



**Case Reference: EA/2023/0016
NCN: [2023] UKFTT 642 (GRC)**

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard: Determined on the papers

**Heard on: 20 July 2023
Decision given on: 2 August 2023**

Before

TRIBUNAL JUDGE FINDLAY

Between

JONATHAN HOLDEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION ON STRIKE OUT APPLICATION

- 1. Decision: The Respondent's Strike Out Application dated 13 March 2023 made pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 ("the Rules") on the grounds that there is no reasonable prospect of the appeal succeeding, is granted.**

REASONS

- 2. I have considered this matter on the papers and am satisfied that it does not defeat the interests of justice to do so pursuant to rule 32(3) of the Rules.**
- 3. The Appellant appeals under section 57 of the Freedom of Information Act 2000 ("FOIA") against the Respondent's decision notice ("DN") dated 22 December 2022 with the reference IC-173004-D8D0**
- 4. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information (section 1(1)(a) of**

the FOIA) and to have that information communicated to him if the public authority holds it (section 1(1)(b) of the FOIA).

5. The Appellant made a request of the Information Commissioner's Office ("ICO") on 9 March 2022. The ICO responded on 1 April 2022 stating that it did not hold the specific information sought and provided links by way of advice and assistance. Following an internal review the ICO wrote to the Appellant on 9 May 2022 upholding its position.
6. The Appellant lodged an appeal on the grounds that the Parliamentary and Health Service Ombudsman ("PHSO") publicised data which showed that it failed to respond to Subject Access Requests ("SARs") and Freedom of Information ("FOI") requests by the statutory deadlines in about two-thirds of all cases. The Appellant asked the ICO why it was taking no action. The Appellant submitted that there was no reason why the ICO should not tell him why it takes no action against an organisation which consistently fails to meet its statutory deadlines. Unless deadlines are enforced they are pointless. He submitted that responses like this lead to the public losing confidence in its abilities to uphold the relevant legislation.
7. The Respondent made a decision on 22 December 2022 that the ICO was correct when it stated that it did not hold information within the scope of the request and had complied with its obligations under section 1 of the FOIA. The Respondent did not require the ICO to take any steps as a result of the DN.
8. The Appellant appealed to the Tribunal on 4 January 2023. He asserted that the ICO failed to enforce or take action if a public authority fails to meet its deadlines and refused to tell him why they were taking no action as to why he considered the PHSO failed to respond to SARs and FOI requests.
9. An appeal under section 57 of the FOIA can be allowed only where the DN contains an error in law or, to the extent that the Respondent exercised his discretion in the DN, the Respondent ought to have exercised it differently.
10. The Respondent submitted that the FOIA provides rights as regards information that is held and does not extend to the right to ask questions, explanations, seek clarification of information or debate the contents of information unless the response to the questions requests for explanation or clarification is already held by the public authority in recorded form.
11. The Respondent decided that the Appellant's requests are clearly requests for explanations rather than recorded information and accordingly the ICO has no obligation to respond to them under the FOIA.
12. The Respondent decided that the ICO had conducted appropriate and relevant searches and on the balance of probabilities does not hold the requested information.
13. The Respondent submitted that the Appellant does not provide any evidence or cogent arguments that the requested information is held or that the searches for the requested information were insufficient.
14. The Respondent has applied for the appeal to be struck out on the grounds that it has no reasonable prospect of success.

15. The Appellant was invited to make submissions in response to the proposed strike out, as required by rule 8(4) of the Rules.
16. The Appellant submitted that the ICO's responses were inconsistent and its approach is inconsistent because it does not take regulatory action against organisations. The Appellant provided links to illustrate this point. He submitted that the ICO's decision to refuse to take formal action against some organisation must not be a secret one.
17. In reaching my decision I have considered the Upper Tribunal's decision in *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC), in which it is stated at [41] that:

...an application to strike out in the FTT under rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in *Three Rivers* the strike out procedure is to deal with cases that are not fit for a full hearing at all.
18. Applying this approach, I have considered both parties' representations and concluded that this is an appeal which can be described as 'not fit for a full hearing.' This is because the role of this Tribunal under sections 57 and 58 of FOIA is to decide whether there is an error of law or inappropriate exercise of discretion in the Respondent's DN. The grounds of appeal do not engage with that jurisdiction as they raise no argument in relation to material legal conclusion of the DN.
19. It does not seem to me that any Tribunal properly directed could allow this appeal because it does not raise a triable issue in respect of the conclusion of the DN.
20. The Appellant has not set out any cogent basis that the Respondent's DN is not in accordance with the law or why the Respondent ought to have exercised his discretion differently. Accordingly, the appeal should be struck out as having no reasonable prospects of success.

Signed: Judge J Findlay

Date: 20 July 2023