



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0062

**Heard at Kings Court, Leicester
On 23rd September 2019**

Before

**JUDGE
MISS FIONA HENDERSON**

Between

MR JOHN POPE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

And

DERBY CITY COUNCIL

2ND Respondent

Representation:

Mr Pope, the Appellant, represented himself.

The Information Commissioner chose not to be represented at the oral hearing

Derby City Council were represented by Mr Rhys Morgan (Solicitor)

Decision and Reasons

The Appeal is allowed. A brief verbal decision was given at the hearing. Below are the reasons for the decision.

Introduction

1. This is an appeal against the Information Commissioner's decision FS5071087 dated 5th February 2019 that Derby City Council (DCC) did not hold information within the scope of the request. The Commissioner did not require the Council to take any steps.

Information Request

2. The requester wrote to Derby City Council on 16th April 2018 asking¹:
“Please could I have the following information relating to cash seizures carried out by Environmental Health and Trading Standards from the 1/4/16 until 31/3/18.

How many cash seizures have been carried out?

How much cash was seized in total?

What powers were used including the Act and the section?

Were the cash seizures considered lawful and properly carried out?

How was the cash disposed of and was that considered lawful?

Was any advice given to officers prior to any seizures? If so copies please (naturally please redact any officer’s details).

Was any advice given after seizures? If so copies please and copies of any emails concerning this matter (redact as necessary).

Was any legal advice sought (internally or externally)? If so copies please.

What is the current (as of today) position on seizing cash?”

3. Derby City Council replied on 15th May 2018² stating that no cash seizures had been carried out between the relevant dates and that consequently the rest of the elements of the request (bar the final one) were not applicable. In relation to the final element of the request they stated that *“Officers are not permitted to seize cash under any circumstances”*.
4. The Appellant sought an internal review on 17th May 2018³ Derby City Council’s response dated 18th June 2018⁴ upheld the refusal but clarified that they had interpreted the request as relating to seizure in accordance with s294 Proceeds of Crime Act 2002 and added that:
“You can amend your request to ask for different information, for example, how many cash seizures did not comply with s294 of Proceeds of Crime Act 2002.
5. The Appellant complained to the Commissioner on 29.6.18 attaching a completed appeal form and relevant correspondence and stating:
*“Please note I have personal knowledge of one cash seizure and can provide evidence of this and senior managers are aware of this seizure”*⁵. The Commissioner accepted the case and following an investigation upheld the refusal stating:
“The Commissioner accepts the statement from the Council that no cash seizures of the type envisaged by the request were carried out”.

¹ P18 bundle

² P19 bundle

³ P18A bundle

⁴ P20 bundle

⁵ p30 bundle

Appeal

6. The Appellant appealed on 26th February 2019 relying upon his knowledge of an incident which he stated fell within the scope of the request. He relied upon email correspondence and an evidence record⁶ to contend that there had been at least one cash seizure and that the Council were aware of this.
7. Derby City Council were joined by direction of the Registrar on 11th April 2019 and were asked to confirm their interpretation of the request and confirm the types of information that were within scope.
8. The Council in their response confirmed that they had uncovered emails relating to this incident when responding to the FOIA request but repeated their reliance upon s294 Proceeds of Crime Act 2002 (POCA) and a dictionary definition of “seized” as set out in their letter of 29.1.19. to the Commissioner⁷ Their case was that as they had no legal right at that time to conduct cash seizures, therefore they held no information and for this reason had given the Appellant the opportunity to amend the request at the internal review. If the information were considered to be in scope they would wish to consider further exemptions namely s30, s31, s36, and s40 FOIA.
9. The Commissioner’s relied upon her finding at paragraph 26 of the decision notice that the Council’s interpretation of the request was an objective reading of the request. Her case was that there had been a thorough search and no information in scope was held.
10. This case was heard by a Judge sitting alone⁸ because the issue in the appeal is whether the public authority holds the information in dispute.⁹

Scope

11. It was agreed between the parties that the issue in dispute was whether the Council had correctly defined what was meant objectively by “cash seizure”. The Commissioner in her response sought to rely upon the Appellant being an informed requestor in light of his job and experience, he should be aware of the limitations explained by the Council as to who may seize cash. In my judgment that would be a subjective approach. DCC have said that the request when first considered was “applicant blind” such that those interpreting the request initially did not know whether and if so to what extent the Appellant had any specific professional or experiential knowledge. I accept that this is in keeping with the Commissioner’s guidance and is evidence that DCC are not entitled to rely upon their knowledge of the Appellant and his knowledge of technical aspects of the law to justify the restrictive definition that they applied to the term “Cash Seizure.”
12. There was no dispute that the Council held information relating to at least one incident where an Environmental Health and Trading Standards Officer had taken money from someone under investigation in order to put it in evidence pursuant to a search into allegedly unlawful behaviour. This money was handed to the Police who themselves “seized” it and that seizure was adjudicated upon in the Magistrates Court. It was surprising that the Commissioner did not ask the Appellant specifically to send a copy of the correspondence he referred to in his complaint, but in any event I am satisfied that the

⁶ P79-80 bundle

⁷ And as set out in paragraph ??? above

⁸ Paragraph 11(2) of The Practice Statement composition of Tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015

⁹ Paragraph 11(3)(a)(i) of the Practice Statement

Commissioner had correspondence relating to the incident involved in front of her when the decision notice was made as it was provided by DCC.

13. The Council's case was that this was not a "cash seizure" because:
- i. Council officers do not have the power to conduct seizures under s294 POCA. Only the following can conduct lawful cash seizures:
 - An Officer of Revenue and Customs,
 - A constable or
 - An accredited financial investigator(none of which were employed by the Council at the time of the initial request¹⁰).
 - ii. That the Environmental Health and Trading Standards Officer's "taking" of the cash did not constitute a "seizure" they said was apparent from the fact that when the cash was handed to the Police it was then recorded as having been "seized" (as explicitly stated in the emails between DCC and the Police¹¹). This indicated that its status prior to being handed to the Police was of cash that had not yet been "seized".
 - iii. They relied upon the Oxford Dictionary definition of "seizure" being:
"The action of confiscating or impounding property by warrant or legal right".
Since their case was that there was no legal right to confiscate or impound money, the taking of the money by the Environmental Health and Trading Standards Officer concerned was not lawful and thus could not constitute a "seizure".
14. The Appellant's case was that in using the term "cash seizure" he had intended to include seizures of cash whether they were lawful or unlawful. He also argued that there was a legal right outside of POCA to confiscate or impound money (as this is included in a definition of goods) in relation to investigating an offence under the Trade Marks Act 1994 s92(c) in conjunction with Part I of the Consumer Rights Act 2015. He stated that this was the Act and the section that he was referring to in the body of this information request.
15. The Tribunal Judge has not found it necessary to determine whether there was an additional legal right for Environmental Health and Trading Standards officers to confiscate or impound money as alleged by the Appellant, as her finding is that the objective construction of the request was not limited to "lawful" takings of money but included unlawful "takings" as well.
16. This was the view initially adopted by the Commissioner who sought further clarification from DCC in a letter dated 23rd January 2019¹² noting that the Council had limited the scope of the request to "*cash seizures in accordance with s294 of Proceeds of Crime Act 2002*" and that their conclusion therefore was that no "*lawful cash seizures were conducted by any officer of the Council and consequently no information was held in that respect*".
The Commissioner observed that the request related to "any" cash seizure and was not limited to those carried out under POCA. Derby City Council were asked to confirm:

¹⁰ As set out in DCC's letter to ICO 15.11.18

¹¹ P77-78 and as attached to the letter from DCC to the ICO on 23.1.19 p 74 bundle

¹² P66 bundle

“whether the Council at the time of the request held any recorded information relating to cash seizures, lawful or unlawful¹³ carried out by Environmental Health and Trading Standards” between the relevant dates.

17. The Tribunal Judge agrees with the Commissioner’s assessment of the scope of the request. The terms of the request do not state “lawful” cash seizures. The fact that the seizures were not limited to s294 POCA is apparent from the element of the request that asked: “what powers were used **including** the Act and the section”.

It is apparent that DCC presume that the Act and section related to POCA when the Appellant told the Tribunal that he had different legislation in mind. The Tribunal Judge observes that in light of the ambiguity of reference to an unspecified act and section, she would have expected the Council to have clarified this prior to responding. However, regardless, the use of the word “including” makes it explicit that incidences outside of whichever Act was being referred to were also in scope. As such DCC’s initial decision to limit the request to s294 POCA was too narrow.

18. Additionally, the fact that the request included **unlawful** cash seizures was explicit in the body of the request in the element that specified

*“Were the cash seizures considered **lawful**...”*

In my judgment it was wrong to limit the definition of “cash seizure” to lawful incidents. DCC’s response to the Commissioner’s question as to whether unlawful cash seizures were considered was to rely upon the definition of what constitutes “seizure” in a legal context. This definition provides that a seizure can only be lawful as it only applies where money is taken “*by warrant or legal right.*”

19. In doing so they have ignored other equally reasonable definitions. The Oxford Dictionary provides other definitions for “seized” including:

*“Take hold of suddenly and forcibly and
Take forcible possession of.”*

Both of which would apply to money confiscated or placed in evidence or taken against the wishes of another and are common usages of the word. These actions do not depend upon legal right. As such the definition relied upon has already added a qualification to the objective meaning by interpreting the request as being a “term of art” and limited to the legal definition when from the terms of the request it was clear that unlawful seizures (and thus those that fell out of the legal definition of seizure) were considered by the Appellant as being in scope. I am not satisfied that there was an objective basis for limiting the definition to a “legal term of art” in the context of the request.

Observation

20. The Tribunal’s view is that the Commissioner’s assertion at paragraph 26 of the Decision Notice that “*there were no cash seizures carried out by the Officers of Environmental Health and trading Standards*” was misleading as it is dependent upon the Council’s definition of a seizure as being inherently a “lawful” process when the Commissioner’s definition was that the request (as set out in the same paragraph) included “unlawful” seizures. Whilst the Commissioner pins her decision upon the fact that the Council’s case was that there were no cash seizures of the type “*envisaged by the request*” having failed to explain what type of seizures she accepted were envisaged by the request creates the impression that there were no occasions when the Council took and retained money (albeit

¹³ Emphasis added

on their case unlawfully). Her conclusion upon the definition of what constitutes “seizure” which is not adequately reflected in the decision notice.

21. The tribunal observes that the purported assistance provided under s16 FOIA would not have advanced the Appellant’s position on the Council’s case. To ask how many cash seizures did not comply with s294 POCA would still lead to a “not held” response in light of the Council’s definition of seizure as being a lawful process. Indeed the clarification sought by the Council as reported in paragraphs 26 and 27 of the decision notice could be expected to lead the Appellant to believe that the Council had been asked that question and had responded to that request as being that no information was held.

Conclusion

22. On the facts of this case based upon the material at p 77-80 of the bundle and the overtly narrow definition of what is meant by cash seizure, I am satisfied that DCC do hold at least some information that falls within the request. I am satisfied therefore that they have not complied with their obligations under s1 FOIA.
23. In light of the widening of the definition and in the knowledge that some information is held that is within the scope of this definition, the Council have indicated that they would wish to consider the application of certain exemptions to some or all of any information they may uncover. The Commissioner in her response proposes that the Tribunal direct that the Council should issue a fresh response (either providing the information pursuant to s1 FOIA or in accordance with a refusal notice pursuant to s17 FOIA). The parties present at the oral hearing agreed with this suggestion.
24. The Appeal is therefore allowed. In light of the Tribunal Judge’s findings relating to scope it is not appropriate to consider the sufficiency of the search. It is not apparent from the information whether the incident referred to in the papers is the only incident of unlawful “seizure” or taking consequently it may be that further information is found to be held.

Substituted decision notice

25. Paragraphs 2 and 3 of the decision notice should be substituted to read:
“On the balance of probabilities, the Council does hold information within the scope of the request in this case.

Within 35 days the Council must comply with s1 and s17 FOIA to provide the information requested where it is held or provide a refusal notice pursuant to s17 FOIA that applies the Tribunal’s definition of “cash seizure” as set out in the body of the decision”.

Signed

Fiona Henderson
Judge of the First-tier Tribunal
Date: 26th September 2019
Promulgated: 27th September 2019