



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL**

**Appeal No: EA2011/0230**

**BETWEEN:**

**AMANDA PERRYMAN**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**STRIKE OUT RULING**

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**RULING in relation to the Information Commissioner's Decision Notice No: FS503086971 dated 27<sup>th</sup> September 2011**

**Introduction**

1. The Appellant's<sup>1</sup> car was struck by the arm of a security barrier which descended as she entered Sheffield College's car park on 20<sup>th</sup> September 2010. In support of her insurance claim against the College's insurer's who were disputing liability she<sup>2</sup> asked for a number of documents including:

*[4] A copy of the report [Named Individual] instigated on 20.9.10 after the malfunction.*

It is the Appellant's case that this document proved the liability of the college and was deliberately withheld from her.

2. The history of the case is set out in the Decision Notice however, the notable parts of the chronology are that:

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<sup>1</sup> The notice of appeal is signed by the Appellant, but the Appellant and her husband made the original complaint to the Commissioner

<sup>2</sup> The Freedom of Information request was made by a representative on the Appellant's behalf.

- Item 4 was dated 29<sup>th</sup> September 2010 and included the following account from an employee on duty at the time:

*“The accident occurred when the barrier was being changed from the manual (permanently upraised) system to the swipe card system. The [Appellant] drove through at the moment the swipe card system was activated and the barrier came down on the car roof damaging the car”.*

- It was passed to the insurance company by the College on 30<sup>th</sup> September 2010 and 3<sup>rd</sup> November 2010.
- The insurance company continued to dispute liability and despite having received the report which indicates that the accident was due to operator error accused the Appellant of having “tailgated” another car and being the “author of her own misfortune”,
- The insurance company admitted liability in May 2011.
- Item 4 was disclosed pursuant to FOIA in June 2011.

#### **The Commissioner’s Decision**

3. The Appellant complained to the Commissioner who issued Decision Notice **FS503086971 dated 27<sup>th</sup> September 2011** in which he found that there had been a breach of s10 FOIA in that the College took many months longer than the time prescribed under FOIA to provide the information. The Commissioner also did *“not require any remedial steps to be taken in respect of this procedural breach because the information has been provided to the complainants.”*

4. The Commissioner did however, note the following in a section entitled “other matters:

*“Although the introduction [to the Code of Practice under rule 45] does not form part of the code itself, the Commissioner echoes its recommendations and expects that, in the future handling of requests, the public authority will ensure that it has regard for its responsibilities under the Act and the recommendations of the Code. It is not adequate for it to delegate its responsibilities under the Act to third parties without making sure that they comply with the obligations that the Act imposes on it.”*

### **The Appeal to the Tribunal**

5. The Appellant appealed on 9<sup>th</sup> October 2011. Her grounds can be summarized from her notice of appeal and her submissions dated 22<sup>nd</sup> October and 12<sup>th</sup> November 2011:

- i. The Commissioner erred in failing to require the College to take steps in relation to the way they handled the Freedom of Information Request.
- ii. The Commissioner never saw a copy of the disputed information (the letter supplying it never arrived) and he should have considered it before holding that no remedial action was required.
- iii. The Decision Notice is wrong in that the Commissioner calculates that the College took 131 days to respond when in fact on the Appellant's calculation it was 157.<sup>3</sup>

iv. The Decision Notice is wrong in that it asserts at paragraph 19 that the situation was complicated:

*“by the complainants apparently insisting that the insurance company dealt with them rather than the College.”*

6. The Tribunal wrote to the Appellant on 9<sup>th</sup> November 2011 indicating that the Judge was considering making a strike out ruling under rule 8 of *the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the GRC Rules)*. Which provides (insofar as it is relevant):

*(3) The Tribunal may strike out the whole or a part of the proceedings if—*

...

*(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding*

7. The Appellant was invited to make representations against strike out pursuant to rule 8(4) GRC Rules and in particular to:

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<sup>3</sup> This is the number of days from the letter of request referencing FOIA until the date that the last piece of information was provided. She also provided other calculations starting from earlier pieces of correspondence.

*“...address what powers you consider the Commissioner has in order to require Sheffield College to take any other steps, now that the information has been disclosed.*

The Tribunal pointed the Appellant towards s 50-56 FOIA as the part of the Act which deals with the powers that the Commissioner has to enforce the Act when an application for a Decision is made under s50.

8. The Appellant responded by way of email dated 12<sup>th</sup> November 2011 in which she observed that despite extensive research on the internet, her case was unique as she had been unable to find any applicable section in FOIA, or any authority or example of a Decision Notice where the Commissioner had required steps to be taken in relation to a breach of s10 where the information had been supplied. She notes that if the information had not been produced the Contempt of Court powers would have eventually become applicable.
  
9. She details what she considers to be the procedural failures at the College, and argues that without steps being taken, FOIA processing at the College will not improve. The implication is that public authorities have no incentive to comply with s10 but can stall disclosure for tactical reasons in the knowledge that no remedial steps will be required by the Commissioner. She suggests:  
*“Thus we felt some sort of enforcement was appropriate (e.g. someone should have “Freedom of Information Responder” written into their job title and appropriate staff training should be given to ALL staff involved in any way with matters arising from the incident relating to the car park barrier).”*
  
10. Although the Commissioner made recommendations to the College including *“Authorities should ensure that proper training is provided in this regard. ....”* She does not consider that this is an adequate response since, no checks are to be made to see if any training has been provided and if it is “proper”.
  
11. I deal with each of the Appellant’s grounds of appeal in turn.

**Ground i.**

12. The right to complain to the Commissioner is provided for in s50 FOIA:

*(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*

Consequently the Commissioner is empowered to make a decision as to whether s10 FOIA has been breached or not.

13. The power to require steps to be taken is provided for under s50(4)

*Where the Commissioner decides that a public authority—*

*(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or*

*(b) has failed to comply with any of the requirements of sections 11 and 17,*

*the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.*

This limits the Commissioner to the power to require remedial steps to cases where information has not been provided, has been provided in the wrong format or has breached the refusal provisions. S10 is not listed as a section whereby the Commissioner has the power to require remedial steps to be taken. As a matter of law the Commissioner had no power to require the College to take steps in relation to the way they handled the Freedom of Information Request.

14. Whilst the Commissioner has the power to make a recommendation of good practice to a public authority pursuant to s48 FOIA, this does not fall within part I of the Act, consequently s50 is not applicable, and neither is s57 (the right to appeal to this Tribunal). Consequently this Tribunal has no jurisdiction to determine how the Commissioner chooses to apply s 48 FOIA. For these reasons this ground of appeal must fail.

### **Ground ii**

15. Although it was apparently sent to him, the disputed information never arrived and consequently the Commissioner did not view the disputed information before reaching his decision. Viewing the disputed material would not have altered the finding that s10 was breached and that the Commissioner has no power in law to require steps to be taken in relation to s10. I am satisfied that the Commissioner's failure to view the disputed information made no difference to the Decision and does not constitute an error of law and that this ground must fail.

### **Ground iii**

16. The Appellant argues that the Decision Notice is wrong in that the Commissioner calculates that the College took 131 days to respond when in fact on the Appellant's calculation it was 157. The Tribunal notes that the Commissioner's calculation of 131 days refers to "*any valid response to requests 1-7*". Whereas the appellant's calculation relates to the date that the final piece of outstanding information was disclosed.

17. The Tribunal notes that however the delay is calculated, the breach of s10 was substantial in that it was more than 100 working days late. I adopt the approach set out in *Billings v IC EA/2007/0076* where it was held that the Appeal process is intended only: "*to provide relief if the Decision Notice is found not to be in accordance with the law*".

18. Additionally in *Caughey v IC EA/2008/0012* in which there was a dispute relating to the accuracy of the chronology, the Tribunal noted at paragraph 37 that:

*"..whether paragraph 6 and/or 7 of the Second Decision Notice contained factual errors is irrelevant. It has already been noted above that the Tribunal in exercising its appellate functions should deal with the substance of any decision notice before it.*

I am therefore satisfied that the exact number of days and the basis for their calculation is not material to the Tribunal's decision, which is that there was a substantial breach of s10. Consequently this does not constitute a valid ground of appeal.

#### **Ground iv**

19. The Appellant has attached to the grounds of appeal correspondence which shows that she was dealing with the insurance company in relation to the insurance claim, and asking the College for the information under FOIA, consequently they argue that the Decision Notice is wrong in fact in that it asserts at paragraph 19 that the FOIA situation was complicated:

*“by the complainants apparently insisting that the insurance company dealt with them rather than the College.”*

20. The Tribunal applies the approach adopted in Billings v IC EA/2007/0076 where the Tribunal noted that:

*“The Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law”.*

This comment forms part of the background of the case, it is not material to the conclusions reached by the Commissioner (namely that there was a breach of s10) or the fact that the Commissioner has no power to require remedial steps in a Decision Notice pursuant to s50 FOIA.

#### **Conclusion**

21. For these reasons I find that the Appellant has no reasonable prospect of succeeding before this Tribunal and I strike out the appeal.

Dated this 9<sup>th</sup> day of December 2011

Fiona Henderson  
Judge