



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

Case No. EA/2012/0126

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50392234
Dated: 21 May 2012**

Appellant: Dr. BARRY PENNINGTON

First Respondent: INFORMATION COMMISSIONER

Second Respondent: WIGAN COUNCIL

On the papers: 19 NOVEMBER 2012

Date of decision: 31 DECEMBER 2012

Before

ROBIN CALLENDER SMITH

Judge

and

Rosalind Tatam and Richard Fox
Tribunal Members

Written representations:

Appellant: Dr. Barry Pennington

First Respondent: Ms Helen Davenport, Solicitor for the Information
Commissioner

Second Respondent: Ms M McKenzie, Chief Legal Officer, Wigan Council

Subject matter:

FOIA

Time for compliance s.10 and s.17(7)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 21 May 2012 subject to the substitution suggested by the Information Commissioner and accepted by the Appellant.

SUBSTITUTED DECISION NOTICE

Dated 31 December 2012

Public authority: Wigan Council
Town Hall
Wigan
WN1 1YN

Name of Complainant: Dr. Barry Pennington

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal substitutes the following decision notice in place of the decision notice dated 21 May 2012 and dismisses the appeal.

The Council's failure to refer to its internal review procedure in its letter of 23 February 2011 represents a breach of section 17(7) of the Act.

Action Required

The public authority should either provide the information requested on 27th January 2011 to the Appellant or issue a valid refusal notice. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Robin Callender Smith

Judge

REASONS FOR DECISION

Introduction

1. In 2010 the Appellant was in correspondence with Wigan Council about documents that he considered should be held on his personnel file but which the Council said were not held on that file.
2. As a result the Appellant took the view that the Council had lost his personal data and wanted an investigation by both the Council and the Commissioner into the potential personal data loss.

The request for information and the complaint to the Information Commissioner

3. On 27 January 2011 the Appellant requested the following information from Wigan Council:

Finally, could you please supply, under the Freedom of Information Act, copies of all correspondence (including electronic) between [a named person] and the Director of Education (latterly Children and Young People's Services) for 2005, 2006 and 2007.

4. At the same time the Appellant repeated questions about his personal data which formed part of his subject access request.
5. The Council responded by a letter on 23 February 2011 seeking clarification of the request but the Appellant stated that he had not received that letter in the post.
6. On 19 August 2011 the Council provided the Appellant with a copy of that letter (of 23 February 2011) by email. When the Commissioner's decision notice was issued on 21 May 2012 the Appellant had not provided the clarification sought by the Council.

7. On 12 May 2011 the Appellant contacted the Commissioner in respect of the Council's non-response to his request. The Commissioner explained to the Appellant that – by virtue of section 1 (3) FOIA – a public authority is not obliged to comply with a section 1 (1) unless it has been supplied with such further information as can reasonably be required in order to identify and locate the information sought by any applicant.

8. The Appellant, on 5 July 2011, asked the Council (in relation to the letter which had apparently gone missing in the post and he had not yet seen):

Can you please forward your complaint letter and the Royal Mail response to me as a hard copy as a request under the Freedom of Information Act?

9. 19 August 2011 the Council responded to him stating that the information was not held.

10. The Commissioner understood that the Council had not complained to the Royal Mail about the apparent loss of its letter.

11. On 6 October 2011 the Appellant wrote to the Council requesting an internal review of its response to his request of 5th July 2011.

12. Not all of the matters contained in the letter of 6 October 2011 formed the basis of the decision notice which is under appeal.

13. The second element of the Appellant's request for the internal review did seek a review in respect of the veracity of the Council's letter of 23 February 2011. The second element of that stated:

Can you please initiate a review of the letter to me dated 23 February, namely

- The authenticity of the date of its creation.

- The validity and reliability of evidence to support this (How can you prove it?).
- Is there any internal evidence that this letter was submitted for posting?

14. On 22 November 2011 the Council responded (correctly, not in terms of an internal review under FOIA) to the Appellant's letter of 6 October 2011 confirming the date of creation of the letter of 23 February and stating that the Council was not instigating an investigation or a review to prove further the authenticity of its letter or evidence confirming the posting of the letter.

15. On 25 November 2011 the Appellant requested further information.

This was:

Please supply the following information requested under the Freedom of Information Act:

1. The documentation that explicitly states your authority to deny the right of appeal of a member of the public who has requested an independent internal review from a Senior Official.
2. Copies of all communications, including electronic, between yourself and any Wigan Council staff and officers on this specific matter from 1 February 2011 up to and including the day you receive this letter.
3. Copies of any instructions, advice and guidance that you have requested and received relating to this specific matter again using the timeframe of 1 February 2011 up to and including the date that you receive this letter.

Please inform me as soon as it is arranged the name of the senior officer conducting the internal review and the nature of this person's independence.

The Council replied to this request on 16 May 2012 stating that this information was not held.

16. The Appellant informed the Commissioner that he did not wish to pursue his request of 27 January 2011 on the basis that:

I have been advised by my solicitor not to pursue my request for information in relation to emails between [a named person] and the Director of Education or respond to a [named Council employee] request for clarification in this matter at this moment in time as this would explicitly and implicitly accept her 23 February letter as [a] factual and chronologically accurate record.

17. The Commissioner concluded that, because the Appellant had not responded to the legitimate enquiry by the Council for clarification, a stalemate had arisen which blocked any progress with the request dated 27 January 2011.

18. The Commissioner focused his investigation on:

- The Council not responding to the request on 25 November 2011.
- Consideration of the Appellant's allegations that the Council did not create the letter dated 23 February 2011 on 23 February 2011 (on the basis that it was created sometime later after the intervention of the Commissioner).
- The conduct of the Council in its provision of internal reviews.

19. The Commissioner concluded that – irrespective of the parties' opinions regarding the Council's letter of 22 November 2011 – the Appellant's letter of 25 November 2011 contained an FOIA request which should have been handled by the Council in accordance with FOIA. Although the Council responded to the request on 16 May 2012 the Commissioner considered the Council had been in breach of section 10 (1) with respect to this request for information.

20. The Commissioner further considered the Appellant's allegation in respect of the letter dated 23 February 2011. In essence, the Appellant believed the eventual letter that had been produced had not been created on 23 February 2011 but only sometime later; this belief was

apparently supported by the “Properties” information on the ‘pdf’ file that he received by email on 19 August 2011.

21. The Commissioner had not been provided with any specific evidence to suggest that had been the case and considered that the processes which the Appellant believed to have taken place would require a disproportionate effort on behalf of the Council (apparently, to fabricate the appearance of compliance with the legislation). The Commissioner was satisfied that no further action was required.

22. The Commissioner also found in his Decision Notice that the position adopted by the Appellant, in relation to his refusal to provide the Council with the clarification of the request legitimately sought by the Council under section 1 (3), effectively meant that the Appellant had not yet made a substantive request for recorded information.

23. The Commissioner noted that the Appellant’s concerns regarding an independent review would have had more weight if he had requested a review of the Council’s response to a valid information request. Instead, because the Appellant requested proof of the authenticity of the letter, that was not an internal review in respect of FOIA. The Commissioner concluded that it was thus appropriate for the same member of staff to respond to what was in effect an enquiry rather than an internal review under FOIA.

The appeal to the Tribunal

24. The Appellant in his 10-page written submissions (Grounds of Appeal) to the Tribunal dated 27 October 2012 (with attachments) stated that he believed that wrongdoing had taken place within the Council and that a reasonable suspicion existed that this had been shielded from public gaze. He believed that the motives for suppressing

whistleblowing had been “directing decisions within and responses from” the Council.

25. He further believed that the public good would be served by releasing the requested information because the Council “was at liberty to use the same tactics at will and without accountability unless challenged”.

26. He stated that neither the Commissioner nor the Council had applied a public interest test.

27. He believed that there was a plausible basis for suspicion that Council officers had acted unlawfully.

Conclusion and remedy

28. In the Commissioner’s original response to the Appellant’s Grounds of Appeal dated 18 July 2012 – along with the invitation to add to the original decision notice the breaches that are now identified in the substituted decision notice – there was an invitation to strike out the Appeal on the basis that there was no reasonable prospect of success (under the provisions of Rule 8 (3) (c) of the 2009 Rules).

29. The Tribunal Judge - who is part of the Tribunal dealing with this appeal -declined to adopt that course in the interests of justice and in order to give the Appellant an opportunity to present any specific evidence he had to support his allegations of bad faith or misfeasance on the part of the Council.

30. The Tribunal, in reaching its unanimous decision to dismiss this appeal, is satisfied that there is no evidential substance to the Appellant’s suspicions in relation to the Council. His belief – however strongly held – is unsupportable and unwarranted.

31. The Tribunal notes and accepts the information set out in the witness statement of the Council's Data Protection and Freedom of Information Officer.

32. That individual details writing to the Appellant on 23 February 2011 in an effort to assist in dealing with his request for information. That individual accepts that the request was not a request for clarification within the meaning of Section 1 (3) of FOIA. Instead the appropriate response would have been either to have provided the information (redacted as necessary where Part II Exemptions applied) or to have considered whether the request fell within Section 12 or 14 of the Act which could have led to the issuing of a refusal notice.

33. That individual also confirms that there was no objection to the Tribunal substituting a Decision Notice requiring the Council to deal with the request either by providing the information or issuing a valid refusal notice.

34. That individual also accepted that if a refusal notice had been issued for the first request then the Appellant would have been entitled to an internal review in respect of that refusal decision.

35. In dismissing this appeal, the Tribunal agrees with the position set out immediately above. The Tribunal concurs that the Council now issues a valid response to the request of 27th January 2011, notwithstanding the Appellant's earlier statement to the Commissioner that he is no longer pursuing this request.

36. There is no order as to costs.

Robin Callender Smith

Judge

31 December 2012