



IN THE FIRST-TIER TRIBUNAL Appeal No: EA/2013/0091 & 0092
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50470517 & FS50470523
Dated: 11 March 2013

Appellant: Anthony Hill

Respondent: The Information Commissioner

2nd Respondent: Dudley MBC

Heard on the papers

Date of Hearing: 21 October 2013

Before

Chris Hughes

Judge

and

Malcolm Clarke and John Randall

Tribunal Members

Date of Decision: 28 October 2013

Subject matter:

Freedom of Information Act 2000

Data Protection Act 1998

Cases:

Wise v IC (EA/2012/0081)

Thompson v IC (EA/2011/0144)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 11th March 2013 and dismisses the appeal.

Dated this 28th day of October 2013

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Mr Hill is a tenant of Dudley MBC. Some years ago works were carried out to his home. He has had concerns about them and has pursued his concerns with the Council over the years. During this time he has received a considerable amount of information from the Council and Council staff visited him to discuss his concerns. He has pursued matters through the Council's complaints procedure and then with the Local Government Ombudsman who made no findings against the Council. Mr Hill remained dissatisfied.

The first request for information FS50470517

2. On 5 September 2011 Mr Hill made a request for a range of information including the employment histories (dating back to 1984) with the Council of a series of named individuals employed by it (details at Decision Notice paragraph 6). The Council provided certain information and following discussions with the Information Commissioner's office ("ICO") and an internal review on 26 February 2013 Dudley wrote to Mr Hill giving information about the identifiable past and present members of staff. It noted that the information related to identifiable members and past members of staff and was personal data. It concluded that full disclosure of all the information requested would breach the Data Protection Act and therefore S40(2) FOIA exempted it from disclosure to Mr Hill. It gave details of current and (where there was a longer employment history) immediate previous post with the Council, indicating when individuals had left the Council and confirming that the Council had no record of employing one of the names supplied by Mr Hill. In addition to relying on S40(2) for non-disclosure of the other information the letter also indicated why the Council considered that the rest of the request fell within section 14 FOIA as being vexatious.
3. Mr Hill complained to the ICO about this refusal.
4. In the decision notice the ICO set out the scope of his inquiry arising from the complaint. He accepted that the withheld material was personal data and then

considered whether or not the disclosure would be in breach of the first data protection principal as being unfair or unlawful. He acknowledged that for certain public employees information about an individual's work role should normally be provided. He noted that the career history of an individual with an organisation they had worked with for a long period of time would describe a career path which resembled an individual's curriculum vitae. While snapshots of the information as to an individual's post at a moment in time would, over several decades, have been disclosed to a few members of the public, the proposed disclosure was of an individuals' career history which was held within a personnel file and which created an expectation of privacy in the individuals concerned. The individuals had indicated that they did not wish these historical career details to be disclosed.

5. The ICO noted that Mr Hill had explicitly indicated that gathering this information was part of a grievance he had against the Council and its officers and would be used in his publicity. The ICO noted that as a result the individuals could be exposed to harassment and that the disclosure would involve loss of privacy for the individuals concerned and had the potential for causing distress.
6. The ICO weighed these issues against the legitimate interest of transparency and accountability of public bodies and that while there was a public interest in demonstrating that officials were suitable for their posts it was not necessary for the detailed career path to be disclosed to demonstrate this, there were other means of securing the same result and the individuals concerned were not the most senior staff. He concluded that disclosure would be unfair and therefore a breach of the first data protection principle and non-disclosure was accordingly justified.
7. In his appeal against this decision Mr. Hill indicated that he wished to ascertain whether the individuals concerned had the correct qualifications for their current position, at the time they were promoted and thereby hold the council accountable. He indicated that he had provided the wrong name of one individual and now sought information with respect to a different name. With respect to the scope of the case investigated by the ICO Mr Hill stated:-

"I can neither deny nor confirm that I would like you or not to take into consideration points 1-4 or points 12-13"

8. In the light of this statement the Tribunal was satisfied that Mr Hill was not appealing with respect to any issues raised by those parts of his request. Furthermore the Tribunal can only deal with the information sought by the original request – Mr Hill cannot now seek to change the names which are the subject of his request. Mr Hill accepted that the information sought was personal data but argued that his request was reasonable and clearly indicated the extent of his disputes with Council officials. He disputed that there was any harassment or that anyone could feel distressed. He further argued that at least one of the posts was an important post given the scale of the council's housing operations. The ICO was therefore wrong to conclude that to disclose the withheld information would breach data protection principles.

Consideration of the First Appeal

9. In essence Mr Hill asserts an entitlement to a very high degree of transparency with respect to public servants:- *“surely a post of a civil servant should be of the utmost accountable and held up for scrutiny in the public domain as a leading example to the rest of us of how to conduct and act... as such should be filled by the very best person for the job”*. However that aspiration takes no account of the realities for middle ranking public employees who expect to deal with the public on the basis of their current role and responsibilities and not have the whole of their career history subject to scrutiny by the world as they go about their day to day responsibilities. The robustness and effectiveness of recruitment processes, training and management are the effective guarantee of the quality of staff. The Tribunal noted that Mr. Hill's request had not sought information on those issues, and the information he had requested on career paths would not inform the issue of whether postholders held appropriate qualifications for their role, which was the focus of his concern, therefore the disclosure of career pathways is of minimal value to what Mr Hill claims he wishes to achieve and represents a significant incursion into the private lives of individuals.
10. The ICO carried out a robust evaluation of the evidence and arguments with respect to this disclosure and concluded that it should not take place. In his appeal Mr Hill has not raised any substantive issue which has not been properly and fairly evaluated by the ICO and accordingly the Tribunal is satisfied that the decision notice is correct in law.

The second request for information- FS50470523

11. On 10 February 2012 Mr Hill made a telephone request for information relating to works carried out on his home some years previously. He had already made similar requests and had received information over the years, The council responded on 2 March 2012 (decision notice paragraph 5) setting out the request-
*“1 Why was it necessary to lay 1 floor 3 times, and a breakdown and total cost?
2 Why it was necessary to do the disabled bathroom twice, breakdown and total cost?
3) Why it was necessary to slab the front access twice, breakdown and total cost?
4) Slabbing of rear access, breakdown and total cost”*
12. Some information was provided and following a review by the council further information was provided. Mr Hill was dissatisfied and complained to the ICO that he had not been given all the information held by the Council.
13. In his decision notice the ICO considered whether information relating to the request was held, taking into account Mr Hill’s evidence and arguments and how the council had set about checking whether it held the information, why the council did not consider that it needed to hold the information and in all the circumstances of the case whether or not it was probable that the information was held.
14. The council had provided Mr Hill on 16 August 2011 with spreadsheets and job printouts for the council’s system summarising all the repairs made and the cost incurred relating to Mr Hill’s home since January 2004 and there were no specific breakdowns with respect to these four issues. It provided explanations as to why this might be the case. It had initially searched on the main housing management computer and paper system, but subsequently searched personal computers and found further information which was supplied in April 2012. The council had no documented evidence to suggest that information relating to this request had been destroyed. Where re-work needed to be carried out the cost would fall to the contractor – such costs would not be recorded by the council. Information was retained by the council in accordance with its legal obligations, the council had devoted considerable time to talking to Mr Hill and dealing with his requests – the ICO considered that the council had no desire to devote further time to such activity

by withholding information. The council confirmed that it dealt with numerous requests for information from Mr. Hill comprehensively.

15. The ICO therefore found that, on the balance of probabilities, the information was not held by the council.

16. In his appeal Mr Hill argued that information supplied to him previously had been incomplete since the amount charged by the contractor was less than it should have been: -

“Whereas my extensive knowledge of the building trade tells me a more realistic figure is in the region of £40,000, which means that either the information you have supplied is incorrect or missing vital parts. I have asked for the information detailing this many times now, I do not believe this is an unreasonable request, and the only reason I can imagine it being withheld is that the council is trying to hide something.

He went on to state:-

“The results I hope from this Tribunal are that the Council are more forthcoming and honest with its information. The fact that I have obviously been sent false information already in a kind of brush off, which most of the public would just accept and know no better does not fill me with great confidence in the system, in place inside the council.

You may call me naïve but I believed that the council worked for the people of the borough and that such a simple request would be met with nothing short of transparent honesty, and not blatantly falsified documents which someone over there must have spent time producing.”

Consideration of the second appeal

17. The council produced a considerable volume of evidence by way of explanation of its processes and how it had checked for the information which Mr Hill had requested. The ICO was satisfied by this and concluded that on the balance of probabilities nothing more was held. In the face of this evidence Mr Hill made an assertion based on his view of the likely costs of the work in the light of his experience and as a consequence invited the Tribunal to conclude that there had been deliberate suppression and falsification of the information.

18. In the response to the appeal the ICO relied on the decision of this Tribunal in

Thompson v ICO where the Tribunal stated that the ICO was:-

“entitled to accept the word of the public authority that it did not hold the letter and not investigate further in circumstances, as here, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or any evidence as to a motive to withhold information actually in its possession. Were this to be otherwise the IC with its limited resources and its national remit, would be required to carry out a full scale investigation in every case in which the public authority is not believed.”

He also cited *Wise v IC*:-

“where the issue is whether a public authority holds requested information, that burden requires some evidence, direct or, more probably circumstantial, that it does”

19. These statements are not in any sense binding on this Tribunal, however they are useful pointers to addressing the question the Tribunal faces.

20. Any major public authority will have a mass of data in many forms and will have an imperfect knowledge of what it holds. It deals with a request for information by searching for it. In this case it has considered where the information is likely to be and has searched, some information was found, and the search resulted in further information coming to light. It has spent a considerable amount of time (including visiting him in his home) in discussion with Mr Hill to try and allay his concerns. It has a reasonable explanation for why the detailed information on work carried out some years ago would not be held. The ICO was rightly satisfied that there was no more to be found. In response Mr Hill has raised a challenge with essentially two limbs – the first is that in his view the works should have cost more; however he has not adduced any cogent evidence for that and the terms on which a major housing authority contracts with its contractors are likely to be substantially advantageous to the council compared with open market rates for small contracts. He has also raised an allegation of misfeasance – forgery of documents, for which he has offered no evidence whatsoever.

21. For Mr Hill’s appeal to be successful he needs to demonstrate that the ICO has erred in law, or has based his conclusion on a material misunderstanding of the underlying facts. Mr Hill has not established either of these contentions. The ICO was, in the

circumstances, entirely justified in accepting that the council had properly looked for the information, but it was not there to be found. The Tribunal rejects the appeal and upholds the decision notice of the ICO.

Conclusion and remedy

22. Both appeals are dismissed.

23. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 28 October 2013