



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]
ON APPEAL FROM:**

Case No. EA/2015/0232

**Information Commissioner's
Decision Notice No: FS50579473
Dated: 16 September 2015**

Appellant: Kelvin Loveday

Respondent: The Information Commissioner

On the papers

Date of decision: 4th April 2016

Date of Promulgation 5th April 2016

**Before
CHRIS RYAN
(Judge)
and
ALISON LOWTON
ROSALIND TATAM**

**Subject matter: FOIA:
Whether information held s.1**

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

Introduction

1. On 10 October 2013 the Appellant sent Downham Market Town Council (“the Council”) a request for information. He made it clear that the request was being made under the Freedom of Information Act 2000 (“FOIA”). The list of requested information is set out in paragraph four of the Decision Notice from which this Appeal arises. It is not repeated here, except to note that the fourth part of the request was for “*Any submissions via letter or email from town councillors ...*”. We have been told that the information sought related to the Council’s housing strategy and that the Appellant was concerned about pecuniary interests of a particular Councillor (“Councillor A”) in relation to property potentially affected by the strategy.
2. The Council responded to the request by providing the Appellant with a body of information which he appeared at the time to have accepted satisfied his right to have information released as requested. However, over a year later, on 11 November 2014, the Appellant drew the Council’s attention to the fact that he had obtained from elsewhere a copy of an e-mail dated 4 September 2012 from Councillor A to an officer at the Borough Council of King’s Lynn and West Norfolk. On the face of the email it appears simply to set out four suggested agenda items for a proposed meeting. Although it is not therefore evident to a stranger reading the email, the Appellant has stated that it relates to a development that would affect property owned by Councillor A. He

therefore asked the Council to undertake an internal review of its response to his original information request as the email had not been disclosed in response to it.

3. The Council did not accept that it was obliged to conduct an internal review but did disclose, by an email from the Town Clerk dated 21 November 2014, that it had *“rechecked through all the Town Council email accounts and can confirm that the email you refer to dated 4 September 2012, was not either sent from nor was the Town Council copied into it; therefore the email you refer to would not have formed part of the FOI response you received.”*
4. The Appellant was not satisfied with that response. He lodged an official complaint to the Council, which led to a communication from the Mayor’s office on 13 February 2015 stating that *“after an extensive search of all [the Council’s] computer records, including a request to our external IT service provider to search all archived email accounts, no trace can be found of the email in question.”* The Council concluded, on that basis, that the email had not been received by it.
5. On 21 April 2015 the Appellant complained to the Information Commissioner about the way in which his request had been handled. In taking that step the Appellant was exercising a right provided by FOIA section 50 which provides that if a complaint satisfies certain requirements for consideration the Information Commissioner is required to decide whether or not the public authority in question complied with its FOIA obligations and, if not, what steps which should be taken in order to comply. It should be added that the Appellant had originally tried to persuade the Information Commissioner to investigate criminal behaviour under FOIA section 77 (alteration or destruction of information to prevent disclosure) but the Information Commissioner was prepared only to pursue an allegation of breach of FOIA section 1 (obligation to disclose on request).

6. During the course of the Information Commissioner's subsequent investigation the Appellant sought to stress the importance of the missing email as evidence of wrongdoing by Councillor A and/or the Council. He drew attention to possible breaches of the criminal law and of the Code of Practice issued under FOIA section 46 and suggested that the Council's failure to disclose the email or to provide what he would regard as a satisfactory explanation for its absence was incriminating. The Council, for its part, sought to persuade the Information Commissioner that, although the email related to Council business, it was not held on behalf of the authority while in the possession of Councillor A and that, as a result, it would not have fallen within the scope of the Council's disclosure obligation. It nevertheless confirmed that it had explored with Councillor A where the document might be and had received from him a communication in the following terms:

"Further to your request I can advise that I had already had a virus on my PC some while back, as both you and other Cllrs will remember from the number of complaints I got!

Following that my phone was water damaged and data was again lost.

I have since instigated a clear out regime whereby anything over 1 month old and or trivia such as this is deleted anyway.

As such none of these emails exist other than what you or the BC already have."

7. On 16 September 2015 the Information Commissioner issued his decision notice. He concluded that, had Councillor A retained a copy of the email, it would have been a document falling within the scope of FOIA section 1, when read with section 3(2). It concerned Council business and would therefore have been held by Councillor A on behalf of the Council even though apparently not stored on the Council's IT

system. However, he concluded that Councillor A was no longer holding it in that capacity at the time when the information request was submitted. The basis for that conclusion was expressed in these terms:

“The council has provided a written confirmation from [Councillor A] that confirms the email was not likely to be held at the time of the request due to information having been lost after a virus on the councillor’s computer. Following this, the councillor also started routinely delete emails once over 1 month old or otherwise trivial.”

8. On 13 October 2015 the Appellant lodged an appeal against the Decision Notice to this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
9. The Notice of Appeal was accompanied by lengthy Grounds of Appeal which raised a large number of complaints. Although they no doubt reflect the Appellant’s frustration about the way in which he believed Councillor A and the Council had behaved, we have been forced to conclude that they fall outside the limited jurisdiction granted to this Tribunal under the FOIA. Its jurisdiction does not extend to questions of whether the Council has acted with competence and/or complied with the Code of Practice or whether the Information Commissioner has performed his duties in relation to either the Code or the promotion of best practice. We are limited to considering whether or not the Decision Notice is in accordance with the law in concluding, on the

balance of probabilities, that the Council did not hold the email at the time of the information request.

10. On that limited issue we are unable to say that the Information Commissioner fell into error in accepting the explanation presented to him by the Council and, indirectly, by Councillor A. We have considerable sympathy with the Appellant's cynicism regarding Councillor A's explanation as to why his copy was not available, but we do not think that the Information Commissioner can be said to have been wrong in concluding, on the basis of that explanation and the Council's statement as to the searches it arranged to be carried out, that on the balance of probabilities the Council did not hold the email at the date of the information request. The appeal must therefore be dismissed.

11. Our decision is unanimous

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Tribunal Judge
4th April 2016