



Appeal number: QJ/2021/0007  
V<sup>1</sup>

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER**

**BRANDON DOLBY**

**Applicant**

**- and -**

**INFORMATION COMMISSIONER**

**Respondent**

**Before:  
JUDGE LYNN GRIFFIN**

**Appearances:**

**Applicant in person**

**The Respondent did not attend and was not represented**

**DECISION**

1. The application is struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, on the grounds that there is no reasonable prospect of it succeeding.

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<sup>1</sup> V: video (all remote)

## MODE OF HEARING

2. The proceedings were held by video hearing. The Applicant joined remotely by telephone and there was no issue with the quality of communication. The Respondent had indicated that she did not intend to participate in the hearing. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. At the end of the hearing, I reserved judgement. This decision is made as soon as possible after the publication of the decision in *Killock & others v Information Commissioner*, see below. I apologise for the length of time that it has taken to resolve the application.

## REASONS

### *Background to the Application*

4. The background to this application concerns what happened to CCTV that was captured in a local shop. The shop has stated that they gave it to the police, however the police say they don't have it.

5. Mr Dolby believes that the CCTV footage would support his account of events that occurred in the shop in September 2018, which together with events in November that year led to police involvement.

### *The Application to the Tribunal*

6. In the notice of application to this Tribunal, dated 15 March 2021 the Applicant makes an application as regards the Respondent's case reference RCC0905820 which is the reference to the case review of the complaint outcome provided under reference RFA0869556. The Applicant said he was seeking to raise a right of rectification in relation to data sharing regarding a subject access request. He wishes the Information Commissioner to investigate to whom closed circuit TV footage was disclosed and/or whether it was disposed of.

7. In the notice of application, the Applicant said that they would like the following remedy from the Tribunal

*"Compliance orders. To pursue my concern and investigate the data breach. to establish a footing under section 173 of the DPA 2018 so police can proceed to prosecute a case."*

8. The application was interpreted by the Tribunal as an application under section 166 Data Protection Act 2018 [DPA18].
9. The Applicant requested an extension of time in which to make his application due to extenuating circumstance. At the hearing he told me that he would have applied sooner to the tribunal but was not aware of the possibility.
10. On 18 March 2021 the Registrar made directions as to the resolution of the application and requiring Mr. Dolby to provide a copy of the decisions he referred to and the complaints he had made.
11. The Applicant is a litigant in person, due to his health he is a vulnerable person. Having regard to the Equal Treatment Bench book and to the overriding objective, I have carefully considered the Applicant's emails to examine whether there is any other remedy that they seek that the Tribunal has power to provide.
12. In the response to the application the Information Commissioner has applied for
  - a. the extension of time to be refused given that the application was made significantly outside the period within which such applications should be made
  - b. this case to be struck out pursuant to rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. It is argued that as there has been an outcome provided to the Applicant, the Tribunal has no power to make an order under s166 and thus the application has no reasonable prospect of succeeding.

*The powers of the Tribunal in s166 applications*

13. Since the DPA18 came into force a person can apply to this Tribunal for an "order to progress complaints" under section 166.
14. A data subject has a right to make a complaint to the Commissioner if they consider that, in connection with the processing of personal data relating to them, there is an infringement of the General Data Protection Regulations

[GDPR] (now the UKGDPR in effect since 31 December 2020), and/or Parts 3 or 4 of the DPA18: see Article 77 [UK]GDPR, and section 165 (1) & (2) DPA2018.

15. Under section 166 DPA18, a data subject has a right to make an application to the Tribunal if they consider that the Commissioner has failed to take certain procedural actions in relation to their complaint.

16. Section 166 DPA18 as relevant states:

*166 (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.*

17. The powers of the Tribunal in considering such applications have been considered by the Upper Tribunal. These cases are binding on the First Tier Tribunal of which the General Regulatory Chamber is a part. The latest decision is that of *Killock and Veal & others v Information Commissioner GI/113/2021 & others* in which the Upper Tribunal reviewed the case law including the following cases and approved the approach taken therein.

18. In *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) Upper Tribunal Judge Wikeley said at paragraph 31

*“Appropriate steps” mean just that, and not an “appropriate outcome”. Likewise, the FTT’s powers include making an order that the Commissioner “take appropriate steps to respond to the complaint”, and not to “take appropriate steps to resolve the complaint”, least of all to resolve the matter to the satisfaction of the complainant.”*

19. Further in the case of *Scranage v Information Commissioner* [2020] UKUT 196 (AAC) the Upper Tribunal went further in saying:

*“... there is a widespread misunderstanding about the reach of section 166. Contrary to many data subjects’ expectations, it does not provide a right of appeal against the substantive outcome of the Information Commissioner’s investigation on its merits. Thus, section 166(1), which sets out the circumstances in which an application can be made to the Tribunal, is procedural rather than substantive in its focus. This is consistent with the terms of Article 78(2) of the GDPR (see above). The prescribed circumstances are where the Commissioner fails to take appropriate steps to respond to a complaint, or fails to update the data subject on progress with the complaint or the outcome of the complaint within three months after the submission of the complaint, or any subsequent three month period in which the Commissioner is still considering the complaint.”*

20. The Tribunal is limited in its powers to those given by Parliament as interpreted by the Upper Tribunal. As stated in *Killock v IC* by Mrs Justice Farbey

*74. The remedy in s.166 is limited to the mischiefs identified in s.166(1). We agree with Judge Wikeley’s conclusion in *Leighton (No 2)* that those are all procedural failings. They are (in broad summary) the failure to respond appropriately to a complaint, the failure to provide timely information in relation to a complaint and the failure to provide a timely complaint outcome. We do not need to go further by characterising s.166 as a “remedy for inaction” which we regard as an unnecessary gloss on the statutory provision. It is plain from the statutory words that, on an application under s.166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome.*

21. The Upper Tribunal went on to say that the First tier Tribunal should firmly resist any attempt to divert it towards a decision on the merits of the complaint, paragraph 74.

22. This Tribunal may consider whether a step is appropriate; the Information Commissioner's view on this will not be determinative but should be taken into account by this Tribunal and accorded due weight given the Commissioner is an expert regulator in the best position to decide what investigations she should undertake into any particular issue and how she should do so. This Tribunal will not interfere with an exercise of regulatory judgement without good reason. See Killock paras 84 to 86.

23. The appropriateness of any investigative steps taken is an objective matter which is within the jurisdiction of this Tribunal. However, as stated in paragraph 87 of Killock, s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. This Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given. It will do so in the context of securing the progress of the complaint in question. It may be possible to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint under s.166(2)(a). However, if invited to do so this Tribunal will cast a critical eye to assure itself that the complainant is not using the s.166 process to achieve a different complaint outcome.

24. Moreover, the Upper Tribunal said in Killock that if the Commissioner goes outside her statutory powers or makes any other error of law, it is for the High Court to correct her on ordinary public law principles in judicial review proceedings. The assessment of the appropriateness of a response already given is for the High Court and not this Tribunal. The combination of a statutory remedy in the Tribunal in relation to procedures and to the supervision of the High Court in relation to substance provides appropriate and effective protection to individuals.

25. Furthermore, a person who wants a data controller (or processor) to rectify personal data, compensate them, or otherwise properly comply with the Data Protection Act 2018 or General Data Protection Regulations in relation to personal data must go to the civil courts<sup>2</sup> not a tribunal pursuant to sections 167-169 & 180 of the Data Protection Act 2018. I express no opinion one way or

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<sup>2</sup> High Court or County Court

another about whether the Applicant can do so, or whether they should do so; that is a matter for the Applicant, about which this Tribunal cannot give advice.

26. This Tribunal does not have an oversight function in relation to the Information Commissioner's Office and does not hold them to account for their internal processes. The Parliamentary and Health Service Ombudsman<sup>3</sup> is the body which has that function. The Applicant has already made such an application, see below.

27. The Tribunal has a discretion whether to extend time under rule 5(3)(a). The relevant case law in deciding whether to exercise that discretion is set out in the Upper Tribunal's decisions in Data Select Limited v HMRC [2012] UKUT 187 (TCC) and Leeds City Council v HMRC [2014] UKUT 0350 (TCC) and BPP University College of Professional Studies v HMRC [2014] UKUT 496 (TCC) in which the Data Select principles were applied. See also Killock & others where this approach was approved.

28. The proper course for a tribunal in considering this type of application is to follow the principles, as described by Morgan J in Data Select at paragraph 34

*[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.*

#### *The Facts*

29. On 28 August 2019 the Applicant sent the Respondent a complaint about how he said his personal data had been dealt with, specifically with reference to the CCTV footage taken in a local shop.

30. The Applicant's concerns have been the subject substantial correspondence with the Information Commissioner given Case Reference Numbers

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<sup>3</sup> [Parliamentary and Health Service Ombudsman \(PHSO\)](#)

RFA0869556 and RCC0905820; the latter of which is the reference for the case review.

31. On 17 October 2019 a case officer wrote to Mr Dolby explaining that the exact nature of the complaint was unclear, after which he provided further information.

32. On 25 October 2019 the case officer provided a response to the complaint made by the Applicant under reference number RFA0869556. He told the Applicant that in his opinion there was no immediate cause for concern and set out the transparency requirements in in Part 3 DPA18 for law enforcement purposes. He offered to consider the matter further over the phone if the matters raised were not resolved to Mr Dolby's satisfaction.

33. Mr Dolby responded on 25 January 2020 as he wished to appeal the outcome provided to him.

34. After some correspondence about what the Applicant was dissatisfied about. The applicant requested a case review of the outcome to their complaint. The result of the case review was provided on 7 February 2020 and given case reference RCC0905820. The reviewing case officer had

- a) reviewed the information relating to the data protection concerns and considered the points the Applicant had raised;
- b) considered whether the complaint was dealt with reasonably;
- c) considered whether the matter was handled in line with the Commissioner's casework processes and case handling procedures; and
- d) considered whether there are any outstanding matters for the Commissioner to pursue and informed Mr Dolby that before they could progress the matter further, the ICO would need to see supporting documentary evidence of
  - i. his claim that the police had collected the CCTV footage two days before he was informed that they did not hold that material
  - ii. the submission of a subject access request or the raising of a concern with the police.

35. The reviewing case officer confirmed she agreed with the explanations provided by the case officer and the steps taken.



36. The Applicant was informed by the case review officer, that if he remained dissatisfied following this case review, then she would have a right under to undertake proceedings through the courts. The Applicant was also advised of the right to refer the Commissioner to The Parliamentary and Health Service Ombudsman (PHSO) if he thought that he had been provided with a poor service.

37. On 27 April 2020 Mr. Dolby provided more information to the Commissioner and the Respondent wrote to Mr. Dolby under Case Reference Number RFA0869556 to say that due to further information provided by him they had a better understanding of his concerns. They set out their conclusions as to the most likely explanation of events and explained they do not act on behalf of complainants and would not pursue allegations of dishonesty without evidence to support such suspicions.

38. Mr. Dolby then wrote to the Commissioner on several occasions expressing his dissatisfaction with the outcome of his complaint. In response he was advised about his rights to complain about the level of service provided to the PHSO and reminded of the previous steps taken by the ICO.

39. On 5 August 2020 under reference RCC0905820 the Information Commissioner wrote to Mr Dolby again setting out the limits of the role of the Information Commissioner and her office as to what they will investigate, noting that Mr Dolby had sent a considerable volume of correspondence to the Commissioner. The Team Manager stated they did not believe there was any cause for concern arising from the facts as explained by Mr Dolby and so they would not be raising matters with the shop. As to the police the Team Manager set out how Mr Dolby could go about raising the matter in the correct way with the police themselves. The letter stated the matter was closed and no further correspondence would be responded to.

40. Mr Dolby made a complaint to the PHSO about the Information Commissioner. On 20 November 2020 the PHSO wrote to Mr Dolby with the outcome to his complaint stating that no further action would be taken as the ICO had given its view and they could see any evidence that the ICO had not done what it should have in terms of assessing the case, gathering evidence, and giving Mr Dolby its view.

*Submissions*

41. Mr Dolby submitted orally that he did not contend that the outcome was incorrect and also said he was not seeking rectification albeit that was what he asked for in his application. He said he wanted a response to his complaint under the same case reference number.

*Analysis*

42. Having considered the 5 principles set out in Data Select I have concluded on balance that notwithstanding the delay the prejudice to the Respondent in the admission of this application out of time does not outweigh the prejudice that would be caused to this applicant and the interests of justice if I were not to admit it. The reasons include the need for finality and the extensive correspondence in this case conducted over years and given the applicant is a vulnerable person. The extension of time is granted, and the application admitted.

43. Turning to the application itself, Mr Dolby is seeking an order of compliance and “rectification” as set out in his documentation. These are not remedies that this Tribunal can give him, and he would have to apply to the civil courts to obtain such relief. I cannot advise him whether to do so and he should seek independent legal advice before doing so given the nature of embarking on any litigation.

44. The outcome received was clearly in relation to his complaint even if it had a different reference number.

45. The Commissioner has taken steps to comply with the obligations placed on them within DPA18. They have sought further information from the Applicant and have clarified the scope of their power to act and the extent to which the Commissioner has decided to exercise her regulatory functions in this case. It was only after protracted correspondence that the Commissioner stated that no further response would be given. This is not a case where the Commissioner has failed to take any steps or acted contrary to the legislation or her own guidance such that this Tribunal should intervene to make an order for steps to be taken.

46. The Applicant was provided with a response to their complaint on 25 October 2019 and this outcome was reviewed and upheld under the Respondent’s case review process on 7 February 2020. The Applicant does not

agree with the outcome, but this Tribunal has no power to consider an appeal against the Information Commissioner's substantive findings.

47. The Applicant is not satisfied with that outcome and wishes it to be reconsidered but it is, nonetheless, an outcome. He is seeking to turn back the clock in order to change the outcome and that is not permitted.

48. This Tribunal has no power to decide about the merits of that outcome, whether it be right or wrong. This is the case regardless of the nature of the complaint made or its evidential basis. The quality, adequacy or merits of the complaints made by Mr Dolby about the outcome fall outside the scope of s.166 and outside the jurisdiction of this Tribunal.

49. The Tribunal has no power to do what the Applicant is asking for; there is no power to investigate a data subject's allegations of dishonesty, interference with or loss of data. This Tribunal's jurisdiction does not extend to providing rectification or compliance.

50. By the time of this application Mr Dolby had received all that which this Tribunal could order under s166(2) DPA18. He remains dissatisfied with the service of the Information Commissioner and of the shop concerned and the police, but these are matters that go to the underlying merits of the outcome rather than the procedural matters which this Tribunal may deal with.

### **Conclusion**

51. Accordingly, for the reasons set out above, there is no basis for the Tribunal to make an order under section 166(2) DPA18.

52. Having considered whether this tribunal could provide the Applicant with any other remedy I have concluded that while there may be a remedy available from the courts (about which I make no conclusions or give any indication) having considered the nature of the issues raised by Mr Dolby there is no other remedy available from this Tribunal in relation to his application.

53. In order for this application to proceed there must be a realistic prospect of its success. For the reasons set out above, I have concluded that this Tribunal would not be able to provide the outcome(s) sought and that therefore the application is hopeless, or in other words has no reasonable prospect of success.

54. I know this decision will be a disappointment to Mr. Dolby however, this Tribunal can only act within the scope of its power and cannot provide him with the remedies he seeks.

55. Having taken account of all relevant considerations, I strike out this application pursuant to 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 because there is no reasonable prospect of the application succeeding.

**Tribunal Judge Lynn Griffin**  
**7 December 2021**

**Promulgation Date: 8 December 2021**