



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
SECTION 57 (2) OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No: EA/2010/0083

EA/2010/0097

EA/2010/0099

RULING

Appellant: Mr E Edem

Respondent: Information Commissioner

Additional Parties: OCC (1)
FSCS (2)
ACAS (3)

RULING

1. Mr Edem lodged three Notices of Appeal in respect of three separate letters sent to him by the Information Commissioner (the "Commissioner"). Those letters related to correspondence sent by Mr Edem to each of the Additional Parties in this matter.
2. The Commissioner did not accept that there was any valid appeal under section 57 of the Freedom of Information Act 2000 ("FOIA") in respect of any of the Commissioner's three letters to Mr Edem in relation to his correspondence directed at any of the Additional Parties.
3. The Commissioner maintained that he did not have jurisdiction in relation to any of the Additional Parties on the basis that none of them were public authorities for the purposes of sections 3 or 6 of FOIA.
4. In the absence of that jurisdiction, the Commissioner had no power to issue a decision notice pursuant to section 50 of FOIA.

5. In turn, in the absence of jurisdiction on the part of the Commissioner, and his consequent inability to issue a decision notice, the right of appeal provided for by section 57 of FOIA did not arise.
6. In the absence of a right of appeal under section 57 – it was argued - the Tribunal had no jurisdiction to hear an appeal and it would be in error to direct itself to the contrary.
7. I set out below the Commissioner's more detailed submissions in this matter which were made on 16 July 2010.
8. The Commissioner's letter to Mr Edem in the ACAS matter related to his subject access request made to ACAS under the Data Protection Act 1998 (the "DPA"). That letter was a response to a request for a review of ACAS's handling of a request made under that legislation, and a response to a service level complaint made by Mr Edem against the Commissioner's office.
9. The fact that a body functioned as a "data controller" for the purposes of the DPA does not make that body a public authority for the purposes of FOIA.
10. As the Commissioner had noted in his letter to Mr Edem concerning ACAS, whilst a public body may respond, on a purely voluntary basis, to a request directed to it and which purported to be made under the provisions of FOIA, that public body's voluntary response could not make that body a public authority for the purposes of FOIA. A public body could not, by its own volition or consent, become a public authority; nor could it become a public authority by direction of the Commissioner or the Tribunal; the status of a public authority was a matter for Parliament through the Secretary of State.
11. Turning to the specifics of the preliminary issue, the Commissioner's position was:
 - (1) In its order of 16 June 2010 the Tribunal stated that "the preliminary point to be determined is whether the Information Commissioner's letters to the Appellant in respect of each of the above appeals are Decision Notices and – therefore – whether the Information Rights Tribunal has jurisdiction to entertain the appeals."
 - (2) In the Commissioner's submission, this is wrong, and the Tribunal has misdirected itself in considering this as a preliminary issue.
 - (3) The reasoning for this is that Tribunal only has jurisdiction to entertain an appeal where a decision notice has been issued. That, however, is not a situation which arises in the present circumstances.
 - (4) Here, and in respect of all three Additional Parties, the Commissioner simply has no jurisdiction to issue a decision notice in the first instance. That is because, as a matter of black-letter law, none of the Additional Parties are public authorities for the purposes of FOIA.
 - (5) In relevant part, the provisions set out in FOIA which specify which bodies are subject to the Act are as follows:

3. Public authorities

(1) In this Act “public authority” means—

(a) ... any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) ...

4. Amendment of Schedule 1

(1) The Secretary of State may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule...

(2) ...

5. Further power to designate public authorities

(1) The Secretary of State may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—

(a) appears to the Secretary of State to exercise functions of a public nature, or

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority.

(2)...

6. Publicly-owned companies

(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)...

(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.

(3)...

(6) Therefore, to be subject to FOIA, a body must be either:

Listed in schedule 1 of FOIA; or

Added to that schedule by order of the Secretary of State under section 4 of FOIA; or

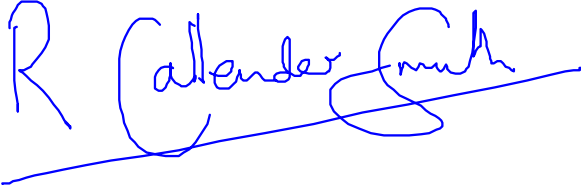
Designated by the Secretary of State under section 5 of FOIA; or

A publicly-owned company for the purposes of section 6 of FOIA.

DECISION

12. I find that none of the three bodies in question are listed in schedule 1 of FOIA or have been added to that schedule by order of the Secretary of State under section 4 of FOIA. Nor have any of the three bodies been designated by the Secretary of State under section 5 of FOIA.
13. Further, none of the three bodies in question are publicly-owned companies for the purposes of section 6 FOIA:
14. The Office of the Complaints Commissioner (OCC) operates under the umbrella of a company limited by guarantee (Registered number 5171304). It is independent of the FSA.
15. The FSCS is the UK's statutory fund of last resort for customers of financial services firms. The FSCS is independent of the government and the financial industry, and was set up under the Financial Services and Markets Act 2000, becoming operational on 1 December 2001.
16. Although largely funded by the Department for Business Innovation & Skills (BIS), ACAS is a non-departmental body, governed by an independent Council.
17. The designation of a public body as a public authority for the purposes of FOIA is reserved to Parliament, through the Secretary of State.
18. I find that the Commissioner has no discretion to issue a decision notice in such cases and for him to attempt to co-opt into FOIA a public body which is not currently subject to the provisions of that legislation would be for him to attempt to usurp the powers of Parliament and to act in a manner which was ultra vires.
19. I find that, if it is beyond the powers of the Commissioner to issue a decision notice under section 50 of FOIA, it must logically follow that the concomitant right of appeal arising under section 57 cannot arise either.
20. Accordingly, the Tribunal's inherent jurisdiction is not engaged, and the preliminary question of whether or not the letters submitted by the Commissioner to Mr Edem amount to decision notices is only one that can be answered in the negative.
21. If I am wrong in respect of any of the jurisdictional issues set out above I am, furthermore, satisfied that Mr Edem's appeal notices should be struck out and dismissed at this point.
22. In making this ruling I am mindful of the ruling of the Principal Judge in **Arkinson v the Information Commissioner (EA/2010/0127)** who found in that case that, because "the IC has not served a decision notice... as a result the FTT does not have jurisdiction to hear the appeal" (see Arkinson paragraph 3).

23. Under rule 8 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended I strike out the appeal on the grounds that Mr Edem has no reasonable prospect of succeeding.

A handwritten signature in blue ink, reading "R Callender Smith". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Robin Callender Smith
Information Rights Judge

6 September 2010