



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

Appeal No: EA/2012/0144

BETWEEN:

MICHAEL HOWARD ASSOCIATES LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**Decision under Rule 8(3)(c) of the Tribunal
Procedure (First-tier Tribunal) (General
Regulatory Chamber) Rules 2009**

Introduction

1. In this case, having considered the Notice of Appeal and the Response of the Information Commissioner, the Tribunal directed the parties to submit arguments and evidence why the appeal should not be struck out as having no reasonable prospect of success. The time for submitting such material has now elapsed and it falls to the Tribunal to consider whether the case should be allowed to proceed.

The role of the Tribunal

2. The Rules of this Tribunal require the Tribunal to deal with cases fairly and justly. A key provision in the rules enables the Tribunal to terminate cases which have no reasonable prospect of succeeding (rule 8(3)):-

“(3) The Tribunal may strike out the whole or a part of the proceedings if—

- (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;*
- (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or*

(c) *the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*"

3. This appeal to the Tribunal is governed by s58 FOIA which provides;-

58.—(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.

4. In order to succeed in its appeal the Appellant therefore needs to show that the Commissioner made a mistake in the law in reaching his decision. If there is no mistake in law then the Appellant may also succeed by demonstrating that the Commissioner made errors with respect to the facts which led the Commissioner to erroneous conclusions and that if the facts had been correctly identified the Commissioner could not, in law, have come to the conclusion he did.

5. In considering the case under Rule 8 the Tribunal needs to satisfy itself whether there is a reasonable prospect that the Appellant's case will succeed, either because the Commissioner misinterpreted the law or made errors with respect to the facts.

Background to the Case

6. The background to this case may be simply summarised. The Appellant tended to do some work for a local authority. While the Appellant was initially successful in the tendering process, the local authority received an anonymous phone call to the Council Hotline. During the course of this telephone call the caller made it clear that they did not wish to be identified. As a result of this phone call the local authority investigated the tender process and while not

- finding any fraud concluded that there were irregularities which required the tender to be conducted again. On the second occasion the Appellant was unsuccessful in tendering for the work.
7. Unsurprisingly the Appellant was dissatisfied and sought information from the Council and disclosure of the records of this telephone call. A redacted version of the record was released and material was withheld under the Data Protection Act in order to protect the caller from being identifiable.
 8. The matter was referred to the Information Commissioner who decided that the Data Protection Act had been correctly applied and the information should not be disclosed under FOIA.

The Appellant's arguments

9. In his Notice of Appeal the Appellant was critical of the local authority's actions and behaviours. The Appellant stated that the crux of its appeal that it was possible to identify the persons involved (the person or persons who made the telephone call). The Appellant continued:-

"It has always been our contention that the matter is not solely restricted to a matter of "personal interest" as concluded by the Information Commissioner that it is also clearly of a "public interest" nature. Our main reasons for disagreeing with the Information Commissioner is our view that it is indeed "public interest" that public bodies are viewed as arbiters of independence, lawfulness and fairness and where there is evidence of potential wrongdoing than the public bodies should not choose to protect those wrongdoers behind a veil of data protection. This was initially raised in our letter of 28 September 2011 (see document 4 in section 7). Whilst the information Commissioner ignores the Council's own policies it is worthy to note that the Council state that internal whistleblowers cannot be expected to be protected if the allegations they make false and dishonest. In our case the allegations that we are corrupt are false. Why had they adopted a completely opposite stands for members of the public? The allegations are false and dishonest."

10. In the Notice of Appeal the Appellant discusses whether possibly a council officer was involved in the process which led to the phone call being made,

argued that the information supplied on the phone call was “serious unsupported allegations of corruption by another party” and that “it is criminal to be allowed to make unsupported allegations against others, the law does not allow defamation and slander. It is in the “public” interest that disclose future should occur. The public would expect this.”

11. In its further submissions the Appellant stated:-

“For the purposes of clarity we have already identified what we consider are some flaws in the analysis completed by the ICO and relevant to our appeal:-

- 1. The flaws in the responses we received from the Council were not acknowledged by the ICO, the responses were not timely and they were evasive. The ICO should have taken more account of this.*
- 2. The Statutory provisions were not fully explored.*
- 3. The ICO decision did not fully recognise our complaints and these can only be properly considered by an appeal, face to face, to the Tribunal. Dealing with the case purely by correspondence can lead to the ICO being selective in his observations and analysis. We note he has made certain assumptions which are just not true. For one example, we do not accept the statement “that is that we simply do not agree with the ICO decision”. Quite the opposite in fact. Please refer to our reasons for stating this as set out in paragraphs 10 – 16 of our first appeal dated 12th September 2012. Our comments in paragraph 14 are significant.*

The judge has requested that we identify further matters of relevance for his consideration. This additional appeal sets out one more reason as to why our appeal should be heard at a Tribunal or upheld at this stage in the process. It is not exhaustive.

The ICO does not think disclosure is in the general public interest. We do not agree with that analysis because the relevant matters have not been fully considered and cannot be through a series of correspondence.

Disclosure is in the public interest because the general public have an expectation that their public services act in a fair way.”

The Issue for the Tribunal

12. The question to the tribunal at this stage therefore is whether, as a matter of law, the Information Commissioner has correctly carried out the legal analysis of the position in terms of the data protection act or whether his analysis is incorrect and he should have applied a wider public interest test as argued by the Appellant. The extent to which the Council mishandled his request or was evasive does not go to the issue of whether there was such an error in law or fact that the decision notice was wrong in law.
13. It is common ground between the parties that the information if disclosed would reveal the identity of the person or persons.
14. The relevant provision of FOIA is:-
(40)(2) Any information to which a request for information relates is also exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1), and*
 - (b) either the first or the second condition below is satisfied.**(3) The first condition is—*
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data 1998 c. 29. Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*
 - (i) any of the data protection principles, or*
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*
15. This is a tortuous piece of statutory drafting. In essence it makes FOIA subject to the safeguards within the Data Protection Act (DPA) relating to the disclosure of personal information. Since it is agreed between the Appellant and the Information commissioner that this information is personal information it can only be disclosed if the requirements of DPA are met. There is a multi-

stage process to be gone through before the personal data can be disclosed. The first step however is to determine whether the disclosure of the data is fair and lawful (the first data protection principle). In this case the maker of the telephone call explicitly refused to disclose their identity. As the Information Commissioner fully explored in his decision notice to breach that confidentiality by disclosing information which would lead to the identity of the telephone caller being revealed would cause distress. It is clear that an individual reporting serious wrongdoing via an anonymous hotline, if subsequently publicly identified and called upon to explain their involvement could well be very distressed and the consequences for them personally might be grave. An individual in such a position clearly has a reasonable expectation that their personal data will not be disclosed; that is the case here, most particularly in light of the specific request to remain anonymous.

16. The first data protection principle – that data must be processed fairly and lawfully - would seem to be breached if, where an individual made a communication in circumstances such as these information revealing their identity was subsequently revealed. Despite the data subject's reasonable expectations and any damage or distress caused to them by disclosure, the Commissioner acknowledged that it may still be fair to disclose the withheld information if it can be shown that there is a more compelling public interest in disclosure (this was explored at DN paragraph 55). However whilst the Commissioner acknowledged that there may be a general public interest in accountability and transparency, in the present case the Commissioner was unable to identify any specific public interest in the withheld information being disclosed to the world at large which would render that disclosure fair (paragraph 56). The Commissioner therefore concluded that, applying the analysis required by the Data Protection Act, the balance was struck in favour of non-disclosure.
17. While the Appellant lays much stress in his appeal on what he sees as a public interest argument there is a very strong countervailing public interest argument which the Tribunal would draw to the Appellant's attention. Many public authorities (for example the police, the DWP etc) have confidential hotlines in which people can anonymously provide information to those agencies in order to enable them to discharge their functions. Without the promise of confidentiality and anonymity which these provide much very valuable

information from members of the public would not come to their attention and the public interest would be profoundly harmed if there was not confidence that these hotlines would remain confidential. It is inevitable that some of the information obtained is less reliable than other information, but the preservation of this valuable source of information is in the public interest.

18. Disclosure of information under FOIA is to the world at large and both Parliament and the Courts have recognised the importance of protecting third party personal data. The Tribunal is satisfied that the Commissioner's analysis is robust. The Appellant has produced no arguments in law which demonstrate that the Information Commissioner has erred in any way in his analysis of the Data Protection Act and its interaction with FOIA. The Tribunal is therefore satisfied that the decision notice is correct in law, there is no reasonable prospect of the Appellant succeeding in the face of that correct analysis and this appeal must fail, accordingly the Tribunal strikes out the appeal under Rule 8(3)(c).

Signed:

Judge C Hughes

Dated: 9 November 2012