



**Appeal number: EA/2019/0018GDPR**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**BARRY SHIEL**

**Applicant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
ROSALIND TATAM  
DAVE SIVERS**

**The Applicant appeared in person  
The Respondent was represented by Harry Gillow, counsel  
Determined at an oral hearing, the Tribunal sitting in public  
at Field House on 21 May 2019**

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## DECISION

1. The application is refused.

## REASONS

2. The Applicant applied to the Tribunal for an Order to Progress his Complaint under s. 166 of the Data Protection Act 2018 (“DPA 2018”). The Tribunal convened an oral hearing at which the Applicant represented himself and the Information Commissioner was represented by Harry Gillow, counsel. We are grateful to them both for their helpful written and oral submissions.

3. In his Notice of Appeal form dated 3 January 2019, the Applicant relied on grounds that the Information Commissioner has failed to “enforce his rights” concerning data breaches by Thames Valley Police and the Disclosure and Barring Service, which had resulted in incorrect information being supplied about him to a prospective employer. The Appellant had been the victim of an “identity theft” in the past and it had been accepted by the data controllers concerned that incorrect information about him had been retained on the Police National Computer which, in turn, had caused an incorrect DBS certificate to be issued. The Appellant had understandably taken legal advice which resulted in an out of court monetary settlement and the removal of the incorrect data from the Police National Computer. His complaint to the Information Commissioner was intended to ensure that the situation would not occur again.

4. The Appellant’s Notice of Appeal was filed with the Tribunal before he had received the Information Commissioner’s substantive response to his complaint made in December 2018. The Commissioner’s response, dated 1 February 2019, explained that she regarded the matter as having been concluded and would be taking no further action. Nevertheless, the Applicant persisted with his application to the Tribunal after receiving that letter, as he was unhappy with the Commissioner’s investigation of his complaint.

5. The Information Commissioner’s Response to the application, dated 26 February 2019, relied on grounds of opposition that the Commissioner had responded appropriately to the Applicant’s complaint and in a timely fashion so there was no basis for the Tribunal making the particular Order sought.

6. The Appellant’s Reply (undated on our copy, see page 26 additional documents) asked the Tribunal to direct the Information Commissioner to investigate his complaint in any way it considered suitable and submitted that the Commissioner had not taken “appropriate steps” in this case.

7. In his oral submissions, the Appellant explained that, whilst he had received assurances that the incorrect information held about him on the Police National Computer had been removed, he remained concerned about the “PNC Extract” records. He said that these contained manually-recorded information about him which the Information Commissioner had not in her response to his complaint confirmed had been deleted. He wanted reassurance that they had been deleted.

8. Mr Gillow’s submissions on behalf of the Commissioner were that she had taken appropriate steps to respond to the Applicant’s complaint and that, whilst he disagrees with the outcome, this is not a proper basis for the Tribunal to make an Order under s. 166 DPA

2018 because the Tribunal's jurisdiction is limited to procedural failings and is not intended to serve as an appeal against outcome.

9. The Tribunal noted that the current and very particular focus of the Applicant's concern (about the "PNC Extract") had not been clear to it from reading his written submissions but had only become clear during his oral submissions. The Tribunal also noted that the Information Commissioner had not expressly referred to the "PNC Extract" in her correspondence with the Applicant. Nevertheless, the Tribunal sympathised with the Applicant's wish to be reassured that the "PNC Extract" was also now correct. Mr Gillow kindly agreed to take instructions from his instructing solicitor on the point and returned with an undertaking that the Commissioner's office would make further enquiries about the "PNC Extract" and write to the Applicant to confirm the position.

### *The Law*

10. Section 166 of the DPA 2018 creates a new right of application to the Tribunal as follows:

#### *Orders to progress complaints*

*(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—*

*(a) fails to take appropriate steps to respond to the complaint,*

*(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or*

*(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.*

*(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—*

*(a) to take appropriate steps to respond to the complaint, or*

*(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.*

*(3) An order under subsection (2)(a) may require the Commissioner—*

*(a) to take steps specified in the order;*

*(b) to conclude an investigation, or take a specified step, within a period specified in the order.*

*(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a).*

11. The “*appropriate steps*” which must be taken by the Information Commissioner are defined by s. 165(5) DPA 2018 as investigating the subject matter of the complaint “*to the extent appropriate*” and keeping the complainant updated as to the progress of inquiries.

12. The powers of the Tribunal in determining a s. 166 application are limited to those set out in s. 166 (2). In Order to exercise them, the Tribunal must be satisfied that the Commissioner has failed to take appropriate steps to respond to or progress a complaint made to her under s. 165 DPA 2018. The jurisdiction to make an Order is limited to circumstances in which there has been a failure of the type set out in s. 166 (1) (a), (b) and (c).

#### *The Evidence*

13. We have considered carefully the agreed bundle of evidence, running to 140 pages. This shows that the Applicant made a complaint to the Commissioner in September 2018 which was unfortunately sent to the wrong email address and not received. His follow up email in December 2018 was acknowledged in January 2019. A substantive response to the complaint was made on 1 February 2019 which confirmed that, after consideration, the Commissioner had decided to take the matter no further as she regarded it as having been resolved by the out of court settlement.

#### *Conclusion*

14. We conclude that the Information Commissioner took appropriate steps to respond to the Applicant’s complaint and in a timely manner. We are not persuaded that she failed to address the matters in s. 166 (1) (a) (b) and (c).

15. We understand that the Applicant is not satisfied with the Commissioner’s conclusions, but we agree with the Commissioner that s. 166 DPA 2018 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s. 165 DPA 2018. We noted in our bundle correspondence (at page 23 of the additional documents) that the Applicant has previously been informed that the “PNC Extract” is refreshed daily, so it would appear likely that it had been corrected when the PNC was corrected. However, we understand the Applicant’s wish to have the situation confirmed in writing by the Commissioner and we are grateful for the agreement to pursue the matter of the “PNC Extract” outside of these proceedings.

16. We conclude that there is no basis for making an Order under s. 166 (2) DPA 2018 on the facts of this case.

17. For these reasons, the application is refused.

**(Signed)**

**ALISON MCKENNA**

**CHAMBER PRESIDENT**

**DATE: 11 June 2019**  
**PROMULGATED: 17 June 2019**