



Appeal number: EA/2019/0464P

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

ANTHONY GALLAGHER

Appellant

- and -

**THE INFORMATION COMMISSIONER
HAMPSHIRE COUNTY COUNCIL**

Respondents

TRIBUNAL: JUDGE ALISON MCKENNA

Determined on the papers, the Tribunal sitting in Chambers on 15 May 2020

MODE OF HEARING

1. This determination was conducted by a Judge sitting alone in accordance with paragraph 11(3)(a) (i) of the Chamber's Composition Statement.¹
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules.²
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 82, plus additional documents containing submissions from Hampshire County Council and the Appellant.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. The Appellant made a request to Hampshire County Council ("the Council") on 13 March 2019 for information about the time taken to respond to complaints made to its Children's Services Department.
6. The Council responded to the information request on 9 May 2019. It provided some of the requested information but, in respect of parts 4 and 5, it stated that *The Freedom of Information Act does not require the Local Authority to provide opinions or explanations*. Following an internal review, the Council wrote to the Appellant on 18 June 2019 to confirm its position, explaining that verbal discussions which take place at line management meetings are not recorded, so that information is 'not held' for the purposes of the Freedom of Information Act 2000 ("FOIA").
7. The Appellant complained to the Information Commissioner, who issued Decision Notice FS50841744 on 25 November 2019. The Decision Notice found that the Council had breached its obligations under sections 10, 16 and 17 FOIA but that on the balance of probabilities the remainder of the requested information was not held by the Council. No steps were required to be taken.

8. The Decision Notice concluded as follows:

28. ...yearly reporting, undertaken by the Council, is in line with the statutory legislation which states that 'For the purposes of such monitoring every local authority

¹ <https://www.judiciary.uk/wp-content/uploads/2014/10/amended-grc-feb-2015.pdf>

² <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

must as soon as possible after the end of each financial year compile a report'. The Commissioner has no basis upon which to refute that information is only recorded to brief the Chief Executive on complaint delays as part of that yearly process. She notes that at the time of the request the yearly reporting had not occurred.

29. ...the issues regarding stage 2 and stage 3 complaints are delegated to the Director of Children's Services rather than the Chief Executive.

30. ...the correspondence exchanged between the Director of Children's Services...and the ...Ombudsman could have been deemed within the scope of the request if it was available at the time of the request. However, it was created after the request date and therefore does not fall within scope. ...

31. ...reasonable to assume that discussions would have been held during the course of the year, within the Council's senior leadership team, regarding delays and potential actions to resolve. If the information is held in recorded form then it must be considered, however the FOIA does not stipulate what information public authorities should record.

32. In the absence of evidence to the contrary, the Commissioner accepts the Council's position that it approached the appropriate teams to find information in scope of the request; that no further information is required from a statutory or business perspective; and that no information was destroyed or deleted.

...

35. Having considered the Council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that on the balance of probabilities the Council did not hold information within the scope of the request questions [4] and [5].

Appeal to the Tribunal

9. The Appellant's Notice of Appeal dated 13 December 2019 relied on grounds that the Information Commissioner's office had carried out an insufficiently robust investigation to support the conclusions reached in the Decision Notice and that it was more likely than not that recorded information was held in circumstances where the Chief Executive had received a critical letter from the Ombudsman (which was attached). By way of outcome, he seeks disclosure of the requested information and amendment of the Decision Notice to require the Council to comply with s. 16, 1 and 17 of FOIA. He regards the Council's breach of s. 16 FOIA (as found by the Decision Notice) to be inconsistent with the finding that no information is held.

10. The Information Commissioner's Response dated 29 January 2019 (should have been 2020) resisted the appeal and maintained the analysis as set out in the Decision Notice. It is submitted that the investigation was robust and supported the findings. Further that the s. 16 breach did not affect the finding of no information held.

11. The Council was joined as a party to this appeal. Its Response dated 18 February 2020 supported the Information Commissioner's Decision Notice. It acknowledges that it holds information which falls outside of the scope of the request made by the Appellant, for

example, he asked for *current* information so the previous financial year's report was considered to be outside the scope of the request. Similarly, the Chief Executive's correspondence with the Ombudsman concerned *past* not *current* complaints. It agrees with the Commissioner that the s. 16 FOIA breach is unconnected with the finding of no information held.

12. The Appellant's final submission (undated) contained his Reply to both Responses. He reiterated his view that the Commissioner's investigation had been inadequate and submitted that she had ignored information he had provided. He complained that her process was unfair in failing to offer him the opportunity to comment on the Council's response before issuing the Decision Notice. He submitted that the Commissioner should have adopted a stronger stance in relation to the Council's breach of s. 16 FOIA. He submitted that, as the Council had originally informed him that it would rely on an exemption, this itself suggested that relevant information was held.

The Law

13. Section 1 (1) (a) FOIA entitles a requester of information to be informed in writing whether a public authority holds the requested information and, if so, to have that information communicated to the requester under s. 1 (1) (b) FOIA³.

14. A decision as to whether a public authority holds requested information is to be decided on the balance of probabilities.

15. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

16. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/1>

17. The Council's Response referred to its previous dealings with the Appellant by way of background. The Appellant has objected to the inclusion of that information and I agree with him that it is irrelevant to this appeal. I have not taken it into account.

18. I have considered relevant evidence before me most carefully but find no error of law in the Decision Notice's approach or conclusions. I sympathise with the Appellant's view that more information is held, but he bears the burden of satisfying the Tribunal on the balance of probabilities that that is the case and I am not so satisfied. Accordingly, I must dismiss this appeal.

19. It may be that a differently worded request would have elicited a different response and I agree with the Information Commissioner that the Council could have been more helpful in assisting the Appellant to refine his request.

20. As the Decision Notice is upheld there is no power for the Tribunal to issue directions to the Council.

(Signed)

ALISON MCKENNA

DATE: 15 May 2020

CHAMBER PRESIDENT