



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

**Case No. EA/2012/0132**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50428468  
Dated: 31 May 2012**

**Appellant: TONY WISE**  
**Respondent: INFORMATION COMMISSIONER**  
**On the papers: 15 October 2012**  
**Date of decision: 21 November 2012**

**Before**

**ROBIN CALLENDER SMITH**  
Judge

and

**ANNE CHAFER**  
**PAUL TAYLOR**  
Tribunal Members

**Attendances:**

For the Appellant: Mr Tony Wise  
For the Respondent: Mr Michael Lee, Counsel instructed by the Information  
Commissioner

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 31 May 2012.

**SUBSTITUTED DECISION NOTICE**

**Dated: 21 November 2012**

**Public authority: Birmingham City Council**

**Address of Public authority: Council House  
Victoria Square  
Birmingham  
B1 1BB**

**Name of Complainant: Mr Tony Wise**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 31 May 2012.

**Action Required**

Birmingham City Council failed to comply with the requirements of the Freedom of Information Act 2000.

Birmingham City Council breached s. 10 (1) of the Freedom of Information Act 2000.

21 November 2012

Robin Callender Smith

Tribunal Judge

**REASONS FOR DECISION**

Introduction

1. Mr Tony Wise wanted information from Birmingham City Council – who is not a party to this appeal – about the impact of the Human Rights Act and the right to respect for private and family life on disclosure of confidential social services information.

The request for information

2. On 9 May 2011 Mr Wise made the following request for information from the Council under FOIA.

I refer to disclosures made from confidential Social Services files. Article 8 offers general protection for a person's private and family life, home and correspondence from arbitrary interference by the State.

Under the Act can you please provide internal recorded information as to precisely how Article 8 impacts upon access to and disclosure of Social Service information held on a confidential basis in the following circumstances.

- 1/ If police are requesting information to prevent crime.
- 2/ If an estranged parent requests detail of his/her daughter.
- 3/ If a school requests information relevant to a pupil.
- 4/ If police request information, to deal with a conduct complaint against them, that is accessed only because it is favourable to them.
- 5/ If a doctor requests information relevant to a patient.

If you require any further information or clarification please feel free to ask.

3. The Council responded on 12<sup>th</sup> May 2011. As part of its response it disclosed a document which the Council said was the only one it had been able to locate which covered the subject addressed in the earlier Request. It went on to state:

Whilst we have undertaken a thorough search of the information held by Birmingham City Council, it may be that due to the size and amount of information held by Birmingham City Council, some information may have been inadvertently missed. If you have any information which may assist us in determining or locating any missed information, we would be grateful if you would contact us with details of this information, so that we can conduct a further search.

4. In that Response Mr Wise was also informed of his right to seek an internal review of the Council's response. He did so on 7<sup>th</sup> June 2011. Mr Wise complained that the information provided by the Council did not meet his request in a number of ways, and that the response was generic.
5. The Council responded to Mr Wise's request for an internal review on 1 July 2011. Mr Wise's review was upheld. He was notified of this by email dated 1 July 2011. This informed him that the May Response had not answered all his questions fully and that whilst the May Request was broad, Mr Wise ought to have been contacted for further clarification. The Review Response stated that the May Request should be referred back to the service area who should contact Mr Wise to seek clarification of what he required.
6. On 5 August 2011, the Council wrote to Mr Wise asking him to contact the Council as soon as possible to clarify his request to enable it to respond precisely.
7. Mr Wise spoke with an officer of the Council on 18 August 2011. He then wrote to the Council on the same date, saying that he hoped he had *"clarified the position in relation to requirements re: consent, records etc in diverse scenarios"*. The Council responded in the following terms:

We do require a clear understanding of what actually you are requesting.

Can you explain and be specific as to what you mean by requirements re: consent, records etc in diverse scenarios.

As we were unable to meet your request in a number of ways, including that our response did not respond to your request in an accurate way. I understand our response was of a generic response in relation to family issues. Therefore we require clarity so that Birmingham City Council are able to provide you with an accurate response.”

8. On 27 November 2011 Mr Wise then wrote to the Council requesting a response to the internal review. He said that he had clarified “everything” in the telephone conversation, that there was no obligation for him to clarify a request at the review stage. Mr Wise further stated that he had been waiting for a response for some time and that there was no basis in the section 45 of the Code of Practice to postpone an internal review pending clarification from a requester.
  
9. Following an extended exchange of correspondence between the Council and Mr Wise, Mr Wise agreed reluctantly - given the history of the matter - to clarify his request. On 6 December 2011 Mr Wise did so, whilst stating that he had already done so by telephone months previously. In the Clarified Request Mr Wise set out the information he was seeking as follows:

1/ Please supply your written procedures (or full explanation of) in relation to how and why Birmingham City Council makes formal records of access/disclosure of Social Services information.

2/ The finished or draft protocol as indicated by Steve Cullen on 12 May 2001 re: Additionally Mark Paul, Area Legal Advisor, West Midlands CPS is also undertaking “negotiations with HHJ Hindley QC, Designated Family Judge to agree an information exchange protocol in West Midlands to incorporate the successful elements of all existing agreements and build closer links with Family Courts (including for linked directions hearings). It is anticipated that a protocol will be produced from these negotiations at some point in the future.”

3/ All statutory procedures (on an indication of what these are) that governs data sharing at Birmingham City Council.

4/ Copies of Information Sharing agreements (if applicable) with police, schools, and NHS (including doctors).

5/ Details of disciplinary actions procedures that are recognised/implemented at Birmingham City Council if access to and disclosure of confidential personal information is not recorded properly.”

10. On 13 December 2011 the Council wrote to Mr Wise thanking him for providing the clarification. The Council then responded to the Clarified Request on 6 January 2012. It provided a range of information, including attached documents and links to further information.

#### The complaint to the Commissioner

11. Prior to receiving the January Response, Mr Wise complained to the Commissioner on 15 December 2011. He complained about the length of time that the Council had taken to deal with his request and pointed out that there was no requirement to clarify a request at the internal review stage.

12. The Commissioner sought further information from Mr Wise as to his complaint. Mr Wise replied by email dated 30 January 2012. He confirmed that in his view the Clarified Request was not a new request. Mr Wise also reiterated that he was not obliged to clarify his request at the review stage. Mr Wise did not raise any issues with regards the substance of the information provided to him by the Council.

13. In the light of the information provided the Commissioner went on to consider whether there had been a breach of the procedural provisions of FOIA. In due course the Commissioner issued the Decision Notice. That determined the Council had complied with the requirements of FOIA in dealing with the request and did not need to take further action.

## RELEVANT LAW

14. Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds the information and if it does, to have it communicated to him: see FOIA s. 1(1). The request must be made in writing: see FOIA s. 8(1)(a).
  
15. Where a public authority “reasonably requires further information in order to identify and locate the information requested”, and it “has informed the application of that requirement”, the public authority is not obliged to comply with FOIA section 1(1) “unless it is supplied with the further information”: see FOIA s. 1(3).
  
16. Section 10 of FOIA provides:  
  
“(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.  
  
(6) In this section—  
  
    “the date of receipt” means—  
    (a) the day on which the public authority receives the request for information, or  
    (b) if later, the day on which it receives the information referred to in section 1(3);  
  
    “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”
  
17. FOIA section 16 imposes a duty on public authorities to provide advice and assistance, so far as is reasonable, to someone who has made a request for information.
  
18. A complainant may apply to the Commissioner for a decision in relation to whether a request for information has been dealt with by the public authority in accordance with the requirements of FOIA Part I: see FOIA



s. 50(1). A complainant or the public authority may appeal to the Tribunal against the decision notice: see FOIA s. 57(1).

### The appeal to the Tribunal

19. Mr Wise believes the information provided to him by the Council and the Commissioner failed to address his complaints.

20. The Information Commissioner erred in concluding that there had not been a procedural breach of the Freedom of Information Act 2000.

### Submissions

#### Appellant

21. The Appellant's submissions are dated 27 August and 18 September 2012.

22. The Appellant contends that the Commissioner was wrong to decide that a generic paragraph, appended to many of the Council's FOI responses, was a request for further information, needed to clarify the request. He cites URL's to "Whatdotheyknow" showing inclusion of the same paragraph.

23. In his second set of submissions the Appellant contends that the Commissioner has ignored the Council's own admissions that it failed to deal with his request properly due to re-organisation.

24. He asserts that the Commissioner inexplicably changed his stance from one where he initially said that the Council was likely to be in breach of s.10 to exoneration of their actions in the final decision.

25. The Appellant maintains that he did in fact complain about the sum total of what he had received in response to his request.

26. He argues that the Council did not invoke s.1 (3) in lieu of further clarification from himself and that the generic paragraph in the letter of

response to his request could not be said to be offering advice and assistance. He was not asked directly for such clarification and indeed the council could not have completed an internal review had the time for response been suspended pending this.

Commissioner

27. The Commissioner's submissions are dated 26 September 2012.

28. The Commissioner asserts that the Appellant did not challenge the substance of the total information disclosed to him, merely stating that he was not satisfied with that part received in May 2011.

29. He goes on to claim that he was not obliged to assess the disclosed information against the request because the Appellant had not exhausted the Council's complaints procedure following their disclosure of January 2012.

30. Regarding the second ground, the Commissioner argues that notwithstanding the Council's note setting out that the Appellant could apply for an internal review regarding their part disclosure, the time for compliance with his request under s.10 had not elapsed because the Council had asked for further information to help it locate relevant information.

31. The Commissioner goes on to argue that even if the statement alluding to further information is frequently used this does not invalidate it and that its effect is to suspend the time for further response until such clarification is received, in accordance with s.1(3).

32. It is also asserted that a public authority can, at the time of internal review, require those originally handling the request to go back and seek clarification from the requestor. The Commissioner states that whether this impacts upon the time limit set out in s.10 will depend on the facts of each case but here, as the Council had stated that it required further information at the time of response, s.10 was not breached by virtue of s.1(3).

33. The last major point of the Commissioner's submissions relates to the scope of the request and the fact that the Council was right to require further information given that it was broad and vague. He also asserts that, as the Appellant did not provide clarification until 6 December 2011, the time limit for response did not commence until then, the eventual response of the 6<sup>th</sup> January 2012 being within 20 working days.

### Reply Submissions

#### Appellant

34. The Appellant's reply submissions are dated 2 October 2012.

35. Here the Appellant reiterates much of his earlier submissions, adding that the Council had lost records of his contact with it in which he provided the clarification requested as a result of the internal review as early as August 2011. This, he argues, led to his refusal to reiterate that clarification out of frustration, until December of the same year.

36. He also stresses that the Council is, in his view, failing to comply with an undertaking given to the Commissioner in respect of failings under FOI relating to the amount of time for responding.

### The Tribunal's Observations

#### Ground 1

37. Whilst it is clear that the Appellant has made general comments which state his dissatisfaction with the information disclosed in May 2011 and January 2012, he does not appear to have gone into any detail about this.

38. The most detail provided is to be found in an undated letter, which appears to be a response to the ICO on the 11 May 2012. Here the Appellant states that he is concerned about the "*inaccurate information*

*supplied....*” and “...*the standard and scope of the material...*” He does not give examples of what he means however.

39. In an earlier letter from the ICO it is made clear that if the Appellant wishes to complain about the substance of information provided (in total) then he must seek an internal review from the Council and “...*clearly state why the response does not fully satisfy your request for information.*” He says this because he considers the clarification provided in December 2011 to be a new request.
40. The Tribunal does not agree that it is a new request but, rather, a clarification of the initial request of May 2011 and a repeat of what was allegedly said in a telephone conversation during August of that year.
41. Given that the Appellant has already gone through the internal review process (whether the request was on hold at that time or otherwise) it is inappropriate to insist on a further internal appeal, not least because it speeds up resolution of the matter. I have some sympathy with the appellant therefore when he insists that such a process is unnecessary.
42. In summary, the Tribunal does not agree with the Commissioner’s approach. It has led to this stalemate. It could have been handled better by dropping insistence on a further internal review (even if the clarification of December 2011 was a new request).
43. The Tribunal notes that holding an internal review is not a requirement of the Act and did not have to occur. The Commissioner could have addressed the matter himself, which could then have been included in the Decision Notice.
44. On balance the Tribunal finds that the Commissioner did not handle this part of the complaint appropriately.

## Ground 2

45. Regarding the second ground the Tribunal considers – in the light of s.1(3) - that any request for clarification must be clear and explicit and invoked

only if the public authority cannot comply with the request at all because it does not know exactly what is requested.

46. In this case they appear to have provided information that they understood fitted the description and said nothing about being unable to provide any more unless clarification was received.

47. At the end of the Council's response, in what is stated to be a standard paragraph, it says that "*it may be that... some information may have been inadvertently missed.*" It goes on to say "*If you have any information which may assist us in determining or locating any missed information, we would be grateful if you would contact us with details of this information, so that we can conduct a further search.*" [Emphasis added].

48. Stating that the Council might have accidentally missed something is not the same as saying that it does not know what the requestor is seeking and asking for clarification. In those terms it seems that the Council is asking Mr Wise for advice and assistance rather than *vice versa*.

49. On that basis the Tribunal does not accept that s.1 (3) was invoked and that the request was on hold pending clarification.

50. The Tribunal observes that, if it is actually the case that the Council includes this paragraph at the end of every response, those who have made several requests of them could be forgiven for believing that it was just an add-on and not a serious statement requiring more information in order to respond appropriately (particularly if previous requests had been satisfied in full with no recourse to an internal review).

51. It creates a process with the potential to become a delaying tactic that could then be employed by public authorities who could always say that the request was on hold by virtue of s.1(3).

52. Additionally, the Council's own internal review decided that the original request handler should have requested clarification. This is contrary to the

Commissioner's assertion that they did. The Council admitted it made a mistake in this area.

53. The Council says nothing in support of the Commissioner's stance during his investigation. On the contrary, in its email of the 24 May 2012 it admits that the delay in seeking clarification and responding to other correspondence was unacceptable.

54. In view of this and the fact that in January 2012 the Council disclosed further information relevant to the request of May 2011, the Tribunal finds there was a breach of s.10 (1).

### Other Matters

#### The Council's record management processes

55. If it was actually the case that the Appellant telephoned to clarify his request on or around the 18 August 2011, then any record of that conversation appears to have been lost.

56. Similarly the Council admits that the letter written later on the same date requesting further clarification was not recorded on the case management file.

57. The Commissioner has said nothing about ensuring good records management practice in accordance with the s.46 Code of Practice. Whilst the Appellant seemingly ignored the Council's further written request for clarification until December 2011 for whatever reason, the point could have been made that better records should have been kept in relation to the request, even if only accepting the disappearance of the Council's letter of the 18 August.

#### The Appellant's tone and language

58. Whilst accepting that it may have been frustrating to have to wait so long for a final response, the strength of the language used by the Appellant

during the course of this appeal is inappropriate. The Tribunal points to one of many examples of this in the Appellant's submissions dated 18 September 2012 where he says:

For the ICO to wilfully act in this way is beyond my understanding but in my view it is sailing close to the wind of dishonesty and public service corruption.

59. Such language and allegations are unacceptable and do nothing to assist the Appellant's claim. Such threatening and abusive language did nothing to advance the Appellant's cause in this appeal. The Tribunal, however, is able to step back from such unpleasant language and make its own objective decision.

#### Conclusion and remedy

60. For all these reasons the appeal succeeds and a substituted decision notice is issued.

61. Our decision is unanimous.

62. There is no order as to costs.

Robin Callender Smith

Tribunal Judge

21 November 2012