



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0147

BETWEEN:

ALAN MATTHEWS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION ON APPLICATION UNDER RULE

8

The Request

1. On 21 April 2011 the Appellant sought information from Business Link West Midlands (BLWM) concerning a tender process in which he had been unsuccessful:-

“1. What was the composition of the evaluation panel which received and scored my tender for delivery of the marketing workshops, in terms which include the name, job title and the material experience and qualifications of each?”

2. What exactly were the tender evaluation guidelines, including the weighting of the criteria and scoring rules, to which the panel worked?”

3. What exactly was the guidance including approval, regarding its processing of such tenders, which the Business Link obtained from the consultant referred to in its letter of 7th April 2011?”

4. Who was the consultant, and what were his/her material qualification and experience?”

The Decision Notice

2. The Decision Notice (DN: FS50421215) relates that BLWM initially claimed that it was not subject to FOIA, however the Respondent advised that as a wholly-owned subsidiary of Advantage West Midlands (AWM) it was. Accordingly BLWM supplied information with respect to requests 2 and 3 but declined to provide the identities of the individuals it felt fell within request 1 and 4 (DN7), although it did provide information concerning the expertise of the consultant (DN35). The Appellant was dissatisfied with the responses he received and complained to the Respondent who published his decision notice on 20 June 2012. During the course of his investigation both bodies were in the process of closing down; AWM closed down on 31 March 2012, shortly after BLWM. During the course of his investigation the Respondent therefore dealt with BLWM, AWM and BIS (the government department which was responsible for sponsoring AWM and is discharging certain residual functions with respect to records for that body). Accordingly he expressed his decision to BIS.
3. In his decision notice the Respondent criticised the handling of the request by BLWM (23,36) and noted the systematic destruction and archiving of records once the decision to abolish it was announced in January 2011 (DN16,17) He set out the evidence and reasoning with respect to his conclusions.
4. The first request was for details of the evaluation panel “which received and scored my tender”. AWM had initially declined to provide details of the individuals on the tender panel on the grounds that it was personal data. However when DBIS became responsible for responding to the request it noted that the tender process was a two stage process and the panel whose identity AWM had declined to disclose had been the second stage, which the Appellant did not reach, and accordingly their identities were not within the scope of the request and the information sought by request 1 was “not held” – in this case because on the proper interpretation of the request there was no such panel (DN20.) The Respondent found that BIS held scoring sheets from the initial examination of the tenders (as a result of which the Appellant was eliminated) but was not able to say who had completed them. Accordingly (by implication the Respondent treated this initial process as possibly falling within the first request) no information relating to the first request was held (DN21).
5. With respect to the consultant’s name the Respondent found that it was held (DN22) but concluded that his reasonable expectation was that his name would

not be released, it would be unfair to release it and the public interest was sufficiently served by the information relating to his expertise (DN 29-36).

6. The role of this Tribunal is set out in S.58 of FOIA:-

(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.

The Appeal

7. By a notice dated 16 July 2012 the Appellant challenged the decision notice in a detailed notice of appeal under seven numbered headings. The Respondent has submitted that these grounds lack validity and that the entire case should be struck out under rule 8 (2) and (3) of the Tribunal rules. These provide (so far as is relevant) that:-

“(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

(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.”

8. I have received the submissions of both parties on this request and I therefore turn to consider each of the grounds of appeal.

Ground 1 The Respondent was wrong to issue his DN to BIS.

9. The Respondent has indicated that *“he was informed by BIS that with effect from 30 March 2012, it had assumed responsibility for this specific matter”*.

The Appellant has argued that his request was to BLWM and it should deal with it since, although it is in liquidation it has a director;-

“The Commissioner’s justifying sending his decision notice to DBIS, on the ground only that DBIS told him that it had assumed the responsibility, should be seen as amenable to challenge by me in my appeal,”

BIS is liquidating its own subsidiary and has transferred a residual function (handling this FOIA request) to itself. The Appellant has not produced any evidence that this has not occurred or legal argument that the Respondent was wrong to act in the light of the notification. This ground has no merit.

Ground 2 The Appellant brought about BWLM’s admission of public authority status

10. In essence this is an argument that the DN is incorrect in a minor factual detail. However even if this is correct the Tribunal agrees with the reasoning in *Billings v The Information Commissioner (EA/2007/0076, 6 February 2008)*

“...the Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law.”

This ground of appeal has no merit.

Ground 3 The Respondent was wrong to imply that BWLM followed due process in tendering

11. This somewhat prolix and confused ground criticises the Respondent for dealing with parties other than BLWM (BIS and AWM) making findings with respect to the regularity of the tendering process and advancing arguments about the tendering process. The ground is misconceived, the Respondent in an impartial way properly dealt with AWM and BIS since they at various times had responsibility for this residual function and he did so in an appropriate way in order to conduct his investigation, made no findings with respect to the regularity of the tendering process and merely commented on the expectations that the consultant would have about the tendering process. Accordingly, this ground of appeal has no prospects of succeeding.

Ground 4 The Respondent erred in disallowing the Appellants request with respect to the tender evaluation panel

12. The appellant has set out his private interest in knowing the identities of the panel. However the finding of the Respondent (see paragraphs 3 and 4 above) was that the information was no longer held. The individuals who had carried out the actual evaluation which led to the Appellant's elimination from the tender process could not be identified by BIS who were at that stage vested with responsibility for responding to the Information Commissioner's investigation. The Appellant has produced no evidence or argument in law that such a finding is incorrect and therefore this ground has no merit.

Ground 5 The Respondent was wrong to agree that the consultant's details should not be disclosed

13. The Appellant has argued his private interest is a broader public concern in the conduct of the tender process. The Respondent acknowledged such interest as part of the general public interest in the regularity of public administration (DN34) and carried out an appropriate exercise in weighing the data protection principles and considering

- Whether disclosure of the requested information would be within the data subject's reasonable expectations;
- What, if any, consequences would flow from disclosure of the requested information; and
- Whether there are any legitimate public interests in disclosure of the requested information.

The Respondent has balanced the interests of the data subject with the public interest and the Appellant has not shown any defect in the approach adopted. This ground is without merit.

Ground 6 document destruction only attracted a passing comment

14. The decisions of the Respondent with respect to prosecution are not matters within the jurisdiction of the Tribunal. In his response to the Rule 8 application the Appellant acknowledged this and (implicitly) withdrew the ground of appeal.

Ground 7 The decision notice was not structured to be clear to the Appellant

15. While the drafting of any decision may always be subject to comment or criticism this is not a valid ground for appeal.

Decision

16. I am therefore satisfied that in accordance with Rule 8(2)(a) I must strike out ground six (insofar as it is not withdrawn) on the grounds that the Tribunal lacks jurisdiction under rule 8(2)(a) and the other grounds of appeal under rule 8(3)(c) as disclosing no realistic prospect of success.

Signed:

Judge Hughes

Dated: 9 October 2012