



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2012/0274

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50384764
Dated: 31 October 2011**

Appellant: Mr Joe Gilbert

Respondent: The Information Commissioner

2nd Respondent: Northumberland County Council

Heard on the papers at: Field House

Date of Hearing: 2 April 2012

Before

Chris Hughes

Judge

and

Elizabeth Hodder and John Randall

Tribunal Members

Date of Decision: 9 May 2012

Subject matter:

Freedom of Information Act 2000

Cases:

Bromley & others v The Information Commissioner and the Environment Agency

EA/2006/0072

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 31 October 2011 and dismisses the appeal.

Dated this 9th day of May 2012

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

The request for information

1. On 14 November 2010 the Appellant wrote to Northumberland County Council ("the Council ") exercising his rights under the Freedom of Information Act (" FOIA ") seeking records and documents the Council held regarding the 681 bus services between 14 May and 14 November 2010.
2. The Council responded providing certain information on 20 December 2010. Following a review on 26 January 2011 it confirmed its position that it had no more material to disclose. The Appellant complained to the Commissioner that all material had not been disclosed. Following a preliminary investigation the Commissioner concluded that all material falling within the scope of the request had been disclosed. At that point the Appellant disclosed four items he possessed which fell within scope including correspondence between the Council and his MP; he expressed the view that: *“the Council has withheld or destroyed correspondence which confirms the depth of opposition to its highly unpopular bus cuts.”*
3. The Commissioner wrote to the Council on 12 September 2011 seeking further explanations and information. The Commissioner was informed that the Council’s policy was that all business-critical information was stored on the Customer Relations Management facility on the network rather than on individual PCs. The former Head of Transport, to whom the MP had written, had left the Council in March 2011 and his hard drive was wiped on his departure. Incoming correspondence was handled through the CRM system; however this held data for only three months. The Council had provided all the information matching the search request that it could find.
4. In his decision notice the Information Commissioner concluded that the Council had at one time held information relevant to the request which it had not disclosed but that it did not now do so and that in his view the Council held no further information which it had failed to disclose. He stated:-

“..... the Information Commissioner can see no gain in the Council claiming that it does not hold these four pieces of correspondence if in fact it does, given its explanation that it failed to disclose them due to an oversight . Further, the Council is aware that the complainant has his own copies of the four letters in question, such that there is nothing to be gained by it withholding them at this stage. Given his

thorough investigation, together with the wiping of the relevant former managers hard drive and the fact that correspondence is only held on its CRM system for a period of three months, the Information Commissioner is satisfied that the Council did hold these letters at the time of the request but has since deleted them from its systems and no longer holds them.

The Information Commissioner is mindful that the Council's failure to provide the complainant with copies of these four letters does cast some doubt as to whether it holds other relevant information about the bus service which it has also missed; however, he has specifically questioned the Council about this and received its categorical confirmation that it does not hold any further information.

On the balance of probabilities, the Information Commissioner has concluded that the Council does not hold any further information relevant to the complainant's request; however, he would remind the Council of the need to undertake a thorough and rigorous search in response to future information requests."

The appeal to the Tribunal

5. The Appellant was dissatisfied and on 18 November 2011 lodged his appeal. The basic argument underpinning his appeal was that he had in his possession a further e-mail dated 20 October 2010 which the Council had not disclosed but which he had obtained from another source. He stated :-

"So the basis of the decision notice has now been proved to be wrong. I would add that this e-mail is now the fifth documented failure to disclose by the Council. So I vehemently contest the Information Commissioner's decision that these acts were unintentional. I believe the Information Commissioner's judgement of the balance of probabilities is seriously flawed. The latest withheld e-mail contains highly controversial plans to decimate local bus services months after. If the Council had disclosed this it would have caused an outcry in the press and mobilised public opposition. The Council know I am a public transport campaigner with close links to the press. I enclose a local newspaper article about me from 2007 in which the same Council were highly embarrassed by damaging disclosures obtained through a FOIA request. This time they deliberately withheld five documents including the 20 October e-mail. I would add to my FOIA request for this information was addressed

personally to [name redacted], the same individual whose key e-mail of 20 October was then withheld. Yet the ICO's decision notice confirmed [name redacted] hard drive was fully intact at the time of my request. In all the circumstances I submit that the balance of probabilities must indicate a section S.77 offence. "

6. The Appellant in his appeal and subsequent documents has submitted that the Council holds further documents and that the Commissioner should have criticised aspects of the Council's behaviour in his decision. He also claims that the Commissioner should have exercised his discretion differently.
7. The Commissioner has resisted the Appeal on the basis that his inquiry was robust and the production of the fifth document was not proof that it was held by the Council at the time of the Commissioner's decision. He argued that the relevant burden of proof for an offence under S77 (altering etc records with the intent to prevent disclosure) required intent on the part of the Council and had to be proved beyond reasonable doubt. He was satisfied that there was no such intent.
8. The Council responded by stating that the additional email was not deliberately withheld, that the reason that it was not supplied was either oversight or as a result of its deletion from the hard drive of the former transport manager, and that:-

"The content of the email is not of a controversial nature and discusses the same thought processes that were discussed in other emails made available to Mr Gilbert as part of his FOI request."

The question for the Tribunal

9. The Commissioner's decision explicitly found that at the time of the request the Council held material which it did not disclose and has subsequently deleted (DN 31) but that at the time of his decision, the Council did not hold any further information within the scope of the request (DN33). Although the Appellant has raised the question of the Commissioner's discretion; on analysis it is clear that the issue he is raising is the finding of fact that no more information is held.
10. The issue the Tribunal must resolve is whether the DN is accordance with law and to do so it may review any finding of fact upon which the decision is based (FOIA S58).

Evidence

11. The Council provided a witness statement from Mr McBride, who carried out the initial search for information and from Mr Cusack who carried out the internal review. The initial request had been directed to the transport manager, after it was acknowledged it was allocated to Mr McBride to action. He circulated a communication to all members of the integrated transport unit "who are either known to be involved in the discussions relating to service 681 or may have been party to documents or other forms of relevant evidence during this period ". Further he made a search of the Council's CRM using a range of search terms relating to the bus, the operator and the route. The product of the searches was then pulled together, checked and redacted before being sent to the Appellant. In carrying out the review Mr Cusack considered the material that had been sent, checked all the sources used by Mr McBride and satisfied himself that all the documents found had been included. He confirmed that there were no other departments likely to have been involved and holding information within the terms of the request by the appellant.
12. The third witness statement from the Council, by a Mr Coe, produced to the Tribunal a copy of an e-mail sent by the then transport manager of the Council to his opposite number working for Cumbria County Council relating to surveys on the use of the 681 service, consultations concerning its future and indicating that he would be replying to the MP explaining the issues.
13. The explanation of the Council remained that given to the Information Commissioner before he concluded his decision notice; that is that information held by the then transport manager had not been fully integrated into the systems which were searched and his hard drive was wiped after he left the Council so it was now no longer possible to determine whether there was any other information which had been held at the time of the original request but that no further information was now held.

Analysis

14. In deciding whether or not the Council holds information for the purposes of FOIA the civil standard of the balance of probabilities is applied (*Bromley & others v The Information Commissioner and the Environment Agency EA/2006/0072*).

15. At the heart of this case is a difference in perspective between the Appellant and the Council. The Appellant considers that the Council viewed the entire request of the background circumstances as a matter of great controversy and that it had "Something to hide". The perspective of the Council however was very different. The transport department had a budget of approximately £16 million to spend on supporting transport. Under the current financial circumstances it would wish to ensure that the public benefit from its expenditure was as great as possible. Considering the future of the 681 bus service was for the officers concerned part of their routine day-to-day business which they carried out in consultation with Parish councils, the adjoining county council and other interested parties. Officers considered the results of passenger surveys, the expenditure concerned and possible alternative solutions.
16. The Appellant invited the Tribunal to draw inferences from the failure of the Council to disclose information it held at the time of the request (the original four documents) and from his subsequent disclosure of a fifth document, to conclude that the Council deliberately suppressed information, destroyed it in breach of S.77 FOIA, and may continue to hide information.
17. The Tribunal is unable to draw such inferences. The evidence of the documents and from the witness statements clearly shows that there was no desire to suppress the information and that the reason the five documents were not disclosed originally was administrative error and that the computer hard drive where they were likely to have been stored in the Council at the time of the request had, by the time of the Commissioner's Decision Notice, been erased.

Conclusion and remedy

18. In his decision notice the Information Commissioner concluded that the Council had at one time held information relevant to the request and that it did not now do so and that in his view the Council held no further information which it had failed to disclose. He had done this after an investigation in which he had challenged the Council about the shortcomings of its management of the request and sought proper explanations for its inability to provide documents of which the appellant had copies. He accepted the Council's explanation that it missed the documents during its search process, that the nondisclosure was a simple oversight and that the hard-drive which had held the data had now been erased. The Commissioner expressed his concerns

about the need to carry out thorough and rigorous searches in response to requests. The further evidence submitted to the Tribunal by the Council, including the copy of the fifth document and evidence as to how the Council sourced the document for submission to the Tribunal, was all entirely consistent with this account. The Tribunal is satisfied that, on the balance of probabilities, the Decision Notice is correct and that by the time the Commissioner issued his decision the Council no longer held any information which had not been disclosed to the Appellant.

19. The Tribunal therefore dismisses this appeal.

20. The Tribunal observes that the Council's systems for locating information appear not to have functioned well in this case, as illustrated by the initial failure to identify relevant correspondence with a Member of Parliament. Wiping the hard disc of a departed senior member of staff, without first checking that it did not contain information which might not be available elsewhere, is a practice which might merit review. The Council may wish to consider if there are lessons it should learn from these matters.

21. Our decision is unanimous.

Judge Chris Hughes

[Signed on original]

Date: 9th May 2012