



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0010

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50353959039
Dated: 15 November 2011**

Appellant: Pol Wong

1st Respondent: The Information Commissioner

2nd Respondent: The Welsh Assembly Government

Heard on the papers

Date of Hearing: 19 April 2012

Before

HH Judge Shanks

Judge

and

David Wilkinson and Andrew Whetnall

Tribunal Members

Date of Decision: 25 April 2012

Subject matter:

Whether redacted information within terms of request for information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 15 November 2011.

SUBSTITUTED DECISION NOTICE

Dated: 25 April 2012

Public authority: The Welsh Assembly Government

Name of Complainant: Pol Wong

The Substituted Decision

For the reasons set out below, the Public Authority should have made the redacted information available to the Complainant pursuant to section 1 of the Freedom of Information Act 2000.

Action Required

The Public Authority is required to supply the redacted information by 25 May 2012.

Dated this 25th day of April 2012

HH Judge Shanks

REASONS FOR DECISION

1. The Appellant, Mr Wong, is a member of a community group called Powys Fadog. Following negotiations, on 16 June 2009 the Welsh Assembly Government and Powys Fadog entered into an agreement to lease a property called River Lodge Hotel which the Government had purchased in March 2007. The agreement was subsequently terminated because (as we understand it) Powys Fadog was not able to satisfy a pre-condition relating to funds to refurbish the property.

2. On 25 August 2010 Mr Wong made a request for information from the Government under the Freedom of Information Act 2000 in the following terms:

Any emails or paperwork either to or from, or on behalf of, Rhodri Morgan [the Welsh First Minister] concerning Powys Fadog and Assembly negotiations with regard to the River Lodge Hotel ... I would like to request any information/communication that has taken place since January 2009.

Various documents have been supplied to Mr Wong under that request including a letter from Karen Sinclair (the Assembly Member for Clwyd South where the River Lodge Hotel is situated) to Mr Morgan dated 21 July 2009 and his reply dated 24 August 2009. The penultimate paragraph of each of those letters was redacted from the copy supplied to Mr Wong. It was agreed by all parties at a telephone directions hearing on 22 February 2012 that the sole issue for the Tribunal on this appeal is whether those redacted paragraphs were within or outside the terms of Mr Wong's request for information.

3. We accept the submissions of the Commissioner and the Government that, notwithstanding that the request is for "emails and paperwork", if there was information within those letters which was otherwise outside the terms of the request the Government was entitled to redact it. We also accept that, to be within the terms of the request, information must "concern" both Powys Fadog and the River Lodge Hotel negotiations.

4. We have been provided with full copies of the two letters and have considered the redacted paragraphs in their context. Ms Sinclair's letter is headed "River Lodge". The unredacted part of the letter recites a number of concerns held and (she states) expressed by her about Powys Fadog over the preceding two years, including concerns about whether it was genuinely a local group and about its financial position. It is perfectly clear that these concerns were only raised in the context of what she calls the River Lodge "project" or "venture" and the fact that the Government had negotiated (and by this stage contracted) with Powys Fadog in relation to it. The redacted paragraph started:

Quite honestly, I am at the end of my patience regarding this venture and the lack of transparency from the start.

It then made a further allegation about the people involved with Powys Fadog and ended:

... I do not think it appropriate for the tax payer to purchase premises for such a group.

The redacted part of Mr Morgan's letter deals with this point; broadly speaking he accepts the allegation but states that it is not relevant to the use that Powys Fadog are to make of the property.

5. The Commissioner and the Government say, in effect, that the redacted paragraphs concern only Powys Fadog and do not concern the River Lodge Hotel negotiations between the Government and Powys Fadog. In our view the entire contents of the letters "concern" both Powys Fadog and the negotiations. It is clear from their terms that they were only written because Powys Fadog was negotiating (or had negotiated) with the Government in relation to River Lodge Hotel and that everything said about Powys Fadog in the letters is said in that context. In particular it is clear from the final words of the redacted paragraph which we recite above and from Mr Morgan's response that the allegation about the people involved with Powys Fadog was intended, and understood to be intended, to support the contention that the Government ought not to have negotiated with Powys Fadog in relation to River Lodge Hotel and not for any other purpose.

6. We therefore reject the contention of the Commissioner and the Government that the redacted paragraphs were outside the terms of Mr Wong's request for information. It follows that we allow the appeal and issue a substituted decision notice requiring the Government to disclose them to Mr Wong. Our decision is unanimous.

7. We mention for completeness that there was a suggestion that Mr Wong had already obtained the redacted material and that the appeal was therefore pointless. Having read his email to the Tribunal dated 16 April 2012 we are satisfied that there is nothing in this point.

HH Judge Shanks

25 April 2012



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**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0010

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50353959039
Dated: 15 November 2011**

Appellant: Pol Wong

1st Respondent: The Information Commissioner

2nd Respondent: The Welsh Assembly Government

Date of Hearing: 19 June 2012

Date of Decision: 26 June 2012

**Before
HH Judge Shanks**

Attendances:

For the Appellant: Pol Wong in person

For the Respondent: Adam Sowerbutts

For the 2nd Respondent: Lucy Morgan

Subject matter:

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

Rule 41	Setting aside a decision which disposes of proceedings
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RULING

The Tribunal sets aside in part its decision dated 25 April 2012 and issues the directions set out at para 7 of the reasons below.

REASONS

1. Following a “paper hearing” in this case the Tribunal issued a decision on 25 April 2012 allowing Mr Wong’s appeal and ordering the Welsh Assembly Government (WAG) to supply certain redacted information to him by 25 May 2012. On 23 May 2012 WAG applied to set aside the decision under rule 41 of the Tribunal’s rules of procedure or for permission to appeal under rule 42. I directed a telephone hearing to consider the application which was held on 19 June 2012.
2. The paper hearing of the appeal followed a telephone directions hearing which took place on 23 February 2012 attended by Mr Wong, Mr Sowerbutts and Ms Morgan for the respective parties. The written directions I issued after the hearing recorded that the WAG was joined as Second Respondent to the appeal (para 3), that the appeal would be determined on the papers (para 1) and, most importantly for these purposes, stated at para 2:

It is agreed that the sole issue for resolution on the appeal is whether the information redacted from the penultimate paragraphs of documents A and C respectively is within or outside the terms of Mr Wong’s request for information.

That reflected my understanding of what had passed at the hearing and it was implicit so far as I was concerned that if the decision on the identified issue went in favour of Mr Wong then he would be entitled to be provided with the information in question. It is fair to note that until the telephone hearing WAG was not a party to the appeal and that it did not serve any form of Response until it did so on 16 March 2012 pursuant to para 5 of my directions.

3. WAG's Response at para 6 recorded the agreement as to the sole issue on the appeal and stated that their submissions were only relevant to that issue. It then referred to the Commissioner's decision notice and in particular paras 2-9 of a Confidential Annex thereto. Paras 3 and 4 of the Commissioner's Confidential Annex refer to a quite separate FOIA request made on 19 April 2011 covering the same information with which this appeal was concerned in which the WAG had issued a refusal notice citing the exemptions at sections 40(2) and 36(2)(c). The WAG also served Closed Submissions with its Response which confirmed those matters and went on to state that the separate request was now the subject of a separate investigation by the Commissioner.

4. The Tribunal met in private on 19 April 2012 and decided unanimously that the redacted information was within the terms of Mr Wong's request and ordered its disclosure. I accept that because of my understanding of the effect of what had been said at the telephone directions hearing the Tribunal paid no attention to the points mentioned above in para 3. WAG (while accepting the decision as to the scope of Mr Wong's request) say that this was a procedural irregularity and that the interests of justice require that the decision is set aside pursuant to rule 41 in so far as it orders disclosure of the information to enable it to rely on sections 40(2) and 36(2)(c).

5. I confess to quite considerable irritation at this turn of events. I fail to see any useful purpose in the parties agreeing that the sole issue on the appeal was "scope" unless an outcome favourable to the requestor would result in his getting what he was asking for; furthermore the costs of the whole exercise seem to me to be getting completely out of proportion. Assuming that there had been some confusion at the telephone directions hearing it was always open to the Commissioner or WAG to apply back to the Tribunal so that the position could be clarified. On the other hand I accept that if I had more carefully considered the matters referred to in para 3 above (which I effectively ignored as irrelevant) I would have sought clarification from the parties myself. In the circumstances I accept WAG's submission that there has been a procedural irregularity. Having reached that conclusion it seems clear to me that

justice requires that, one way or another, WAG should now have the opportunity to raise the exemptions provided by sections 40(2) and 36(2)(c) and that the requirements of rule 41(1) are therefore satisfied.

6. WAG suggest that the order for disclosure is set aside and that they should be allowed to issue a response under FOIA (by which I understand them to mean section 17) raising those exemptions. The effect of this would be that Mr Wong would be put right back to the beginning of the process in his pursuit of the redacted information, a result which I would regard as very unfair to him. Given the wide terms of section 58(1) of FOIA I do not think that the procedure suggested by WAG is necessary or appropriate and it seems to me that the Tribunal which has already been constituted to deal with this appeal can adjudicate on the exemptions WAG rely on in fairly short order.

7. I therefore issue the following order and directions (which were discussed in broad terms at the hearing on 19 June 2012):

(1) The decision of the Tribunal dated 25 April 2012 is set aside in part: the determination that the redacted information was within the scope of Mr Wong's request stands but the order for its disclosure is set aside and the Tribunal will now determine whether the WAG were entitled to rely on sections 40(2) and 36(2)(c) of FOIA to resist disclosure.

(2) By 16.00 on 27 July 2012 WAG must serve on the other parties and the Tribunal a written statement of its case in relation to sections 40(2) and 36(2)(c) along with any supporting material on which it relies. In so far as it requires to refer to the content of the redacted information it may redact the statement and supporting material served on Mr Wong but (i) it shall provide him with as much material as it can and (ii) it shall indicate clearly on the copies served on the Tribunal and the Commissioner what has been redacted.

- (3) Mr Wong and the Commissioner may respond to the material served by WAG provided they do so by 24 August 2012 and serve all other parties and the Tribunal. The Commissioner may redact the copy of his response to be served on Mr Wong subject to the same conditions as the WAG.
- (4) The WAG may respond to Mr Wong and the Commissioner provided it does so by 16.00 on 7 September 2012. The same conditions as to redaction and service apply.
- (5) The issues raised shall be determined without a hearing by the existing Tribunal (Judge Shanks and Messrs Wilkinson and Whetnall) either at a meeting or by telephone shortly thereafter on the basis of the existing bundle and any material served under paras (2) – (4).
- (6) Any party may apply to vary or add to these directions provided such application is made promptly, is in writing, is served on the other parties and sets out the reasons for it. In particular, Mr Wong may apply to the Tribunal if he decides on further reflection that he requires some form of hearing before the Tribunal reach a determination.

HH Judge Shanks

Dated: 26 June 2012