



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0078

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50237887
Dated: 8 April 2010**

Appellant: Denise Harris

Respondent: Information Commissioner

Additional Party: Eastleigh Borough Council

Heard at: Field House London

Date of consideration: 18 October 2010

Date of decision: 02 November 2010

Before

Christopher Hughes OBE
Tribunal Judge

and

Vivian Bown and Richard Enderby
Tribunal Members

Attendances:

The consideration was conducted on the papers in the absence of the parties.

Subject matter: FOIA S.50 Decision notice by Commissioner, appeal under S57.

Cases: Linda Bromley and Others and Information Commissioner v Environment Agency (EA/2006/0072)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 8 April 2010.

Signed:

Christopher Hughes OBE
Tribunal Judge

Dated: this 2nd day of November 2010

REASONS FOR DECISION

Introduction

- 1 Mrs Harris is concerned as to the circumstances leading up to the death of her husband and the extent to which there were shortcomings by his employer which may have contributed to her bereavement.
- 2 The Additional Party is the local authority with responsibility for Health and Safety oversight of the employer. It conducted an investigation of the circumstances of the death and on 19 December 2008 confirmed to Mrs Harris that there was insufficient evidence to prove beyond reasonable doubt that there had been a breach of health and safety legislation. She was dissatisfied with the investigation and has raised various complaints about it.

The request for information

- 3 On 24 February 2009 Mrs Harris wrote to the Council asking for:-
 - “1 All information relating to the meeting between [named official] and [named employer].
 - 2 The document [named official] asked for and allowed [named employer] 3 weeks to provide.
 - 3 Any complaints that have been made against [named employer] such as employee's.
 - 4 [named Environmental Health Manager]'s file – full contents.
 - 5 All paperwork relating to the investigations [named employer] undertook prior to [named official]'s visit i.e. I understand an outside company came into [named employer] and assessed their working practices/arrangements – what was the outcome of this I have been told recommendations were made.
 - 6 What recommendations did [named official] make following his visit.”
- 4 On 19 March 2009 the Council confirmed it had disclosed all information relating to point 1, disclosed a copy of the file the Environmental Health Manager was working from, disclosed the recommendations and confirmed that no complaints about the employer had been received.
- 5 After correspondence (including a request to the Information Commissioner) and a request for an internal review by the Council of its handling of her requests; the Council responded with the outcome of the review on 11 May 2009. This repeated some information concerning disclosures already made, provided further information and with respect to a request for the outside company's report, stated that it considered that S41 of FOIA applied and refused to confirm or deny whether such information was held.

The complaint to the Information Commissioner (IC)

- 6 Mrs Harris renewed her complaint to the Information Commissioner on 25 June 2009. In this she complained about the Council's handling of her request and sought further information. Following discussions between her

and the Information Commissioner and in particular a discussion on 13 July 2009 the Information Commissioner considered three issues:-

- 1 Whether the report prepared by external consultants was correctly withheld under S41(1)
 - 2 Whether the Council held further information generated by its Environmental Health Manager during his review of the Council's investigation of the employer's working practices and whether it should be disclosed.
 - 3 Whether there had been procedural breaches of the Act.
- 7 By a decision notice dated 8th April 2010 the Information Commissioner found that the Council was:-
- 1 Correct to state that it did not hold further information in relation to the review of its initial investigation into working practices of the employer
 - 2 Correct to apply S41(1) of the Act to the report provided to it by the employer
 - 3 In breach of S10(1) and S17(1) by reason of its failure to issue a proper refusal of point 5 of Mrs Harris's request of 24 February within 20 working days.

The appeal to the Tribunal

- 8 Mrs Harris appealed to the First-tier Tribunal (Information Rights) ("FTT") on 11 April 2010.
- 9 The issues raised in the appeal were considered to be:-
- a. The Commissioner was wrong to find that there was no working file for the Environmental Health Manager;
 - b. The Commissioner did not reproach the Council sufficiently;
(We note that the Commissioner has stated that it his intention to monitor the Council's future compliance)
 - c. Mrs Harris has not had disclosure of the personal data the Commissioner identified; (We note that at the time of the Directions Notice the Commissioner still had this matter under review)
 - d. The Commissioner's investigation and conduct has been inadequate (We note that at the time of the Directions Hearing " a service level complaint " from Mrs Harris was being investigated under the Commissioner's provisions for this); and
 - e. The Council has not dealt with this matter properly (We understand that a complaint has been lodged with the Local Government Ombudsman).
- 10 Although Mrs Harris raised concerns about the treatment of the external report for which S41 protection was claimed in that it appeared to contain material

which could be disclosable under the Data Protection Act (sub-paragraph c above) she did not contest the application of S41 to the report itself.

- 11 Following a Directions hearing it was agreed that only the first of these five issues was properly within the scope of the Tribunal at this time and that the other matters fell outside its remit. However (as indicated above) the Tribunal has been informed of actions being taken or considered with respect to the other issues Mrs Harris has raised.

The law

- 12 The Tribunal's jurisdiction in determining appeals is set out in S58 of FOIA. This provides

***“(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.”***

- 13 S. 1 FOIA provides in material part as follows:

***“General right of access to information held by public authorities
(1) Any person making a request for information to a public authority is entitled –
(a) To be informed in writing whether it holds information of the description specified in the request, and
(b) If that is the case, to have that information communicated to him”***

- 14 The Tribunal reminded itself that in order to be satisfied that particular information is not held, it is not necessary for the public authority to prove to a point of certainty that this is so, rather the matter is to be determined on the balance of probabilities (*Linda Bromley v ICO & the Environment Agency EA/2006/0072*). Thus, the Tribunal must ask itself is it more likely than not that the information is held.

Question for the Tribunal

- 15 In the light of the evidence available to it the Tribunal needs to decide whether on the balance of probabilities during the course of his review the Environmental Health Manager of the Additional Party created a working file or not.

The evidence

16 As a starting point the Tribunal considered that an outside observer could have a reasonable expectation that there would be a working file for the Environmental Health Manager's review of the Council's investigation. The original investigation generated a series of hand-written file notes detailing the course of that investigation; a reasonable inference might be that the review would generate similar notes.

17 An Eastleigh Borough Council internal e-mail sent 25 March 2009 appears to imply the existence of such a working file. Mrs Harris certainly was satisfied that such a file exists.

18 In the working notes from the original investigation there are a number of entries relating to conversations with Mrs Harris; she states that she had conversations with the new manager and her expectation is that they would be recorded.

19 However it is necessary also to consider the circumstances of the review. Mrs Harris was notified that a review would be carried out by a letter dated 17 February 2009. This stated that a new Environmental Health Manager had been recruited and had been asked to review the file afresh.

"To this end, he will go through your file and make enquiries as appropriate, before reaching a conclusion.

As you will appreciate, the background and detail of this case is quite extensive and [named EHM] will require sufficient time to consider all the facts. He will aim to let you have his findings within the next 10 days, however if more time is required, he will let you know."

20 The Council's response, based upon the new EHM's consideration, was contained in a letter from the Chief Executive dated 2 March 2009. This set out the manager's actions and conclusions. The word consistently used throughout the letter to describe his actions is "reviewed" that is he looked at existing material. The exception to this was in connection with the question of whether there had been similar complaints about the employer in the past. Here the manager "checked with neighbouring local authorities" and the information he found – a complaint to New Forest District Council in 2002 - is set out in the letter. There is no indication in the letter of any information gathering apart from that contact with other local authorities. There is no indication of any activity by the manager apart from evaluating what has been done before.

21 This activity was carried out over a brief period of time and met the deadline in that the outcome was communicated to Mrs Harris within 10 working days. It was carried out by a new and senior member of staff who clearly will have had other responsibilities and calls on his time during that period.

22 On 11 May 2009 the Council wrote to Mrs Harris with the outcome of its internal review of the way it had handled Mrs. Harris's request for information.

This confirmed the view of the EHM that all the papers from the file had been supplied.

Conclusion and remedy

23 In considering whether the information sought by Mrs Harris was held the tribunal has considered all the evidence available. Although the Tribunal notes the expectations of Mrs Harris these views do not amount to evidence that the information existed. The internal e-mail (para 16 above) assumes the existence of such a file, however it does not come from the holder of such a file and it does not affirm the existence of such a file. On the other side of the balance are the repeated assurances from the Council that such a file does not exist, the methodology of the review described in the Chief Executive's letter of 2 March 2009 and the constrained timescale for carrying out the review. The Tribunal is satisfied on the balance of probabilities that the new manager conducted a review of the existing material and did not generate a working file. As a result of our findings we conclude that the Information Commissioner was correct in determining that the information sought was not held and accordingly we uphold the Information Commissioner's decision notice.

24 Our decision is unanimous.

Permission to appeal

25 An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed:

Christopher Hughes OBE
Tribunal Judge

Dated: 2nd November 2010