



Neutral citation number: [2024] UKFTT 00190 (GRC)

Case Reference: EA.2023.0397

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

**Considered on the papers
Heard on: 07 March 2024
Decision given on: 11 March 2024**

Before

**DISTRICT JUDGE REBECCA WORTH
(authorised to sit as a Tribunal Judge in the GRC)
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER JO MURPHY**

Between

RICHARD FOWLER

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) EQUALITY AND HUMAN RIGHTS COMMISSION**

Respondents

Decision: The appeal is Dismissed

Definitions:

“DN”the Decision Notice which is the subject of this appeal, namely IC-21189-P7B6 dated 21 August 2023
“EHRC”Equality and Human Rights Commission
“EIR”Environmental Information Regulations 2004 (SI 2004/3391)
“FOIA”Freedom of Information Act 2000
“ICO”The Information Commissioner’s Office
“PA”The Public Authority (as defined by Schedule 1 of FOIA), which in this matter is the Equality and Human Rights Commission
“the Requester”the person who applied for information – referred to in FOIA, section 1 as the applicant

“the Rules”.....The Tribunal Procedure (First-tier Tribunal)
(General Regulatory Chamber) Rules 2009 (SI
2010/43), as amended¹

Mode of hearing: The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Rules.

Documents considered: Bundle (126 PDF pages), any reference in bold square brackets (i.e. “[]”) is a reference to the page number of the open bundle.

REASONS

The Law

1. As far as is relevant, FOIA provides:

General right of access to information held by public authorities

1(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

(2)

(3) ...

(4) The information—

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment of deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

¹ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

(6) In this Act, the duty of a public authority to comply with subsections (1)(a) is referred to as “the duty to confirm or deny”.

2. FOIA requires a PA to give advice and assistance to a person seeking information as section 16 (as relevant) provides:

Duty to provide advice and assistance

16(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it,

3. FOIA defines “Information” as section 84 which provides:

Interpretation

84 “information” (subject to sections 51(8) and 75(2) means information recorded in any form;

4. There is a process of challenge – the first challenge is for the Requester to apply to the ICO for a Decision Notice (FOIA, section 50). If either side (the Requester or the PA) wishes to challenge the ICO’s Decision Notice, they are entitled to appeal to this Tribunal (FOIA, section 57). This Tribunal’s powers are found in FOIA, section 58 which provides:

Determination of appeals

58(1) 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.

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

5. In determining whether information is, or is not, held, we apply the normal civil standard of proof which is the balance of probabilities (see *Preston v ICO and Chief Constable of West Yorkshire Police* [2022] UKUT 344 and *Bromley v IC and Environment Agency* [2007] UKIT EA_2006_0072 (31 August 2007).
6. In considering the scope of a request under FOIA, the First-tier Tribunal held in *Department for Culture, Media and Sport v IC (Freedom of Information Act 2000)* [2010] UKFTT EA_2009_0038:

In general the scope of a Freedom of Information Act request (which is what gives rise to and defines the obligations of a public authority under section 1(1) of the Act) must be determined by an objective reading of the request itself in light of any relevant background facts. In this case the parties expressly agreed the scope of the request (see paragraph 9 above; only (b) of the agreement is relevant for the purposes of the appeal but it must obviously be read with (a)) and the Tribunal's task is to interpret the words of that agreement against the relevant background set out above.

Background

7. The exact wording of Mr Fowler's request (see [B83]) was:

Please disclose how the public can guess what EHRC can and cannot:

- a. retrieve with unknown degrees of ease using unknown terminology,
- b. disclose (see below)
- c. search for, not just supply, when requested in accessible formats.

Explanation. The main purpose of FOIA request 6533056 was to explore what EHRC have done, and are doing 'behind the scenes' which is of tangible use to disabled people. Clearly, disabled people can only remind providers if they know who has agreed to do what. The secondary aim is to see what EHRC are doing with public money and public records without relying on EHRC self-reporting.

[there was then further explanation].

8. The EHRC did not understand exactly what information (as defined in FOIA) was being requested and asked Mr Fowler to clarify what information (i.e. what recorded data) he asked them to provide.
9. The EHRC, following correspondence with Mr Fowler, interpreted the request as Mr Fowler wanting to receive:

... a catalogue, index or similar which incorporates all detailed requirements and summaries of our formal and informal compliance work as referenced in the [Women and Equality Select Committee Report]

Grounds of Appeal

10. Mr Fowler sets out his grounds of appeal by giving 3 Reasons, namely:

- 10.1. Reason 1: "We need to know what the EHRC can retrieve and how easily, not what it cannot".
- 10.2. Reason 2: the ICO's interpretation of the request was not agreed by them. He is "concerned with how the ERHC retrieves its own records broadly but in sufficient detail".

10.3. Reason 3: Was the Women's and Equalities Select Committee misled?

By way of expansion of his reasons, Mr Fowler submitted the following:

10.4. "If the EHRC expected us to somehow know the terminology in their legislation their expectations are too great for us."

10.5. "The way that the EHRC keeps its records make it almost impossible for them to identify and supply documents within cost limits unless the specific document or terminology is known to the requestor. But the requestor often cannot reasonably know the specifics."

11. The outcomes that Mr Fowler seeks from this appeal (section 6 of the Notice of Appeal, [A27]) are:

11.1. Withdrawal of the ICO Decision.

11.2. EHRC to disclose how they retrieve records in their own systems.

Responses

12. The EHRC's response to the appeal is found at [A30] to [A61]. They resist the appeal, summarising their resistance as "the Appellant has not put forward any realistic arguments to challenge the DN." (paragraph 4 at [A31]).

13. At paragraphs 15 to 18 (see [A34]), the EHRC seeks to answer Mr Fowler's overall question: How does the EHRC retrieve information? They inform the reader:

We can theoretically retrieve everything that we hold (paragraph 15).

Our information is filed in a number of ways (paragraph 15).

Documents relating to a particular matter are not always held in a single location (paragraph 16).

How we retrieve documents depends on how it is stored: hard copies being extracted differently than emails (paragraph 17).

Locating a document and information contained within that document will depend on the nature of the document held (paragraph 17).

14. They also remind the reader that, even if they have retrieved information, its disclosure may be refused by applying exemptions found in FOIA.

15. Their overall submission is that the explanation does not fall under FOIA as it is not "recorded information"; by which we understand them to mean that it was not information, recorded by any means and held at the time Mr Fowler made his request. The EHCR are correct, in that FOIA does not require a PA to create information.

16. The ICO response is found at [A62] to [A70], and resists the appeal, arguing that Mr Fowler's grounds of appeal "provide no basis at all for the Tribunal to question the

Commissioner’s conclusions” (see paragraph 43 at [A69]). Paragraphs 29 to 31 ([A67 to A68]) set out the following principles, which are a correct statement of the legal position:

- 16.1. FOIA does not oblige authorities to modify their record keeping or to require them to produce additional information, answer questions, provide explanations or opinions, unless this is held in a recorded form (paragraph 29).
- 16.2. If the [EHRC] does not document / record this ‘how to search’ information, FOIA does not provide a right to it and it is not within the Tribunal’s jurisdiction to address.

The ICO also observed that, as the EHRC (within their response) provided an explanation to Mr Fowler about their filing system, Mr Fowler may no longer wish to pursue the appeal.

Appellant’s Reply

17. Mr Fowler continued with the appeal, his Reply is found at [A71] to [A74]. He asks ([A71]) the Tribunal to consider 2 principles, namely:
 - 17.1. Whether a requestor can be refused because they cannot correctly guess at official terminology which they cannot reasonably know but which the public bodies to, or should, know.
 - 17.2. Whether an FOIA request is a test of the requestor’s drafting ability when some public bodies seize on requestors’ wording. Raising issues about accessibility for those who are functionally illiterate and/or overawed by even the basic FOIA process.
18. Mr Fowler concludes by hoping that the Tribunal will “see the wood for the trees”; he submits that the PA is blaming the requestor for using the wrong words, which a requestor could not know but which the public bodies should.

Discussion

19. We remind ourselves of the original request (emphasis added):

Please disclose **how the public can guess** what EHRC can and cannot: (a) retrieve with unknown degrees of ease using unknown terminology, (b) disclose and (c) search for, not just supply, when requested in accessible formats.
20. We consider that it is difficult to understand how Mr Fowler believed there was information in recorded form (which is what FOIA it about) which would meet the terms of his request. It seems clear to us that he was asking for an explanation. Even in this appeal, Mr Fowler is not asking for recorded information: his outcome is for the EHRC “to disclose how...” – that seeks an explanation.
21. To their credit, the EHRC did not refuse to deal with the matter on the basis of this not being a valid request, instead they corresponded with Mr Fowler in an attempt to understand what he wanted so that they could conduct a proper search for information held

in recorded form which assisted him. This was the EHRC recognising their obligations under Section 16 to provide advice and assistance.

22. We find that the EHRC's eventual interpretation of his request was realistic and objective. We note that Mr Fowler objects to it, but he has not come up with an alternative which would enable a PA to search for recorded information.
23. We turn to Mr Fowler's 2 principles as outlined in his Reply. They are matters of principle rather than matters which relate to this specific request. We do not consider it appropriate, within the setting of this appeal, to set out such things other than to observe that it would seem Parliament envisaged that there may be people who struggle to identify what they seek and who struggle with literacy and that is why they enacted section 16 whereby a PA must give advice and assistance.

Conclusion

24. For all the above reasons, we consider that the DN was right to conclude that the EHRC did not hold recorded information as sought by Mr Fowler in the terms of his request made on 02 October 2022.

Signed: District Judge Worth

Date: 07 March 2024