



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No EA/2010/0102

ON APPEAL FROM:

**The Information Commissioner's
Section 51 Information Notice
Dated: 27 April 2010**

Appellant: The Governing Body of Aberdare Girls' School

Respondent: Information Commissioner

On the papers

Date of decision: 19 August 2010

Before

Robin Callender Smith
Information Rights Judge

Documentation considered in this appeal:

Representations from the Appellant signed by P C Scott, Chair of the Governing Body of Aberdare Girls School, and the Notice of Appeal signed by M Keating on 24 May 2010

Directions issued by the Tribunal on 6 June 2010

Response from Clare Nicholson on behalf of the Respondent, the Information Commissioner dated 5 July 2010

Subject matter:

FOIA

**Complaint to commissioner s 50 (1)
Decision of commissioner s 50 (2) – (6)
Information Notices s 51**

Cases:

***Swanage Town Council v Information Commissioner (EA/2009/0058) and
Health Professionals Council v Information Commissioner (EA/2007/0116).***

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Information Commissioner's Information Notice dated 27 April 2010 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 16 April 2009 the Rt Hon Ann Clwyd MP ("the Complainant") requested information regarding the decision of the Governing Body of Aberdare Girls' School ("the Appellant") to defend a legal case regarding the exclusion of a Sikh pupil for refusing to remove a religious bracelet. She divided her request into 14 separate questions asking for information about the legal, administrative and other costs of defending the case.
2. The information requested related to a court case heard in the High Court under case reference CEO/11435/2007 between the Claimant and the Appellant.
3. On 21 May 2009 the Appellant replied, refusing to provide the information. It failed to provide the exemptions it was relying on to withhold the information.
4. The Complainant contacted the Appellant on 9 June 2009 expressing dissatisfaction with the Appellant's response and, on 30 June 2009, the Appellant provided a further refusal citing sections 12, 14 (2), 21, 31, 32, 41 and 42 of the Freedom of Information Act 2000 ("FOIA").
5. On 15 July 2009 the Complainant contacted the Information Commissioner ("IC") to complain about the Appellant's handling of her request for information in respect of questions 1, 3, 7, 9, 10, 11, 12 and 13.
6. On 7 October 2009 the IC contacted the Appellant requesting further information and set a deadline for a substantive response of 4 November 2009.
7. When this did not occur the IC issued a section 51 notice dated 27 April 2010 under FOIA requiring the Appellant to furnish him with the information.
8. I issued directions on 6 June 2010 in relation to this matter requiring the IC to file a response to the Appellant's 19-page notice of appeal. On 5 July 2010, in accordance with my directions, the Respondent filed an 18 page response.
9. At an earlier stage the Appellant advised the IC on 10 November 2009 that the information withheld "was the subject of on-going litigation and

therefore cannot be disclosed". The Appellant went on to say that if the information was to be viewed, it would require a confidentiality agreement to be personally signed by the case officer concerned. The IC set out to the Appellant on 20 November 2009 the role and powers of the IC and the duty of confidentiality imposed under section 59 of the Data Protection Act 1998.

10. On 23 November 2009 the Appellant indicated it would provide the IC with the information he required for the investigation. The IC then e-mailed a letter to the Appellant setting out the information he required and setting a new deadline of 7 December 2009. The same day the Appellant e-mailed the IC explaining it would be seeking further legal advice. The IC subsequently requested confirmation from the Appellant that the information requested (that had been withheld) would be sent.
11. On 27 November 2009 the Appellant wrote to the IC indicating the IC had not responded to its letter of 10 November 2009 it went on to say that it would consider the request to supply information within seven days of receipt of a written response. On receipt of that letter the IC called the Appellant and advised that the deadline set out in the letter of 23 November 2009 remained.
12. A further letter from the Appellant was sent by e-mail on 9 December 2009 stating that – in relation to the provision of the information withheld – *"upon your [sic] receipt of your legal undertaking as requested by us we will consider the matter further with departmental advisers"*.
13. In view of the previous correspondence and the nature of the section 50 application the IC issued an Information Notice dated 17 December 2009. The Appellant appealed that matter to the Tribunal and the IC subsequently decided to cancel that Information Notice on 18 February 2010 and advised the Appellant and the Tribunal of that decision. The IC explained that, despite the cancellation, the information was still required from the Appellant and the further correspondence would follow.
14. On 2 March 2010 the IC wrote to the Appellant setting out clearly what further information he required. The Appellant responded on 9 March 2010. The IC wrote on 1 April 2010, asking for a response within 14 days. He noted that the letter would have been likely to arrive during the Easter vacation break and allowed a further two weeks for a response. In the absence of any contact from the Appellant the IC proceeded to issue the Information Notice dated 27 April 2010. The IC's office checked the Royal Mail website and the Information Notice was delivered 28 April 2010.

The section 51 Information Notice

15. The Information Notice set out the fact that a section 50 application had been received (as required by section 51 (2) (a) FOIA), set out some of the history leading up to its issuance, required the Appellant to provide the IC – within 30 days of the date of the Information Notice – certain information set out in Annex A to the Information Notice and set out the consequences for non-compliance under section 54 FOIA together with the Appellant's rights to appeal as required by section 51 (3) FOIA.

The Notice of Appeal and the appeal to the Tribunal

16. The Appellant raises eight specific grounds of appeal which, for the conciseness, are listed below:
- (i) The Information Notice was not issued in accordance with the law because the Complainant had not exhausted the Aberdare Girls' School's internal complaints procedure;
 - (ii) Confidentiality would be lost if the information requested was provided to the IC;
 - (iii) The Appellant had provided most of the information requested;
 - (iv) The cost of collating the information for the IC to study would be grossly excessive;
 - (v) There had been a previous similar request for the information;
 - (vi) The information was available to the Complainant by other means;
 - (vii) The IC had failed to give reasons for the Information Notice; and
 - (viii) The IC could make the decision without recourse to an Information Notice.

Conclusion

17. The use of the fast track procedure in relation to this case is something of a misnomer.
18. I had reviewed the elements of what the IC was seeking from the Appellant at an earlier stage when the original Information Notice was issued on 17 December 2009 but then subsequently withdrawn by the Commissioner on 18 February 2010. The Commissioner specifically noted that the information was still required.
19. A general issue for me to determine in appeals such as this is whether there are any "*valid grounds which exist in order to justify a finding that the Information Notice is in some way invalid or unlawful*".
20. That test is set out in Paragraph 25 of *Swanage Town Council v Information Commissioner (EA/2009/0058)*. I have to say at the outset that the Appellant's grounds of appeal reveal nothing that leads me to that conclusion. If anything, my observation is that the IC's approach in respect of this Information Notice has been transparently fair and lawful.
21. The Appellant complains that the IC has issued the Information Notice before the Complainant has exhausted the schools internal complaints procedure. There is no substance to this argument. It is not a requirement that the complaints procedure has to be invoked and exhausted before the IC may serve an Information Notice.
22. Further the Complainant has attempted to use the complaints procedure but the Appellant refuses to accept that it has been invoked. The Complainant specifically requested and "internal review" in her letter dated 9 June 2009 but the Appellant appears to have ignored this and at no stage has given details of the process or any other complaints procedure that the Complainant should follow.
23. In the IC's letter of 2 March 2010 he specifically addressed the issue of internal reviews and highlighted that the Complainant clearly requested the Appellant conduct such a review. In that letter the IC indicated he considered the Appellant's 30 June 2009 letter was its internal review response and that the IC did not expect an internal review of a response to an FOIA request to have more than one stage.
24. That is also the Tribunal's view in the absence of any cogent or compelling argument or case law presented by or on behalf of the Appellant.

25. The "loss of confidentiality" that might be caused by the Appellant revealing the required information to the IC has no merit to it. Disclosure of the information is to the IC and, quite regularly, senior Departments of State give over closed and confidential information under the provisions of the Freedom of Information Act to allow the IC properly to determine the status of information. To suggest the potential disclosure of information to the IC would render legal professional privilege worthless – and that people would be less likely to act as school Governors – is to ignore the IC's statutory functions.
26. It is not for the Appellant to set the limits or seek to bargain about what has already been expressed in legislation lawfully enacted by Parliament. It is for the Appellant to provide the information so that the IC can consider its significance – in confidence – in his decision-making process.
27. The IC correctly sets out his statutory duty of confidence and it is one that applies to all of the IC's staff. It is set out in detail at section 59 of the Data Protection Act 1998 ("DPA") and – although I will not set out the full wording – it reads across to the Freedom of Information Act 2000 (by virtue of section 59 (4) DPA).
28. Breach of section 59 is a criminal offence. The Tribunal reviewed the issue of the protection of section 59 DPA in *Health Professionals Council v Information Commissioner (EA/2007/0116)* and concluded that the protection was not only extensive but, in some respects, wider than the duty of confidentiality.
29. Paragraph 52 of that decision states: "*.... In most circumstances the Information Commissioner would need to see the disputed information and that it would be a very high hurdle to clear to convince a Tribunal that the Information Commissioner could and should carry out his functions without sight of the relevant material.*"
30. The Appellant has failed to convince me - to any standard - that the information requested has been supplied but has merely crossed in the post.
31. One of the reasons my Directions gave the IC almost a full month to respond in terms of this appeal was to take account of the fact that there might be information in the post that caused the IC to withdraw the Information Notice, because of belated compliance with the Information Notice. This has clearly not been the case.
32. In terms of the "excessive" cost of providing the information the Appellant does not specify how or why this could occur. The IC's response points out – at Paragraph 48 – that the information in relation to questions 12 and 13 should not require the perusal of 20,000 pages of documentation.

33. In relation to the argument that there has been a previous similar request by the Complainant I find that none of the exemptions set out at section 50 (2) FOIA applies, that the IC must issue a decision notice and that he needs to investigate the matter so that he is able to issue such a notice.
34. Whether the information is available to the Complainant by other means is not an issue when the IC has issued an Information Notice.
35. There is no requirement that the Information Notice itself should include detailed reasoning about why it is being issued. Having regard to the background circumstances I find no merit in this argument from the Appellant. Similarly there is no merit to the Appellant's contention that the IC could proceed with his investigation in the absence of compliance with the Information Notice.
36. For all these reasons I find there is no substance or merit in the grounds advanced by the Appellant for failing to comply with the Information Notice. The Appellant's appeal fails and I direct that the Appellant complies with the Information Notice within 30 days of receipt of this decision.
37. By then it will be nearly 18 months since the Complainant wrote to the Appellant seeking the information.
38. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith

Tribunal Judge

19 August 2010