

**FOIA s.10(1)** – Time for compliance

**FOIA s.1(1)** – Whether information held

## ***Paul Harper v IC & Royal Mail Group PLC***

**EA/2005/0001**

**15<sup>th</sup> November 2005**

### **Cases:**

### **Facts**

The Appellant requested confirmation from Royal Mail that there had been no requests for access to his personal file. At first, Royal Mail refused the request stating that they were not obliged to provide that information. The Appellant persisted stating that his request fell under the FOIA. Royal Mail responded by agreeing that the request was indeed a FOI request, however they did not hold the information the Appellant required.

The IC held that by responding to the Appellant's request Royal Mail had fulfilled its obligation under s.1(1) of the FOIA, however, because the response was three working days out of time, Royal Mail did not comply with its obligation under s.10(1) of the FOIA. However, the IC confirmed that the Royal Mail did not hold the information requested and no remedial action was ordered.

### **Findings**

The questions for the Tribunal were whether the IC should have ordered remedial steps to be taken for the contravention of s.10 and whether the IC was wrong to find that Royal Mail did not hold the information requested.

### **Section 10**

The Tribunal agreed with the respondent's argument that under s.50 of the Act the Commissioner has no power to specify any steps that must be taken, even though there was a breach of s.10(1) of the Act. The Tribunal held that such powers only apply to other sections of the Act (ss.11 and 17). Therefore, they stated that the Commissioner was right not to order any remedial steps to be taken.

However, the Tribunal pointed out that this does not mean that the IC has no power to deal with such breaches. The IC might in appropriate circumstances:

- a) make a good practice recommendation under s.48, if the delay appeared to involve a failure to follow a code of practice under s.45 and s.46;
- b) include in his annual report to Parliament under s.49 an appropriate report on late responses;
- c) issue an Enforcement Notice under s.52 in cases where it appeared that a Public Authority had adopted a practice of responding out of time.

The Tribunal was satisfied that although s.10 was breached, it was not the sort of breach that required the use of the provisions outlined above.

### Did Royal Mail hold the information?

The Tribunal was satisfied that Royal Mail did not hold the information requested by the Appellant due to the practice of periodical data deletion so as to avoid system crashes.

### **Conclusion**

The Tribunal upheld the decision notice and dismissed the appeal

### **Observations**

#### General Advice

The Tribunal had some guidance for Royal Mail in that they should review post-training whether there is now an adequate awareness – on the part of all staff with responsibility for managing information – of the right to information created by FOIA and should undertake periodic reviews thereafter. They also advised Royal Mail to implement data retention policies so as to facilitate a consistent treatment of FOI requests; as they regarded the current system of periodic deletions to be unsatisfactory due to the fact that it causes uncertainty as to whether information is held at a given time and the risk that similar requests for information will be treated differently.

#### Deleted Information

The Tribunal also questioned whether information previously held by the Public Authority which had been deleted no longer falls under the Act. The Tribunal held that the authority should establish whether information is completely eliminated, or merely deleted. In the latter case, the authority should consider whether the information can be recovered and if so by what means. If information has been deleted but can be recovered by various technical means, the Tribunal found that whether the information is still ‘held’ by the authority will be a matter of fact and degree depending on the circumstances of the individual case.

Also, the Tribunal stated that the extent of the measures that could reasonably be taken by a Public Authority to recover deleted data will be a matter of fact and degree in each individual case. The Information Commissioner should give serious consideration to issuing guidance to Public Authorities on this matter, and to enquiring himself, where appropriate, in relation to complaints made to him, whether an authority has considered the recovery of deleted material.