



Appeal No. EA/2011/0275

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Dated: 28 February 2012

BETWEEN:

Appellant: Andrew Bousfield

Respondent: The Information Commissioner

Decision by: **David Marks QC**
(Tribunal Judge)

RULING

On application made by the Information Commissioner (the Commissioner) to strike out Appellant's appeal.

DECISION

The Tribunal strikes out the Appellant's Notice of Appeal dated 2 November 2011 under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (The Rules).

Reasons

1. This appeal concerns a request for information made by the Appellant to the Department of Environmental, Food and Rural Affairs (DEFRA) made on 4 October 2010. The request was as follows, namely:

“We are informed by the Cabinet Office that the permanent secretary of each department of state maintains a register of conflicts of interest raised by civil servants within the department of state. This register is the subject of some provisions in the Civil Service Management Code. We ask for disclosure of the register only insofar as the information relates to financial interests, including shareholdings ...”

Subsequently, the Appellant expressly limited his request to entries in the relevant register for the top 30 civil servants within DEFRA for the years 2000, 2005 and 2010.

2. DEFRA replied by letter dated 27 October 2010 to the effect that for 2010, none of the top 30 civil servants recorded or registered any conflict of interest. The register for previous years was not retained and therefore information relating to the earlier years of 2005 and 2010 was not held.
3. The Appellant responded with a written request seeking an internal review. In the process, he alleged that he expected DEFRA to have held a register and queried why the register for the year 2010 did not exist. As for the earlier years, namely 2000 and 2005, he characterised the allegation put forward by DEFRA as one whereby DEFRA had alleged that it had destroyed the registers for those years. He therefore

saw no reason why such action could be taken as conflicts of interest were “of incredible organisational and public importance”.

4. The outcome of DEFRA’s internal review were sent by email dated 25 January 2011. In that exchange, DEFRA explained that the information which the Appellant had requested for 2010 did not exist “in that there were no entries made for financial conflicts of interest”.
5. In relation to the earlier years, DEFRA informed the Appellant that it had only recently started collating information on conflicts of interest so that from that period on, such information would be processed and “held centrally”. The assurance therefore was that this issue “will not exist in the future”.
6. The Decision Notice of the Commissioner dated 24 October 2011 bears the reference FS503376531.
7. The Commissioner determined that prior to 2010, DEFRA did not hold a central register. Civil servants would simply report interests they had to a manager in each business unit who would then manage such interest.
8. By the end of 2010, a central register had been created by DEFRA’s Strategic Human Resources department. However, none of its top 30 civil servants had declared any relevant interests for that year, 2010. To guard against the possibility of a conflict of interest being declared in 2010 but not having been transferred to the new central register, the Commissioner stated that DEFRA had made enquiries with its Permanent Secretary and its Director Generals as to whether they or the staff that they were managing directly had declared relevant conflicts in 2010. No such conflicts had been declared.
9. In the circumstances, the Commissioner determined that on the balance of probabilities, DEFRA held no recorded information about conflicts of interest declared in 2010.

The submissions by the Commissioner

10. The Tribunal has been referred to what has been called The Civil Service Code. This Code sets out the Civil Service “core values” regarding integrity, honesty, objectivity and impartiality, together with the standards of behaviour expected of all civil servants in upholding such values. This Code requires civil servants to raise any concerns about compliance with the code, including the actions of others, with line management.
11. There is in addition a Civil Service Management Code. The Commissioner submits this is the Code that the Appellant intends to refer to in his Notice of Appeal. This Code is issued under Part 1 of the Constitutional Reform Governance Act 2010. This Code requires civil servants to declare relevant financial and business interests to senior management so that senior management can determine how best to proceed: particular emphasis is drawn to sections 4.1.3(c) and 4.3.1.
12. The Commissioner therefore contends that there is simply no evidential basis for the bald assertion by the Appellant that either of said codes requires the maintenance of a central register.
13. The Commissioner therefore contends that as this is the only basis on which the Appellant seeks to challenge the Decision Notice, there is no realistic prospect of success within the meaning of the Tribunal Rules, in particular, rule 8(3)(c).
14. The Commissioner adds that even if either code did require the maintenance of a central register, a fact which is denied, then any failure by a government department to comply with such a requirement would be irrelevant to the question of whether the department did, as a matter of fact, hold such a register.

Findings

15. The Tribunal is entirely satisfied that there is in effect no answer to the contentions made by the Commissioner. Although, as the Commissioner points out in relation to 2010 the Commissioner did determine that DEFRA did hold a central register, there is no reason to query the Commissioner's determination that none of the top 30 civil servants within DEFRA registered any conflicts in that year. The Tribunal accepts that this is made perfectly clear by virtue of DEFRA's refusal notice. The response by the Appellant that any such assertion by DEFRA is untrue and perhaps "a lie", adding that it was simply not possible in his opinion at least that no conflicts exist, is not in the Tribunal's view and judgment enough to counteract the force of the Commissioner's submission.
16. The Tribunal therefore accepts that the Commissioner was entirely correct to find that on the balance of probabilities, DEFRA had no recorded information about conflicts which occurred in 2010. There is simply no basis provided by the Appellant as to why the Commissioner's conclusion and determination in that respect should be overturned.
17. Since the first draft of this Ruling was prepared, the Tribunal has been shown a written Response to the application to strike out sent in by the Appellant dated 21 February 2012. In this Response, the Appellant claims that it is "not unreasonable to expect DEFRA to be able to produce to the Tribunal some evidence of [any register held pursuant to the Civil Service Management Code] to uphold its claim for 2010 and that no civil servant had any conflict." The Appellant therefore asserts that he expects "the Tribunal to independently evaluate the claim from DEFRA that no conflict was registered". He then alludes to the fact that "several other government departments" have disclosed conflicts and

therefore it appears “highly unlikely” that DEFRA’s claim holds any creditability.

18. With regard to the registers for 2000 and 2005, again, he claims that he would “expect to see some evidence, namely, an internal DEFRA policy on how long registers are retained.” Similar to the terms of the Response with regard to the 2010 register, he says that it is “not sufficient for the Information Commissioner again to take DEFRA simply at its word and does not credit to the freedom of information regime.
19. The Tribunal fully understands the concerns, and to some extent the frustration apparently expressed by the Appellant. However, it is not the function of the Tribunal to question the independent stance which by statute is afforded to the Commissioner with regard to the investigative function that the Commissioner has to fulfil. There may well be exceptional cases when the Tribunal is satisfied on sufficient evidence that there are grounds for impeaching the investigative functions and associated functions conducted by the Commissioner, but this on the evidence available is simply not such a case.
20. In the circumstances, it is not appropriate for there to be any relief of the type as suggested by the Appellant to be granted. Quite apart from the bases set out above as to why this appeal should be struck out, it would in the Tribunal’s opinion be completely disproportionate to embark on the form of exercise or exercises which the Appellant claims to be appropriate in this case.

Conclusion

21. For the above reasons, the Tribunal strikes out the said appeal under the Tribunal rules, in particular, Rule 8(3)(c).

DAVID MARKS QC

Tribunal Judge

Dated: 28 February 2012