IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0151**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50546714
Dated: 17 June 2015

Appellant: **London Borough of Haringey**

Respondent: **The Information Commissioner**

2nd Respondent: **Fusion Lifestyle**

Heard at: Field House, Breams Buildings, London

Date of Hearing: **18 and 19 November 2015**

Before

Chris Hughes

Judge

and

Steve Shaw and **Nigel Watson**

Tribunal Members

Date of Decision: **27 November 2015**

Attendances:

For the Appellant:	Timothy Pitt-Payne QC
For the Respondent:	Laura Elizabeth John
For the 2nd Respondent:	Adam Heppinstall

Subject matter:

Freedom of Information Act 2000

The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009

ORDER OF THE FIRST-TIER TRIBUNAL

BY CONSENT OF ALL PARTIES

IT IS ORDERED:

1. The Decision Notice at Annex A to this decision is to be substituted for the Decision Notice at issue in this appeal.

2. Having regard to the terms of the substituted Decision Notice, the Appellant is not required to take any further steps in relation to Mr. Fink's request for information made on 12th February 2014.

REASONS

Introduction

1. It is the function of courts and tribunals to resolve the disputes between parties which are brought before them in accordance with the law and using the rules of the tribunal or court to ensure that the resolution is fair, proportionate and timely. It then issues a public judgement to explain its reasoning and to demonstrate that justice has been done. In this case the decision which was the subject of the appeal was made on 17 June 2015 and the final disposal of the matter, by this decision and the annexed Decision Notice, is just five months later – a timely decision by the standards of most courts and tribunals.

2. The case was initially listed for three days; at the start of the hearing the tribunal expressed its disquiet at the disproportionality of the proceedings which had resulted in a total of 12 people before it – the lawyers and senior officials of the parties to the dispute. It was also clear that there had been intensive work over the weeks and months leading up the hearing by all the parties exploring and adjusting their positions and moving closer to each other. The amount of disputed information whose disclosure had been ordered by the Respondent (the Information Commissioner

"ICO") had reduced with further disclosures being made by the Appellant (the London Borough of Haringey, "Haringey") in consultation with the commercial organisation whose interests were affected the Second Respondent (Fusion Lifestyle, "Fusion") or by the ICO recognising that the material should not be disclosed. After oral evidence in which one witness from the public authority and one from the commercial organisation explained their concerns about the impact of disclosure; Counsel for the Information Commissioner had the opportunity to take further instructions overnight and it was possible for the parties to come to a resolution of the dispute through the consent order.

3. On one interpretation of the proceedings this was a model of effective dispute resolution with rational co-operation between the parties under the supervision of the tribunal enabling them to come to a resolution which reconciled the competing rights and interests of the parties.

4. This is, however, an over-generous interpretation. Properly analysed it is doubtful whether this matter should have ever come before the tribunal. It was all, in the words of Counsel for Haringey "somewhat artificial". That artificiality however demanded considerable expenditure of time and money on the part of the three bodies represented – at a conservative estimate at least £20,000 – which could have been far better expended by them in the public interest rather than wasted in a sterile exercise with no underlying dispute. The remainder of this decision explores the root cause of this unwarranted use of resources and sets out the concerns of the tribunal.

<u>The request for information and the ICO's investigation</u>

5. In January 2013 Haringey entered into a 20 year agreement with Fusion for the management of its leisure centres. Among the developments anticipated was a refurbishment and re-ordering of arrangements at its swimming pool at Park Lane. In early 2014 there were discussions about the possibility of installing a moveable floor in the diving pool so that in addition to use for diving it could be used for shallow water activities. There was concern among the diving community, four public meetings were held to explore the issue and at the end of that period (in about March 2014) the decision was made not to go ahead with that modification.

6. The request for information was made on 12 February 2014 from an individual who, while not a diver, was connected to the diving community stated:-

Summary: Information regarding the removal of diving boards from Park Road pool

i. "Copy of contract between Haringey and Fusion and Council minutes approving this with any further documents containing variations.

ii. Bid from Fusion for the contract referred to above.

iii. Minutes of original decision to make changes to Park Road leisure centre and proposal from Fusion which was approved by the Council.

iv. Minutes of decision to change the spec for the changes to Park Road pool to remove the diving boards, information presented by Fusion to Haringey Council to support this and reasons given by Haringey and Fusion for removing the boards.

v. The obligations of Haringey and Fusion to consult before deciding to remove the diving boards.

vi. Fusion's business plan for all Haringey leisure centres.

7. Haringey stated in evidence that the requester did not attend any of the meetings but was informed of the change of approach by email when the decision not to close the diving facilities at the pool was made. On 13 March 2014 Haringey responded providing some information and withholding other information (contained in the first two parts of the request) on the grounds of the harm that it would cause. On 19 March the requester responded, demonstrating significant knowledge of the mechanisms of FOIA and disputing Haringey response. On 28 March 2014 Haringey provided a detailed letter exploring the grounds for resisting further disclosure which it and Fusion relied upon to protect commercial interests – sections 43(2) and 41(1) of FOIA and 40(2) to prevent the disclosure of employee data.

8. On 10 May the requester asked for an internal review of the decision and a response, now relying on similar provisions of the Environmental Information Regulations, was sent on 10 June. On 3 July the requester complained to the ICO under section 50 of FOIA. This attached the various items of correspondence. The introduction to the email read:-

"This has been a long running saga. It relates to the decision made by Haringey Council and Fusion to close the diving facilities at Park Road leisure centre in Crouch End"

9. On 28 August 2014 the ICO wrote to Haringey starting his investigation. He did not send the email which had been sent to him and recited the specific terms of the request (set out at paragraph 6 above) but not the introductory summary; nor did it send the email of complaint with its introductory explanation. On 31 October 2014 Haringey responded in a 13 page/50 paragraph letter with an extensive schedule exploring in more detail specific points in the extensive documentation the subject of the request and the reasons that Haringey and Fusion supported non-disclosure.

10. After a protracted investigation the ICO on 17 June 2015 issued his decision notice requiring the disclosure of substantial parts of the contract. In the light of the well-reasoned contents of Haringey's letter and schedule certain of the conclusions of decision are somewhat surprising and suggest relative lack of expertise in commercial issues. The conclusions of the decision notice then became the subject of the process explored above.

Consideration

11. The information was requested in February 2014 by an individual who believed that diving was being withdrawn from Park Lane pool. Although Haringey told the tribunal that that idea was abandoned shortly afterwards and believed that the requester was aware of that; it is not entirely clear that the requester was aware. Certainly when the complaint was made to the ICO it was on the basis of a decision to close the diving facilities. Indeed at the point of complaint it may be that diving was not available at the pool – as part of the contract between Fusion and Haringey extensive works have been carried out on the pool which has now again opened – with diving still in place.

12. The original cause of the request for information has therefore been overtaken by events but the information request, due to the way it is handled, has taken on a spectral life of its own long after the original dispute had died. In the handling of complaints to the ICO "information" is treated as having an inherent value divorced from its context. In the tribunal's experience the disinterested pursuit of information for its own sake is rare. Requesters seek information because they wish to understand why a decision has been made, to influence a future one or because the information is of value to them. The ICO when handling complaints is not dealing with academic inquiry but with requesters who often have disputes with the public authorities

concerned and are using requests for information as a means of advancing their side of the dispute – they have interests at stake, not simply an interest in the information itself.

13. It is important that the ICO recognises these interests and their role in the dispute which has come to him. By treating the issue entirely in terms of FOIA – a request for information that has been denied; the ICO has not recognised that his role in resolving the disputes which are brought to him has a social context.

14. It is a truism that FOIA is purpose and person blind. However while that article of faith is repeatedly cited it is a misleading oversimplification. The purpose of the request for information frequently comes into play – for example in consideration of cases of possibly vexatious requests where section 14(2) is in issue the motive of the requester is keenly analysed. In the instant case, if it had become apparent that the requester had had the position fully and repeatedly confirmed to him that diving would not be lost, but continued to state that it would be, then an issue of a drift into vexatiousness might arise. Similarly in a case such as this, if the requester were one of Fusion's commercial competitors, then the identity of the requester would buttress an argument for non-disclosure relating to the commercial harm to Fusion.

15. In this case, from the information before the tribunal, the requester has in his two key communications, the request and the complaint, written in the belief that diving facilities are being lost. This was a false belief. The interest being advanced by the request was not so advanced. If the ICO's investigation had provided the context to Haringey, then it might have been possible to short circuit this wasteful process; if Haringey had been in the position of providing to the ICO and the requester a summary of the true position.

16. A feature of this case has been the entire absence of non-generic public interest in the disclosure of information. The requester's motivation (on the basis of the misapprehension) as exploring why diving was lost would certainly be a matter of public interest. In the light of the evolving evidence it was formulated by the tribunal during the hearing "a distributional struggle between two groups of consumers for the use of the pool and how Haringey had resolved it" however no party espoused that or any other specific public interest argument suggested by the tribunal. There was certainly no question of misconduct by Haringey or anyone else. The information

requested is a large mass of commercial documents which do not reveal misconduct. High level versions of the key information in the documents are widely available. A careful analysis of the full documents by a commercial competitor could be used to advantage by that competitor, to the public at large or any likely interpreter for the public (journalists, pressure groups) they are of no apparent use.

17. It is also noteworthy that the requester appears to have played no substantive part in the proceedings since the complaint. Over the last months various redacted and unredacted documents have been sent which are likely to have been of no value to the requester, since the interest advanced – diving at Park Lane pool, had not been lost.

18. The actual public interest in the disclosure of these documents was always likely to be negligible. They would not have been useful in explaining why diving had been lost (if in the event it had been) and the relevant information about that was already publicly available including through the public meetings. In reality the request, for the practical purpose it sought to advance, was quickly redundant. An informed member of the public looking at these events may well be aghast at the waste of resources which has occurred.

19. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 27 November 2015

ANNEX A

1. Prior to the hearing of this case, on 9th November 2015 the Appellant disclosed to Mr. Fink the following further information from the contract between the Appellant and the Second Respondent dated 17th January 2013 ("the Contract").

   Clause 1.1 – definition of Eligible Employees
   Clause 1.1 – name of the Independent Certifier
   Clause 7B.1 – Pensions
   Clause 12.6 – Profit Sharing (aside from the table of figures)
   Clause 12.8 – VAT (aside from 12.8.2, 12.8.6, 12.8.8 and 12.8.9)
   Clause 39 – Notices (save for the name and contact details of the individual employed by Fusion)
   Schedule 3 – Admission Agreement (not including the list of eligible employees)
   Schedule 7 – Payment mechanism – definitions, and parts 2 and 6
   Schedule 8 – required insurances (omitting part of the Schedule, and not including the names and contact details of Council officers)
   Schedule 10 – Appendix 14 (save for Schedules 1, 11 and 12 to Appendix 14)
   Schedule 11 – Bulk transfer terms
   Schedule 19 – Contractor Guarantee (save for covering letter and individual contact details)

2. The Information Commissioner accepts that the following information from the Contract is exempt from disclosure under section 41 of the Freedom of Information Act 2000 ("FOIA").

   Schedule 10, Appendix 14 (Schedules 11 and 12)

3. The Information Commissioner further accepts that the following information from the Contract is exempt from disclosure, under section 43(2) of FOIA.

   Clause 1.1 – definition of Breakage Costs
   Clause 1.1 – definition of Contract Sum
   Clause 1.1 – definition of Performance Standard Benchmarking Exercise

Clause 1.1 – definition of Qualifying Change in Law (limb (c))

Clause 1.1 – definition of Works

Clause 1.1 – definition of Works Programme

Clause 14.5

Clause 14.6

Clause 14.7

Clause 14.8

Schedule 10, Appendix 14 (Schedule 1)

4. No further information is required to be disclosed by the Appellant to Mr. Fink.