



Case Reference: EA/2021/0250

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

**Considered on the papers
On 25 November 2022
Decision given on: 28 November 2022**

Before

TRIBUNAL JUDGE NEVILLE

Between

JANE FAUST

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed.

Substituted Decision Notice: Within 35 days of this decision being sent to Huntingdonshire District Council, it must send Ms Faust a fresh response to her information request dated 23 May 2020, because the public authority did hold some of the information within the scope of Ms Faust's request for information on 23 May 2020.

Warning: Failure to comply with the above decision may result in the Tribunal being asked to certify an offence of contempt to the Upper Tribunal.

REASONS

1. Pursuant to regulation 5(1) of the Environmental Information Regulations 2004, on 23 May 2020 Ms Faust made a request to Huntingdonshire District Council for various items of information concerning a windfarm development at Cotton Farm, Cambridgeshire. The council responded on 17 September 2020, claiming that it did not hold the requested information. In a decision notice dated 19 August 2021 the

Commissioner rejected Ms Faust's subsequent complaint, holding that the council did not hold the requested information. Ms Faust exercised her right of appeal to the Tribunal.

2. When the council was notified of the appeal, its newly employed Information Governance Manager carried out a new investigation which revealed that it did hold some information that had been requested. As a result, the Commissioner responded to the appeal by suggesting that the parties agree that the appeal be compromised by a consent order, as follows:

The Commissioner suggests that the Consent Order indicates that the appeal be allowed, that Decision Notice IC-56893-B1Z9 dated 19 August 2021 be substituted in the following terms, Decision Notice IC-56893-B1Z9 was wrong to conclude that on the balance of probabilities the public authority held no information within the scope of Ms Faust's request for information dated 23 May 2020. The Commissioner would also suggest a step in the Consent Order that within 35 days of the Consent Order being granted by the Tribunal that the public authority must send Ms Faust a fresh response to her information request dated 23 May 2020. There be no order for costs.

3. Ms Faust indicated that she would be willing to agree to that consent order, subject to the addition of the words "because the public authority did hold some of the information within the scope of Ms Faust's request for information on 23 May 2020" to the penultimate sentence. Without this, she argued, it was unclear from the decision that the Commissioner's decision had been wrong in substance rather than in form: the decision ought to reflect the council's acknowledgement that it had held some material all along.
4. I made directions suggesting that it would be disproportionate to convene a full hearing in circumstances where the parties agreed that the ground of appeal was made out, the only dispute between them being their respective forms of substituted decision notice. The parties agreed that the Tribunal would decide the matter for itself, on the papers. I have carefully taken into account everything put forward by the parties.
5. Nothing turns on the original proposal being a consent order, as the Tribunal cannot make an order by consent that it could not make following a hearing. The question is therefore whether Ms Faust's suggested extra words are appropriate to include in the substituted decision notice. The power to make the substituted decision notice is given by s.58(1) of the Freedom of Information Act 2000:

58 Determination of appeals.

(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.*

6. The substituted decision notice must be one that could have been made by the Commissioner. Under s.50(1), that decision is whether the request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. Applying s.50(4), in a case where the Commissioner decides that a public authority was wrong to state that it did not hold information:

[the Commissioner's] decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

7. The Tribunal's substituted decision notice will ordinarily only contain the steps that must be taken, the reasons for that conclusion being given later. But as a matter of law, there appears to be no principled reason why the reasons cannot be part of the decision notice as defined. For that reason, and the fact itself being common ground, I do include the wording sought by Ms Faust. The Commissioner has put forward no substantive reason as why I should not. This course of action should not be taken as setting any precedent or expectation that it will be appropriate in future. This decision is not by way of consent order, given that a ruling has had to be made.

Signed

Date:

Judge Neville

25 November 2022