



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2006/0077
Information Commissioners Ref: FS50133971

Freedom of Information Act 2000

Heard on the papers
on 11 February 2008
and on 27 February 2008

Decision Promulgated
on 28 February 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Roger Creedon and Rosalind Tatam

BETWEEN

**Mr. Gerry Tuckley
on behalf of the Brook Area Residents and Shopkeepers Group and
the Brook Area (Soho) Neighbourhood Forum**

Appellant

and

The Information Commissioner

Respondent

and

Birmingham City Council

**Additional
Party**

The parties are referred to in this determination as the Appellant, the Commissioner, and the Council, respectively.

DECISION

The Tribunal finds that the Decision Notice is in accordance with the law. Accordingly, this appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Appellant against a Decision Notice issued by the Commissioner dated 24 July 2007.

The Request for Information

2. On 24 October 2004, the Appellant wrote to the Council with a number of information requests, including for the following information:

“A list from 1992 of all Neighbourhood Forums and money paid to each Forum”.

3. The Freedom of Information Act 2000 (“FOIA”) was not yet in force at the time, but that is of no significance because the request was repeated, in similar terms, on a number of occasions after FOIA came into force.
4. On 4 January 2005, the Council provided the Appellant with list of Neighbourhood Forums, but said that it was unable to supply a year-by-year breakdown because it did not hold that information. It also explained that it had only become responsible for issuing grants to the Birmingham Association of Neighbourhood Forums (“BANF”) in 2001 and to Neighbourhood Forums in 2002. On 4 March, the Council provided the Appellant with details of grants paid in each financial year from 2002-05.
5. In subsequent correspondence, the Appellant clarified that what he was seeking was a list of Neighbourhood Forums who were members of BANF year-by-year since 1992. He was not interested in pursuing the question of which Neighbourhood Forums had applied for or received a grant.
6. A large volume of correspondence passed between the Appellant and the Council. Not all of it is relevant to this particular request, nor to the issues for determination in this appeal.
7. The Council invoked section 21 of the Freedom of Information Act 2000 (“FOIA”), i.e., that the information requested was available through other means, namely through Ward Committee Minutes which are available for

public inspection. The Appellant replied that the Ward Committee Minutes did not in fact contain the information requested. They showed which Neighbourhood Forums had received a grant in any given year, but since not all Neighbourhood Forums received a grant every year, they did not provide the year-by-year breakdown of which Neighbourhood Forums were members of BANF.

The Complaint to the Commissioner

8. On 28 February 2005, the Appellant contacted the Commissioner to complain that the Council had failed to respond to his request. Considerable correspondence then followed, between the Commissioner and the Appellant, and between the Commissioner and the Council, although some of it related to other information requests the Appellant had made to the Council.
9. In correspondence with the Appellant, the Commissioner noted that the Council had told the Appellant on a number of occasions that it did not hold the information he was seeking. The Commissioner also informed the Appellant that he considered that the Council had correctly applied section 21 of FOIA.
10. The Commissioner further noted that the Appellant had requested the year-by-year breakdown from BANF, but that BANF had not responded. The Commissioner told the Appellant that BANF was not required to respond to requests for information because it is not a public authority for the purposes of FOIA.
11. In correspondence with the Council, the Commissioner asked how the Council had been able to produce a list of those Neighbourhood Forums that had been members of BANF since 1992, but was unable to produce a year-by-year breakdown of membership over that period. The Council explained that it had obtained a list of all Neighbourhood Forums from BANF, following the Appellant's request, but that up to that point the Council had not held such a list. The Council also said that it had asked BANF if they held that information on a year-by-year basis, but BANF had advised the Council that to provide this information would require its records to be analysed, and that as it was not a public authority under FOIA, it did not have an obligation to do so.
12. We note that on 14 November 2006, the Commissioner also contacted BANF by e mail to ask if the information requested by the Appellant was held by BANF. In that e mail, the Commissioner said that it acknowledged that BANF is not a public authority. BANF said in reply that they could not help.
13. On 24 July 2007, the Commissioner issued a Decision Notice stating that he was satisfied that the information requested was not held by the Council, and that the Council had dealt with the request for information in accordance with section 1 of FOIA.

The Appeal to the Tribunal

14. By a letter dated 30 July 2007, the Appellant appealed to the Tribunal. He considered the Commissioner's view that BANF was not a public authority to be perverse. He went on to say that :

"The organisation was set up by Birmingham City Council in 1991; its officers were & are directly employed by the City Council. In 2003 it was converted by the Council into a limited company but remained entirely dependent on Council and government grants and its Council employed "development officer".

15. He also said that if the Commissioner's decision stood, it would mean that any public authority could avoid its responsibilities under FOIA by forming a limited company to carry out activities it wished to conceal from public scrutiny.
16. After receipt of the Commissioner's Reply, the Appellant wrote to the Tribunal. Although his letter dated 17 September 2007 is headed "Further Grounds of Appeal", the points in that letter are more in the form of evidence and submissions and we have taken them into account as such.

Evidence and Submissions

17. We have considered all the documents received from the parties (even if not specifically referred to in this determination), including in particular, the documents in the agreed bundle, and the parties' written submissions and replies. We have also considered the response from the Council to the Tribunal's further directions made on 12 February 2008.
18. We have also received and considered witness statements from:
- John Lindsay Hutchinson
 - Arthur Brown
 - Maureen Murphy
 - Gerald Denis Tuckley
 - Martin Lawrence Tolman (2 statements)
 - Kenneth Lawrence
 - Karen Balfour
 - Malkiat Thiarai
 - Denise Boardman
 - Jennifer Pickford
19. An issue arose with respect to the Appellant's submissions which we should record. The Tribunal's directions dated 25 October 2007 required the parties to exchange and lodge their written submissions by 29 January 2008. The Appellant did not do so, nor did he request an extension of time.

Bearing in mind that the Appellant is not represented, the Tribunal contacted him to inquire whether he intended to lodge any submissions, and on its own motion, the Tribunal extended the time for doing so until 12 noon on 1 February 2008. The Appellant did not respond. On 4 February 2008, the Tribunal contacted the Appellant again and advised the Appellant that if he intended to lodge submissions he would now need to apply for leave to submit them late, and reminded him of the implications of any delay on the timetable for Replies from the other parties. The Tribunal received the Appellant's submissions on Tuesday 5 February, without leave being sought. The Council says that in these circumstances, the Tribunal should not take the Appellant's submissions into account.

20. While not condoning the Appellant's delay, nor his disregard of the Tribunal's directions, the Tribunal does not consider that the Council or the Commissioner has been prejudiced by his delay. The submissions that were received from the Appellant are brief, comprising only two paragraphs, and do not add much to the Appellant's position as had already been put forward. In these circumstances, the Tribunal has taken the Appellant's submissions into account, but the outcome of this appeal would have been the same had the Tribunal ruled to exclude those submissions.

Questions For the Tribunal

21. We will address the issues that arise in this appeal by reference to the following questions:
- What information did the Appellant request?
 - Does the Council hold the information?
 - Is the information exempt under section 21?
 - Is the question of whether BANF is a public authority an issue that is properly before the Tribunal?

Findings

What information did the Appellant request?

22. We have posed this question simply for the avoidance of doubt, and because the request was clarified over time. There does not in fact appear to be any dispute between the parties on this issue, and the appeal has been put forward and dealt with by the parties on the basis that the information requested was for a year-by-year breakdown from 1992 onwards, of those Neighbourhood Forums that were members of BANF. This is also the basis on which the Commissioner's decision was made.
23. Although the appeal does not turn in any way on the Appellant's reasons for seeking the information, it may be of interest to record that the Appellant has explained that he and others have been engaged in a study

of BANF and other organisations concerned with regeneration of run down city areas. They want the year-by-year breakdown in order to analyse the Neighbourhood Forums as they came into existence and their life span.

Does the Council hold the information?

24. The right of access established by section 1 of FOIA applies to information “held” by a public authority (see sections 1(1)(a) and 1(4)). If the information is not held by the Council, then no duty of disclosure arises. The first question, therefore, is whether the Council holds the information. We have framed this question in the present tense because although under FOIA, the issue is whether the public authority held the information at the date of the request, there is no suggestion on the evidence that the position may have changed between the date of the request and now.
25. The Appellant’s position appears to be that because BANF was set up by the Council and because it has been funded or part-funded by the Council and is closely connected to the Council as evidenced, *inter alia*, by the secondment of staff, it must follow that the Council holds information as to BANF’s activities, including the year-by-year breakdown of its members.
26. On 25 October 2007, the Tribunal directed the Council to provide, *inter alia*, a detailed explanation (with supporting documents where appropriate), as to:
- a. *its relationship with BANF at all material times from 1992 to the date of the Appellant’s information request, including (but not restricted to), whether BANF held any of the information requested by the Appellant, on behalf of the Additional Party;*
 - b. *whether (and if so how, and between what dates), the Additional Party and/or any company owned by the Additional Party and/or any person acting on behalf of the Additional Party, within the meaning of section 6 of the Freedom of Information Act 2000, is or has ever been a member of BANF at any time from 1992 to the date of the Appellant’s information request; and*
 - c. *whether (and if not why not), it is able to meet the Appellant’s information request for any years since 1992 even if not to the date of the Appellant’s request.*
27. The Council says that BANF was formally set up in 1997. To the extent that it has been funded by grants from the Council, it has been subject to the normal procedures of having to provide audited accounts and other information on its activities. The Council says that BANF is and always was a separate entity from the Council, and indeed, that it would not otherwise have been eligible for grants from the Council. BANF has operated from a Council building referred to as “Revesby Walk”. The use of part of that building by BANF was negotiated as part of the conditions of the Grant Aid provided to BANF by the Council. The Council also seconded staff to work at BANF’s Resource Centre. The staff costs were deducted from the grant paid by the Council to BANF. As part of the conditions of grant, there was an annual Service Level Agreement

between the Council and BANF. In 2004, BANF was incorporated as a company limited by guarantee.

28. The issue before us is not whether the Council *should* hold the information, but whether it does. We accept that BANF is a separate entity from the Council. The fact that the Council funds or partly funds BANF and has or had a relationship with or responsibility for BANF means that it may hold certain information about BANF's activities. To the extent it does, that information is subject to the disclosure requirements in section 1 of FOIA. However, if the Council does not hold the year-by-year breakdown that the Appellant is seeking, it cannot be said to hold it by virtue of the fact that BANF may hold it.
29. The Council says that notwithstanding its relationship with BANF as set out above, it does not hold the year-by-year breakdown that the Appellant seeks. The Appellant has not put forward any evidence to suggest that the Council does, in fact, hold the information requested. For completeness, however, on 12 February 2008, we directed the Council to respond to the following specific questions:
- a) *Does the Council hold information that would, through analysis or other effort, enable the year-by-year breakdown from 1992 onwards of those Neighbourhood Forums that were members of BANF to be obtained, in whole or in part? If so, what such information does the Council hold and what would need to be done in order to obtain the year-by-year breakdown from that information? The Council is directed to respond to this question:*
 - (i) *Generally, by reference to all information it holds;*
 - (ii) *Specifically, by reference to the information received by the Council pursuant to the Service Level Agreements between the Council and BANF (an example of which is at page 173 et.seq. of the agreed bundle), particularly in relation to any statistical and qualitative information that was provided to the Council by BANF (see page 176 and 179), and any numerical information provided to the Council by BANF (see sub-paragraphs ((e),(f),(k), (l), and (m));*
 - (iii) *By reference also to the information supplied to the Council in relation to the grant applications as referred to in the witness statement of Karen Balfour (see pages 193-4);*
 - (iv) *And by reference to the information in relation to constitutions and AGMs that it is said Denise Boardman had access to (see page 226).*

- b) *What searches of its files and records has the Council undertaken to verify that it does not hold the year-by-year breakdown requested by the Appellant?*
- c) *Has the Council ever held the year-by-year breakdown requested by the Appellant? If so, and if the Council no longer holds such information, what happened to the information and when?*

30. The Council's responses were not as thorough as we might have hoped, but there is nothing in its answers, nor in any other evidence before us, to indicate that the Council holds the year-by-year breakdown or that it has ever held this information. In particular, there is nothing to indicate that it holds the information requested by virtue of the information it received pursuant to the Service Level Agreements between the Council and BANF, nor that the information requested could be compiled, through analysis or other effort from other information in the Council's possession. Furthermore, leaving aside any considerations under section 12 of FOIA, we are satisfied that although the Council could compile a year-by-year breakdown of Neighbourhood Associations that have received grants, that would not provide the Appellant with the information he has requested because as the Appellant has pointed out, not all Neighbourhood Forums apply for or receive grants each year.
31. We note, for completeness, that section 3(2)(b) of FOIA provides that information held by another person on behalf of a public authority is held by that public authority. BANF may hold information as to its membership on a year-by-year basis, but nothing in the evidence indicates that it does so on behalf of the Council.
32. It follows that the only proper finding the Tribunal can make on this appeal is that the Council has complied with its obligations under section 1 of FOIA. It has provided the Appellant with such information as it holds relevant to his request (albeit that it obtained that information from BANF). It also informed the Appellant, as it was required to do under section 1(1)(a) that it did not hold the year-on-year breakdown.

Is the information exempt under section 21?

33. The exemptions in FOIA only come into play if a public authority holds information which it says is not subject to disclosure because one or more exemptions apply. In the present case, we have found that the Council does not hold the information requested. It follows that neither the exemption in section 21 (information accessible by other means), nor any other exemption, is relevant.
34. We appreciate that some confusion may have been caused for the Appellant by the fact that the Council appeared to have stated, at times, that it did not hold the information, and at other times, that the information was exempt from disclosure by reason of section 21. The fact that the Appellant's request was clarified over time in respect of whether he was or

was not interested in information relating to grants, may have contributed to this confusion. For the avoidance of doubt, we should say, however, that the evidence does not suggest that by stating that the information was exempt under section 21, the Council was ever indicating that it held the year-by-year breakdown requested by the Appellant.

Is the question of whether BANF is a public authority an issue that is properly before the Tribunal?

35. The appeal before the Tribunal is an appeal against the Commissioner's Decision Notice of 24 July 2007. That Decision Notice is in respect of the Appellant's complaint that the Council did not provide him with the information he requested.
36. The Appellant also said that he had written to BANF on a number of occasions to ask for the information, but had received no reply. In dealing with the Appellant's complaint, the Commissioner did not draw a clear distinction between the Appellant's complaint against the Council and his complaint against BANF. We do not criticise the Commissioner for this, because the Appellant's arguments against both have been closely intertwined, and in part, he has been asserting that BANF is a public authority because of its relationship with the Council. Nevertheless, the Appellant's submissions indicate that he expects that this appeal will also deal with the issue of whether BANF is a public authority, and we need to consider, therefore, whether that is an issue properly before this Tribunal.
37. We note that the Commissioner informed the Appellant in correspondence that BANF is not a public authority for the purposes of FOIA, but he did not issue a Decision Notice to this effect. The Commissioner was entitled to deal with the issue in this way (albeit that it may have been helpful if he had explained why he was doing so). His obligation, and indeed his power to deal with a complaint under section 50 of FOIA, and to issue a Decision Notice in respect of that complaint, only arises if the complaint is against a public authority. In turn, there can only be an appeal to the Tribunal if there is a Decision Notice to appeal against. Since there is no Decision Notice in respect of the Appellant's request to BANF, there can be no appeal to the Tribunal against the Commissioner's position that BANF is not a public authority. It follows that the question of whether BANF is a public authority is not an issue properly before this Tribunal. As noted by the High Court's decision in **BBC v Sugar [2007] EWHC 905 (Admin)** (recently upheld by the Court of Appeal: [2008] WLR (D) 14), the Appellant's only recourse in this situation is by way of Judicial Review.
38. It may be helpful if we outline briefly how FOIA defines a public authority. We wish to make it clear, however, that our comments below are simply intended to provide some assistance to an unrepresented Appellant. They do not form part of our decision in this appeal.
39. Under section 3 of FOIA, a public authority is a body listed in Schedule 1, or designated by order under section 5, or is a publicly owned company as defined by section 6 of FOIA. BANF is not listed in Schedule 1, nor

designated by order under section 5. Therefore, it can only be a public authority if it is a publicly owned company as defined by section 6.

40. In so far as it is relevant, section 6 provides as follows:

“(1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if—

(a) it is wholly owned by the Crown, or

(b) it is wholly owned by any public authority listed in Schedule 1 other than—

(i) a government department, or

(ii) any authority which is listed only in relation to particular information.

(2) For the purposes of this section—

(a) a company is wholly owned by the Crown if it has no members except—

(i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or

(ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and

(b) a company is wholly owned by a public authority other than a government department if it has no members except—

(i) that public authority or companies wholly owned by that public authority, or

(ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority.

41. Since BANF is not owned by the Crown, section 6(1)(a) would not apply.

42. Is BANF wholly owned by a public authority? The Appellant says it is wholly owned by the Council. By virtue of section 6(1)(b), that can only be the case if BANF has no members except the Council or companies wholly owned by the Council, or persons acting on behalf of the Council or of companies wholly owned by the Council. The evidence indicates that the members of BANF are the various Neighbourhood Forums about which the Appellant has been seeking information. In view of this, it would seem that the Commissioner’s position that BANF is not a public authority for the purposes of FOIA, must be correct.

Signed:

Date: 28 February 2008

**Anisa Dhanji
Deputy Chairman**