

Information Tribunal

Appeal Number: EA/2005/0031
FS50084406

FREEDOM OF INFORMATION ACT 2000

Determined on papers

Decision Promulgated

1st June 2006

Before

**Christopher Ryan – Deputy Chairman
Jenni Thomson – Lay Member
Ivan Wilson – Lay Member**

Between

GLEN MARLOW

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

We have decided that the Decision Notice issued by the Information Commissioner on 5 December 2005 should not stand and that we should issue a substituted Decision Notice. The terms of that substituted Decision Notice are to be decided at a further determination or hearing, once we have been provided with the additional information that we need for that purpose.

Reasons for Decision

- 1 On 5 December 2005, the Information Commissioner (“the Commissioner”) issued a Decision Notice on a complaint by Mr G Marlow. The Commissioner’s decision was that a request by Mr Marlow for certain information from Melton Borough Council (“the Council”) had not been responded to within 20 working days, as required under Section 10(1) of the Freedom of Information Act 2000 (“FOIA”). This appeal is not concerned with what the Decision Notice said, however, but with what it did not say. The essence of Mr Marlow’s complaint is that the Commissioner did not adjudicate on a related issue, which the appellant considered formed a legitimate part of his complaint.
- 2 In order to understand what that issue was, and to decide whether the Commissioner should have made a decision on it, it is necessary to summarise the history of the dispute between Mr Marlow and the Council.
- 3 In early 2005, Mr Marlow was in correspondence with the Council on certain issues regarding the collection of household waste. We are not concerned with the detail. On 1 March 2005, the Council wrote to Mr Marlow and, in an apparent attempt to explain its stance on one of those issues, enclosed what it described as “the relevant sections of the Environmental Protection Act as it has now been amended by the Household Waste Recycling Act 2003”.
- 4 Mr Marlow replied to that letter on 16 March 2005 and sought clarification on the interplay between the two statutes referred to in the 1 March letter. On 1 April 2005, the Council wrote to him with an explanation. It explained that the Environmental Protection Act 1990 had been largely amended by the Household Waste Recycling Act 2003. The letter then said:

“HMSO print legislation as it is passed by Parliament, they do not subsequently amend Acts of Parliament and reprint them as amended”.

“The document sent to you was printed from a formal advisory system for lawyers. It was printed on 16 February 2005 - hence the date”.
- 5 We infer, from this correspondence and from further statements in subsequent correspondence, that the Council’s executives were well aware of a number of facts in relation to the availability of statutory material in this country. These included the following:

- (a) The amendment of a statute is frequently effected by means of a subsequent statute setting out the words that are to be deleted from, or added to, specific provisions of the earlier one.
- (b) Generally, no official version of the original statute, incorporating those deletions and additions, is generated as part of the legislative process.
- (c) However, commercial publishers will often create unofficial versions in order to provide a convenient means of reading the statute in its amended state.
- (d) Those publications are available both in hard copy, printed, form and as part of an online service that may be interrogated over an electronic communication link. An online service would generally permit the text to be copied into the memory of the enquirer's computer or to be printed direct from screen.
- (e) One of the publishers providing such a service operates under the abbreviated title "Butterworths Direct".
- (f) The Council had accessed Butterworths Direct and either downloaded an updated version of the relevant statute, or generated a print of it direct from screen, and had sent a copy to Mr Marlow, the copy bearing the date when the search had been conducted.

6 We also infer that Mr Marlow was not aware of these facts. There is no reason why he should have been. However, the consequence was that he misunderstood the Council's reference to a "formal advisory system for lawyers". The phrase is misleading, even for those who are familiar with the Butterworths service, and it is unfortunate that the Council should have, first made an unjustified assumption that Mr Marlow would be familiar with online services for publishing statutory material and, secondly, adopted obscure language by which to refer to it. Had the Council made the position clear, either in its letter of 1 April, or later in its communications with Mr Marlow, the effort and expenditure that has been involved in this appeal might have been avoided. Mr Marlow's misunderstanding led to the sequence of events summarised in the following paragraphs.

7 On 17 April 2005 Mr Marlow wrote to the Council, his letter including the following:

"You have also kindly referred to a "formal advisory system for lawyers", although I am unclear whether or not you are claiming information/law contained in this system as

legal authority for the MBC's [i.e. the Council's] refusal to collect side waste. Are you so claiming?

“In any event, such information as may be contained within that system must also be within the public domain if it is the law of England. If you are maintaining that this “lawyers only information” is legal authority for [the Council], please let me have hard copies from the system of that information. I emphasise that I do not require copies of an entire act, but merely any sections relating specifically to side waste collections, et cetera, which you believe authorises non-collection/removal.”

We will refer to this request from Mr Marlow as the “Advisory System Issue”.

- 8 Mr Marlow has asserted that he did not receive any response from the Council on the Advisory System Issue and we have not seen any material suggesting that he did.
- 9 Mr Marlow's letter then goes on:

“In addition, and with regard to the document you sent which, I understand, was printed on 16 February 05, I note that item (5) under receptacles for household waste is missing. What is the content, in full, of this missing item?”

That material was not sent to Mr Marlow until after the expiration of the 20 working days within which a public authority is required to comply with a request for information (under section 10 of the FOIA). We will refer to this as the “Delayed Information Issue”.

- 10 Subsequently Mr Marlow made a complaint to the Commissioner. None of the material provided to us has enabled us to determine the date of that complaint or its precise terms. However, we infer from a letter from the Commissioner to Mr Marlow dated 22 June 2005, in which the Commissioner sought clarification on a number of issues that were apparently open at the time, that the Commissioner was at that time considering a complaint from Mr Marlow in respect of both the Delayed Information Issue and the Advisory System Issue. It is certainly clear that the Commissioner asked for information from the Council, in general terms, on both issues and received the following response on the Advisory System Issue, in a letter from the Council dated 19 July 2005:

“The third question - regarding the meaning of the extract of legislation given to Mr Marlow from the Butterworths Direct online law service - relates to the extract sent

to Mr Marlow in our letter dated 1 March 2005. Clearly, legislation exists independently of the authority, and is, technically, information available by other means, but we considered it helpful to try to provide a summary of the relevant legislation. Mr Marlow has then entered into a lengthy correspondence regarding the meaning of the legislation - including telling us that the amendments to the Environmental Protection Act arising from the Household Waste Recycling Act 2003 are not relevant. The matter of the interpretation of the legislation is beyond the scope of disclosure under FOIA 2000, and any reply we would make to this matter is not covered by the 20 day disclosure rule of the Act.”

- 11 There was no significant further progress on the matter until the Commissioner wrote to Mr Marlow on 9 November. By that stage, the Commissioner had apparently decided that the Advisory System Issue ought not to form part of Mr Marlow’s complaint. He wrote:

“Having discussed this matter within this office, I can now advise you that this [the Advisory System Issue] would not be considered a request valid for the purposes of the Act. The Act provides a right of access to recorded information; this is a request that is clearly not for recorded information held by Melton Borough Council. It appears to be a question to the addressee that would be answered or otherwise through the addressee’s own knowledge rather than with recorded information. I would stress that the Act does not require a public authority to create information that you have asked for, it requires that public authorities provide access to information that they do hold. You also appear to ask for a copy of what seems to be an excerpt from an item of legislation. I would advise that if you wish to receive copies of legislation, you should contact the HM Stationery Office.

As this request is not considered a request for information valid for the purposes of the Act, the Commissioner will not issue a Decision Notice in connection with this request. This aspect of your complaint is considered closed.”

The Commissioner then went on to say that he would issue a decision on the Delayed Information Issue if Mr Marlow wished to press his complaint, notwithstanding that he had received the information by that date.

- 12 By letter dated 11 November 2005, Mr Marlow confirmed that he did require a Decision Notice to be issued in respect of the Delayed Information Issue. However, he also went on to

explain why he considered that the Commissioner should also adjudicate on the Advisory System Issue. It is clear to us that Mr Marlow was at this stage still under the impression that the Council's "formal advisory system for lawyers" was something other than an electronic subscription library of Parliamentary materials, including statutes. Possibly, he was under the impression that it was some kind of manual used by officials of the Council to deal with household waste issues. Neither the Council nor the Commissioner appears to have explained the position to him at any stage. Accordingly he wrote in that letter:

"When I received notification from [the Council] that it was using this system as a basis for its response to an enquiry from myself, I checked (as a computer illiterate) with librarians, both public and academic, if there was any printed material available on this subject. Having located nothing, I then checked with HM Stationery office in Birmingham and was advised that no details were available of a "formal advisory system for lawyers" and that HMSO were unaware of the existence of such a system.

"At that stage, I requested of [the Council] the details in printed form (hard copy) of the system to which it had referred me. The Council must hold that information in order for it to have used it in its original response to me in the first instance and for it to have referred me to it in the second instance. Thus, I did NOT ask the Council to supply information it did not hold, as you have suggested.

"Nor did I ask for a copy of an exert from an item of legislation as you have suggested, since the "formal advisory system for lawyers" (if such a thing even exists) is not an item of legislation and [the Council] has never claimed it was such. I merely requested a copy of it.

"[The Council] alluded to the system and I am, therefore, entitled to assume that such does exist and that [the Council] has used it as a point of reference, then it must be on record and constitute "recorded information" within the meaning of the FOI Act and as I have been quite unable to locate this information elsewhere, in spite of considerable effort on my part, I really cannot appreciate how you have arrived at the conclusion that my request is not considered a "request for information". [The Council] must hold, formally, such information and I am, thus, entitled to it."

- 13 There was no further correspondence on the subject and the Decision Notice issued on 5 December 2005 made no reference to the Advisory System Issue.

- 14 On 22 December 2005, Mr Marlow lodged an appeal to the Tribunal on the basis that the Commissioner had failed to address the Advisory System Issue and relying on his correspondence with the Commissioner to illustrate the grounds of his appeal. The Commissioner lodged a Reply to the Appeal on 1 February 2006 in which he recorded that the material sent to Mr Marlow by the Council was an extract from Butterworths direct online law service. He then reiterated the statement in his 9 November 2005 letter to the effect that the request for information was not a valid one and argued that the material made available to a subscriber of that service was not information held by the Council in recorded form. The parties agreed that we could determine the appeal without a hearing.
- 15 In our view, it was not open to the Commissioner to deal with the Advisory System Issue in the way that he did. Section 50(2) of the FOIA provides that on receiving a complaint:

“... the Commissioner shall make a decision unless it appears to him -

- (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority ...
- (b) that there has been undue delay in making the application,
- (c) that the application is frivolous or vexatious, or
- (d) that the application has been withdrawn or abandoned”.

None of those exceptions applies and the Commissioner was therefore required to issue a Decision Notice incorporating his decision - FOIA Section 50(3)(b). The reason, set out in his letter of 9 November 2005, as to why he did not intend to include the Advisory System Issue is not justified. Accordingly, his Decision Notice was not in accordance with the relevant law and it cannot therefore stand.

- 16 FOIA Section 58(1) provides that in those circumstances we may “allow the appeal or substitute such other notice as could have been served by the Commissioner”. Our difficulty in substituting our own decision is that we do not have all the information we believe we would need to do so. Nor do we have the Commissioner’s powers of investigation (or his resources) in order to fill the gaps in our knowledge. We have therefore decided that we should adjourn further consideration of the content of the substituted Decision Notice and give directions under Rule 14 of the Information Tribunal (Enforcement Appeals) Rules 2005

as to the further steps that should be taken in order to assist the Tribunal to determine that issue.

- 17 Before setting out those further directions, we will deal with the information that we do have and the reasons why we believe that we need a little more information in order to finalise our decision.
- 18 We do know that the Council apparently subscribed to the Butterworths Direct online service, which entitled it to interrogate a database of relevant legislation online and, in this case to either download and print, or to print direct from screen, the text of a particular statute in its amended form.
- 19 It is clear that both the particular material that was printed off and sent to Mr Marlow, as well as the complete database of statutory material, falls within the meaning of “information” for the purposes of the FOIA - Section 84 says that the term means “information recorded in any form”.
- 20 The obligation of a public authority under Section 1 of the FOIA is to state whether or not it “holds” information requested and, if so, to disclose that information, unless it is covered by one of the exemptions set out in the Act. To what extent, therefore, can it be said that the Council “held” information contained in the Butterworths database at the time when Mr Marlow made his request? Once particular information on that database has been identified, selected, downloaded and saved on the subscriber’s computer system then it is in our view clearly information that is “held” by the subscriber. Information printed direct from screen is also “held” by the subscriber who has possession of the printed version. Some information that fell within either of those categories has, of course, already been provided to Mr Marlow, under cover of the Council’s letter of 1 March 2005.
- 21 The question of what other information on the database may properly be regarded as “held” by a subscriber will depend on two factors. The first is the terms of the contract between the subscriber and the owner of the database and the second is the technical means by which the subscriber may access the database. The two are, of course, connected in that the contract between the parties is likely to place limitations on the right to access/download material, and technical features will go some way to enforce those restrictions. The contract may, for example, limit the number of individuals or individual computers that may access the database. Or it may provide that only a limited number of searches may be conducted

simultaneously. In both cases, the communication system between the subscriber and the database may monitor and block excessive usage. In other respects, the control imposed by the subscriber will be purely contractual. It may provide that information obtained from the database must be used only for the subscriber's own purpose and must not be distributed as part of a separate commercial service to third parties. Alternatively, it may allow for reproduction and use, provided that there is adequate acknowledgement of source and copyright.

- 22 We have no doubt that in the great majority of cases the total body of information, held on a third party's database and capable of being accessed by a public authority under subscriber rights of the type that we have described in the preceding paragraph, should not be characterised as having been "held" by the public authority. It is not so easy to discern the stage between that situation, at one extreme, and the downloading and/or printing of a specific item, at the other, at which it may be said that the information is "held" by the subscriber. It is conceivable that cases will exist where the subscriber has such unrestricted rights to access, use and exploit a third party's database (perhaps subject to appropriate attribution) that it may be said that information on it is "held" by the subscriber, even before an online search facility is operated in order to identify a particular item or items. It is for that reason that we do not believe that we have sufficient information to make a reliable decision on the point. An investigation of the contractual and other arrangements between Butterworths Direct and the Council may well show that the Council did not, at the relevant time, "hold" any relevant information beyond that which was provided to Mr Marlow. However, we do not believe that decisions of this nature should be made on the basis of assumptions or guesswork and, although we have been reluctant to pass this matter back to the Commissioner, we have decided that this is the correct step to take. Accordingly, we propose to direct the Commissioner to make such enquiries and investigations as are necessary in order to establish the nature of the relationship between the Council and the publishers of the Butterworths Direct service and to provide that information to us to enable us to issue a substituted Decision Notice. The detailed directions as to the time needed by the Commissioner to complete this task, and the manner in which the information he uncovers may be made available to the Tribunal, may be left to be determined either in

correspondence between the Tribunal and the parties or, if unavoidable, at a pre-hearing review.

Signed

31st May 2006

Christopher J L Ryan

Deputy Chairman