



NCN: [2024] UKFTT 00220 (GRC)

Case Reference: EA/2023/0441

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

Heard: GRC Remote Hearing Rooms

**Heard on: 07 March 2024.
Decision given on: 15 March 2024**

Before: Brian Kennedy KC, Anne Chafer and Stephen Shaw.

Between:

JOHN GREENWOOD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: John Greenwood as a Litigant in person.

For the Respondent: Gemma Garvey on behalf of the Commissioner

Decision: The appeal is allowed in part.

SUBSTITUTE DECISION NOTICE

Result: a) The Tribunal finds the Commissioner erred in failing in the exercise of his discretion to order steps in accordance with section 50(4) FOIA. The Commissioner has accepted that he failed to properly determine that the Appellant had not in fact been provided with a response to his request on 4 October 2023 and the Appeal is allowed in this respect.

b) The Tribunal find that as the public authority later provided a response disclosing the requested information on 22 November 2023, it has already complied with any potential substituted steps and no further action is required by the public authority. This part of the appeal is dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) against this decision notice of the Commissioner dated 5 October 2023 Ref. IC-258257-V7Y7 (“the DN”) which is a matter of public record.

Factual Background to this Appeal and Decision Notice:

2. This appeal stems from an information request made by the Appellant to the Public Authority (“PA”) on 6 July 2023:

” As a Freedom of information request would you please tell me the make and model type of the body-cams your security guards were wearing at the time of the incident which occurred on the 25 April 2023 on ward G4. ”(our emphasis).

3. As the Appellant did not receive a response to this request, he submitted a complaint to the ICO under section 50 FOIA on 11 August 2023. He explained that he was of the view that the PA had breached section 10(1) and section 17(1) FOIA.
4. The Commissioner contacted the PA on 25 September 2023 and asked it to provide a response to the request. The Trust subsequently informed the Commissioner it had responded to the request on 4 October 2023 and provided him with a copy of the response.
5. The Commissioner issued a DN on 5 October 2023 finding a breach of section 10(1) FOIA (see Paragraph 7. Below). The Commissioner did not order any further steps to be taken by the PA as the Commissioner’s ***understanding*** (our emphasis) was that the Trust had at that point provided a response to the request on 4 October 2023.

Legal Framework:

6. Section 1 FOIA:

“A person requesting information from a public authority has a right to be informed by the public authority in writing whether it holds the information (s.1(1)(a) FOIA) and to have that information communicated to him if the public authority holds it (s.1(1)(b) FOIA).

7. Section 10 (1) FOIA states that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

8. Section 17(1) FOIA states that:

*“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
(a) states that fact,
(b) specifies the exemption in question, and*

(c) states (if that would not otherwise be apparent) why the exemption applies.”

9. Section 50(4) FOIA states that:

*“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.”*

Grounds of Appeal:

10. The Appellant challenges the Commissioner’s Decision Notice on the grounds that:

- a. The Appellant asserts that he had not received a response to the request.
- b. The DN failed to find a breach of section 17(1) FOIA.

Commissioner’s Response:

- 11. The Commissioner resists this appeal. The Commissioner contacted the PA on 20 November 2023 and alerted them to an error in their response to the request. The Commissioner understands that the Trust effectively sent the response to the Appellant on 22 November 2023 (attached as Annex A). In consideration of the overriding objective contained in The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, that Commissioner argues that he dealt with the matter proportionately and thereby contacted the Appellant on 22 November 2023 to ask whether he was willing to withdraw the appeal on the basis the Trust had now provided a response to the FOIA request. On 24 November 2023 the Appellant confirmed he wished to pursue the appeal.
- 12. The Commissioner argues that the DN correctly found a breach of section 10(1) FOIA and therefore there is no error of law in this regard.
- 13. The Commissioner however accepts that the DN was incorrect to find that a response was provided to the Appellant on 4 October 2023 and in accordance with section 50(4) FOIA the Commissioner should therefore have ordered steps obliging the Trust to provide a response.
- 14. The Commissioner argues that in accordance with section 58(1) FOIA, **if** (our emphasis) the Tribunal is satisfied that the Commissioners’ decision erred in law or, to the extent that it involved the exercise of the Commissioner’s discretion, he ought to have exercised it differently, the outcome open to the Tribunal would be to *“allow the appeal or substitute such other notice as could have been served by the Commissioner.”*
- 15. The Commissioner further argues that the PA has however provided a response to the Appellant disclosing the requested information on 22 November 2023 and therefore has already complied with any potential substituted steps that could or should be required.

16. In response to the second issue (as can be seen from the response dated 22 November 2023 which mirrors the response the Trust endeavoured to provide on 4 October 2023), the Commissioner argues that the PA has disclosed the information requested and was not relying upon any exemptions contained within Part II FOIA. There was therefore no error in law in the DN by not finding of a breach of section 17(1) FOIA.
17. The Commissioner argues that the Appellant does not identify any error of law in the DN regarding the Commissioner's findings in relation to section 10(1) FOIA and by the Commissioner not finding a breach of section 17(1) FOIA and the appeal should therefore be dismissed in this regard. However, the Commissioner consents to a substituted DN reflecting the fact the Appellant had not received a response to the request on 4 October 2023 and therefore the Commissioner erred in failing to order steps in accordance with section 50(4) FOIA. Further the Commissioner argues that as the PA provided a response disclosing the requested information on 22 November 2023, it has already complied with any potential substituted steps.

Reply of the Appellant:

18. The Appellant states that the issue at the centre of the appeal is the failure of the Commissioner to issue a decision notice which included a breach of section 17 FOIA.
19. The Appellant contends that the Trust breached section 10 and 17 FOIA and further, that the Commissioner erred in law by not including a breach of section 17 FOIA. The Appellant argues that the reply was still out of time and the section 17 FOIA breach ought to have been reflected in the DN.

The Commissioners' Submissions:

20. In relation to the Appellant's grounds of appeal that he had not received a response to the request, the Commissioner consents to a substituted Decision Notice reflecting that a response had not been provided to the Appellant on 4 October 2023 and therefore the Commissioner erred in failing to order steps obliging the Bolton NHS Trust (the Trust) to provide a response to the request.
21. However, a response was subsequently provided by the Trust to the Appellant on 22 November 2023 and so the Trust has already complied with any potential substituted steps. In relation to the Appellant's assertion that the DN failed to find a breach of section 17(1) FOIA, the Commissioner submits the appeal should be dismissed.

Discussion:

22. The Tribunal have carefully studied the history and chronology provided in the papers in the hearing Bundle and, in short, we find we are compelled to agree with the Commissioners' Response to the Grounds of Appeal in that there has been a breach of s10 but not in relation to s17. The Tribunal accept that the Appellant had not received a response to the request on 4 October 2023 (due to an error on the part of the public authority) and therefore the Commissioner erred in failing to order steps in accordance with section 50(4) FOIA. We further accept that as the PA provided a response disclosing the requested information on 22 November 2023, it has already complied with any potential substituted steps and no further action is required by the public authority. We do not find any breach of s17(a) FOIA.
23. In the hearing Open Bundle ("OB") at page D66 a letter from the Commissioner to the

PA explains that an error on the part of the PA in using the wrong address resulted in the Appellant not receiving the requested information on 4 October 2023 as the Commissioner had been informed. This oversight by the PA resulted in an error in the DN which has since been discovered and recognised. Hence the Commissioner consents to the appeal being successful in that regard.

24. At page D66 of the OB – we find the email dated 22 November 2023 wherein the PA provided the answer to the relevant request, the subject to this appeal. The words used in that confirmation were: “*At the time of the incident, the type of body-cams used was a Pinnacle PR6 HD WDR camera.*”

*The department have also confirmed that all data requested in **your previous SAR** (our emphasis) has been provided, the footage was redacted in order to protect the identity of Trust staff and members of the public in line with UK GDPR.”*

Conclusion:

25. The Tribunal have an explanation for the confusion in the Appeal before us. In other words, the strict scope of the request as set out at paragraph 3. above was complied with on 22 November 2023. On this basis we find that s17(1) FOIA is not relevant to this appeal. The PA did not and are not relying on any exemption. We find the PA have complied with a proper response by providing the information sought in the precise wording of the request in question: “ - - *please tell me the make and model type of the body-cams your security guards were wearing at the time of the incident which occurred on the 25 April 2023 on ward G4.* This question was precisely answered in the Response by email properly addressed on this occasion to the Appellant at 15.53 dated 22 November 2023 with the response: “*At the time of the incident, the type of body-cams used was a Pinnacle PR6 HD WDR camera.*” (See OB page D65 & 65). Neither the Commissioner, nor this Tribunal on hearing the issues afresh, can look beyond the specific request before us. It is trite law to say that all parties are constrained by the actual request made, which is the subject matter of the appeal. Anything extraneous to the precise request is not in issue before us. It is well established in this Tribunal that the precision of a request must be adhered to. This can often pose a problem for Litigants in person and unfortunately that is what has occurred in this appeal.
26. The Tribunal have every sympathy for the Appellant in such tragic circumstances that prevailed in his involvement with the PA in this case, but we have to accept the Commissioner is right in the above submissions made in his Response to the Grounds of Appeal and accordingly we must issue the following:

Substitute Decision Notice:

27. The Tribunal finds:

- a) That the Commissioner erred in failing in the exercise of his discretion to order steps in accordance with section 50(4) FOIA. The Commissioner has accepted that he failed to properly determine that the Appellant had not in fact been provided with a response to his request on 4 October 2023 and the Appeal is allowed in this respect.
- b) That as the public authority later provided a response disclosing the requested information on 22 November 2023, it has already complied with any potential substituted steps and no further action is required by the public authority. This part of the appeal is dismissed.

Brian Kennedy KC

08 March 2024.