



**NCN [2024] UKFTT 877 (GRC).**

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: FT/EA/2024/0252**

**Decided without a hearing  
On 2 October 2024**

**Before**

**TRIBUNAL JUDGE HEALD**

**Between**

**SIMON MCGEE**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION and REASONS**

The Appeal is struck out.

**Application**

1. On 5 August 2024 the Information Commissioner ("IC") applied for the Appeal to be struck out under rules 8(2)(a) and 8(3)(c) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the 2009 Rules").

**Background**

2. On 2 October 2023 the Appellant made a request for information pursuant to the Freedom of Information Act 2000 ("FOIA") to The Governing Body of Uppingham Community College ("UCC"). UCC's response was that this information was exempt from disclosure by section 40(2) FOIA. The Appellant complained to the Information Commissioner ("IC"). In the relevant Decision

Notice (ref IC-2708606-N7T4) ("DN") dated 14 May 2024 the IC concluded as follows:-

*"The complainant has requested information about certain pupils' attendance at Uppingham Community College (UCC). UCC initially advised it was withholding all the information under section 40(2) of FOIA, which concerns personal data. It subsequently provided some relevant information and indicated that it didn't hold the remainder. The Commissioner's decision is that UCC breached sections 1(1)(a) and 10(1) of FOIA but that, on the balance of probabilities, UCC doesn't hold the information requested in parts 1 and 3 of the request."*

### **The Appeal**

3. On 2 July 2024 the Appellant commenced this Appeal. I noted the "Reasons" in part 7. The outcome sought was stated in part 8 to be:-

*"The Tribunal [which I take to mean the IC] failed to consider that Uppingham Community College (UCC) did not comply with the Freedom of Information Act (FOIA) 2000 requirements promptly and accurately. Despite repeated requests UCC withheld essential information and did not provide clear responses within the legal time frame. This has obstructed the fair view of our son's admission process. Additionally the Tribunal did not adequately address the systemic issues of record keeping and transparency within UCC which are critical for ensuring compliance with FOIA and maintaining public trust. The recent findings from the School's Compliance Unit indicate multiple counts of maladministration in UCC's admissions process further compounding these issues. We seek a comprehensive review and investigation into UCC's FOIA compliance and record keeping practices ensuring they adhere to legal standards and improve transparency and [words unreadable]"*

4. The IC responded on 5 August 2024 and concluded with these submissions:-

*"32 Further, with respect to the Appellant's desired outcome as noted at paragraph 11 above, the Commissioner submits that these matters are not within the Tribunal's jurisdiction and cannot be obtained through this appeal.*

#### *F. Conclusion*

*33. The Appellant has failed to identify any error of law in the DN or any incorrect exercise of the Commissioner's discretion and has raised matters outside the Tribunal's jurisdiction. Accordingly, the Commissioner applies for this appeal to be struck out under Rule 8(2)(a) and 8(3)(c) of the Rules on the basis that there are no reasonable prospects of the Appellant's case succeeding.*

*34. Alternatively if this appeal is not struck out the Commissioner would invite the Tribunal to dismiss the appeal for the reasons set out in the DN and this response"*

### **FOIA and the role of the Tribunal**

5. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1(1)(b) FOIA). These entitlements are subject for example

to exemptions which can be absolute by section 2(2)(a) FOIA or qualified as set out in section 2(2)(b) FOIA.

6. The role of the Tribunal is set out in Section 58 FOIA and provides that:-
  - (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 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.*
  - (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*
7. It is not part of the Tribunal's role to look into the way in which the complaint was investigated as opposed to the outcome. (*see for example William Stevenson -v- Information Commissioner (EA/2015/0117) and Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149.*)

#### **Striking out an Appeal by Rule 8(3)(c) 2009 Rules**

8. Rule 8 of the 2009 Rules provides that: -
  - (3) *The Tribunal may strike out the whole or a part of the proceedings if*
  - (c) *the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*
9. In *HMRC -v- Fairford Group (in liquidation) and Fairford Partnership Group (in liquidation) [2014] UKUT 0329* the Upper Tribunal summarised the task to be carried out by a Tribunal in these circumstances: -

*41. In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman [2001] 2 All ER 91* and *Three Rivers (see above)* Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472*. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all*
10. In *AW-v-Information Commissioner and Blackpool CC [2013] 30 ACC* the Upper Tribunal at paragraph 7ff set out the principles governing the application of rule 8(3)(c) of the 2009 Rules. These included: -

7. ...It is well established in the ordinary courts that the historic justification for striking out a claim is that the proceedings are an abuse of process .... On that basis, the power should only be exercised in plain and obvious cases

8. More recent rulings from the superior courts point to the need to look at the interests of justice as a whole ....It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules.

### **Strike out by Rule 8(2)(a) 2009 Rules**

11. Rule 8(2)(a) 2009 provides:-

*(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal (a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them*

### **Application procedure and matters considered**

12. As required by rule 8(4) 2009 Rules the Appellant was informed of the IC's application and he has provided a response to it.

13. In reaching my Decision I had regard to the GRC5 and the response to it, the DN, Appeal and IC's Response. I also considered the overriding objective in part 2 of the 2009 Rules.

### **Conclusions**

14. It is clear that the Appellant has strongly held concerns about the way in which he says UCC has been dealing with him and this request for information. However it is not for the Tribunal pursuant to its statutory role set out in section 58 FOIA and with its focus on the DN to involve itself with such issues on this occasion.

15. In my view there are parts of the Appeal for which the Tribunal has no jurisdiction by section 58 FOIA being:-

- (1) the outcomes sought in part 8.1
- (2) issues about a Data Subject Access request (para 3)
- (3) the manner of UCC's communication with the Appellant (para 5)
- (4) the matters said about the Schools Complaint Compliance Unit (para 4)

16. Where I accept the Tribunal does have jurisdiction is where the Appeal seeks to challenge the DN's conclusions regarding whether UCC were to be taken to be correct (as the IC says) when saying certain information was not held.

17. Keeping in mind part 2(2)(a) and (b) 2009 Rules (and while it was not readily apparent) I did conclude that paras 1 and 2 of the Appeal should be taken to be a challenge to this part of the DN.

18. However I agree with the IC in its Response when it submits that if there is an issue about whether information is held or not that question is resolved on the balance of probabilities. I also agree with the IC that in the absence of some relevant indication otherwise it can be appropriate for the IC to accept the public authority's (in the case UCC's) position on this issue.
19. I considered the Appellant's response to the application to strike out as well as the Appeal itself to establish if there was something said that might indicate the IC should not have accepted UCC's "not held" position and if so what that was.
20. I concluded that while the Appellant explains his concerns about UCC (and generally) nothing said provided enough of a challenge to UCC's position and IC's conclusions on this matter for there to be to the a reasonable prospect of the Appellant's case or part of it succeeding.

### **Decision**

21. Accordingly paragraphs 3 and following of the Appeal are struck out by rule 8(2)(a) 2009 Rules in the absence of Jurisdiction and because I am not exercising the power in rule 5(3)(k)(i) 2009 Rules. Had I not reached this conclusion I would have struck out these parts of the Appeal by rule 8(3)(c) 2009 Rules as in my view they would have no reasonable prospect of succeeding.
22. Additionally the other parts of the Appeal are struck out by rule 8(3)(c) 2009 Rules because in my view they have no reasonable prospect of succeeding.

**Signed** Tribunal Judge Heald of the First-tier Tribunal

**Date:** 2 October 2024.