



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Appeal No. EA/2015/0183

BETWEEN:

DUNCAN CARINS

Appellant

-and-

INFORMATION COMMISSIONER

Respondent

Before

**Brian Kennedy QC
Roger Creedon
Michael Jones**

**Date of Hearing: 12 February 2016, Court 7, Field House, 15 Breams Buildings,
London.**

Date of Decision: 14 March 2016-03-15

Date Decision Promulgated: 15 March 2016

DECISION

Application of section 44(2) and section 44(1)(a) of the Freedom of Information Act 2000.

The Tribunal dismisses the appeal but with the consent of the Parties allows the substitution of the respondent's Decision Notice as requested by the Respondent.

REASONS

Introduction

1. The decision concerns an appeal of a Decision of the respondent (“the Commissioner”) dated 28 July 2015, reference: FS50576253 (“the DN”).
2. In the DN the Commissioner held that the Public Authority, in this case, the City of Westminster (“the Council”) had correctly withheld requested information from the appellant pursuant to s 44(2) of Freedom of Information Act 2000 (“the FOIA”).
3. The Tribunal is provided with a bundle of documents referred to herein as the Open Bundle, (“OB”).

Background concerning requested information:

4. This is set out clearly in paragraphs 3 – 10 of the Commissioner’s’ Response at pages 14 - 17of the OB. The pertinent Chronology is as follows;
 - a) 10 December 2014: Appellant’s request for clarification that M&S blamed a store employee error for the tilling mistake, and that M&S have systems to change centralize tilling errors immediately.
 - b) 11 December 2014: The Council refusal, citing s44 (prohibition under enactment) and part 9 of the Enterprise Act 2002
 - c) 11 December 2014: Appellant’s request to the Council for internal review
 - d) 27 January 2015: Westminster Council’s refusal under s44 to confirm or deny whether information held
 - e) 24 March 2015: Appellant’s complaint to the Respondent Commissioner.

- f) 28 July 2015: The DN – the Commissioner's rejection of complaint, with reasons.
- g) 20 August 2015: Notice of Appeal
- h) 16 September 2015: Response by the Respondent Commissioner.
- i) 24 September 2015: Reply by Appellant.
5. In March 2014 the Appellant raised a query with Marks and Spencer ('M&S') head office advising that he had been overcharged for a meal deal and that the store manager had advised him that this could be a central tilling issue as several people had complained of the same discrepancy. The Appellant was advised by M&S that till programming is done centrally, but M&S refused to explain how they would ensure till programming is done correctly as this is "internal business practices".
6. The Appellant raised the matter with Surrey County Council's ("SCC") trading standards division, who indicated that his complaint was outwith their investigative criteria. They advised him to report the matter to the Westminster Council as it had a trading standards 'Primary Authority' relationship with M&S. After initially advising the Appellant that they would only consider matters raised by Westminster residents, a Westminster Council trading standards officer then raised the issue with M&S 'informally' and was advised that the tilling error was caused by reason of the store employee not following correct procedure rather than a central programming issue.

The Legislative Framework:

7. The relevant legislation is set out at paragraphs 12 – 21 of the Decision Notice at page 4 of the hearing bundle before us and paragraphs 11 - 13 of the Commissioners' Response to the Grounds of Appeal at pages 15 – 30 of the hearing bundle before us and in particular the relevant exemption applicable in this appeal concerning section 44 of the FOIA which provides as follows:
8. S44 FOIA provides an absolute exemption where disclosure is prohibited by an enactment. Enterprise Act 2002 Part 9 prohibits the disclosure of specified information relating to the business of an undertaking which has come into the possession of a public authority through the exercise of certain of its statutory functions.
9. This prohibition is subject to certain exceptions contained in the gateways (ss239-244). Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information)(Amendment and Specification) Order 2003 provides that the Consumer Protection from Unfair Trading Regulations 2008 are subordinate legislation for the purposes of the Enterprise Act and can give rise to specified information.
10. The Regulatory Enforcement and Sanctions Act 2008 ('RESA 2008') Part 2 allows eligible businesses to form a partnership with a single local authority for regulation, advice and compliance. Primary Authorities can enforce the requirements of the Unfair Trading Regulations under this legislation.

Issues for this Tribunal to consider:

11. The Appellants' request was as follows: "*I understand from Steve at Surrey County Council that you have reached an agreement with Marks and Spencer ("M & S") in which the fault of the inability to change centralised tilling error has been allocated to an employee in store not following the correct action and that m and s have systems in place that change centralise tilling errors immediately.*"
Is this the correct summary?"
12. This request was interpreted as being for information held by the Council about the M & S tilling system ("the withheld information").
13. The Commissioner interpreted the request as a request for any information held by the Council regarding the operation of M & S's central till operating system. The Commissioner concluded in his DN that the Council correctly applied section 44(2) of FOIA. However the Commissioner, having reviewed matters further following the appeal, accepted that he was incorrect to state in his DN that the Council refused to confirm or deny whether the requested information was held under section 44(2). The Commissioner therefore changed his view and decided that section 44(2) is not engaged in the facts of this case. Accordingly the Commissioner has confirmed in his Response that the view expressed in paragraph 33 of his DN that the exemption under section 44(1) (a) is engaged on the facts of this case.
14. The main issue in this appeal is whether information received by a Public Authority in a Trading Standards investigation is subject to the s 44 FOIA and Part 9 Enterprise Act exemption and whether disclosure of the withheld information would be prohibited by virtue of section 2237(2) of the Enterprise Act 2002.
15. The Tribunal accepts that the Commissioner was correct to conclude that the exemption under section 44 is engaged with respect to the withheld information, not other information, and accepts and adopts his reasoning as set out at paragraphs 12 – 29 in his Response at pages 3 – 6 of the OB before us.

Decision Notice:

16. Even a hypothetical confirmation or denial of whether information is held could engage the s44 exemption. The Council informed the Respondent that any information it may hold would have come to it as part of its function under the Consumer Protection from Unfair Trading Regulations 2008, which engage Part 9 of the Enterprise Act.
17. The Respondent held for the Council under ss44 (2), with no need to consider the public interest test, as the exemption is absolute. This is not in issue. However as stated above, the Commissioner in his Response has changed his view in relation to the application of section 44(2). The Appellant helpfully, at paragraph 14 of his Reply (page 34 of the OB) raises no objection to a substituted DN as requested by the Commissioner. This Tribunal also agree with the substitution and allow for the DN to be substituted. Accordingly the Tribunal substitutes the DN as requested by the Commissioner at paragraph 18 of his Response (Page 20 of the OB).

Grounds of Appeal:

18. The Appellant argues that the Unfair Trading Regulations are the domain of SCC where he registered his initial complaint, and that the Council received the information from its powers under the Regulatory Enforcement and Sanctions Act 2008, which does **not** engage Part 9 of the Enterprise Act. Westminster Council stated that it used its powers to secure compliance with many legislative provisions including the Unfair Trading Regulations.
19. The Appellant stated that the information is already in the public domain, as SCC advised him of the nature of the error [NB this is erroneously referred to as a ‘central tilling error’ in para.30 of the Decision Notice – the error was not a central tilling error but an input error by a store employee] (our emphasis). The Respondent however determined that whilst the Appellant has received information pertaining to

his particular complaint, this does not amount to public disclosure regarding the operation of a central tilling system.

20. The Appellant points out the errors in para.30 of the decision notice and highlights what he sees to be an anathema between the admission that information has been disclosed but holding that it does not constitute public disclosure. He further highlights that the information was released from the SCC to the Appellant via unsecured email.
21. The Appellant noted that the relationship between M&S and Westminster Council was formed under RESA 2008, which was implemented to better coordinate the enforcement powers of local Councils. He is of the opinion that non-disclosure of information obtained under this relationship can only be justified if the Primary Authority views the investigation as a criminal one.
22. The Appellant distinguishes the Primary Authority relationship, being a consensual arrangement, from the relationship created when a local authority formally investigates a business under the Unfair Trading Regulations. He states that there is no reason to apply the same protection from disclosure on the consensual relationship

The Commissioner's Response:

23. As stated above, the Commissioner accepts his error in finding that the Council was entitled to refuse to confirm or deny the holding of information under s44(2), as s44(2) is not engaged on the facts of the case. (see Paragraph 16 of the Response at page 19 o the OB before us).
24. We note at paragraph 18 of the Commissioners' Response to the Grounds of Appeal, at page 20 of the OB, the Commissioner states as follows; "*For the avoidance of doubt, the Commissioner confirms in this response the view expressed in paragraph 33 of his decision notice that the exemption under section 44(1) (a) is engaged on the facts of this case. The commissioner requests that the Tribunal issue a substituted decision Notice accordingly.*"

25. As stated above, the Tribunal has granted that request and determined that a substituted DN be promulgated accordingly.
26. The Council is an enforcement authority under the Unfair Trading Regulations, and it has informed the Commissioner that the information was obtained whilst investigating whether enforcement action was required under those regulations. The existence of the Primary Authority agreement is therefore irrelevant.
27. Regarding the Appellant's argument that material has already been released in the public domain, the Commissioner states that the material already communicated to the Appellant is not the requested material and so this gateway does not apply. The Tribunal agree with the Commissioners' view.

The Appellant's Reply:

28. The Appellant re-asserts that the only reason the Council came into possession of the information was as a result of the RESA relationship, which is not listed in the Enterprise Act as an exempt relationship. He assumes that the Council views its RESA investigation into the Appellant's query as a criminal one, hence the withholding of the information. The Appellant states that it is an inappropriate exercise of the Primary Authority relationship to switch from informal discussion to formal enforcement action arbitrarily, and that the fact that the businesses pay the Primary Authority for this enforcement relationship raises issues of conflict of interest. Therefore, in the interest of full accountability and transparency the records of Primary Authorities should be open to disclosure.
29. As Westminster Council disclosed information to SCC over unsecured email, the Appellant argues, the information has effectively been broadcasted on the Internet.
30. The Appellant sees the question for the Tribunal as being whether the Primary Authority relationship allows a local authority to consider matters formally 'whenever they wish'. If yes, then he accepts that s44(1) is engaged, but if the matter can be considered informally then information gathered informally should be subject to disclosure.

31. The Tribunal is of the view that the RESA Primary Authority status provides for certain local authorities to take the place of other local authorities for enforcement purposes. It merely shifts the collection of information, which is undoubtedly 'specified information' under the Enterprise Act between public authorities. The formality or otherwise of the conduct of an investigation does not, in our view, detract from the fact that the only reason an authority can investigate these matters is as a result of the Unfair Trading Regulations, which automatically engage the Enterprise Act considerations for disclosure.

Conclusion:

32. In light of all the above considerations and for the reasons given above, this Tribunal finds the information received in this case by the Public Authority in a Trading Standards investigation is subject to the s 44 FOIA and the Appellant has failed to persuade us that the Commissioner erred in that conclusion or in his reasoning in support thereof in the DN.
33. Further the Tribunal will allow the Commissioner to issue a substituted DN in accordance with the agreed format above in that the Council are correct to rely on section 44(1)(a) FOIA.

Brian Kennedy QC
Judge

14 March 2015