

Information Tribunal

Appeal Number: EA/2005/0004

Freedom of Information Act 2000 (FOIA)

**Heard at Procession House London
On 14 October 2005**

Decision Promulgated

.....11/11/2005.....

Before

INFORMATION TRIBUNAL CHAIRMAN

John Angel

and

LAY MEMBERS

Malcolm Clarke and Suzanne Cosgrave

Between

EDWARD ANTHONY BARBER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr T Pitt-Payne

Decision

The Tribunal is minded to substitute a different Decision Notice. However in view of Mr Barber's subsequent request under FOIA, which has resulted in Mr Barber receiving information from the Inland Revenue, the Tribunal has decided to adjourn the hearing so as to allow the Information Commissioner, with the help of Mr Barber, to review all the information already provided to Mr Barber by the Inland Revenue and consider, in the light of the information already provided to Mr Barber,

what further information, if any, could still be provided by the Inland Revenue, in order for them to comply with the original FOI request, the subject of this appeal. The Respondent should then report back his findings to the Tribunal, including details of the information already provided to Mr Barber, by 6 January 2006. In the light of the report the Tribunal will then substitute an appropriate Decision Notice.

Reasons for Decision

The request for information

1. Under s.58(2) of FOIA the Tribunal when considering whether the Decision Notice against which an appeal is brought is not in accordance with the law, or to the extent that the Notice involved an exercise of discretion by the Commissioner that he ought to have exercised his discretion differently, may review any finding of fact on which a Decision Notice is based.
2. In the late 1990s the Inland Revenue introduced Self Assessments, which resulted in delays in tax refunds. Mr Barber's wife was affected by these delays and Mr Barber suggested ways of dealing with the problem to the Inland Revenue. There followed lengthy communication between Mr Barber and the Inland Revenue which eventually resulted in a FOIA request. In a letter dated 3 February 2005 Mr Barber requested that the Inland Revenue disclose what action it had taken in relation to several examples of what he described as 'maladministration' and 'failed standards' in respect of the prioritisation of identifiable Self Assessment(SA) refunds between the date of the introduction of self assessment and June 2003. As already mentioned this request had followed, what could be described as, a long dispute between the parties. Mr Barber had suggested a reform of the system in and around September 2000 and as far as he was concerned the Inland Revenue did not deal with the matter fully until June 2003, when they issued IR Newsboard Message: 434/03 instructing staff working on SA returns to deal with them in a way similar to Mr Barber's original suggestions in 2000.
3. The Inland Revenue did not agree with Mr Barber's assertion of failed standards and in a letter of 17 February David Varney the Chairman of the Inland Revenue stated that they "therefore have no information on this to provide you with." Mr Barber then wrote two further letters attempting to clarify his request which resulted in the Inland Revenue in effect confirming their refusal of the request.
4. The Information Commissioner (the Commissioner) in his letter to Mr Barber of 16 May 2005 attaching the Decision Notice date 16 May 2005 (the Notice) found that Mr Barber's request for information under FOIA was "framed in a way that levelled particular allegations and criticism at the Inland Revenue" and that the Inland Revenue disagreed with Mr Barber's assessment that there had been failed standards. The Commissioner, through one of his Complaints Resolution Officers, concluded in the letter of 16 May that the Inland Revenue "can reasonably and correctly state that they have no information to provide and are thus unable to meet your request." The Commissioner in the Decision Notice supported the view that the Inland Revenue were thus unable to meet Mr Barber's request.

5. Under s.1(1) FOIA there is no definition of a valid or effective request as such. The only provision is that "any person making a request for information to a public authority is entitled ...to be informed by the public authority whether it holds information of the description specified in the request." There is no restriction on what that "description" might be. However, where the public authority cannot easily "identify" the information then s.1(3) provides a mechanism whereby the authority can seek to clarify the request and if this further information is not supplied then the authority is not obliged to comply with the request. There is no evidence that the Inland Revenue exercised this right under s.1(3).

6. The Commissioner in his Notice finds that Mr Barber's "request for information is framed in general and subjective terms focusing on the complainant's opinions of the alleged actions of the Inland Revenue" and, in effect, because the Inland Revenue did not accept those opinions they were justified in refusing the request.

7. Let us examine Mr Barber's request. In his letter of 3 February he finishes with the sentence "Will you please disclose what action has been taken as regards each of these instances of failed standards." Prior to this line he gives five examples of what sort of information he is looking for. Each example is prefaced with terms such as 'failure', 'resistance' and 'refusal'. In his letter of 19 February 2005 he withdrew the general statement "instances of failed standards" in the first part of his letter of 3 February but again repeated his request in terms "I asked you to disclose what action has been taken in respect of five aspects of the Departments activities..." In his letter of 22 February 2005 Mr Barber expresses himself by saying "what I had in mind when I asked what action had been taken as respects certain aspects of the Revenue's work". In Mr Barber's evidence before the Tribunal he reinforced the view that his request included a formal request for details of actions, although he also admitted that he was hoping that the information he would receive from the Inland Revenue would show that they accepted fault on their behalf.

8. Whilst Mr Barber's language in his letters in February 2005 taken in isolation might appear to be accusatorial, this must be viewed in the historical context of his letters and other communication expressing concerns about delays of refunds of tax in the year 2000 and afterwards. A public apology concerning delays on the part of the Inland Revenue was made in May 2000 and was broadcast publicly via the BBC as documented in IR Newsboard 299/00. The statements within the IR Newsboard message 434/03 announcing the change in the system for identifying and prioritising refunds included a statement that "there is a lot of concern amongst our customers regarding the time it takes us to process returns especially in cases where a repayment is due." The message then elaborates on this issue, "This in turn leads to complaints and rework." The interpretation of the phrase "and rework" makes clear that the internal processes within the Inland Revenue were not only causing delays which were resulting in complaints from the public but leading to additional work - in fact repeated processing - by the Inland Revenue. In this context it is not surprising that a member of the public might reasonably construe that the delay in making refunds over such a long period could be capable of being interpreted as a 'failure' on the part of the Inland Revenue and that many years of delay in resolving the problem, a possible solution to which had been made to the Inland Revenue several years earlier, might reasonably be described as 'resistance to reform'. Therefore we do not find it accurate to describe these terms as subjective and opinionated. Any reasonable Public

Authority, knowing the historical context of the request in this case, would have understood the basis of Mr Barber's request. In fact there is evidence in the correspondence before the Tribunal that some of the information requested by Mr Barber may have already been provided.

9. If Public Authorities are permitted under the FOIA to pick and choose which requests they respond to on the basis of whether or not they approve of the language used by requesters, this would make a mockery of the legislation. If the language causes difficulty in identifying the information then they can resort to s.1(3) as outlined above.

10. Mr Boyd for the Information Commissioner in his evidence admitted that Mr Barber in common with many who have complained to the Commissioner use strong language arising from their frustration with dealing with complaints against a public authority, but that would not in itself invalidate the request. We find it difficult to understand the Commissioner's interpretation of the request as stated in his Notice as "framed in general and subjective terms focusing on the complainant's opinions of the alleged actions of the Inland Revenue."

11. The Inland Revenue at the time of the initial request by Mr Barber and subsequently the Commissioner in relation to the complaint seem to have been overly influenced both by the history of the complaints made by Mr Barber and the style of his letters. There is no evidence that the Commissioner actually contacted Mr Barber to discuss his complaint with him personally. Also the Commissioner seems to have taken the view that because the Chairman of the Inland Revenue refused his request that there was no further point in contacting the Inland Revenue. In evidence Mr Boyd considered that the Inland Revenue's letters of 17 February and 3 March seemed to be referring to the historical complaint rather than solely the FOI request, and there was no apparent referral of the request to the Inland Revenue's FOI department, who usually dealt with responses to such requests. In these circumstances we consider it would have been a more suitable course for the Commissioner to have made further investigation of the Inland Revenue and Mr Barber before making a decision.

12. We find that Mr Barber had a genuine and unfulfilled requirement to know what actions had taken place in relation to the prioritising of refunds of overpaid tax. This we consider was an integral part of the initial request by Mr Barber which the Inland Revenue should have been able to determine from Mr Barber's three letters in February 2005. As a result we find the Commissioner was wrong in law to find that the Inland Revenue "have no information to provide in response to his request". Alternatively, to the extent that the Notice involved an exercise of discretion by the Commissioner we find that he ought to have exercised his discretion differently. This, in effect, was a finding by the Commissioner that Mr Barber's request was an ineffective request under s1 FOIA, based on the form of that request. We do not agree with this finding, based on our findings of fact as set out above and bearing in mind what we have already said about s.1 of the Act

Conclusion

13. Following our above findings we are mindful to allow the appeal and substitute a new Decision Notice. However, in his evidence Mr Barber informed the Tribunal that he had, subsequent to this request to the Inland Revenue and the sequence of events giving rise to this appeal, framed another request to the Inland Revenue concerning the background to the IR Newsboard Message 434/03. This request had been complied with under FOIA without incident and Mr Barber had been provided with notes, minutes and other relevant material concerning the background to the IR Newsboard Message in question. As a result he has received some if not all the information he might have received had the request, the subject of this appeal, been complied with.

14. Mr Pitt-Payne in his final submissions made a very helpful suggestion of a way forward in the circumstances of cases like the present appeal. We are going to ask the Commissioner to take certain further steps and, once those steps have been taken, we are going to ask the Commissioner and Mr Barber to come back before us and report on the outcome of those steps and, in the light of that report, we will then decide what substituted Decision Notice we should serve. The Tribunal, therefore, adjourns the hearing so that the parties can review all the information already provided to Mr Barber by the Inland Revenue and consider, in view of the information already provided to Mr Barber, what further information could still be provided by the Inland Revenue, if any, in order for them to comply with the original FOI request, the subject of this appeal. The Commissioner should then report back his findings, including details of the information already provided to Mr Barber, to the Tribunal by 6 January 2006. In the light of the report the Tribunal will then substitute an appropriate Decision Notice.

Other matters

15. Several other matters arose from this case, which although unnecessary to consider in order to determine this appeal, are matters the Tribunal intends to comment on, particularly because Mr Boyd sought guidance from the Tribunal on these matters.

Applications under s.50 FOIA

16. It is not for the Tribunal to determine how the Commissioner should conduct his investigations when considering a complaint under s.50 FOIA. However the Tribunal notes that the Commissioner in coming to his decision in relation to Mr Barber's request did not appear to communicate in any substantive way with Mr Barber or the Inland Revenue until sending out the Decision Notice, except perhaps to acknowledge the complaint and respond to enquiries on the progress of the investigation. We would have thought that there would be very few complaints where the Commissioner could only rely on the complaint notice and any accompanying documentation, particularly where the complainant is not represented.

Advice and assistance

17. In the preliminary stages of this appeal the Tribunal asked whether the Commissioner had considered whether the Inland Revenue had provided advice and assistance, under s.16 FOIA, to Mr Barber in relation to his request. The Commissioner responded that he had not and that as Mr Barber's complaint did not specify this respect, which the

Commissioner says is a requirement under S.50 FOIA, the Commissioner was under no obligation to consider whether the Inland Revenue had complied with s16.

18. We have not had to make a finding in relation to s.16 in this appeal. However, we would observe that a complainant in person should not be expected to be familiar with all the provisions of Part I of FOIA and that just because a complainant does not specify a breach of the duty to provide advice and assistance in his complaint, that should not mean that the Commissioner is under no further obligation to consider the public authority's duty in this respect. We come to this conclusion because we consider that where an authority has not complied with its duty under s.16 this may go to the very nature of the request and that any exercise of discretion by the Commissioner which does not take this into account may be flawed. Moreover the Commissioner has a general duty to promote the following of good practice by public authorities under s.47(1) FOIA so as to promote the observance of the requirements of the Act. Again if he does not consider the s.16 duty then it could be argued that the Commissioner is in breach of s.47, particularly because a Code of Practice has been provided under s.45 of the Act to cover this area.

19. As a result of the above observation it may be helpful for the Tribunal to outline what in practice this might mean. It is suggested that the Commissioner should consider when investigating a complaint, whether or not compliance with s.16 has been specified in the complaint, drawing the attention of the parties to the duty of the authority under s.16 to provide advice and assistance and the guidance in the associated Code of Practice issued by the Secretary of State. The hope is that by drawing the matter to the parties attention it may help to deal with the request, avoiding the need for the Commissioner having to make a decision in the matter.

Signed

Date: 09/11/2005

John Angel
Chairman

