



Neutral citation number: [2024] UKFTT 00697 (GRC)

Case Reference: EA/2023/0418
Decision given on: 13 December 2023

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Before

TRIBUNAL JUDGE BUCKLEY

Between

IVAN MURRAY-SMITH

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. Having considered the matter afresh pursuant to rule 4(3) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (the GRC Procedure Rules), I agree with the Registrar's decision of 2 November 2023 to refuse to extend the time limit for the notice of appeal to the tribunal.
2. The notice of appeal is not admitted by the tribunal.

REASONS

3. Mr. Smith applied by email dated 6 November 2023 to have the decision considered afresh by a Judge under rule 4(3) of the GRC Procedure Rules. In that email he stated:

“An appeal to the tribunal is a full merits appeal and, in considering the appeal, the tribunal is entitled to substitute its own decision for that of the Commissioner. In a judicial review, the High Court cannot review the *merits* of a decision but it can merely determine if the correct decision making process has been followed, and if it hasn't the High Court may remit the matter to the Information Commissioner for a redetermination.

Even if a judicial review were successful and the Information Commissioner were to issue an adverse decision notice, the full merits of the matter would still ultimately end up before the First-tier tribunal, but with great delay and great additional costs to all sides. It would therefore be far more expeditious and in the interests of the efficient administration of justice for the First-tier tribunal to grapple the substantive merits of the dispute at the earliest available opportunity.”

4. The First-tier Tribunal is sometimes referred to as ‘a creature of statute’ and it is said that it does not have any ‘inherent jurisdiction’. In practice, that means that it only has the powers that are given to it by statute. It cannot decide, in the interests of the efficient administration of justice to determine a dispute unless statute has given it jurisdiction to determine that dispute.
5. For the purposes of this appeal, the enforcement provisions are found in the Freedom of Information Act 2000 (FOIA) (see regulation 18 of the Environmental Regulations 2004 (EIR)).
6. The tribunal has jurisdiction once a decision notice has served (sections 57 and 58 of the Freedom of Information Act 2000 (FOIA)). Before that decision notice has been served it has no jurisdiction. Even though the tribunal carries out a full merits review in information rights, it does not have the power to attempt to shortcut matters by determining a dispute before a decision notice has been served.
7. Enforcement of a decision notice is, under statute, not a matter for the First-tier Tribunal (see section 54 FOIA). It is a matter for the Commissioner, who can certify non-compliance to the High Court.
8. Nor does statute give the tribunal the power to consider a challenge to the Commissioner’s decision not to make a decision because it appears to him that the application is frivolous or vexatious under section 50(2)(c) FOIA. This decision can be challenged by judicial review.
9. Mr. Smith knows these things, and that is why he has asked the tribunal to do something it does have the power to do, and that is to extend time to hear an out of time appeal against a decision notice served on 12 May 2023.
10. In a decision notice IC-228374-W5Z4 dated 12 May 2023 the Commissioner decided that:
 - a. The public authority should have dealt with Mr. Smith’s request for traffic management orders under the Environmental Information Regulations 2004.
 - b. Having done so it would have been entitled to withhold the signatures on those orders as personal data under regulation 13.
11. In June 2023 Mr. Smith made a new request to the public authority for one of the orders (‘the Hackney order’) without signatures redacted. Mr. Smith made this request because he had, since the decision notice, been provided with a copy of the other order (‘the Croydon order’), signed by the same persons as the Hackney order, but without any redactions. His argument is that the personal data has now been released to the world so there is no longer any justification for withholding it under regulation 13. This request was refused (around the end of June/early July 2023) and this was upheld on internal review on 7 July 2023. The

public authority relied on section 40(2) FOIA and referred Mr. Smith back to the decision notice in IC-228734-W54.

12. Mr. Smith raised this with the Commissioner and his complaint was given the reference IC-2578010Z0H8. On 20 September 2023 the Commissioner declined to consider this complaint further or issue a decision because he considered the complaint to be frivolous, fundamentally on the basis that it was a similar request to that considered in IC-228374-W5Z4.
13. On 20 September 2023 Mr. Smith drew to the Commissioner's attention his view that the situation had materially changed since the decision notice because the public authority had provided him with an unredacted copy of the Hackney order which contained the same personal data as the Croydon order. He argued that the personal data which had not been in the public domain at the date of the decision notice, was now in the public domain. He argued that it followed that the Commissioner was likely to reach a different outcome on the merits, because there was no longer any reasonable expectation that the information would not be made public.
14. Mr. Smith received no response within 5 working days and then issued the notice of appeal in the tribunal.
15. In his grounds of appeal, Mr. Smith states that he could see two avenues of redress:
 - a. He could seek a judicial review of the Commissioner's decision to consider the section 50 application in relation to the more recent information request, or
 - b. He could seek to bring an out of time appeal challenging decision notice IC-228374-W5Z4.

What the tribunal cannot do

16. As a result of the statutory regime explained above the tribunal cannot determine the merits of the response to Mr. Smith's request for information made in June 2023, because no decision notice has been served. The tribunal cannot consider any challenge to the Commissioner's refusal to consider Mr. Smith's section 50 application.
17. The tribunal cannot do any of those things, even if I considered that it was in the interests of justice to do so. Even if I allowed this appeal to proceed for other reasons, the tribunal could not do any of those things.

Should I exercise my discretion to extend time

18. Mr. Smith wishes to bring an appeal against the decision notice that was issued on 12 May 2023. In an appeal against that decision notice the tribunal would consider whether the requested information should have been disclosed *at the relevant time*. The relevant time, in this case, is the date at which the public authority responded to the requests (2 March 2023 and 21 March 2023). At that date the personal data was not in the public domain. The tribunal cannot take account of information that came into the public domain at a later date. Although the tribunal undertakes a full merits review, it considers the position as it was at the date of the response to the request.

19. Thus, allowing this appeal to proceed would not enable Mr. Smith to put forward the argument that he wishes to make about whether disclosure would breach the first data protection principle because the personal data was in the public domain. At the relevant time, the personal data was not in the public domain.
20. For those reasons, bringing an out of time appeal against the decision notice is not the avenue of redress that Mr. Smith hoped it would be.
21. The merits of an appeal are relevant to the question of whether or not to extend time. For the reasons set out above, the tribunal will be unable to consider Mr. Smith's arguments about the subsequent release of personal data into the public domain.
22. The length of delay is very significant. The date of the decision notice is 12 May 2023. The notice of appeal is dated 28 September 2023.
23. Although Mr. Smith has an explanation for the delay, it relates to matters that have no bearing on the question of whether or not the decision notice was wrong in law or whether the Commissioner should have exercised his discretion differently. All Mr. Smith can do in an appeal against a decision notice is assert that the decision should have been different in the light of the circumstances that were in existence at the date of the response, and he could have done that in May 2023.
24. For all those reasons, considering the overriding objective, I take account of the need for litigation to be conducted efficiently and at a proportionate cost, and of the need to enforce compliance with procedural rules. Looking at all the relevant circumstances, I refuse to extend time.

Signed

Sophie Buckley

Tribunal Judge

Date:

11 December 2023