

FOIA s.1(1) – Duty to confirm or deny

FOIA s.10 – Time for compliance

FOIA s.17 – Refusal of request

FOIA s.48 – recommendations as to good practice

IT(EA)R Rule 29 – costs

Dr Peter Bowbrick v IC & Nottingham City Council

EA/2005/0006

28th September 2006

Cases:

Malcolm Kirkaldie v IC and Thanet District Council [2006] UKIT EA_2006_001

Facts

A request for information was made regarding a school which had been closed. The council replied that the information already received should answer the query. However, the Appellant contested that he had not received any information previously. The Solicitor for the Council issued a Refusal Notice stating that the local authority would not hold any more information that had not already been provided and that information regarding future proposals for the school were exempt under s.22 FOIA.

The IC upheld the Refusal Notice.

Findings

The Council and the IC agreed that the Decision Notice upholding the Refusal Notice could not stand, and under s.58(1) the Tribunal held that it was not in accordance with the law. The question for the Tribunal was whether to allow the appeal or issue a revised Decision Notice. This depended on whether the Tribunal should order further disclosure of the documents. The Tribunal was required to decide whether the authority could rely on the exemptions, and if so, whether the information actually fell within the exemptions. The Tribunal substituted a new decision notice requiring a few further documents to be disclosed but no further action as the vast majority of documents had already been disclosed during the Tribunal proceedings. The Tribunal upheld some of the exemptions claimed.

Can exemptions be claimed for the first time before the IC/Tribunal

Some of the documents claimed by the council to be exempt were done so for the first time upon supply to the Tribunal. The question for the Tribunal was whether the Council could be debarred from relying on this information. The FOIA does not say that failure to specify an exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way.

However, if the local authority fails to invoke a particular exemption relating to information before the IC, there is no positive duty on the IC to look for exemptions on which the public authority might rely. The Tribunal further held that public authorities have discretion as to whether to invoke an exemption. There are exceptional instances however, when the IC can identify exemptions, for instance where the public authority has misidentified the exemption to be relied on. The Tribunal also held that they are in a similar position to the IC in this matter.

Costs

The Tribunal ordered Nottingham to pay the whole of the Appellant's costs taxed as a litigant in person.

Conclusion

The Tribunal held that the Council failed to comply with its duties under s.1(1)(a) and s.1(1)(b) of the Act within the time limit prescribed by s.10; and with its duty under s.17(1) of FOIA within the time limit prescribed by that section. They concluded that the Information Commissioner was wrong in upholding the Council's Refusal Notice because the decision was based on finding of fact which was not correct and the Tribunal implemented a new decision notice.

The Tribunal recommended to the IC that he use his powers under s.48 FOIA to investigate Nottingham's processes with a view to making good practice recommendations on how these processes could be improved.

Observations:

The IC carried out investigations under s.48 following this case and subsequently made a number of practice directions:

Provision of advice and assistance

- The IC examined the Council's procedure for dealing with requests for information and found its contents to be rudimentary and its tone to be discouraging to applicants. As such, the IC recommended that the Council should review its published procedure for handling FOI requests and produce a more comprehensive explanation of the process removing any bias to non-disclosure. This procedure should include an address, email address and telephone number for the Information Governance Team and should be published on the Council's website and as part of its publication scheme.
- There was no single point of contact at the Council for applicants, therefore the Council should also review this procedure.
- The Council did not provide any evidence to maintain their claim that they telephoned the applicant to clarify request and that no procedure existed for recording such calls. Therefore, when dealing with 'wide' requests for information, the IC recommended that the Council should seek to clarify the request at the earliest opportunity and should properly record and document all communications relating to the clarification and handling of a request
- The Council's response to the request was slow and incomplete which is inconsistent with the general provision of advice and assistance. This is inconsistent with the general provision of advice and assistance and so the

Council should respond in a manner appropriate to its obligations under the Act.

- The authority should ensure that all information is checked for references to additional information

Transferring requests for information

- The IC found that some information was held by the Council. Some by the school and some by both. The IC considered that it was inappropriate for the Council to transfer or redirect the request knowing that they held some information but not knowing the specifics of that information.
- Therefore, the Council should develop a clear procedure for transferring requests for information which should be published on its website and included in its publication scheme. In particular this procedure should outline the steps the authority will take to assist an applicant whose request concerns information partly held by the Council and partly held by another public authority. The IC recommended that this procedure must allow for unique circumstances of a given case.

Complaints procedure

- Due to the Council's unstructured involvement of several individuals the Council would have struggled to implement a fair and impartial review of both the handling of the request and the decision in this case.
- Therefore, the Council should produce a definitive FOI complaints procedure which should be published on the Council's website and as part of its publication scheme. The procedure should be invoked whenever the Council receives a written reply from an applicant expressing dissatisfaction with the authority's response to a valid FOI request.
- The Council should ensure that the complaint is acknowledged and a target date for determining the complaint is given. These targets should be reasonable and the Council should publish information on how successful it is in meeting those targets
- The complainant should also be informed of the outcome.
- The Council should keep records of all complaints and their outcomes