



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0094
Information Commissioner's Ref: FS50199187

Determined on Papers Alone
On 03 June 2009

Decision Promulgated
26 June 2009

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS QC

and

LAY MEMBERS

ROGER CREEDON
TONY STOLLER

Between

BRITISH MUSEUM

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject Matter

Freedom of Information Act 2005 - time limits - sections 1(1) and 10(1)

Decision

The Tribunal amends the Information Commissioner's Decision Notice dated 8 December 2008 in the way more specifically set out at paragraph 21 below

Reasons for Decision

Introduction

1. The British Museum (Appellant) received two requests for information relating to two currently well known artists, namely, Banksy and Damien Hirst. Both requests concerned information relating to what can be called in general terms any and all dealings between the Appellant and the two artists in question. With one very minor exception, the Appellant answered the requests by indicating it did not hold any relevant information.
2. The Information Commissioner (the Commissioner) was satisfied that the Appellant did not hold any further information relating to the request. However, he found that the Appellant was in breach of the relevant time limits applicable to responses to requests for information set out in the Freedom of Information Act 2005 (FOIA). The Appellant now appeals as to this last finding.

The facts

3. The first request was made by the Arts and Media Editor of The Sunday Telegraph by email dated 23 January 2008. The email made the following request stating that the writer understood that the request would take 20 days to "process". The Complainant asked for:
 - (1) all internal museum documentation which in any way related to the artist known as Banksy or any of the artist's work;
 - (2) all correspondence between the museum and the artist or any representative and/or gallery acting on his behalf;

- (3) all works by Banksy which had been displayed by the museum voluntarily; and
- (4) a list of occasions when works by Banksy have appeared or were believed to have appeared on the museum premises.

The email noted that the works would not have been solicited by the museum or any of its representatives. The Appellant was asked to provide the dates “the work” appeared and all supporting documentation.

4. The second request followed in an email dated 24 January 2008. Reference was again made to the 20 day period. The request sought:

- (1) all correspondence (including emails) between the Appellant and Damien Hirst which in any way related to a work called “For The Love of God” also known as “The Skull”;
- (2) all correspondence between the Appellant and any gallery and/or representative of Damien Hirst which in any way related to the work referred to in (1); and
- (3) all internal documentation relating to the said work.

5. The Appellant’s Head of Press & PR replied by email dated 20 February 2008. This now appears with the documents appended to the Notice of Appeal. This document was not provided by the Appellant at any time prior to the lodging of the Notice of Appeal. Section 10 of FOIA which will be set out in full below provides that the public authority must comply with a request promptly and in any event not later than 20th working day following the date of receipt of the request. As to Banksy, it was stated that there was “*no documentation or correspondence on this issue*”. The Appellant added that no works had been displayed voluntarily and therefore no relevant documentation or correspondence was held. As for Damien Hirst and the specific work of art referred to, there was just one item of correspondence in an email from Mr Hirst’s personal assistant which was attached. The Appellant otherwise held nothing else.

6. The same response was provided in a subsequent email dated 5 March 2008. No reference is made to the earlier email of 20 February. The implications of this are set out in further detail below.

7. The Sunday Telegraph sought an internal review by an email also dated 5 March 2008 on the basis that the newspaper believed that *“in both instances there is a strong possibility that the Museum holds more information than has been disclosed”*. The Appellant responded on 1 April 2008 to say that it maintained its original response.

Dealings with the Commissioner

8. In mid-October 2008, the Commissioner contacted the Appellant. The Appellant had complained to the Commissioner on 9 April 2008. The Commissioner pointed out the normal standard of proof was applicable when determining whether a public authority held any request for information and that that standard was on the balance of probabilities. The Commissioner therefore asked for details of the searches in fact conducted. A number of other relevant requests were also made.
9. The Appellant provided a very full response by an email of 20 October 2008. The Commissioner informed The Sunday Telegraph of its exchanges with the Appellant. The Commissioner later invited the newspaper to withdraw its complaint. The Sunday Telegraph declined to do so partly on the basis that the Appellant had not conducted a “proper internal review”.

The Decision Notice

10. In paragraph 8 of the Decision Notice which is dated 8 December 2008, the Commissioner noted that a public authority is not required by FOIA to carry out an internal review. He then proceeded to summarise the later exchanges between the Appellant and the Commissioner.
11. As at to the time limits, the Commissioner noted, as indicated above, that no response was sent to the newspaper’s information requests of 23 and 24 January 2008 until 5 March 2008, *“thus exceeding the time limit for response”*.
12. The Commissioner therefore made the following determination in paragraph 18 of the Notice:

“18. The Commissioner’s decision is that the public authority correctly complied with its general obligations under section 1 of the Act. However, the Commissioner has also decided that the Museum breached the requirements of sections

1(1)(a) and 10(1) of the Act in that it failed to respond to the claimant's information request within 20 working days."

In the circumstances, no steps were directed to be taken.

The FOIA provisions

13. Section 1(1) provides that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

14. Section 10(1) provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Time limits – the parties' contentions

15. The Appellant filed a Notice of Appeal dated 12 December 2008. Prior to that, the Appellant took issue in writing with the Commissioner's finding that the Appellant had not responded within the 20 day period.

16. In an email of 9 December 2008, the Appellant contended that far from there having been a response on 5 March 2008 as had been stated in the Notice, the response:

"... to the original request was actually sent by the Head of Press & PR on 19 February. This is within the 20 working day period: the request was received on 24 January. This incorrect date, presumably supplied to you by Mr Hastings [the relevant editor at the newspaper] is the date of the receipt of Mr Hastings' request for an internal review and was quoted in your original email to me of 15 October. This was not picked up at that time and is now, of course, very relevant to your findings."

The Appellant therefore sought to procure the issuance of an amended Notice. The Commissioner refused to do so on the grounds that no such jurisdiction existed.

The Notice of Appeal and Reply

17. The Notice of Appeal is dated 12 December 2008. It repeated the facts and matters set out in the preceding section of this judgment. The grounds of appeal therefore stated in paragraph 4 that:

“ ... the Museum did respond within 20 working days. The requester did not complain to the Museum or to the ICO about the failure to respond within the statutory period. It did not therefore provide the Information Commissioner with the date of the original response. The investigating officer did not request evidence or confirmation of the date of response from the Museum or from the Complainant before issuing the Decision Notice.”

18. The Notice of Appeal had appended to it a set of documents, the majority of which have been referred to above and in particular it included the email from the Head of Press & PR at the Appellant to the newspaper editor dated 20 February 2008. In the light of that enclosure, the Commissioner's reply duly took the contents of the email of 20 February 2008 into account. The Commissioner therefore accepted that it *“appears to respond to the two requests of the present Decision Notice and one other request”*. The Commissioner pointed out that it had not been provided to the Commissioner during the course of the investigation. The Commissioner had only seen the email of 5 March 2008.

Findings

19. The Tribunal therefore respectfully agrees with the Commissioner that having seen the email of 20 February 2008, it seems clear that the response was properly made by the Appellant to the requester on 20 February for both requests and had done so in time. Indeed, in an email to the Tribunal of 29 January 2009 (which refers only to the Banksy request), the Commissioner, in effect, reconsidered his earlier comment to the contrary, by confirming that the Appellant had responded within the relevant time limit in the case of both requests.

20. The Tribunal would, in addition, dismiss any part of the appeal insofar as there is any ground to this effect that the Commissioner exercised his discretion wrongfully or unlawfully by considering whether there was a breach of FOIA in the time taken to respond to the request even though it was not specifically raised by the Complainant. The Commissioner opposed that ground of appeal and the Tribunal duly agrees. In other words, the Tribunal does not consider that the Commissioner exercised his discretion wrongfully or unlawfully by considering whether there was a breach of FOIA in the time taken to respond to the request even though it was not specifically raised by the complainant.

Conclusion

21. The Tribunal therefore accedes to the Commissioner's invitation and duly amends the Decision Notice pursuant to its powers under section 58(1) of FOIA. It will amend the Decision Notice and substitute the existing paragraph 18 with the following passage, namely:

"18 The Commissioner's decision is that the public authority correctly complied with its general obligations under section 1 of the Act."

Signed:

David Marks QC
Deputy Chairman

Dated 26 June 2009