



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

Case No. EA/2014/0177

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50542759
Dated: 15 July 2014

Appellant: POTTO PARISH COUNCIL

Respondent: INFORMATION COMMISSIONER

Additional Party: [REDACTED]

On the papers: 23 OCTOBER 2014

Date of decision: 11 DECEMBER 2014

Before

ROBIN CALLENDER SMITH
Judge

and

DR HENRY FITZHUGH and SUZANNE COSGRAVE
Tribunal Members

Written representations:

For the Appellant: Ms Joanna Wilde, Clerk & Financial Officer, Potto Parish Council
For the Respondent: Mr M Thorogood, Solicitor for the Information Commissioner
For the Additional Party: [REDACTED]

Subject matter: FOIA 2000

Right of access s.1

Time for compliance s.10

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 July 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. [REDACTED] the Additional Party to this appeal) asked the Appellant Parish Council for information received by the Council in respect of non-attendance at a particular meeting.
2. The Appellant Council had failed to respond to the request for information and the Commissioner took the view that it had breached its duty under Section 10 FOIA to issue a response to the request for information under the Act.
3. The Appellant was warned to respond to the request for information within 35 calendar days of the date of the decision notice (15 July 2014).
4. Failure to do that could be sanctioned by the Commissioner making written certification to the High Court of the failure to issue the response – by virtue of Section 54 FOIA – and could be dealt with as a contempt of court.

The request for information

5. On 19 February 2014 the Additional Party asked the Appellant, in relation to a parish council meeting in December 2013, to confirm whether it had received apologies of absence from either of two named Councillors.
6. On 20 February the Appellant replied that all Councillors except the Additional Party had responded to an email notification about the meeting.
7. A further seven subsequent requests were made. Apart from an email dated 10 April 2014 – offering to provide a copy of the same reply that had been sent to the Additional Party on 20 February 2014 – there was no substantive reply.

The complaint to the Information Commissioner

8. The Additional Party contacted the Commissioner on 29 May 2014 complaining that the Appellant had failed to respond to his information request.
9. The Commissioner considered that apologies for absence at council meetings was information that was regularly recorded by the Appellant. Section 1 FOIA provided a right of access to information held by a public authority.
10. When a request was made for such information the Public authority had to state whether it held it and, if so, provided unless there was a valid exemption under the Act. Section 10 provided that the public authority should comply with its Section 1 duty promptly and no later than 20 days after receiving the request.

11. By failing to respond, the Appellant had breached Section 10 FOIA.

The appeal to the Tribunal

12. The Appellant's Grounds of Appeal set out seven points. In summary these were:

- (1) The Parish Council was perplexed about why a government organisation issue a Decision Notice under FOIA on information from only one of the parties concerned. It did not understand how the Commissioner could reach a balanced decision to issue a Decision Notice when only one of the parties had provided information.
- (2) The Additional Party was [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] of the Parish Council.
- (3) He had emailed a request to the Clerk requesting a "yes or no" response. The Clerk had responded to the request in an appropriate manner the following day and referred the correspondence to the Parish Council for discussion at its next meeting. The request was "somewhat unusual" because there was no meeting held in December 2013 and the Additional Party had been informed that the meeting had been cancelled by email.
- (4) Because of that a simple "yes or no" answer was "obviously inappropriate". The Council had responded in a timely manner.
- (5) The information request had been included in the agenda for the January 2014 meeting. The Council agreed that as there had been no meeting in December there were no minutes to be recorded and no apologies could be made. The Additional Party had been emailed the agenda before the meeting – along with all other Councillors – and it had been posted on the village noticeboard and the Potto Village website.
- (6) The Appellant observed that the Additional Party [REDACTED]
[REDACTED]
[REDACTED] and it had been noted that there was no Parish Council meeting held in December from which any minutes or apologies could be received or noted.

The questions for the Tribunal

13. The Tribunal has to decide whether the Additional Party's request for information should be treated as a request for information under FOIA placing a duty on the Appellant to respond to the Additional Party stating whether it held the information and, if so, providing it.

Conclusion and remedy

14. A great deal of ancillary documentary evidence has been provided in this paper-based appeal. The Tribunal has considered all of it but the point at issue is very narrow.

15. The point is whether the Appellant's response on 20 February 2014 – stating that everyone [REDACTED] had responded to an email notification about the meeting in question – was a proper response to the question about whether apologies of absence had been received from two named Councillors about a parish council meeting in December 2013.

16. Evidentially it is clear that the Additional Party was dissatisfied with the Appellant's response of 20 February 2014. He replied the same day thanking the Appellant for its prompt response but pointing out that it had not answered his query.

17. From this point on the Appellant was aware that the Additional Party did not regard the response as a valid one.

18. The Tribunal's view which follows in Paragraphs 19 – 25 is the majority view of Robin Callender Smith and Dr Henry Fitzhugh. The minority view of Suzanne Cosgrave is expressed in Paragraphs 25 - 28.

19. The Commissioner wrote to the Appellant on 17 June 2014 making it clear that he, too, did not consider that the reply complied with the Appellant's

duty under FOIA. The Commissioner asked the Appellant to respond to the request in accordance with the Act. He warned that failure to do so would lead to the issuing of a Decision Notice.

20. The majority view of the Tribunal is that, on the balance of probabilities, not only was this communication sent by the Commissioner but – contrary to the Appellant’s contention that it was not received – that it was delivered to the Appellant. The Appellant, after all, appears to have received all other communications in relation to this appeal without difficulty.
21. At this stage the Appellant, in the Tribunal’s majority view, had been clearly apprised of the situation and told that the existing response was not adequate. It was put on warning about the consequences of failing to issue a substantive response.
22. No further response was received from the Appellant and, in these circumstances, it was inevitable in the Tribunal’s view that the Commissioner would issue the Decision Notice made on 15 July 2014. He was quite entitled to do this.
23. Its response to the Additional Party on 20 February 2014 did not comply with the duties imposed on it under the Act and – when this was pointed out to the Appellant – it continued to maintain an untenable position.
24. If it had any doubts about the legal situation prior to 17 June 2014 it can have had no doubt about the situation thereafter.
25. The minority view of Suzanne Cosgrave relates, firstly, to whether this was a valid request FOIA at all. There was no mention of FOIA by the requester at any stage also the only notification to the public authority was a letter from ICO dated 17 June. It is the Appellant’s case that the letter was not received.

26. If it is that all such requests to public authorities are FOIA requests then the majority view of this Tribunal should prevail.

27. However the Commissioner did not require [REDACTED] r the Council to confirm that the internal review process had been conducted and was complete. The Commissioner went ahead without any formal confirmation that the public authority knew of the matter nor had any argument from it.

28. I do have sympathy with the public authority on the basis that it did not know that this request, which it seems was one of very many for the requester, had the character of an FOIA request. I question whether the public authority can be considered to have had a fair hearing by the Commissioner if it had no idea it was being considered as a FOIA request until the Decision Notice arrived.

29. The majority decision of the Tribunal is that the Appellant failed to comply with its duties under FOIA and that its appeal in respect of the issuance of the Decision Notice cannot succeed.

30. Our decision – as identified above - is by a majority.

31. There is no order as to costs.

Robin Callender Smith
Judge
11 December 2014