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

Appeal No: EA/2011/0210

BETWEEN:

PAUL CHARMAN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE OLYMPIC DELIVERY AUTHORITY

Second Respondent

RULING ON JURISDICTION

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1. This ruling addresses an application under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") to have the appeal struck out for lack of jurisdiction.

2. The application arises from procedural complexities that have arisen from the sequence of events set out in the following paragraphs.

3. On 9 June 2009 Mr Charman sent the Olympic Delivery Authority ("ODA") a request for information. The request was for "*All records and data concerning radiation monitoring, sampling and assaying, including any air filtering assaying devices, deployed on and near the Olympic Park Development Site, including the location of each and every device."* There is no dispute that the request fell within the scope of the Environmental Information Regulations 2004 ("EIR"). EIR imposes on public authorities, such as the ODA, an obligation to disclose requested information unless it is covered by one or more of a number of exceptions set out in the EIR.

4. The ODA refused the information request on the basis that it was manifestly unreasonable (EIR regulation 12(4)(b)) and was formulated in too general a manner (EIR regulation 12(4)(c)).

5. Mr Charman complained to the Information Commissioner about the refusal. He was entitled to do so under EIR regulation 12, which incorporates the complaint mechanism in Part IV of the Freedom of Information Act 2000 ("FOIA"). Part IV includes FOIA section 50. The text of the section, as amended by EIR regulation 12 (4), is as follows:

   "(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of these Regulations.
   (2) …
   (3) Where the Commissioner has received an application under this section, he shall either –
   > *(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or*
   > *(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.*

   (4) Where the Commissioner decides that a public authority –
   > *(a) has failed to communicate information…in a case where it is required to do so by regulation 5(1),*
   > *(b) …*
   > *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"*

6. In a Decision Notice bearing reference FER0267670, stated to have been issued under Part 4 of FOIA and dated 20 December 2010 ("the First Decision Notice"), the Information Commissioner decided that the ODA was not entitled to rely on the exceptions claimed. In reaching his decision that the information request was not manifestly unreasonable the Information Commissioner took into account representations from the

ODA as to the extent of the task of identifying and collating materials, including correspondence. It was therefore common ground at that stage that correspondence fell within the scope of the original request.

7. The First Decision Notice concluded :

> *"81. The Commissioner requires [the ODA] to take the following stems to ensure compliance with [FOIA]:*
>
> - *Disclose the information or issue a refusal notice relying on exceptions other than Regulations 12 (4)(b) and 12(4)(c).*
>
> *82. The [ODA] must take the steps required by this notice within 35 calendar days of the date of this notice*
>
> *83. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court…pursuant to section 54 of [FOIA] and may be dealt with as a contempt of court."*

8. The relevant part of FOIA section 54 reads:

> *(1) If a public authority has failed to comply with-*
>
> > *(a) so much of a decision notice as requires steps to be taken,*
> >
> > *…*
>
> *the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.*
>
> *(2) …*
>
> *(3) Where a failure to comply is certified under subsection (1), the court may enquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court."*

9. The ODA had a number of available options in responding to the First Decision Notice. First, it could have issued a refusal notice, relying on any of the other EIR exceptions that might have been available to it. Had it done so Mr Charman would have had a right to complain to the Information Commissioner about the refusal and the Information Commissioner would have had an obligation, under FOIA section 50, to issue a further decision notice ruling on it.

10. Secondly, the ODA could have appealed the Decision Notice to this Tribunal. Such an appeal would have been governed by FOIA section 57. The relevant part reads:

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

    Under rule 22(1) of the Rules:

> *"An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received …within 28 days of the date on which notice of the act or decision to which the proceedings relate was sent to the appellant."*

    The 28 day appeal period therefore expired before the expiration of the 35 day deadline imposed by the Information Commissioner for complying with the Decision Notice.

11. The third option available to the ODA was to disclose the requested information.

12. Although the ODA did not appeal or issue a new refusal notice. It took the third option. It disclosed some information within the 35 days stipulated. This did not include correspondence falling within the scope of the request. A short time after the 35 day deadline the ODA sent some correspondence to Mr Charman. Some of it was redacted, and the ODA told him that other correspondence had been withheld. It asserted that

the withheld information fell within the exceptions provided by EIR regulation 12(5)(e) (confidentially of commercial information) and regulation 13 (personal data).

13. No point seems to have been taken at this stage over the assertion of these new exceptions some time after the expiration of the 35 day deadline. However Mr Charman did complain to the Information Commissioner that, in his view, the ODA had omitted from the materials released to him some information which he believed it must have held at the relevant time, including correspondence. By an email to Mr Charman on 8 March 2011 the Senior Case Officer in the office of the Information Commissioner dealing with the complaint informed him that

> *"Following a meeting with senior managers yesterday, it was decided that the best way forward would be for the ICO to investigate whether or not the ODA has provided you with all the information it holds within the scope of your request…I have therefore set up a new case (FER0379316) to specifically investigate whether the ODA complied with its duty under Regulation 5(1) in relation to your request in case FER267670."*

14. The Information Commissioner told the ODA of Mr Charman's complaint and the Information Commissioner's second investigation in a letter dated 19 April 2011. This bore the reference of the second investigation (FER0379316) and included this statement:

> *"In view of the history of the request, we have exercised our discretion to accept the new complaint without the need for Mr Charman to first exhaust the ODA's internal complaints procedure as would normally be required. I trust you will agree that this is the most pragmatic way forward in the circumstances."*

The letter went on to put to the ODA the various complaints and questions which Mr Charman had evidently raised and sought clarification as to

whether the identified materials were held or not. Some of the questions posed concerned correspondence.

15. The ODA sent a detailed reply to the Information Commissioner on 24 May 2011. It recorded its understanding that, in response to Mr Charman's complaint, *"the ICO is now investigating whether the ODA has complied with the requirements of the [First Decision Notice]."* The letter then set out a detailed response to each of the queries raised by Mr Charman. On the question of correspondence, the ODA explained the work that it would have to do in order to locate any relevant correspondence and expressed the view that requiring it to do this would be "*manifestly unreasonable and an unjustifiable and disproportionate diversion of internal and external resources…".* The ODA requested the Information Commissioner to "*confirm whether the ODA is required to proceed with the processes we have described*."

16. It appears that at some stage after this:
    a. the Information Commissioner and ODA agreed that the investigation of Mr Charman's complaint would not include the issue of correspondence;
    b. the Information Commissioner informed Mr Charman that correspondence would be excluded from the investigation, on the basis that it was an issue that the ODA was still considering (although there seems to be some doubt as to whether it was), and that Mr Charman should request an internal review by ODA of its decision in respect of those materials and should make a further complaint to the Information Commissioner if he was dissatisfied with the outcome; and
    c. in the course of dealing with the request on those terms, as well as in a subsequent internal review, the ODA sought to rely on EIR regulation 12(4)(b).

17. I pause at this point to summarise what appears to have happened up to this stage:

    (a) the information request was in terms which were wide enough to include correspondence;

(b) the First Decision Notice acknowledged that correspondence was included and that the ODA had relied on the effort of finding and disclosing it in order to support its argument that the request was manifestly unreasonable under EIR regulation 12(4)(b);

(c) the Information Commissioner nevertheless rejected the ODA's claim to exception under EIR regulation 12(4)(b) and directed it to disclose the requested information or to rely on another exception;

(d) the ODA did not appeal the First Decision Notice and thus did not challenge the finding that it had not been manifestly unreasonable to require it to include information that included correspondence;

(e) the ODA failed to disclose correspondence when it purported to comply with the First Decision Notice during January and February 2011;

(f) the Information Commissioner treated Mr Charman's complaint about the failure to disclose relevant information, including correspondence, as a complaint under FOIA section 50 and not under section 54;

(g) the Information Commissioner and the ODA then agreed that the new complaint would not include the issue of correspondence (and, by inference, that the prohibition in the First Decision Notice against further reliance on EIR regulation 12(4)(b) could be ignored);

(h) the Information Commissioner then told Mr Charman to pursue the correspondence issue as, in effect, a new request for information;

18. On 22 August 2011 the Information Commissioner issued a Decision Notice ("the Second Decision Notice) under the reference of its second investigation (FER0379316). The Decision recorded the events leading up to the First Decision Notice and then stated, in paragraph 3:

> *"The complainant was however dissatisfied with the information subsequently disclosed by the public authority in compliance with the [First Decision Notice]. The complainant therefore requested a further investigation by the Commissioner to determine whether the public authority had disclosed all of the information held within the scope of his request of 9 June 2009."*

The first sentence clearly identifies a complaint that the terms of a Decision Notice have not been complied with. The second sentence is consistent with that, in that the First Decision Notice had directed the ODA to comply with the original request and, if it had not disclosed all the information falling within the scope of the request, it would have been in breach of the First Decision Notice. However, thereafter the Second Decision Notice made no further reference to the First Decision Notice. It recorded the date and content of the original information request in June 2009 and then, in the next sentence, leapt forward 18 months and stated that Mr Charman had contacted the Information Commissioner on 31 January 2011 and "*alleged that the public authority had failed to disclose all the information within the scope of his request above of 9 June.*" It then recorded the events of 2011 summarised above, including the Information Commissioner's decision to disregard the correspondence element of the requested information, and commented on the investigation of each of the other categories of document that Mr Charman claimed had not been disclosed to him.

19. The Second Decision Notice concluded:

    "The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR".

20. On 19 September 2011 Mr Charman lodged an appeal from the Second Decision Notice with this Tribunal. He included in his grounds of appeal a claim that the Information Commissioner had treated his complaint on 31 January 2011 as a "*routine FOI section 50 complaint case*" and not as an "*enforcement investigation*" under section 54. He added that if the Tribunal did not accept that point then he would rely on various criticisms of the substance of the decision, which he then set out.

21. The Information Commissioner filed a response to the appeal. In addition to answering criticism of his conclusions in respect of each category of document that Mr Charman claimed had been withheld, the response dealt with two main points. First, it challenged the jurisdiction issue raised by Mr Charman (in terms which I summarise later in this document).

Secondly, it acknowledged that the Information Commissioner had been wrong to permit the ODA to exclude correspondence from the scope of the investigation that led to the Second Decision Notice, as the language of the original request had been wide enough to cover it. The Information Commissioner noted that the ODA had not appealed the First Decision Notice and suggested that the prohibition against relying on EIR regulation 12(4)(b) therefore still applied to any information falling within the scope of the request, including correspondence.

22. In response to a suggestion in the Information Commissioner's response I ordered the ODA to be joined as a Second Respondent. Its response was to invite me to consider, as a preliminary issue, whether the Tribunal had jurisdiction to consider the Second Decision Notice. I treated that as an application to strike out the appeal and accordingly gave directions for each party to file written submissions on that issue.

23. The Information Commissioner's submission, developing the arguments set out in his response, argued that his discretionary enforcement powers under FOIA section 54 are only engaged when a public authority fails to comply with the steps directed in a decision notice and that had not occurred in the current case. He relied on the fact that the First Decision Notice set out two options for the public authority and added: "*where the Commissioner was satisfied that there had been compliance in relation to one of the two distinct options…(neither of which had been finally determined in that decision notice), a second decision notice was both permissible and appropriate."* The options he identified were either to "disclose the requested information *in full*" (his emphasis) or refuse disclosure under an alternative EIR exception.

24. It seems clear to me that if the ODA had chosen the second option there might well have needed to be a second decision notice, if Mr Charman had remained dissatisfied. However, the Information Commissioner argued that it would also be appropriate to issue a second decision notice if the first option was selected. In what I regard as a key passage of his submission he argued:

> *"the only possible basis upon which the Commissioner's discretionary powers under section 54 FOIA would have become engaged would have been had the ODA, after the [First Decision Notice], refused to pursue <u>either</u> option (1) or (2)…*[and had] *failed to take any action whatsoever. However that did not happen; the ODA disclosed some further information."*

25. The Information Commissioner's position appears to be that if the ODA had disclosed <u>nothing</u> then the Information Commissioner would have the ability to investigate the failure under FOIA section 54. But if the ODA disclosed <u>some</u> of the information then a section 54 investigation would not arise in respect of the shortfall and it would be appropriate to start a new investigation under section 50 and proceed towards a second decision notice.

26. The Information Commissioner maintained this position, even though he conceded that, by agreeing that correspondence should not be covered, the second investigation did not cover all the categories of information that the First Decision Notice directed to be disclosed and that the Second Decision Notice was therefore wrong in concluding that all relevant information held by the ODA had been disclosed.

27. Mr Charman's submission expressed concern that the result of his jurisdiction challenge might be that the Tribunal would not review the Second Decision Notice and, in what I regard as a change in his position, appeared to argue that if the Information Commissioner characterised the record of a concluded investigation as a "decision notice" that should be determinative.

28. The submissions filed by the ODA supported the position adopted by Mr Charman in his Grounds of Appeal (although resiled from, to some degree, in his subsequent submissions). This was to the effect that an appeal to this Tribunal lies only from a decision notice and does not lie from a determination as to whether or not a public authority has complied with steps required to be taken by a decision notice. The remedy for a

person aggrieved by the second of those determinations is a challenge by way of judicial review. Applying those general principles to the facts of this case, the ODA argued that the second investigation undertaken by the Information Commissioner was an exercise of his powers under FOIA section 54 and not under section 50.

29. The right to appeal to this Tribunal only arises (under FOIA section 57) when "*a decision notice has been served*" on the party wishing to appeal. By virtue of FOIA section 50(3) a "decision notice" is a decision by the Information Commissioner resulting from "*an application under this section"*. Those words clearly refer back to section 50(1) which provides that "*Any person…may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."*

30. The First Decision Notice clearly fell within that definition. The question I have to consider is whether the Second Decision Notice should still be treated as a "decision notice" for these purposes, notwithstanding the fact that it arose, not from Mr Charman's original information request, but from his complaint that the First Decision Notice had not been complied with. It does not fall within the definition just because it is formatted in the now familiar style of all Decision Notices issued by the Information Commissioner. I have to consider its nature, not its form.

31. In my view the Second Decision Notice, construed properly, has to be treated (despite its title) as a determination as to whether or not the ODA had failed to comply with the First Decision Notice. It arose from a complaint that the First Decision Notice had not been complied with (in that, no refusal notice having been issued, not all the requested information had been disclosed). The Second Decision Notice confirmed, on its face, that this was its basis. It did not say that it arose from a complaint about the handling of an information request, and it did not so arise. It is not possible, therefore, to apply FOIA section 50 to it.

32. I specifically reject the Information Commissioner's argument to the effect that the section 54 mechanism may only come into play where there has

been a complete failure to take any step in compliance with a decision notice. It is illogical to suggest that a public authority which only complies in part with a direction in a decision notice should not be vulnerable to the section 54 sanction. The degree to which the public authority complies may influence both the decision of the Information Commissioner to certify the failure and the court's decision as to whether to impose any sanction for contempt of court. But it does not affect the basic structure of Part IV of the FOIA, which incorporates a clear distinction between the right to appeal from a decision notice and the sanction for disobeying it.

33. In these circumstances I conclude that it is not within the Tribunal's powers to treat the decision set out in the Second Decision Notice as an appeal for the purpose of FOIA section 57.

34. As the FOIA provides no mechanism for appealing a section 54 decision it must follow that the only remedy available to Mr Charman is a potentially out of time application for judicial review (or possibly a complaint to the ombudsman – see www.ico.gov.uk/complaints/satisfied_with_our_service/complaints_and_compliments.aspx). That is some way short of a satisfactory outcome, especially as the difficulties have not been of Mr Charman's making – they stem from

    a. the Information Commissioner's confused approach to Mr Charman's complaint about the First Decision Notice;
    b. the ODA's cavalier attitude to the directions and time limits imposed by the First Decision Notice; and
    c. the wholly inappropriate agreement between those two organisations to proceed with the convenient fiction that correspondence had not been covered by either the First Decision Notice or the January 2011 complaint.

35. It would clearly be more convenient if the Tribunal could simply review the Second Decision Notice and decide whether the ODA disclosed all relevant information, including correspondence. However, the wish to achieve a pragmatic solution may not be achieved by ignoring the limitations on the Tribunal's powers imposed by Parliament. And it seems

to me, in any event, that the Tribunal would still not be able to determine the ODA's claim that other exceptions apply to the information that it continues to retain, because that issue does not arise from the Second Decision Notice. It represents an attempt by the ODA to take advantage of the first option provided by the First Decision Notice, even though a very long time after the 35 day deadline and without any apparent attempt to either appeal the First Decision Notice or seek an extension of time to comply with the directions embodied in it.

36. In any future proceedings Mr Charman will, of course, have the advantage of the Information Commissioner's concession that the conclusion reached in the Second Decision Notice is unsustainable, in view of the admitted failure to include any consideration of correspondence. It is not for me to suggest to the Information Commissioner how he should react to my decision but one effect of it is that the Second Decision Notice, unlike a decision under FOIA section 50, may be susceptible to his office's own case review process.

37. I would hope that, as all the difficulties that have arisen have been caused by the Information Commissioner and the ODA, those two organisations will be able to find a way of proceeding that secures a fair outcome for all sides, without exposing Mr Charman to the costs implications and procedural complexities of an application to the Administrative Court.

38. In light of what I have written above I strike out the appeal under rule 8(2)(a) of the Rules on the ground that the Tribunal does not have jurisdiction to entertain it.

Chris Ryan
Tribunal Judge
Dated: 27 April 2012