



Tribunals Service

Information Tribunal

Information Commissioner's number FS50111331

Information Tribunal Appeal Number EA/2008/0017

Determined on the papers Decision Promulgated on 2 March 2009

**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000
AND ENVIRONMENTAL INFORMATION REGULATIONS 2004**

BEFORE

DEPUTY CHAIRMAN

Peter Marquand

and

LAY MEMBERS

Dave Sivers

Henry Fitzhugh

B E T W E E N

MS K GRIFFIN

Appellant

AND

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

Information Tribunal (Enforcement Appeals) Rules 2005 as amended –
Application for striking out, Rule 9 – Summary Disposal of Appeals, Rule 10.

Cases:

Tanner v Information Commissioner and HMRC (EA/2007/0106)

British Broadcasting Corporation v. Sugar & Another [2008] EW CA Civ 191

British Broadcasting Corporation v. Sugar [2009] UKHL 9

DECISION

The Tribunal dismisses this appeal on the basis that the Notice of Appeal discloses no reasonable grounds of appeal.

Reasons for Decision

Summary Background

1. Ms Kay Griffin has made various complaints to Hampshire Constabulary (“the Constabulary”) and made a number of requests for information to them.

The request for information

2. As she was dissatisfied with the response from the Constabulary Ms Griffin contacted the Information Commissioner (“the Commissioner”) on the 24th March 2006. In correspondence with the Commissioner, the Commissioner clarified the nature of Ms Griffin’s request for information. Paragraph 9 of the Decision Notice it states:

“Several of the complainant’s lengthy items of correspondence to the public authority included information requests and the process of identifying which of these constituted the focus of the complaint was complicated. Following several attempts to agree the scope of the investigation, the Commissioner informed the complainant that the investigation would focus on the requests [which are set out below]”.

3. The text in square brackets is a reference to the ten requests for information, which are as follows (paragraphs 3 and 6 of the Decision Notice):

i. “...how may a victim or a defendant request that your officers seek the assistance of people with expertise in AS [Asperger's Syndrome], either via an inter-agency partnership approach or perhaps less formal means?”

ii. “...please confirm that there is no disability policy relating to dealing with the public whether as complainants/offenders etc.”

iii. “Do you have such a policy [relating to mentally disordered suspects] and if so may I please have a copy asap?”

iv. “Why has the force not followed the advice in the circulars in dealing with [name redacted]?”

v. “Please provide copies of [the PSD (Professional Standards Department) and Inspector John Heath] reports?”

vi. “Please advise whether PSD made a decision on the basis of phone conversations....Please advise whether anyone has investigated these issues”

vii. “...if officers conduct has been investigated, please advise details of allegations made.”

viii. *“Please confirm whether PSD claim to have investigated [name redacted] false statement or my counter complaints of harassment to decide whether the warning was unjust & should be retracted”*

ix. *“Please identify what written information from me was read by PSD before a decision was reached. Please advise whether PSD read my letters to Sergeant Sahota up to & including 23/3/05, & Inspector Smith of 25/2/05. Please advise whether PSD received the audio & videotapes.”*

x. *“Please let me know whether I King was entitled to pass the file to CID & disclose such information about me to progress a ‘rape’ investigation without my knowledge or formal allegations.”*

4. The Decision Notice records that the Constabulary had originally responded to requests for information on the 19th May 2005, but in the course of the Commissioner’s investigation, the Constabulary gave further responses. In essence, in relation to requests (i) – (iii), the Constabulary stated that they had provided the information. In relation to requests (iv) – (viii), the Constabulary had claimed that the information was exempt from disclosure because it had been recorded in connection with a police investigation (the exemption in section 30(1) FOIA) and/or that it was personal data and exempt from disclosure under FOIA (section 40). In relation to the remainder of the requests, it stated that the appropriate limit would be exceeded i.e. that it would take the too much time to identify the information that was sought (section 12 FOIA).
5. The conclusion of the Commissioner’s investigations and the record of the Decision Notice are that in relation to (i) of the information request, the public authority had failed to confirm or deny whether it held the information and in relation to part (x), it has initially failed to respond. In relation to parts (ii) and (iii), it had complied with the Act, but it had fallen into error by claiming an exemption in section 22, when in fact, subsequently the Constabulary confirmed the information was not held at the time of the request. The Commissioner also found that the Constabulary had acted in accordance with the Act in relation to other aspects of the request however, it had failed to comply with the obligation to provide advice and assistance and had failed to comply with the formalities of the Act when responding to Ms Griffin.

The Appeal to the Tribunal

6. Ms Griffin appealed to the Tribunal by notice dated 24th February 2008. However, Ms Griffin requested more time because of particular difficulties that she had in formulating her Notice of Appeal. Ms Griffin subsequently filed a letter dated the 20th April 2008 and the Commissioner filed and served a

Reply dated the 9th May 2008 opposing the Appeal. In particular, the Commissioner asked the Tribunal to first, strike out the Appeal under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 (“the Rules”) on the basis that the Notice of Appeal disclosed no reasonable grounds of appeal. Secondly, the Commissioner invited the Tribunal to strike the Appeal out under Rule 10 of the Rules, on the basis that the Appeal did not have any realistic prospect of success.

7. The Tribunal, having considered the Notice of Appeal and Reply, issued a direction that it would consider the Commissioner’s applications. However, in the interim, because of Ms Griffin’s particular circumstances, extra time was allowed by the Tribunal. In particular, Ms Griffin has been able to obtain pro bono assistance from Simmons & Simmons from Mr Alexander Brown. The Tribunal would like to record its gratitude to Mr Brown for assisting the Appellant and the Tribunal. In accordance with further directions, written submissions were received on Ms Griffin’s behalf, which helpfully identified the issues. Specifically an oral hearing was not sought by Ms Griffin or the Commissioner.
8. The full Tribunal considered the applications under Rule 9 and Rule 10 on the 15th January 2009 on the papers.

The Tribunal’s Jurisdiction

9. The Tribunal’s remit is governed by the FOIA and in particular section 58. Section 58 is set out below:

“58- Determination of Appeal.

(1) 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 involves 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.

(2) On such an Appeal, the Tribunal may review any finding of fact on which the Notice in question was based.”

As can be seen from section 58 the jurisdiction arises out of the Decision Notice issued by the Information Commissioner.

Rule 9 and Rule 10

10. The Tribunal procedure is governed by the Rules, made under section 67(2) and paragraph of Schedule 6 to the Data Protection Act 1998. Rule 9 is relevant here and is as follows:

“(1) Subject to paragraph (3) below, where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal.

(3) This rule does not apply in the case of an appeal under section 48(3) of the 1998 Act.”

Section 48(3) is not relevant here.

11. Rule 10 provides (in so far as it is relevant):

“(1) Where, having considered–

(a) the notice of appeal, and

(b) any reply to the notice of appeal,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may, subject to the provisions of this rule, so determine the appeal.”

12. The Tribunal can only determine those matters that fall within its jurisdiction, as Rule 9 above makes clear. If the appeal does not fall within its jurisdiction, then Rule 9 allows the Tribunal to strike out the appeal. In addition, the Tribunal may strike out an appeal if, within the Notice of Appeal, there are no “reasonable grounds”. For example, if there is no indication of what the claim is about.

13. In Tanner v Information Commissioner and HMRC (EA/2007/0106) the Tribunal (differently constituted) concluded that the appropriate test in Rule 10 for a claim to be summarily dismissed if it had no real prospect of success. It must be decided whether there is a "realistic", as opposed to "fanciful", prospect of success.

The Grounds of Appeal

14. The Tribunal has carefully considered the Notice of Appeal in this matter and also the written submissions sent on behalf of Ms Griffin. The written submissions ask the Tribunal to consider in particular a letter from Ms Griffin dated 8th March 2007 to the Commissioner's Office and the Tribunal has carefully considered that document.

15. The submissions on behalf of Ms Griffin essentially identify two broad areas where it is said that the Decision Notice was wrong. First, it is said that the Commissioner fell into error by omitting certain information requests when he formulated the list of requests set out at i - x above at paragraph 3 of this Decision. In particular, it is said that the following were omitted:

- a. *A response to the question raised by the Appellant, which asked whether, in December 2003, there was any provision in relation to "information and training", cooperation with local interagency schemes etc., as per Home Officer Circular 12/95?". This information request was set out at paragraph 1 (d) on page 4 of the Appellant's letter of 8 March 2007 and was originally asked of the Police in a letter dated 23 January 2006.*

- b. *Do the Police agree that if an individual's actions are reasonable the opportunity (or perhaps more accurately the possibility) to issue a warning (for harassment) does not arise. This information request was set out at paragraph 2(d) on page 5 of the Appellant's letter of 8 March 2007 and was originally asked of the Police in a letter dated 23 January 2006.*

- c. *A copy of the Hampshire police mental health procedure (procedure number 07401) that was in force in December 2003. The Appellant has previously been provided with procedure number 07400, rather than procedure number 07401. This information request was set out at paragraph 7 on page 6 of the Appellant's letter of 8 March 2007.*

- d. *A copy of (i) the guidance booklets for investigating officers and (ii) the guidance booklet for victims, as per Home Office Circular 28/2001. Please*

note that this is a request for copies of those aforementioned booklets that were in force during December 2003 and January 2004. This information request was set out at paragraph 8 on page 7 of the Appellant's letter of 8 March 2007.

e. Details of the information & training given to the force regarding harassment in general and specifically "liaison with other agencies" and "the importance of an inter-agency partnership approach" as per the Circular. This information request was set out at paragraph 9 on page 7 of the Appellant's letter of 8 March 2008.

f. A response to the Appellant's question in relation to whether the Chief Inspector CID (policy) or the Inspector, Community Safety, has in relation to mentally disordered persons, developed force policy & practice, including the provision of information and training for officers, or has ensured that force policy on deciding when to charge reflects the need to safeguard the public. This information request was set out at paragraph 14 on page 9 of the Appellant's letter of 8 March 2008.

16. Secondly, it is said that the Commissioner should be required to reconsider those requests i and ii set at paragraph 3 above of this Decision as follows:

*"a. Request (i) as categorised in the Decision Notice cut short the Appellant's full question, as it omitted to encompass the first part of that question. The full question as set out in the 8 March letter was **"Please would you... advise whether your officers are allowed to approach... anyone... with expertise in AS (Asperger's Syndrome) such as an officer in another force.** In addition, how may a victim or a defendant request that your officers seek the assistance of people with expertise in AS, either via an inter-agency partnership approach or perhaps less formal means?". The part of the question written in [bold] was that part that the Information Commissioner failed to consider. This information request was initially made in a letter dated 07 November 2004.*

b. In relation to request (ii) as categorised in the Decision Notice, the Appellant has previously been provided with Policy number 23900 in response to this request, which was noted in paragraph 3 (ii) of the Decision notice. However, policy number 23900 is entitled "Equality and Disability in Employment", and was not relevant to the Appellant's information request."

17. The Tribunal reviewed the Notice of Appeal and the letter of the 8th March 2007. If it were not for the written submissions provided on behalf of Ms

Griffin the Tribunal would have been unable to identify grounds of appeal on that original documentation. In particular, in her letter of the 20th April 2008, Ms Griffin's assertion that all the documentation that she has provided "shows substantive grounds for the appeal and should be taken as part of the Notice", is not sufficient to identify Ms Griffin's objections to the Decision Notice served by the Commissioner. However, as identified above, we now have the written submissions which, in essence, would require the Tribunal to give permission in accordance with Rule 11 of the Rules to amend the Notice of Appeal. Rule 11 is as follows:

"(i) With the leave of the Tribunal, the Appellant may amend his Notice of Appeal or deliver supplementary Grounds of Appeal".

18. The Tribunal's approach in the circumstances of this case has been to proceed as if such permission had been given. We have assumed that what Ms Griffin has said about the relevant facts is correct for the purposes of this Decision.
19. Dealing with items a. – f. set out in paragraph 15 above, the Tribunal's conclusion is as follows. As indicated, the submissions on behalf of Ms Griffin are that in formulating the nature of the information request from the correspondence, the Commissioner fell into error by excluding those items from his consideration. But the Decision Notice makes it quite clear that the Commissioner informed the complainant that he was going to investigate items i. to x, as set out in paragraph 3 above. The Decision Notice proceeds on the basis of the investigation into those pieces of information alone. The Tribunal's jurisdiction arises out of the Decision Notice. In the case of British Broadcasting Corporation v. Sugar & Another [2008] EW CA Civ 191 and [2009] UKHL 9, this point was clearly made. Mr Sugar sought an internal report commissioned by the BBC on the subject of possible bias in an area of its news reporting. The Information Tribunal found it had jurisdiction to hear the Appeal and a Judge allowed the BBC's Appeal, but Mr Sugar applied to the Court of Appeal to overturn the decision. The Court of Appeal's decision has now been overturned by the House of Lords, but the point of the importance of the Decision Notice remains. In the course of the Judgment, Buxton LJ in the Court of Appeal, when considering the scope of the Information Tribunal's jurisdiction, stated:

"Section 57(1) provides that when a Decision Notice has been served, the complainant or the Public Authority may appeal to the Information Tribunal against that Notice; thus the serving of

a Decision Notice is a condition precedent to the Information Tribunal doing anything and it is the Decision Notice and nothing else that is appealed against.”

(Paragraph 19 of the Judgment). The Tribunal finds therefore, that it does not have jurisdiction to consider requests for information that were set outside the Decision Notice at the very commencement of the Commissioner's investigations. Accordingly, points a. to f. above would not form a matter that can be entertained by the Tribunal and this aspect of the Appeal fails.

20. Turning to (a) set out in paragraph 16 above, Ms Griffin's submissions are that the Commissioner did not consider the full wording of her request. The Tribunal's conclusion is that the wording that was omitted is not so significantly different from the wording that the Commissioner included to require this point to be looked at further. The words that were included in the Tribunal's view, would be sufficient to identify any recorded information on the topic in question. For this reason, we do not consider that this is a reasonable ground of appeal or if it were a ground of appeal, then we would dismiss summarily under Rule 10 for the same reasons.
21. In relation to (b) in paragraph 16 above, it is said that the information that was provided was not relevant to the request. However, in the Decision Notice, at paragraph 3 (ii), Hampshire Constabulary replied stating: "The force policy on disability appears in the policy 23900. This has already been forwarded to [Ms Griffin] and is the overarching policy that includes the statement of policy in relation to disability".
22. We do not see the fact that this policy is not relevant to the request is itself a ground of appeal. If that is the policy that the Constabulary has, then that is all that can be said. It is up to Ms Griffin to make whatever point she sees fit to the Constabulary about the adequacy or otherwise of their policy, but the Tribunal cannot do anything about whether it is or is not relevant. Accordingly, this is not a reasonable ground of appeal and we strike it out under Rule 9. We would also strike it out under Rule 10 for the same reasons.
23. Accordingly, this ground of appeal also fails.
24. As such, there is no realistic prospect of succeeding on any ground of appeal if permission were in fact given to amend the Notice of Appeal.

25. The Tribunal's unanimous conclusion is that this Appeal in its entirety should be struck out.
26. Having dismissed this Appeal there is, of course, nothing to prevent Ms Griffin from making a further request for information in particular in relation to (a) – (f) above. However, it is important to realise that FOIA only provides a right of access to recorded information. The chances of recovering recorded information in relation to a question that starts "Do the Police agree that if an individual's actions are reasonable ..." could be increased in our view if applicants formulated questions in a way that was easier for a public authority to interpret as a specific request for recorded information. For example, "Can I have a copy of any written policy you hold on issuing warnings for harassment?" would, in the Tribunal's view, be more likely to be easily dealt with by a public authority. The Tribunal points out of course, that it is not advising Ms Griffin, but making a point of general application.

SUMMARY

27. For the reasons given above, the Tribunal dismisses the appeal on the grounds that the Notice of Appeal discloses no reasonable grounds of appeal.
28. The decision of the Tribunal is unanimous.

Signed:

Peter Marquand, Deputy Chairman

Date: 2 March 2009