



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0107

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50503811
Dated: 31 MARCH 2014**

Appellant:	TIM BROWN
1st Respondent:	INFORMATION COMMISSIONER
2nd Respondent:	DONCASTER METROPOLITAN BOROUGH COUNCIL
On the papers:	23 SEPTEMBER 2014 (and then adjourned for oral hearing at Rotherham Combined Court Centre)
Date of oral hearing:	4 NOVEMBER 2014
Date of decision:	23 DECEMBER 2014
Decision adjusted:	25 JANUARY 2015

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and MALCOLM CLARKE
Tribunal Members

Attendances for the oral hearing:

For the Appellant: Mr T Brown

For the 1st Respondent: written submissions from Mr M Thorogood, Solicitor for the Information Commissioner

For the 2nd Respondent: Mr C Knight, Counsel instructed by Doncaster MBC.

Subject matter: FOIA 2000

Whether information held s.1

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 31 March 2014 and dismisses the appeal on the basis that – although the requested information has subsequently been discovered and disclosed to the Appellant – Doncaster Metropolitan Borough Council (DMBC) was unaware that it held the information at the time of the information request, at the time when the Information Commissioner made his decision and until the matter was appealed to the Tribunal.

REASONS FOR DECISION

Introduction

1. On 4 September 2009 the then Mayor of Doncaster Metropolitan Borough Council (DMBC) decided to withdraw funding for DMBC's United Nations Day including Black History Month.
2. On 11 September 2009 a letter regarding the funding cuts was sent out. This was ostensibly signed by a named official of DMBC, Mr Nadeem Murtuja.
3. Mr Murtuja had not, as a matter of fact, given permission for his name or signature to be used in respect of this letter.
4. On 25 February 2010 Mr Tim Brown (the Appellant) asked DMBC

Who instructed Mr Murtuja to implement the withdrawal of support for Black History Month 2009 along with any information that he may have been provided with regarding to the legality of that decision?
5. On 24 March 2010 DMBC purported to release that requested information to him.
6. Then, having become aware of media reports which stated that Mr Murtuja's signature had been forged, he made a further request on 4 June 2013 to DMBC

....for access to all emails, background papers, officer decision records, reports etc regarding the faking of Mr Murtuja's signature.

7. DMBC responded to that in a letter dated 18 July 2013 stating that this information was withheld on the basis of exemptions within FOIA. Following an internal review DMBC revised its position and released some of the requested information to the Appellant (on 16 August 2013) but continued to withhold some of the information relying on section 40 (2) in relation to the personal data of a third party.
8. One of the items that was released to the Appellant in this exercise was the draft of a letter dated 24 March 2010 which contained the paragraph – one which did not appear in the final version of the letter – that stated

Mr Murtuja throughout this whole process provided the Council with briefing notes and advice with particular reference to equality and the general duties. These briefing notes were shared with Mayor Davies by both [2 other officials]. This resulted in the subsequent Equality Impact on the whole equality and diversity calendar.
9. The Appellant then contacted the Information Commissioner on 4 July 2013 to complain about the way his request for information had been handled.
10. He explained that he did not take issue with the withholding of information on the basis that it was the personal data of a third party under the provisions of section 40 (2) FOIA. What he wished, however, was for the Information Commissioner to investigate whether DMBC had in its possession the “briefing notes” referred to (in Paragraph 8 above) which DMBC asserted it did not hold.
11. The Information Commissioner, in his Decision Notice, explained that he had put a number of questions to DMBC to assess the adequacy of its search for the information and any other reasons that might explain why the information was not held.
12. DMBC – at the time – explained to the Information Commissioner that it did not know the name that might have been given to the briefing notes and it had instigated searches for the most likely generic title.
13. It had made searches in relation to the in-boxes of key individuals including the former Mayor, his support team, and senior members of staff who could have been involved originally. No relevant material had been found.
14. Paragraphs 17 – 21 of the Decision Notice (which is a public document) detailed other avenues DMBC had taken to search for the information without success.
15. The Information Commissioner concluded, on the basis of the information and responses DMBC had provided to him, that its searches for the documents were reasonable within the meaning of the legislation.
16. The original network search had taken 9 ½ hours and a further search took 16 hours (part of which was carried out overnight). DMBC had said it was anxious to comply with the request but believed that any further searches of the remaining network would be disproportionate given the resources that had

already been applied in searching for the documents and the impact that such searches had on the speed of DMBC's network.

17. Further searches, it said, were only likely to identify thousands of other documents entitled "Briefing Notes" and containing the word Equalities. It considered that any further search would be excessive and go beyond what should be considered as reasonable and proportionate.
18. There were matters discussed in a confidential annex to the Decision Notice that suggested that DMBC had been in possession of the briefing notes at the time of the request. Conversely DMBC stated that it had searched extensively for the briefing notes and had been unable to find them. It had stated that it had nothing to gain from "hiding" the briefing notes. The staff members involved in the matters in 2010 were no longer with DMBC and its political administration had changed.
19. On the balance of probabilities the Information Commissioner came to the view that "around the time of the request the Council did not have possession of the briefing notes and that it has undertaken reasonable and satisfactory searches which failed to find them".
20. The Information Commissioner noted that his decision had not been an easy one to reach.
21. That finding was based on the searches made by DMBC in response to the Information Commissioner's enquiries and, to a lesser extent, the fact that key personnel in 2010 were no longer with the Council.

The appeal to the Tribunal

22. The Appellant appealed to the Tribunal on the basis that he believed that DMBC – on the balance of probabilities – held the "briefing notes". He did not accept that DMBC should be believed as it had been "evasive, unreliable and economical with the truth" and that the "briefing notes" must have been held by DMBC for the purpose of the grievance proceedings brought by Mr Murtuja.
23. He also questioned the Information Commissioner's use of a confidential annex in relation to the Decision Notice.
24. The Information Commissioner subsequently reviewed the appropriateness of using the confidential annex and concluded that it contained no information that the Appellant, at the very least, was not already aware of.
25. On that basis the confidential annex was disclosed to the Appellant.

The questions for the Tribunal

26. At the time of the Appellant's request for the "briefing notes" was DMBC aware that it held them?

The Tribunal's preliminary view when dealing with the matters on the papers

27. The Tribunal issued a Case Management Note dated 25 September 2014 which is self-explanatory. The main portion of it is reproduced below:

Having considered this appeal on the papers the Tribunal wishes to hear oral evidence from Doncaster Metropolitan Borough Council (DMBC) on issues raised by the chronology provided. The Tribunal wishes to hear further explanation arising out of the information on page 35 of the Appeal Bundle and – in particular – the grievance procedure involving Mr Murtuja heard on 4 and 5 December 2012 and the outcome communicated to Mr Murtuja 1 March 2013.

The information request about whether DMBC held the information was made on 4 June 2013. If the dates in the first paragraph (above) are correct then, for the Public Authority to be unable to locate the requested information three months later (given the background circumstances), will require a credible and detailed explanation to be presented to the Tribunal.

Also the original FOI request was made on 9 May 2013 in an email which was copied to the FOI officer (page 85) but not picked up or registered as an FOI request until a response was chased by Mr Brown 4 June 2013 with the FOI officer (page 19).

It was then acknowledged 6 June 2013 and subsequently chased by Mr Brown 4 July 2013 according to the hand-written date on the top of page 19. This chronology, on the face of it, covers less than the three months mentioned above but only about 6 weeks.

....

There is an apparent contradiction between what the CEO of DMBC states and his apparent contact with the Appellant and the Tribunal.

We will convene a half-day oral hearing at a venue in or as close to Doncaster as possible to hear from DMBC about these issues....

The Oral Hearing at Rotherham Combined Court Centre on 4 November 2014

28. The purpose of the oral hearing was to hear the responses to this from DMBC.
29. The Appellant (assisted by a McKenzie friend Mr Martin Broughton) and the other parties who attended, including Mr Murtuja, clearly would have liked the hearing to have been a general exploration about all of the background relating to the original events and its subsequent history.
30. By the time of this oral hearing DMBC had provided the Appellant with the requested information which had been located.

31. The Tribunal explained that the focus of the oral hearing was limited simply to establishing whether, at the time of the information request by the Appellant, DMBC knew that it held the information in the light of the searches that it had made in response to the Information Commissioner's enquiries prior to his issuing the Decision Notice dated 31 March 2014.
32. The Tribunal heard oral evidence from Mr Simon Wiles who had been the Director of Finance and Corporate Services with DMBC since 7 February 2011.
33. He was a qualified accountant and had worked in local government for over 28 years and had had a further two years working for the Government. He had held senior financial positions with Councils in London and York and managed budgets of £300m or more for the last 24 years.
34. In his current role he was responsible for, among other things, Legal, Human Resources (HR), IT and Customer Services which included dealing with Freedom of Information matters.
35. He was also the Hearing Officer who dealt with Mr Murtuja's appeal against the outcome of his original grievance.
36. He adopted an 8-page written witness statement dated 31 October 2014 and answered questions from the Tribunal and – to the very limited extent that the Tribunal permitted questions from the Appellant and other parties – gave a number of other factual responses.
37. In short, he confirmed that DMBC had held some documents that could be said to be briefing notes and gave his explanation about why those had not been disclosed to the Appellant until July 2014.
38. When the Appellant had appealed from the Information Commissioner's decision to the Tribunal DMBC – in preparation for the appeal – had retrieved a file from its Archives.
39. DMBC had moved to a centralised location in the Civic Building and historic case files had been archived in an off-site storage facility. The relevant file had been archived in or around June 2014 at the time when DMBC's Human Resources officer went on maternity leave and when she archived her historic files.
40. When they were retrieved from storage they were found to include additional papers which matched the Appellant's information request.
41. Mr Wiles stated [at Paragraph 15 of his witness statement]:

At this stage it is worth noting that the Council has never said that these notes did not exist, the position is simply that we had not been able to find them. In addition Council officers involved in the search were not 100% clear about what the "briefing notes" they were looking for actually looked like, contained or who they had been sent to. Even upon discovery of the documents in July 2014, that I immediately authorised to be sent to Mr Brown, there was uncertainty over whether

these were really what Mr Brown had been asking for.... Having located the documents believed to be the briefing notes, the Council has subsequently carried out further electronic searches of its Network to see if these notes would have been revealed if different keywords had been used. Our IT section has confirmed that using the words "Corporate Equality Framework" and Equality and Diversity Calendar" no documents were found in either the Neighbourhood and Communities or the Regeneration & Environment Folders of the Network.

42. He acknowledged that DMBC's Document Management Systems were lacking centralisation at the time of the request. DMBC had been aware of this for some time and the position had been exacerbated by "multiple office locations of Council departments".

43. In December 2012 a consensual audit by the Information Commissioner had concluded that:

Records management controls require considerable development. Information Asset Owners are in place but are not yet supported by staff in the business, of an appropriate seniority, with identifying and risk-assessing the information assets held within their departments and recording these on information asset registers. In addition there is no Records Management policy and no procedure to ensure files removed from storage are tracked and returned promptly when no longer required.

44. He added that the Information Commissioner had made 20 recommendations in relation to Records Management (out of a total of 34 recommendations). He confirmed that evidence had been submitted to the Information Commissioner that all the recommendations had been completed or were ongoing, increasing the outcome from "limited assurance" to "reasonable assurance". He was confident that the situation was very unlikely to happen again.

45. He accepted that the Appellant did not believe all the documents had been disclosed in relation to his request. However he believed that the searches that had now been carried out were sufficiently thorough and extensive to have produced all of the information relevant to the information request. He had read again the grievance file and the additional papers and did not believe there were other papers which could be considered for within the scope of the request for "briefing notes" other than those which had been disclosed Mr Brown.

46. DMBC did accept that it had not complied with the statutory time limits for dealing with Mr Brown's FOIA request and apologised to him on behalf of the Council.

Conclusion and remedy

47. The Tribunal is in an unusual position in respect of this Appeal.

48. DMBC, having found the relevant information, now maintains that all the requested information has been provided to the Appellant.
49. We have had the opportunity of hearing directly from the senior individual in DMBC responsible for conducting the additional searches which eventually supplied the requested information.
50. He gave his evidence clearly, credibly and cogently.
51. In doing so he was admitting that DMBC had fallen short of its Records Management responsibilities in relation to this information request.
52. At the same time he was making it clear that, having found the relevant information, it was immediately passed to the Appellant.
53. From the start, even during the Information Commissioner's enquiries, DMBC had maintained it had nothing to gain from "hiding" the briefing notes.
54. The fact that they are now in the Appellant's possession, albeit much later than he might have expected to have the information, adds credence to that position.
55. In many senses it is more embarrassing for DMBC now to admit the truth that it had, historically, an unreliable and ineffective Records Management system than to continue to maintain that it could not find the requested information.
56. On that basis, the Tribunal accepts the substance and content of the explanation and evidence presented by Mr Wiles on behalf of DMBC.
57. The Tribunal finds that Doncaster Metropolitan Borough Council was unaware that it held the information at the time of the information request despite making extensive searches, at the time when the Information Commissioner made his decision and until the matter was appealed to the Tribunal.
58. The Tribunal finds that the Information Commissioner was right to conclude on the balance of probabilities on the basis of the facts provided to him that the information was not held, albeit that conclusion subsequently turned out to be wrong.
60. For the reasons above - and on the basis of the facts that have now emerged - this appeal fails despite the fact that the Appellant turned out to be correct in his belief that the briefing notes were always held by DMBC.
61. Our decision is unanimous.
62. There is no order as to costs.

Robin Callender Smith
Judge
25 January 2015