



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2011/0291

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50368428
Dated: 15 November 2011**

Appellant: LIAM COSTELLO

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: NORTHAMPTONSHIRE COUNTY COUNCIL

Date of hearing: 20 June 2012

Date of Decision: 3 July 2012

Before

**Annabel Pilling (Judge)
Roger Creedon
and
John Randall**

Subject matter:

FOIA – Absolute exemptions – Information accessible by other means s.21
FOIA – Means of communication of information s.11

Representation:

For the Appellant:	Liam Costello
For the Respondent:	Clare Nicholson
For the Second Respondent:	Allis Karim

Decision

For the reasons given below, the Tribunal allows the appeal and issues a Substituted Decision Notice.

Substituted Decision Notice

Dated: 3 July 2012

Public Authority:

Northamptonshire County Council

Address:

County Hall
Northampton
NN1 1ED

Northamptonshire County Council did not deal with the request for information in accordance with the requirements of the Freedom of Information Act 2000; it was not entitled to withhold the information requested on the basis of the exemption in section 21 of FOIA. It was required under section 11 of FOIA to provide a copy of the information requested as this was the means for communication as expressed by the Appellant and it was reasonably practicable for the Council to give effect to that preference.

As the information requested has been provided to the Appellant no further action is required.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 15 November 2011.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Northamptonshire County Council (the 'Council') for a copy of the Admission Agreements entered into when Northampton Enterprise Ltd and the Council became an admitted body in the Local Government Pension Scheme.
3. The Council took the position that the requested information was available for inspection only and asked the Appellant to make an appointment to attend the Council's office to view it.

4. The Appellant complained to the Commissioner about the way his request for information had been handled. He asked the Commissioner to consider whether the Council had breached section 11 of FOIA (the requirement that a public authority shall, so far as reasonably practicable, give effect to the expressed preference for means of communication of the information requested) by failing to provide him with a copy of the requested information.
5. The Commissioner commenced an investigation, during which the Council relied upon section 21 of FOIA (that the information was reasonably available to the Appellant) and a Decision Notice was issued on 15 November 2011.
6. In summary, the Commissioner concluded that as the Appellant had visited that Council's offices numerous times in the past, and had not made the Commissioner aware of any reasons which would prohibit him from doing so on this occasion, the information was reasonably accessible and fell within the absolute exemption from the obligations in section 1 of FOIA provided for by section 21 of FOIA.

The Appeal to the Tribunal

7. The Appellant appeals to this Tribunal. In his Notice of Appeal, the Appellant advanced a number of failures by the Commissioner in reaching his conclusion that the information was exempt under section 21(1) of FOIA.
8. There were no numbered grounds of appeal and the Commissioner, in his Response, attempted to identify the relevant grounds of appeal; these were not accepted by the Appellant. The Commissioner invited the Tribunal to strike out the whole of the Appellant's appeal under Rule 8(3)(c) of The Tribunal Procedure (First-tier) Tribunal (General Regulatory Chamber) Rules 2009 (the "Rules") on the basis that there was no reasonable prospect of success.

9. The Tribunal refused that application. It found that the Appellant's submissions fall into two broad areas of challenge to the Commissioner's decision:
 - i) the Commissioner erred in concluding that section 21 was applicable;
 - ii) the Commissioner should have considered section 11 of FOIA before section 21.

10. The Appellant submits that the Commissioner's conclusion in respect of the information being reasonably accessible was based upon a flawed analysis of the Council's representations to the Commissioner. This amounts to a valid ground of appeal with a reasonable prospect of success; the Tribunal ruled that it would consider evidence and submissions on whether the Council permitting inspection only at their offices amounts to reasonable access in this case. The Commissioner had conceded that if his decision was wrong in respect of section 21, then section 11 would become relevant.

11. On being joined by the Tribunal to this Appeal, the Council reviewed its position, provided a copy of the information requested to the Appellant and it does not oppose the Appeal so far as it relates to the Council.

12. Although he had now been provided with the information requested in the format requested, the Appellant has maintained his Appeal to the Tribunal on that basis that the Commissioner's Decision Notice remained on record. The parties were unable to follow the Tribunal's proposal that they agree suitable wording to be attached to the Decision Notice rather than incurring the possibly disproportionate expense to the public purse in proceeding to a full hearing.

13. One member of the Tribunal's view is that the Appellant, having been provided with the information he requested, should have withdrawn his Appeal. There is no further remedy which is needed or which the Tribunal can provide. If the Commissioner erred in his findings, any error has not now disadvantaged the Appellant. Any finding by this

Tribunal is not binding on another Tribunal and it would be preferable for any matter of interpretation of the FOIA to be dealt with in a case which warrants an oral hearing; a decision in this case, on the papers, would be of little value as a persuasive precedent. Pursuing the Appeal in these circumstances does not address the Appellant's original complaint, which is now resolved. It involves needless public expenditure. As the Appellant had declined to withdraw his Appeal, the member's view was that the Appeal should be struck out as an abuse of process.

14. We are, however, not sure that we have the power under the Rules to strike out an appeal on this basis, having previously decided that the grounds advanced by the Appellant have a reasonable prospect of success. In any event, public expenditure had been incurred and ultimately we decided unanimously that the better option would be to decide this Appeal which had been fully prepared by the parties.

15. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

Section 21 of FOIA

16. We agree with the Commissioner that we should first consider the applicability of section 21 of FOIA.

17. Section 1 of FOIA provides:

(1) 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.

18. Section 2 of FOIA provides that:

(1) where any provision of Part II¹ 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 an absolute exemption

...

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

(a) the information is exempt information by virtue of a provision conferring absolute exemption.

19. Section 21 of FOIA provides for an absolute exemption:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

20. If, therefore, the information requested is reasonably accessible to the Appellant, section 21 of FOIA applies. If, however, the information requested is not reasonably accessible to the Appellant, the public authority would have to comply with the obligation in section 1(1)(b) to communicate the information to the Appellant and section 11 of FOIA may be relevant.

21. In concluding that the information was reasonably accessible to the Appellant, the Commissioner explained to the Tribunal that he took into account the following:

- (i) that the Appellant lives less than five miles from the Council's offices;

¹ Sections 21 to 44 comprise Part II FOIA

- (ii) the information requested is a discrete document, likely to be in a relatively structured format, and it was unlikely to be overlong; and
- (iii) there was no indication that visiting the offices was likely to be difficult for the Appellant.

22. The Commissioner stated at paragraph 12 of the Decision Notice:

“...the council has informed the Commissioner that the complainant has visited the council offices numerous times in the past...”

23. The Appellant took issue with this assertion and complained that the Commissioner’s conclusion was based on a flawed analysis and lack of evidence. He explained to the Tribunal that he works a long distance away from his home and would need to take a day off work in order to attend the Council’s office. He also complained that the Commissioner had never made any enquiries with him in respect of how reasonable it would be for him to attend the Council’s office.

24. The Commissioner has conceded that the statement in paragraph 12 is not supported by any evidence but based upon the recollection of the case officer of an unrecorded telephone conversation with an individual from the Council for which no contemporaneous notes exist.

25. We are surprised and concerned that the Commissioner should have based his conclusion on an unsubstantiated comment made during an unrecorded telephone conversation and that he failed to make any enquiries with the Appellant. Regardless of whether the Appellant, in fact, had made any visit to the Council’s office in the past, circumstances might have changed and the Commissioner could not have reached a proper conclusion in respect of whether the information was reasonably accessible to the Appellant without making enquiries in respect of the Appellant’s personal circumstances. We find that the Commissioner erred in his approach to section 21.

26. On the evidence from the Appellant, we are not satisfied that the information requested was reasonably accessible to the Appellant and therefore consider that the exemption provided in section 21 of FOIA is not engaged.

Section 11 of FOIA

27. The Commissioner concedes that if the information was not exempt under section 21 of FOIA that section 11 is relevant.

28. Section 11 of FOIA provides:

(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

(b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

(c) the provision to the applicant of a digest or a summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

29. The Council concedes that it was not for the Council to choose the means of communication of the information without having regard to the preference expressed by the Appellant. The Appellant had the choice, so far as it was reasonably practicable to the Council, to specify the means of communication. The Council admits that it would not have posed any practical difficulties to the Council to have provided a copy of the information to the Appellant rather than make it available only by inspection at the offices.

30. The Commissioner raises no argument to the contrary.

31. While there may be cases in which it would not be reasonably practicable to provide the requested information as a copy, for example because of its length or physical condition, the information requested in this case was a relatively short document. We therefore conclude that in dealing with the Appellant's request for information the Council failed to comply with section 11 of FOIA.

Conclusion and remedy

32. The Council was not entitled to withhold the information requested on the basis of the exemption in section 21 of FOIA. It was required under section 11 of FOIA to provide a copy of the information requested as this was the means for communication as expressed by the Appellant and it was reasonably practicable for the Council to give effect to that preference. We therefore allow this Appeal.

33. As the information has now been provided to the Appellant we need make no further directions.

34. Our decision is unanimous.

Signed

Annabel Pilling
Tribunal Judge

Dated: 3 July 2012