require the public authority to provide such information.

17. Having decided that the “requirement” of section 17(1)(c) had been met by the Commissioner himself, the Commissioner did not have anything to require the Ombudsman to do. Therefore, stating that “no steps” were required was correct.
18. It might be said that the Tribunal’s decision in this case will encourage public authorities to fail to give explanations for exemptions and “sit back” and wait for the Commissioner to do their job. However, it would have been open to the Commissioner in this case to have conducted a less detailed investigation and to have decided fairly quickly, without seeking much information, that the Ombudsman was in breach of section 17(1)(c) and have issued a decision notice obliging the Ombudsman to give the required explanation. The Commissioner chose not to take that course of action in this case.
19. For the reasons set out above the Tribunal unanimously dismisses the Appeal.

SUMMARY

The Tribunal dismisses this appeal unanimously. The requirement of section 17(1)(c) had been met as the Information Commissioner had provided the necessary explanation in the Decision Notice. Therefore, there was no obligation on the Information Commissioner to require the Ombudsman to take any further steps.

Signed:

Peter Marquand, Deputy Chairman

Dated: 20th May 2008