



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0221

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50384752
Dated: 27 September 2012**

Appellant: MS RACHAEL HUSHON

First Respondent: INFORMATION COMMISSIONER

**Second Respondent: THE CHARITY COMMISSION FOR ENGLAND
AND WALES**

Heard at: VICTORY HOUSE, LONDON

Date of hearing: 18 FEBRUARY 2013

Date of decision: 11 MARCH 2013

Before

ROBIN CALLENDER SMITH
Judge

and

JACQUELINE BLAKE and RICHARD FOX
Tribunal Members

Attendances:

For the Appellant: Ms R Hushon supported by Mr Nigel Webster
For the Respondent: Representations on paper from Richard Bailey, Solicitor for
the Information Commissioner.
For the Second Respondent: Ms Kait White and Ms Alice Holt

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Subject matter:

FOIA

Absolute exemptions

- Confidential information s.41

Qualified exemptions

- Law enforcement s.31
- Legal professional privilege s.42

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 27 September 2012 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The issues in this appeal relate to the long-term future of the Recreation Ground, Bath. This is a charitable trust governed by a conveyance dated 1 February 1956.
2. In a judgement in the High Court dated 31 July 2002 Hart J determined that the Recreation Ground was held on charitable trusts and that the Trustee of the trust – Bath and North East Somerset Council (BANES) – had the responsibility of maintaining the land as “open space” and as a “recreational facility for the benefit of the public at large”.

3. As a result of that decision, the Charity Commission for England and Wales (the Second Respondent) became concerned that not all the activities of the Recreation Ground complied with the purposes of the trust.
4. The Second Respondent concentrated on two main concerns: firstly, a Council-run leisure centre that did not comply with the Charity's purpose of maintaining land as an open space for sports and recreation and secondly the disposal of charity assets in terms of a lease to Bath Rugby Club (BRC) in breach of the trust.
5. The Trust agreed to undertake a Strategic Review to determine the future uses of the Recreation Ground. That was completed in March 2007. In 2008 the Trust submitted plans to the Second Respondent involving the retention of both the leisure centre and BRC on the Recreation Ground. The Second Respondent accepted that the leisure centre could remain and that there were circumstances in which BRC could remain, including the possibility of a land swap.
6. The Appellant wanted disclosure of communications between the Second Respondent and the Trustees of the Charity regarding the future of the Recreation Ground.

The request for information

7. The Appellant's request – made to the Second Respondent on 3 December 2010 and further clarified on 10 December 2010 – was for:

all contact notes, minutes or records of phone calls, meetings, emails and letters in fact any and all contact whether formal or informal that the trustees of the Rec [the Bath Recreation Ground Trust] and or Bath Council and or Bath Rugby Club have had with the Charity Commission from 2007 until the present day.

8. The Second Respondent stated on 23 December 2010 that it held relevant information but that any information it held relating to a statutory enquiry that concluded on 16 March 2007 was exempt from disclosure under section 32 (2) FOIA.
9. In addition, the Second Respondent also withheld other information on the basis of sections 22, 31 (1) (g), 31 (2) (c), 31 (2) (g) and 43 (2). Following an internal review the Second Respondent told the Appellant on 28 February 2011 that it also believed it was entitled to withhold the requested information – in addition to the above provisions of FOIA – on the basis of section 41 (1).

The Complaint to the Information Commissioner

10. The Information Commissioner informed the Appellant, when she complained about the withholding of the requested information, that previous cases had found an enquiry held by the Charity Commission under the Charities Act was an enquiry for the purposes of section 32 (2) FOIA. As a result the Appellant confirmed she would not be pursuing access to information about the statutory enquiry or any information that predated the end of the enquiry on 16 March 2007.
11. During the initial course of the Information Commissioner's investigation the Second Respondent disclosed several of documents containing information within the scope of the request. The Second Respondent accepted that section 43 FOIA was not relevant and dropped its reliance on that exemption.
12. The Second Respondent had also relied on section 40 (2) to redact the names and contact details of individuals within the Bath and North East Somerset Council with whom it had corresponded. After discussions with the Appellant it was agreed that the Commissioner would not

pursue the use of section 40 (2) to redact personal data from the remaining withheld information.

13. The Commissioner's decision was that the Second Respondent had correctly applied the section 31, 41 and 42 FOIA exemptions to withhold the information which remained at issue between the Appellant and the Second Respondent.

14. That was after considering the public interest arguments and concluding that the public interest favoured withholding that information. The Decision Notice in respect of that decision contained a detailed open annexe running to 150 items that were tabulated showing a brief description of the relevant item together with the appropriate section or subsection of FOIA relating to the exemption.

The questions for the Tribunal

15. Have the exemptions, as they currently remain in this appeal, properly been applied?

16. Does the Second Respondent hold any additional material that should be disclosed?

Legal submissions and analysis

17. There is additional narrative in respect of this appeal. The Charity made a formal application for a scheme on 16 May 2012 to authorise the provision of facilities for indoor recreation and to provide administrative provisions to regulate the occupation of the Recreation Ground by Bath Rugby Club consistent with the terms of the trust.

18. The Second Respondent published a draft scheme on its website on 30 November 2012 and invited representations from the public. The

matter is now going through the Second Respondent's internal review process and – in the light of documents the Appellant has been provided with recently – she had been afforded the opportunity to make further representations if she wished.

19. The Second Respondent ceased to rely on the section 31 FOIA exemptions and had disclosed all the documentation listed in the schedule covered by that exemption in the annexe to the Decision Notice.
20. The Charity then confirmed to the Second Respondent that the documents that it had determined were confidential under section 41 could be disclosed as the scheme had been published.
21. On 21 December 2012 those were disclosed to the Appellant except for four of them. Two documents had been omitted in error and sent to the Appellant on 3 January 2013. Documents 91 and 144 remained withheld under section 42 FOIA in respect of Legal Professional Privilege.
22. On 2 January 2013 the Appellant identified that a number of documents appeared to have been omitted from the documentation disclosed to her in December 2012 and, previously, in September 2012 at the conclusion of the Commissioners Decision Notice.
23. The Second Respondent rechecked its records and whether it held documentation that was disclosed to the Appellant 9 January 2013. Additionally the Second Respondent received confirmation from the Charity Trustees that they did not wish to assert legal professional privilege over documents 91 and 144 so those were disclosed to the Appellant at the same time.
24. On 9 January the Appellant contacted the Tribunal in respect of documentation she believed was still missing.

25. The Second Respondent searched its records. Its final position to the Tribunal is that everything that could be disclosed to the Appellant – in line with the various changes of position – had been disclosed to her.
26. The Appellant had emailed the Second Respondent on 14 January 2013 requesting copies of a Receiver and Manager report (R&M) referred to in document 50 and the Second Respondent's response to a letter dated 22 June 2007.
27. The R&M report was dated 25 July 2003 and did not fall within the scope of the Appellant's original request. The Second Respondent did not hold the reply to that letter. The Second Respondent maintained that the Appellant had been provided with all the information held by it which fell within the scope of her original request.
28. The Appellant believes the R&M report falls within the scope of her request – as it was mentioned in meeting notes that was submitted during the period covered by her request – and the Second Respondent resists that submission.
29. The Appellant had confirmed to the Commissioner that she was not seeking disclosure of any of the documentation which was related to the statutory enquiry. As a result the point was not considered by the Commissioner and could not form part of the Appellant's appeal against the Decision Notice.
30. The Appellant had identified a number of documents that might fall within the scope of her request but which had not been disclosed (set out in an email dated 14 January 2013). The documents were not listed in the original schedule prepared in relation to this appeal and were not documents held in its possession at that time.
31. The Appellant had not raised the matter of missing documents with the Second Respondent or the Commissioner and – because of that – such omissions did not form part of the decision of the Commissioner.

Since receiving that notification the Second Respondent had searched its electronic and hardcopy files on at least two occasions and had not located any more of the relevant information. Its position was that it did not hold the information at the time of the original request.

32. The Appellant's position is summarised in her final written submissions and in a detailed speaking note that she prepared for the oral hearing. A précis of that material follows:

- As a Beneficiary of the Bath Recreation Ground Trust - and a member of the public who used the Recreation Ground - she had requested information that was repeatedly refused by the use of exemptions. Her continued efforts had led to partial disclosure of information which had been clearly in the public interest. The release of that information had helped her and other Beneficiaries understand more clearly the process the Trustees had adopted. She believed that the current disclosure had enabled others to challenge the legality of some of the decisions taken on their behalf.
- She did not accept the Charity Commission's or the ICO's interpretation of the public interest test at any point in the process. Her position had always been hampered by the fact that she could not see the documents which were not been disclosed because of the exemptions being claimed.
- The Charity Commission had agreed to conduct a Decision Review in respect of the draft enabling scheme. She believed that had only occurred because the Beneficiaries and members of the public were able to review the detailed documents which were disclosed as a result of her original FOIA request that had allowed them to make informed comments and to question the regulatory process conducted by the Charity Commission in creating the scheme. She believed that the information contained within the "missing documents" and the two documents for which the Charity

Commission had claimed exemptions could prove relevant to the Review process and informed Beneficiaries further in the process.

- In respect of the documents disclosed so far, they had revealed highly contentious decisions made by the Trust and the Commission that had enabled her and other Beneficiaries to comment on and scrutinise the assumptions in a more informed way.
- The documents, she maintained, demonstrated a potential lack of impartiality on the part of the Trustees who appeared to be unable to separate their roles as councillors from their role as Trustees. Without the disclosure which had occurred she and others could not have challenged the incorrect use of the Cy Près doctrine which was being inappropriately applied. They could not have challenged the gifting of the liability of an ageing leisure centre. They could not have challenged the questionable indemnity or the valuations provided which ignored the attempted re-zoning of the Recreation Ground and which had a major impact on its true commercial value.
- The disclosed documents also identified the attempts by both the Trust and the Commission to aid commercial development of Charitable land by a company whose parent was incorporated – offshore and with less transparency - in the Bahamas.
- She believed that to argue that documents fell outside the scope of her original appeal was confusing and incorrect. That would allow public authorities routinely to avoid disclosure of contentious material by mistakenly concealing selected and important documents at the information gathering stage so that they could later claim that they should not be considered because they were outside the original scope of the information request.

- She believed that the R&M report did form part of her appeal because it was within scope. The enabling scheme currently under review appeared to have cherry-picked the advice contained within the disclose bundle, potentially seeking to navigate its way round Hart J's 2002 decision. As it was legally contentious it was in the public interest to know how that had been allowed to happen. If it had been used correctly then full and frank disclosure should create no problems.
- Concealing relevant information that applied to a possible misuse of Charitable assets could increase possible misconduct of both the Trust and the Charity Commission.
- Full and transparent disclosure would demonstrate that all the actions and advice had been taken within the requirements of the Charity Commissions regulatory remit and the requirements of charity law.

Decision

33. The Tribunal has some sympathy with the Appellant because – throughout the appeal process – she has been dealing with a moving target of additional disclosure and exemptions which, in the event, have not been fully maintained.
34. It is fair to say that some of the additional disclosure has clearly revealed issues or conduct which in themselves raise additional questions about the processes being applied by the Second Respondent and the Charity.
35. That said, the Second Respondent has been at pains to disclose as much to the Appellant as it felt was proper within the FOIA exemptions that it had not only claimed but also reviewed and had confirmed by the Commissioner. In disclosing additional information to the Appellant

it appears to the Tribunal that the Second Respondent has gone the extra mile.

36. The significance of this is that it needs to be set against the fact that the Tribunal has had sight of all the closed material that was withheld in relation to the original request (and not initially disclosed to the Appellant).
37. It is clear that the Second Respondent has shifted its position significantly to allow disclosure of material which has allowed much greater understanding of the issues in play.
38. When the Tribunal is dealing with closed material its approach is rigorous in terms of protecting the public interest balancing exercise that has to be conducted, mindful of the fact that Appellants in this situation cannot see the material.
39. Looking at all the evidence in this appeal in the round it is clear that the Appellant has asked difficult and uncomfortable questions and the Second Respondent has revealed – within the terms of the original request – as much as is possible.
40. The Tribunal does not believe that the Second Respondent is holding any further information that has not been disclosed lawfully or should disclose, save for the remaining information withheld subject to the properly-claimed exemptions.
41. The Tribunal finds that the R&M report – because it never formed part of the Commissioner's Decision Notice – is outside the scope of this appeal.
42. The Appellant had confirmed that she was not seeking disclosure of any of the documentation related to the statutory enquiry.

43. In any event this information would be subject to the section 32 FOIA exemption as it lies within a document “placed in the custody of a person conducting an enquiry or arbitration for the purposes of the enquiry or the arbitration”. It is clear that section 32 FOIA applies (on current case law) to situations that are not limited in time but applies to documents that continue to be held by the public authority after the enquiry has ceased.

44. Because all the remaining public interest factors within the exemptions claimed by the Second Respondent resolve themselves – on the balance of probabilities – in favour of non-disclosure it follows that the Appellant’s appeal fails.

45. Our decision is unanimous.

46. There is no order as to costs.

Robin Callender Smith
Judge

11 March 2013