



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

Appeal No: EA/2013/0004

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50455280
Dated: 18 December 2012**

Appellant: Tony Wise

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 28 June 2013

Before

Chris Hughes

Judge

and

Anne Chafer and Suzanne Cosgrave

Tribunal Members

Date of Decision: 2 July 2013

Subject matter:

S.1 Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 18 December 2012 and dismisses the appeal.

Dated this 2nd day of July 2013

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. The appellant in these proceedings ("Mr Wise") sent a complaint to a councillor of Wyre Borough Council ("the Council") and did not receive a response. He subsequently received an explanation from the councillor which has given rise to this appeal.

The request for information

2. On 20 March 2012 Mr Wise wrote to the Council and requested the following information:-

"I require all internal information relevant to auto forwarding set ups at Wyre Borough Council and all internal information in relation to my e-mail timed at 26/5/2011 at 12:06:44 GMT Daylight Time being received at Wyre Borough Council. I also require all internal information as to the precise setup that allowed my e-mails to be auto forwarded to Lancashire County Council and **also automatically deleted** at Wyre Borough Council. I also wish to receive internal information that would allow or justify a Wyre Borough Councillor auto forwarding a Wyre Borough Council e-mail to Lancashire County Council and also automatically deleting a Wyre Borough Council e-mail from Wyre's server when it involved purely Wyre business."
3. In his request he explained that he had been told in November 2010 by Lancashire Police Authority that his e-mails to them had been blocked but that they had not told him that his e-mails were also been blocked at Lancashire County Council. He had sent an e-mail to a Wyre Borough councillor who had denied subsequently that he received it.
4. In its reply, the following day, the Council explained that for convenience and to save money a councillor who served on both councils had one set of computer equipment provided by Lancashire County Council and e-mails sent to Wyre Borough Council were automatically forwarded to his county council e-mail account. This had been set up by the Wyre Borough Council IT service on the mail server in conjunction with the

Lancashire County Council IT staff rather than by the councillor himself. The effect of this was that the Council e-mail server did not retain any information in its original inbox-it was in essence a forwarder of e-mails and it did not operate in the same way as a normal e-mail account. The councillor accessed all his e-mails sent to either of his Council addresses via his County Council account. Wyre Borough Council had no knowledge of any blocks relating to Mr Wise. While at this stage it did not explicitly provide a formal confirmation the effect of this was a statement under section 1 (a) of FOIA that it did not hold the requested information.

5. Mr Wise requested a review of this on 16 May 2012 and the Council provided its review on 29 May 2012. This statement stated that while it had given a full explanation of the IT arrangements which were referred to, it had failed to clearly state whether information was held: it therefore confirmed that no information was held in respect of the request.

The complaint to the Information Commissioner

6. He was dis satisfied with this response and complained to the Respondent in these proceedings (“the Commissioner”) on 5 July 2012. He also made a complaint under the Data Protection Act 1998 which has been separately considered and is not the subject of this appeal.
7. In formulating his view on the matter the Commissioner considered Mr Wise's evidence and arguments and the actions which the Council had taken to check that the information was not available and its explanation of why the information was not available.
8. Mr Wise was highly sceptical about the explanation which had been given by the Council and believed that it was administratively poor and could enable a councillor to manipulate and ignore complaints. He argued that the Council had fabricated a deception to protect the councillor and that there should be evidence to prove that the auto forwarding arrangements had been enacted, if it had been, and that there should be some sort of audit trail available.
9. The Council explained to the Commissioner that there had been a long-standing and informal arrangement between the IT departments of the two councils and that there was no information specifically relating to Mr Wise. All e-mails to a particular elected member would be auto forwarded. It explained that it had replaced the

Council's server in January 2012 and that while with its new server details of auto forwarding were captured they had not been possible at the time of the disputed e-mail. The paperwork with respect to the IT equipment would have been retained by the County Council as its supplier. The Commissioner specifically enquired as to whether any of this information had ever been held and the extent of searches carried out by the Council and whether the information may have been copied and held in other locations. The Council's response to this was that no formal electronic or paper searches had been undertaken because the arrangement with the County Council was undocumented and verbal. It could find no evidence of any relevant information as copies of e-mails which were auto forwarded were not retained in the Council. It did not consider that there were any statutory requirements to retain the information but acknowledged that there was a business purpose in documenting such arrangements with the Council. It confirmed that it had not been notified of any decision to block e-mails received from Mr Wise by Lancashire County Council and was therefore unable to inform Mr Wise of that.

10. The Commissioner could not find evidence to support Mr Wise's view that the Council had fabricated a story to protect a councillor and concluded that there was no reasonable motive to conceal the requested information. On the balance of probabilities he found that the information was not held by the Council.

The appeal to the Tribunal

11. On 14 January 2013 Mr Wise appealed against this finding. In his appeal he accepted the need to demonstrate on the balance of probabilities whether or not information was held but considered that he was submitting evidence which proved the case on that basis. In his appeal he stated that he was advancing challenges on four points:-

- Was auto forwarding ever in place?
- Were e-mails truthfully not retained at the Council when auto forwarded?
- Whether there was a legal requirement or business need for the Council to hold requested information?
- Was his e-mail address blocked by the County Council and why did the Commissioner deny that any such evidence existed in his decision notice?

The question for the Tribunal

12. The basic question the Tribunal has to answer is whether on the evidence the Council held the information requested or not.

Evidence and analysis

13. The key evidence Mr Wise relied on to support his first argument was an e-mail he had received from the councillor dated 8 July 2011. Mr Wise stated that the councillor in his e-mail had not mentioned auto forwarding at all:-

"The incontrovertible evidential fact is that councillor [redacted] would not have searched for my e-mail at Wyre Borough Council in July 2011 if the current story from the Council in FS50455280 is in any way true because he wouldn't have received any e-mails at Wyre Borough Council since 2006. The known facts state that he would only have searched at LCC because he knew or ought to have known that auto forwarding would have been at his request (DN16) for him as a particular elected member who acts as a district and county councillor and would apply to all of his incoming Wyre e-mails not just e-mails from any particular or named member of the public."

14. The e-mail upon which Mr Wise is relying has a subject line of "complaint" is dated 8 July 2011 and is from the councillor to Mr Wise. It reads:-

"I have received, from Michael Ryan-(Wyre's Monitoring Officer), a notice of an official complaint that you have made against me. Unfortunately I am not yet permitted to know the full details of your complaint? The one tangible aspect of the complaint which I have been informed of is my failure to respond to an e-mail from you dated 26th May. I could not recall receiving such an e-mail and on checking to my system (inbox, deleted items and even including "recovery of deleted items") there is no record of it. Consequently I asked Mr Ryan to send me a copy of what you had sent.

I have now received a paper copy of your e-mail but it does not include the attachment. I can't see anything within the e-mail that would have triggered the "firewall" however there may have been something contained in the attachment? Whatever the reason however the fact is that I did not receive your e-mail and therefore was not able to formulate any response.

The problem that I now have is that although I have received your e-mail - but without the attachment to which it refers-I do not have the full details of the alleged comments or the context.”

15. Mr Wise then went on to point to a very brief extract from an interview with the Councillor in 2011 which he has provided (bundle page 27). From the context (contained on the single sheet of the record of the interview which he has provided) it is clear that it was probably produced as part of a disciplinary investigation of the councillor arising by a complaint from Mr Wise under the Code of Conduct for Councillors. The investigator (“Q”) has read to the councillor (“A”) the allegation:-

“Q My allegation therefore is [name redacted] is breaching and continues to breach clause 3.1 of the Code of Conduct in relation to his unreasonable ignorance of the e-mail dated 26th of May 2011 and all the concerns made out. So this seems to centre on the e-mail. If I show you a copy of the e-mail, which is dated 26 May, have you received this either then or subsequently?

Q I will give you a few moments just to read it through

A I'll just check because I had one which I received by copy. Yes, yes I have received the e-mail but I didn't receive it as an e-mail, I received it as a paper copy from Michael Ryan.

Q And Michael Ryan's the Monitoring Officer

A Yes, and I did respond to it.

Q Well just taking these points in turn. The e-mail dated 26 May is addressed to your Wyre Council e-mail address.

A Yes.

Q Can you confirm that you haven't received it in your e-mail inbox?

A I can confirm that I have not and cannot receive any e-mails from Tony Wise. I didn't know at the time that I have subsequently found out that any e-mail from Tony Wise has been blocked from/by on the request of Lancashire Police Authority by my County Council e-mail address. All e-mails to my Wyre Borough Council e-mail then forwarded to my County Council e-mail address, and therefore it would be automatically blocked and so that's why I mentioned at the time, to Michael Ryan that I didn't recall receiving an e-mail from Tony Wise, that's why he gave me a paper

copy of the e-mail that I said I hadn't received and that's why I made enquiries as to find out why I hadn't received such e-mails and found out that these e-mails was blocked.

Q Ok

A I did respond via e-mail to Tony Wise to the issues that was raised within this e-mail but then of course any subsequent reply from Tony Wise I wouldn't get, I wouldn't receive. ”

16. While Mr Wise has in his arguments placed great stress on this e-mail and record of interview and strives by pointing to inconsistencies to demonstrate duplicity: the natural and infinitely more probable explanation is the simple explanation which appears on the face of these two documents. The councillor in question finally received some details of the complaint when he was passed it by the Council's Monitoring Officer who had received a paper copy of it from Mr Wise. A busy councillor dealing with the affairs of at least two public authorities would be unlikely to be aware of the administrative arrangements relating to his e-mail system which appear to have been in existence and operating one assumes effectively for five years or possibly longer and is unlikely to think it necessary or relevant to explain how his emails are handled to everyone who contacts him. Despite Mr Wise's protestations, this does not provide the slightest evidence of misconduct, a cover or any attempt to mislead the Commissioner. The Councillor's comments with respect to a computer firewall are the entirely rational speculation of an individual trying to understand why he has not received an e-mail sent to him.
17. In his second point of appeal Mr Wise states with respect to the councillor "*why did he search at Wyre for my e-mail*" here again there is over interpretation - the councillor merely indicated that he searched his system; he had one system provided by the County Council on which he handled all his public authority business.
18. The third line of attack on the Commissioner's decision relating to a legal or business need turns on the Commissioner's concerns as regulator of the Data Protection Act 1998 with respect to the system in place. It does not go to whether or not any information is held.

19. The fourth ground on which he impugns the Commissioner's decision is again based on a misapprehension. Mr Wise argued that there was a "two strand cover story"; the key evidence for the second strand (the first strand being dismissed above) being:-
- "... the e-mails... dated 24 January 2011 and 28 January 2011 as provided to this appeal... prove beyond any doubt that my e-mail address wasn't blocked in any event by LCC about three months after they said that it was."*
20. These e-mails which he provided with his notice of appeal and which he relied upon as evidence do not sustain his argument. The simple point is that both of them were originally sent to a person whose e-mail address is "@preston.gov.uk" another Borough Council within the county of Lancashire but a separate domain name not within a blocked area "@lancashire.gov.uk". The forwarding of such an e-mail to someone within "@lancashire.gov.uk" would not be blocked, was not blocked, and provides no evidence in support of the proposition that an e-mail directly from Mr Wise would not be blocked.
21. The Commissioner in his Decision Notice considered the scope, quality, thoroughness and results of the searches and concluded that there was no evidence to justify refusing to accept the Council's position that it does not hold any information relevant to the request. We note the Commissioner's view, also accepted by the Council, that there is a business purpose for documenting the email management arrangements with Lancashire County Council. However, the question we are considering is whether the Council held the information, not whether it should hold it and we support that view taken by the Commissioner that on the balance of probabilities it did not hold the information.

Conclusion and remedy

22. In summary therefore all four grounds of appeal are demonstrably wholly unfounded. They rely on misinterpretations of what is transparently obvious, this appeal must fail.
23. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 2 July 2013