



Neutral citation number: [2024] UKFTT 628 (GRC)

Case Reference: EA/2023/0290

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

**Decided without a hearing
Decision given on: 19 July 2024**

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER RAZ EDWARDS
TRIBUNAL MEMBER MIRIAM SCOTT**

Between

SUE BRAMALL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2023/0290, set out below, is substituted for the Information Commissioner's Decision Notice reference IC-199652-L3V2 dated 18 April 2023 with regard to the request for information made to The Home Office by Sue Bramall dated 10 March 2022.

Substituted Decision Notice

1. The Home Office shall make a fresh response to the request for information made to The Home Office by Sue Bramall dated 10 March 2022.
2. That fresh response must make clear whether or not any information within the scope of any part of the request is held by The Home Office. If any such information is held, The Home Office must either disclose it or claim any relevant exemptions to disclosure (other than the exemption pursuant to section 38(1) of the Freedom of Information Act 2000).
3. The Home Office must issue such fresh response within 20 working days (as defined in section 10(6) of the Freedom of Information Act 2000) of the date on which the

Information Commissioner sends it notification of this decision in accordance with the Directions below.

4. Such fresh response will be subject to the rights given under section 50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.
5. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

Directions

6. The Information Commissioner must send a copy of this decision to The Home Office within 35 days of its promulgation, or (if there is an application to appeal this decision) within 14 days after being notified of an unsuccessful outcome to such application or any resulting appeal.

REASONS

Preliminary matters

1. In this decision, we use the following terms to denote the meanings shown:

Appellant: Sue Bramall.

Authority: The Home Office.

Commissioner: The Information Commissioner.

Confirmation or Denial: Confirmation or denial as to whether any of the Requested Information is held by the Authority.

Decision Notice: The Decision Notice of the Commissioner dated 18 April 2023, reference IC-199652-L3V2, relating to the Request.

Duty to Inform: The duty of a public authority to confirm whether or not it holds information which is requested, pursuant to section 1(1)(a) of FOIA (set out in paragraph 20).

Endangerment: Endangerment of the safety of, or the physical or mental health of, any individual (as referred to in section 38 of FOIA, set out in paragraph 29).

FOIA: The Freedom of Information Act 2000.

HMO: A house in multiple occupation.

Public Interest Test: The test, pursuant to section 2(1)(b) of FOIA (set out in paragraph 23), as to whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the Duty to Inform outweighs the public interest in disclosing whether the public authority holds the information.

Property: The property which is the subject of (and specified in) the Request.

Request: The request for information made by the Appellant dated 10 March 2022, as referred to in paragraph 6.

Requested Information: The information which was requested by way of the Request.

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision to numbered paragraphs are to paragraphs of this decision so numbered.
3. Nothing we say in this decision should be taken as an indication as to whether or not any of the Requested Information is held by the Authority.

Introduction

4. This is an appeal against the Decision Notice, which (in summary) concluded that the Authority was entitled to rely on section 38(2) of FOIA to refuse to confirm or deny whether it holds any information falling within the scope of the Request. The Commissioner did not require the Authority to take any steps.

Background to the appeal

5. The background to the appeal is as follows.

The Request

6. On 10 March 2022, the Appellant requested information from the Authority in the following terms:

"[Address redacted] is and [sic] HMO used to provide accommodation via SERCO under the AASC Contract.¹

Please provide anonymous details of the number and reason for calls to MIGRANT HELP regarding complaints about this property.

On a month-by-month basis, since the start of the current AASC contract and the 28/2/22, please provide:

A - total number of new housing complaints logged each month at this property

B - a breakdown of the above number by all types of complaint - for example (but not exclusively) damp, leak, broken heating, infestations,

C - total number of calls each month received in regard to housing complaints at this property (to include second or third calls to chase action on initial complaint)

D - total number of housing complaints resolved each month at this property and closed on MH system.

E - average time a housing complaint takes to be resolved at this property."

The Authority's reply and subsequent review

7. The Authority responded on 4 April 2022. It refused to confirm or deny that it held

¹ (The Decision Notice cited that 'HMO' was referring to a 'house in multiple occupation' and 'AASC Contract' was referring to an 'Asylum Accommodation and Support Services Contract'.)

the Requested Information, citing section 38(2) of FOIA (health and safety). The Authority's response also set out considerations in respect of the Public Interest Test.

8. Following an internal review, the Authority contacted the Appellant on 27 May 2022, upholding its position.
9. On 30 October 2022, the Appellant contacted the Commissioner complaining about the Authority's response to the Request.

The Decision Notice

10. In essence, the Commissioner concluded in the Decision Notice:
 - a. that the exemption under section 38(2) of FOIA was engaged in respect of the Request;
 - b. that the application of the Public Interest Test favoured maintaining the exemption; and
 - c. accordingly, that the Authority was entitled to refuse to confirm or deny whether it holds any information falling within the scope of the Request.

The appeal

The grounds of appeal

11. The Appellant's grounds of appeal were based on the Appellant's views that:
 - a. the Commissioner erred in concluding that the exemption under section 38(2) of FOIA was engaged in respect of the Requested Information, including because the test of whether harm "would" occur by a Confirmation or Denial had not been met; and
 - b. the Commissioner erred in concluding that the public interest in maintaining the exemption under section 38(2) of FOIA outweighed the public interest in a Confirmation or Denial. The Appellant considered that this was because (amongst other things) the Commissioner did not take into account that no issues had been reported giving rise to any concerns about the need to protect individuals living at the Property, nor the reasoning behind the Request which related to the need to protect those living at the Property.

The Tribunal's powers and role

12. The powers of the Tribunal in determining the appeal are set out in section 58 of FOIA, as follows:

"(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.”.

13. In summary, therefore, the Tribunal’s remit for the purposes of the appeal was to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

Mode of hearing

14. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
15. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

The evidence

16. The Tribunal read and took account of a bundle of evidence and pleadings. All of the contents of the bundle were read and considered, including all of the submissions from the parties, even if not directly referred to in this decision.

Outline of relevant issues

17. The primary issue which we needed to determine in the appeal was whether the Commissioner was correct to conclude, in the Decision Notice, that section 38(2) of FOIA was engaged such that the Authority was entitled to refuse to confirm or deny whether it holds the Requested Information.
18. If we concluded that section 38(2) of FOIA was engaged, then we would need to go on to consider the Public Interest Test and whether the Commissioner was correct to conclude, in the Decision Notice, that the public interest favoured maintaining the exemption of the Duty to Inform.
19. We deal with those issues below, but first we set out the applicable legislation and summarise relevant caselaw.

The law

The relevant statutory framework

General principles

20. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

“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.”.

21. In essence, under section 1(1) of FOIA, a person who has requested information from a public authority (such as the Authority) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

“Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”.

22. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold, nor an unconditional right even to be told if the information is held by the public authority. The rights contained in that section are subject to certain other provisions of FOIA, the relevant aspects of which (for the purposes of the appeal) we address below.

Exemptions

23. Section 2(1) of FOIA addresses potential exemptions to the Duty to Inform. That section provides:

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.”.

24. Section 2(1) of FOIA refers to both ‘exemptions’ and ‘exclusions’ but for convenience we shall just use the term ‘exemption’.
25. Where there is any applicable exemption as referred to in section 2(1) of FOIA, it negates the Duty to Inform. This means the public authority is permitted to neither confirm nor deny (sometimes known by the acronym ‘NCND’) whether or not it holds the requested information.
26. Pursuant to section 2(1) of FOIA, some exemptions to the Duty to Inform are absolute and some are subject to the application of a public interest test. Where an applicable exemption is not absolute and that public interest test applies, this means that a public authority may neither confirm nor deny whether or not it holds requested information if the public interest in maintaining the exemption of the Duty to Inform outweighs the public interest in disclosing whether it holds the information.

27. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. For the purposes of the appeal, the relevant exemption (as cited in the Decision Notice) is section 38(2) of FOIA. Section 38 is not included in that list.
28. Accordingly, in summary, section 38(2) of FOIA is an exemption which is subject to the Public Interest Test.

Section 38 of FOIA – health and safety

29. Section 38 of FOIA provides:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

Relevant Case law

30. Section 38 of FOIA is a prejudice-based exemption. In contrast to class-based exemptions (which protect information because it is of a particular type or class), prejudice-based exemptions protect information where its disclosure would or would be likely to harm a particular interest specified in that exemption. The same principles apply to exemptions to the Duty to Inform.
31. The exemption in section 38(2) of FOIA uses the phrase “would, or would be likely to”. The following statement from a First-tier Tribunal case² was subsequently confirmed as being the correct approach by the Court of Appeal in the case of *Department for Work and Pensions v Information Commissioner & Frank Zola*³:

“..there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”
32. The first limb referred to relates to prejudice which “would” occur and the second limb is about prejudice which “would be likely to” occur. Therefore “would” means that the prejudice in question is more probable than not, and “would be likely to” means that there is a real and significant risk of it happening.
33. The First-tier Tribunal, in another case⁴, took the view that there was no material difference between the word ‘endanger’ as used in section 38 of FOIA and the word

² *Hogan and Oxford City Council v Information Commissioner* [2011] 1 Info LR 588, paragraph 35.

³ [2016] EWCA Civ 758, paragraph 27 – see also *Carolyne Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.

⁴ *People For The Ethical Treatment of Animals Europe v Information Commissioner & The University of Oxford*. Case reference EA/2009/0076 (sometimes cited as [2010] UKFTT EA_2009_76 (GRC)); see paragraph 30 of that case.

'prejudice' as used in other applicable exemptions in FOIA. Whilst First-tier Tribunal decisions are not binding on us, we agree with that view. That case related to section 38(1) of FOIA (which confers an exemption from the duty to disclose information), rather than section 38(2) of FOIA (which confers an exemption from the Duty to Inform), but in our view this reasoning applies equally to both.

34. Applying the above to the context of the appeal, this means that if the Authority is to rely on the exemption in section 38(2) of FOIA, there must be some causative link between potentially giving a Confirmation or Denial and the Endangerment.

Discussion and findings; application of the law

35. We start with a preliminary point before turning to the other issues in the appeal.

Burden of proof

36. We note that the Commissioner submitted (in his response to the appeal) that the burden is upon the Appellant to demonstrate that the Decision Notice is not in accordance with the law. The Commissioner provided no legal authority to support that view. Section 58 of FOIA sets out the remit of the Tribunal, which we have cited above (paragraph 12). Our role is, essentially, to consider all of the evidence and make our decision based on it, applying the relevant law. It is sometimes referred to as a 'full merits review' regarding the lawfulness of a decision notice issued by the Commissioner.
37. In dealing with a complaint pursuant to section 50 of FOIA, the Commissioner does not make a resulting decision on the basis that the complainant or the public authority manages or fails to discharge any purported burden of proof. It is no different for the Tribunal's decision. Accordingly, the appeal does not involve a question of whether the Appellant has discharged a burden of proof regarding the matters which are the subject of her appeal. Our role is to consider all of the evidence in order to determine whether or not the Decision Notice involved an error of law, in accordance with our powers under section 58 of FOIA.

The primary issue

38. It may be helpful to reiterate and clarify that the primary issue we needed to determine is not whether there should be disclosure of any Requested Information which may be held by the Authority, but rather whether or not the Authority Office is entitled to neither confirm or deny whether it holds any of the Requested Information.
39. As noted in paragraph 13 of the Decision Notice, the Commissioner does not know whether the Authority does or does not hold information falling within the scope of the Request. Likewise, we also do not know whether or not any of the Requested Information is held by the Authority (there was no indication of this either way in the material before us). We concur with the view taken by the Commissioner that it is not necessary to know whether or not the Authority holds any of the Requested Information in order to reach a decision regarding the engagement of section 38(2) of FOIA.

Was section 38(2) engaged?

40. As we have noted, in order for section 38(2) of FOIA to be engaged, it requires that a

Confirmation or Denial “would, or would be likely to, endanger” the health (physical or mental) or the safety of any individual. If that section is engaged, then the Public Interest Test would then need to be applied.

41. In summary, the Commissioner’s view in the Decision Notice (also reflecting the Authority’s arguments) was that:
 - a. giving a Confirmation or Denial would confirm whether or not the Property is one that is used to house asylum seekers;
 - b. giving a Confirmation or Denial would attract attention from individuals or groups who are opposed to the provision of asylum accommodation or the asylum process in general; and
 - c. accordingly, this could attract protests at the Property, such that there is a real risk that this would endanger the physical or mental health of the individuals living there.
42. In support of that position, the Decision Notice cited an example of an incident regarding the Suites Hotel in Knowsley in February 2023 which housed asylum seekers and where there was significant disorder, including violence and criminal damage, because of the presence of asylum seekers there.
43. The Appellant’s position is that there is no such risk at the Property. She stated that it is well known in the local area that the Property is used to house asylum seekers. The Appellant cited in her grounds of appeal various organisations which assist the individuals living there, giving website addresses of those organisations. The Appellant also stated that the local community have been generally supportive of those living in the Property and there has been no trouble or other issues which put their welfare at risk.
44. The Appellant also argued that it would be very easy for people who were intent on targeting asylum seekers to discover the addresses of properties housing them, by identifying the property as an HMO through the public register of HMOs, by speaking to people in the local community or by reviewing local press coverage. The Appellant’s grounds of appeal also provided links to certain news articles in which hotels have been named as accommodation for asylum seekers.
45. The Commissioner submitted that, even if the Property were listed as an HMO, a member of the public would not, from that list, be able to identify the Property as one which houses asylum seekers. The Commissioner also stated that the websites for the organisations which were provided by the Appellant do not actually name the Property as being accommodation in which asylum seekers are housed. In respect of the links to news articles provided by the Appellant, the Commissioner commented that those articles do not refer to the Property.
46. The Commissioner further submitted that the only public reference, in the information provided by the Appellant in her grounds of appeal, to the Property being a property which houses asylum seekers was the Appellant’s own posting on the WhatDoTheyKnow website. The Commissioner contended that even if there were reference on a website to the Property being one in which asylum seekers were housed, or someone from the organisations referred to by the Appellant were to disclose

information which suggested this, a Confirmation or Denial would constitute official confirmation of that. In support of this view, the Commissioner referred to the case of *Commissioner of the Police of the Metropolis v Information Commissioner & Rosenbaum*⁵, in which the Upper Tribunal stated:

“Official confirmation adds something to other information in the public domain, even if that is credible information provided by third parties who are well placed to provide that information.”

47. The Commissioner accepted that anyone opposed to the housing of asylum seekers could, with sufficient time, effort and motivation, probably identify the Property as being one which houses asylum seekers (if applicable). However, notwithstanding that, the Commissioner’s view was that identification of the Property as being one which houses asylum seekers would be made much easier through any official Confirmation or Denial.
48. The Decision Notice recorded (in paragraph 22) that the Authority wished to rely on the ‘higher’ level of prejudice in section 38(2) of FOIA – namely that the Endangerment “would” occur should it issue a Confirmation or Denial (rather than “would be likely to” occur). As we have noted, this means that the Authority’s position was that the Endangerment is more probable than not. It is not clear from the Decision Notice whether the Commissioner himself considered that the Endangerment ‘would’ occur, or only ‘would be likely to’ occur. However, it would appear from paragraph 23 of the Decision Notice that the Commissioner accepted the Authority’s position that Endangerment ‘would’ occur.
49. The only evidence provided by the Commissioner in support of the view that there would be any Endangerment if there was any Confirmation or Denial was that of the significant disorder at the Suites Hotel in Knowsley (referred to in paragraph 42).
50. The Commissioner submitted that he was reasonable in accepting the Authority’s argument that the threat of reprisals, harassment and actual threats to any asylum seekers at the Property is very real and can include physical violence.
51. We accept the possibility that individuals at the Property could be subjected to threats or harm (and consequently that there could be Endangerment) should there be any Confirmation or Denial, but that is not what the law requires in order to engage the exemption in section 38(2) of FOIA. Given the stated position of the Authority (and, we believe, that of the Commissioner) that Endangerment would occur should it give a Confirmation or Denial, this means that the Authority would need to establish that the Endangerment is more probable than not. We find that there is insufficient evidence to support that position and we consider that the Commissioner was wrong to accept the Authority’s arguments (as noted in paragraph 50) on the basis of the available evidence. Even considering the lower level of prejudice (namely whether there is a real and significant risk of Endangerment should the Authority give Confirmation or Denial), we still find that there was insufficient evidence to support a conclusion that there was such a risk.
52. We recognise that assessing prejudice for the application of relevant exemptions in FOIA is a speculative task, in that it involves an assessment of the potential future

⁵ [2021] UKUT 5 (AAC), paragraph 55.

prejudice by considering what would, or would be likely to, occur. However, using the words of the First-tier Tribunal in another case regarding the potential application of a prejudice-based exemption: “it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely”.⁶ We find that there is no basis for extrapolating from the available evidence that Endangerment would or would be likely to occur if there was a Confirmation or Denial. We conclude that the Commissioner erred in this regard by forming his view based only on the Authority’s arguments and the limited evidence regarding the incident at the Suites Hotel in Knowsley in February 2023. In other words, we find that the Commissioner’s view in the Decision Notice was based largely on mere assertion from the Authority in respect of the potential Endangerment without sufficient evidence to support those assertions. In this regard, we have also taken into account that there was no evidence before us to contradict the Appellant’s arguments that:

- d. the disorder at the Suites Hotel in Knowsley did not appear to have occurred as a result of any official confirmation by the Authority regarding the housing of asylum seekers there;
- e. it is well known in the local community that the Property houses asylum seekers and there have been no issues to date, therefore the risk of there being an issue following an official confirmation from the Authority was very low;
- f. there are other locations where it is well known that asylum seekers are housed, without any issues being reported at any of those; and
- g. there are locations which have been officially confirmed by the Authority regarding the presence of asylum seekers, including thirteen Immigration Reporting Centres which are listed on the Authority’s website⁷, Immigration Removal Centres⁸, and The Bibby Stockholm barge in Portland.

53. We also note that the Appellant conceded the possibility of there being a risk to the health and safety of individuals housed on The Bibby Stockholm barge, but stated that nevertheless the Authority made the decision to “officially confirm the status of those individuals”. Our conclusions above have also been formed, in part, because we cannot reconcile (on the one hand) the view of the Commissioner and the Authority that a Confirmation or Denial would endanger the health or safety of asylum seekers at the Property with (on the other hand) the publicly-known existence of various locations at which asylum seekers can be found - some of which are published or confirmed by the Government or the Authority itself.

54. The Appellant stated, in her reply to the Commissioner’s response to the appeal:

“The general argument put forward that official confirmation is likely to lead to a risk to the individuals being housed is not supported by the evidence available, and neither the Home Office or the ICO have identified why, in this particular case, there would be a risk to those specific individuals if official confirmation of this specific site were to be provided.”

55. That is a cogent view with which we agree. As we have stated, insufficient evidence

⁶ *Colin P England v London Borough of Bexley and the Information Commissioner* EA/2006/0060 and 0066, paragraph 62.

⁷ www.gov.uk/immigration-reporting-centres

⁸ www.gov.uk/immigration-removal-centre

has been put forward to support the view that there would be, or would be likely to be, any Endangerment by any Confirmation or Denial. Whilst we accept that the incidents at the Suites Hotel in Knowsley in February 2023 illustrate that there is a possibility of Endangerment, a mere possibility is not sufficient to engage section 38(2) of FOIA. Whether something 'could' happen is not the same as whether something 'would' or 'would be likely' to happen, as required by that section and as confirmed by the case law we have referred to.

The Public Interest Test

56. For completeness we record that, having determined that section 38(2) of FOIA was not engaged, it is not necessary for us to go on to consider the Public Interest Test.

Final conclusions

57. For all of the reasons we have given, we find that the Decision Notice involved an error of law in concluding that section 38(2) of FOIA was engaged in respect of the Request. Accordingly, the Authority was not entitled to rely on that section to refuse to confirm or deny whether it holds any of the Requested Information.

58. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 17 July 2024

Promulgated on: 19 July 2024