



NCN: [2022] UKFTT 00362 (GRC)

Case Reference: EA/2021/0358

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

10 Heard: by determination on the papers  
Heard on: 4 October 2022  
Decision given on: 5 October 2022

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Before:  
Judge Alison McKenna  
Susan Wolf  
20 Emma Yates

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Between:

**DEPARTMENT OF HEATH AND  
SOCIAL CARE**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**First  
Respondent**

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## DECISION

- 5 1. The appeal is allowed.
2. The Tribunal now makes a Substituted Decision Notice, as follows.

### SUBSTITUTED DECISION NOTICE

- 10 (a) **The Department of Health and Social Care must, within 28 days of this Decision being sent to it, provide the requester with a fresh response to his information request dated 10 August 2020.**
- (b) **The fresh response must make clear whether information within the scope of either or both parts of the request is held, and either disclose it or claim any relevant exemptions to disclosure.**
- 15 (c) **The Department of Health and Social Care should take any appropriate steps to clarify the request or offer the requester advice and assistance before responding.**

## REASONS

### *Mode of Hearing*

- 20 3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules<sup>1</sup>.
4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 98. It also considered a closed bundle comprising pages 1 to 66.
- 25 5. It is not clear to us whether the information requester, Mr Downing, was given the opportunity to participate in this appeal. We would have found his submissions helpful. As he is not a party, we would be grateful if the Information Commissioner would send him a copy of this Decision promptly and ensure that he understands his right to bring the matter back to the Information Commissioner and, if necessary, the Tribunal in due course.
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### *Background to Appeal*

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<sup>1</sup> <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

- 5 6. The Information Commissioner issued a Decision Notice on 22 October 2021, requiring the Appellant to disclose the requested information. The Decision Notice found that the Appellant had correctly claimed an exemption to disclosure under s. 35 (1) (a) of the Freedom of Information Act 2000 (“FOIA”) but that the public interest favoured disclosure of the withheld information.
- 10 7. Subsequently, the Appellant informed the Information Commissioner that the information which had been provided to the Information Commissioner during the course of its investigation was erroneous as, in its view, it fell outside the scope of the request. The parties agreed that the appropriate course in these unusual circumstances would be for the Appellant to appeal to the Tribunal and request a substituted Decision Notice.

### *The Information Request*

- 15 8. On 10 August 2020, Mr Downing wrote to the Department of Health and Social Care regarding its changed advice for clinically vulnerable people in relation to the Covid pandemic. He requested from the Appellant: “1....the scientific advice you used when making recent changes to the shielding policy” and “2. ...the source of any scientific advice you received on this matter”.
- 20 9. The Appellant wrote to Mr Downing on 4 September 2020 and confirmed that “it held information relevant to your request”. It did not specify whether that was the case in relation to part 1 or part 2 of the request, or both parts. It declined to provide the requested information in reliance upon s. 35 (1) (a) FOIA. It reiterated its position following an internal review on 29 October 25 2020. Again, it did not make clear whether the exemption was claimed in respect of one or both parts of the request.
10. Mr Downing complained to the Information Commissioner.

### *The Information Commissioner’s Investigation*

- 30 11. As is usual, the Information Commissioner’s Office (‘ICO’) asked the Appellant to provide it with a copy of the disputed information.
- 35 12. On 23 August 2021, the Appellant sent the ICO an electronic file of documents, said to constitute the disputed information. On 6 September 2021, the Appellant contacted the ICO to say that the wrong file had in fact been sent and provided a substituted file of information. This is the information which is referred to at paragraph 17 of the Decision Notice.
13. It does not appear from the information before us that the ICO ever queried the relevance of the information provided to it by the Appellant or asked any questions about the Appellant’s failure to respond to the second part of the request.

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### *The Decision Notice*

14. The Decision Notice relied on the ‘*briefing documents*’ provided by the Appellant at paragraph 17. It found that, in relation to those documents, the Appellant had correctly identified that s. 35 (1) (a) FOIA was engaged but reached a different view to the Appellant as to the balance of public interest.
15. It directed disclosure of the withheld information on the basis that the information which had been sent by the Appellant was the requested information.

### *The Law*

16. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*“If on an appeal under section 57 the Tribunal considers -*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

### *Submissions and Evidence*

17. The Appellant’s Notice of Appeal dated 2 December 2021 relied on grounds that (1) the information which it had been directed to disclose was outside the scope of the request because it was not ‘scientific’ advice; and (2) that the balance of public interest lay in maintaining the exemption. The Appellant invited the Tribunal to allow the appeal and make a substituted Decision Notice confirming that the information provided to the Information Commissioner need not be disclosed.
18. The Information Commissioner’s Response dated 3 February 2022 was that all the information provided to it may be described as falling within the scope of the request, as it is in the broadest sense ‘scientific’. It relied on the contents of the Decision Notice as to the public interest test. The Information Commissioner invited the Tribunal to refuse the appeal and uphold the Decision Notice.
19. The Appellant’s Reply dated 28 February 2022 clarified that the information sent to the Information Commissioner’s Office was, in its view, outside the scope of the request in part because it is not ‘scientific’ and in part because it was relevant to the policy position before the ‘recent changes’ referred to in the information request.

20. Neither party has provided the Tribunal with witness evidence. The Tribunal had before it an open and a closed bundle of documentary evidence.

*Conclusion*

- 5 21. The Tribunal's jurisdiction under s. 58 FOIA makes clear that the Tribunal may set aside a Decision Notice which was made on the basis of an error of fact. It seems to us that the Decision Notice in this case was made on the basis of an error of fact concerning the nature and extent of the information held and falling within the scope of the request.
- 10 22. We conclude that neither the Information Commissioner when she issued her Decision Notice, nor the Tribunal on appeal, can be sure what information the Appellant was referring to when it told Mr Downing that it held information within the scope of his request. It is uncertain whether additional 'scientific' information is held but which was not disclosed to the requester and the Information Commissioner. It is uncertain whether any information within  
15 part 2 of the request is held at all. As a result, it does not seem to us that the Information Commissioner was in a position to make a finding of fact and form a sound conclusion about the Appellant's compliance with its duties under FOIA, or indeed to form a reliable view about where the public interest lay in respect of the exemption claimed, having before her only a partial  
20 picture of the full situation.
23. We have some sympathy with the Information Commissioner in these circumstances. The Appellant's response both to Mr Downing's request and to the Information Commissioner's investigation can only be described as sloppy. The regrettable result of that sloppiness is that this matter must be sent  
25 back to the beginning in an attempt to put it right and that the legislative intent of FOIA has been frustrated in an important and sensitive matter of public policy.
24. Our sympathy for the Information Commissioner is, however, limited to its conduct of the investigation and does not extend to the conduct of this appeal.  
30 It seems to us that where the Decision Notice has been issued on the basis of a clear error of fact then the appropriate course would have been for the parties to make a joint application for a consent order under rule 37 of the Tribunal's Rules, requesting for the Decision Notice to be set aside. We conclude that the Information Commissioner's defence of the indefensible in this appeal has  
35 served only to cause delay in putting matters right for Mr Downing and to increase the cost to the public purse.
25. The Tribunal has no hesitation in allowing this appeal. However, the remedy which the Tribunal directs is not that the Appellant is absolved from responsibility to disclose the information, as it requests. The Appellant must  
40 make a fresh response to Mr Downing within 28 days, making clear whether it holds information within the scope of either or both parts of the request, disclosing any information which it now considers should be disclosed or claiming any relevant exemptions. It seems we should also add here that we would expect the Appellant to keep a careful note of the information which it  
45 considers in framing its response, so that it can supply the identical

information to the Information Commissioner if there is a further complaint from Mr Downing in due course.

5 26. When responding afresh, the Appellant may wish to remind itself of its duties to provide the requester with advice and assistance under s. 16 FOIA and the Code of Practice. It may, for example, wish to clarify the request as to the meaning of 'scientific' and the date of the 'recent changes' referred to by Mr Downing.

10 27. When Mr Downing receives the fresh response from the Appellant, he is entitled to make a fresh complaint to the ICO if he wishes. We are sorry that he has been put to so much trouble and delay in the exercise of his legal rights. We note that the Appellant will now, in responding afresh, have to assess the public interest test in relation to a different point in time, so the response may differ from its earlier response.

15 28. In all these circumstances, we now allow this appeal and make the Substituted Decision Notice above.

**(Signed)**

**JUDGE ALISON McKENNA**

**DATE: 4 October 2022**

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