



Neutral Citation Number:

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

**Appeal No: EA/2015/0235**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50565674**  
**Dated: 16 September 2015**

**Appellant: Pat Ruder**

**Respondent: The Information Commissioner**

**Heard at: Harlow Magistrates' Court**

**Date of Hearing: 20 July 2016**

**Before**

**Chris Hughes**

**Judge**

**and**

**Nigel Watson and David Wilkinson**

**Tribunal Members**

**Date of Decision: 25 July 2016**

**Attendances:**

For the Appellant: Mrs Ruder with Suzanne Jones

For the Respondent: did not attend

**Subject matter:**

Freedom of Information Act 2000

**DECISION OF THE FIRST-TIER TRIBUNAL**

Subject to the correction to the decision notice listed in the schedule below, the Tribunal upholds the decision notice dated 16 September 2015 and dismisses the appeal.

Schedule

For paragraph 6 of the decision notice the following shall be substituted;-

“The council responded on 25 July 2014. This was outside the 20 day period for response and accordingly the council was in breach of s.10(1) FOIA. It provided some information and answered the questions asked by the complainant.”

## **REASONS FOR DECISION**

### **Introduction**

1. Harlow Welfare Rights and Advice (“HWRA”) formerly provided advice and representation to people in its area concerning their entitlement to DWP benefits. It received funding from a number of sources including from central government through legal aid funding and from Harlow District Council (“the Council”) which provided some core funding.
2. In autumn 2012 the Council removed funding in the light of the financial difficulties which it perceived in HWRA. Litigation flowed from this decision and there were subsequently winding up proceedings relating to the organisation.
3. The appellant in these proceedings, Mrs Ruder, was a user and trustee of HWRA. On 18 June 2014 she made an 18 part request for information about how the Council had made its decision, the costs projections it had used and the costs of the various proceedings (for the text of the request, decision note paragraph 7). The Council provided some information and there was a follow up request and further exchanges and information provided before Mrs Ruder referred the request to the respondent Information Commissioner (“ICO”) believing that the Council had more information than it disclosed and that it was not entitled to rely on certain exemptions.
4. The ICO in his decision notice carried out a detailed analysis of the request and response making certain findings favourable to Mrs Ruder and upholding the position of the Council on other matters.
5. In her appeal against the findings of the ICO Mrs Ruder broadly welcomed the decision, identified a material error, certain errors of detail but not substance and raised certain more substantive points.
6. In responding the ICO acknowledged the errors, agreeing a specific amendment relating to the material error, indicating that typographical errors were not a proper matter for appeal and maintaining the stance adopted in the decision notice. He also obtained further clarification from the council on substantive matters.

### **The hearing**

7. The tribunal is grateful to Ms Jones for the clarity of her presentation of the issues remaining between the parties. The two substantive issues were whether the information sought about internal legal costs incurred in the dispute was held by the Council and whether the Equality Impact Assessment on the impact of the proposed decision about HWRA was presented to the Council's Cabinet.

Internal Legal Costs

8. The council provided significant information about the legal costs incurred in the disputes. Requests 13, 14 and 18:-

*"13. Please provide details of the legal fees and incidental costs incurred to respond to HWRA's judicial review application and pre-action private law correspondence..."*

*14. Please provide an estimate of the costs of the management and officer time from the date officers advised the Cabinet to terminate HWRA's contract on Thursday 11/10/12 to the mediation July 2013*

...

*18 Please provide details of the total internal and external costs and the management and petition costs of the wind-up proceedings"*

9. In its response of 25 July 2014 the Council (bundle pages 45-50) gave the following information:-

*"Q13 response*

*Legal fees for provision of advice in response to HWRA issuing a pre-action protocol letter for Judicial review, including advice to Councillors and settling witness statements after application for judicial review £47,000. Costs for mediation including advice to Councillors regarding the necessity for mediation, responding to the three legal firms instructed by HWRA, as HWRA and their advisers would not accept a joint response. Including settling the skeleton arguments required under the code of practice and conduct of the mediation including detailed responses to questions posed by Councillors £32,065.*

*Q14 Response*

*Harlow District Council does not hold a record of management time incurred. Only legal officer time can be captured at £66,895 [this figure includes correspondence with three different firms instructed by HWRA]*

*Q18 Response*

*External legal costs are:*

*QCs advice requested and presented to Councillors £5,250.*

*Counsel's advice and representation including a third hearing instigated by HWRA with no prospect of success £18,750, hearing dates 2 and 5 September and 5 October 2013.*

*Petition fee £1,165 advertisement fee £26.*

*Internal legal costs cannot be extracted for this specific part of the case”*

10. Mrs Ruder had argued (decision notice paragraph 46) that:-

*“I do not believe that the internal legal costs associated with the wind-up cannot be extracted. Nor do I believe that the £66,985 includes the wind up work. The Council should provide a breakdown of all the costs separating the work up to the mediation from the later wind-up work.”*

11. The ICO at paragraphs 47-50 concluded that it was unlikely managers' time would be recorded, that there was no indication as to the way the Council managed its legal budget and the Council had repeatedly confirmed the information could not be extracted and there was no evidence to contradict this he accepted the Council's statements at face value.

12. In her appeal Mrs Ruder asked the tribunal to find that it was not credible that the information could not be extracted in answer to question 18 – she argued that the information was clearly available and should be disclosed. In oral argument it was put forward that the Council's head of legal service attended for three whole days of hearing and therefore (as Mrs Ruder had argued in an email to the ICO of 7 April 2015 (bundle page 87):- *“It should be possible to provide details of the cost by reference to this information alone.”*

13. After Mrs Ruder appealed to the tribunal the ICO sought further clarification from the Council of the issues had raised by the appeal. With respect to costs the Council, by

an email dated 1 December 2015 (bundle pages 186-187) setting out how the Council's time recording system worked and was operated in this case. The response set out the various categories recorded:-

*".. The Council informed Mrs Ruder of the total captured time for the dates requested which would include those relating to the insolvency proceedings. Mrs Ruder also requested total management time spent on the case which is not captured.*

*I requested that all the files pertaining to this case be retrieved from storage to ascertain if it would be possible to manually cost the files to provide the information to Mrs Ruder. There are 15 blue folders and 22 lever arch files of correspondence on this matter.*

*To extract the information each file would need to be looked at, which would capture the correspondence, telephone and meeting notes, it is likely that it would not accurately show the preparation or research time spent on the matter. I would estimate to go through each file and extract the information then cost that information would take the following:*

...

*The current Fees Regulation sets the limit of £450 outside of London using an hourly rate of £25 per hour of officer time, the estimated cost of providing this information would be between £1137.50 and £1187.50.*

*In the circumstances though the Council does hold electronic records the Council is not able to extract the information from those electronic records without recourse to the paper files that would be manually costed.*

*The Council believes that the exemption in s12(2) FOIA 2012 (sic – this should be 2000) applies to extract the information would exceed the appropriate limit for the reasons set out above"*

14. It should be noted that the costs relating to the head of legal services attending court hearings were not requested. If they fell to be included as a component of the total legal costs then the disclosure of the costs of the head of legal alone would not provide the information actually requested – the argument noted at paragraph 12 is misconceived.

15. Although Mrs Ruder has remained sceptical as to the position the tribunal was satisfied both on the evidence considered by the ICO in coming to his decision and confirmed by the further information submitted subsequently by the Council that the Council did not have the information requested in an accessible form. The ICO was entitled to rely on the assurances given by the Council; the detailed explanation given subsequently relating to the actual working of the time recording system and the scale of the paperwork is convincing and there is a further over-arching point; the Council had already provided detailed information of the substantial sums of public money expended on the costs in this dispute, there is no reason why it would not have provided more detail if it had been available. It had no reason to hide the information, merely a record system which could not readily provide the answer to the specific request made. The tribunal upholds the decision of the ICO on this issue.

#### The Equality Impact Assessment

16. Questions 5-8 of the information request related to the provision of advice to the Council's Cabinet of the impact on vulnerable groups of the decision to terminate the funding of HWRA.

*"5 Was the Cabinet presented with full details of the impact on vulnerable groups of the termination of HWRA's contract in accordance with the statutory equalities duties?"*

*6. If yes, please provide details of the assessment presented to the Cabinet when the decision to terminate HWRA's contract was taken on 11/10/12.*

*7. Was the Cabinet presented with a report setting out the transitional arrangements to protect vulnerable groups when the decision was taken on officer advice to terminate HWRA's contract with a few days notice?"*

*8. If yes, please provide details of the transitional arrangements presented to the Cabinet"*

17. In its response the Council confirmed an Equality Impact Assessment (EIA) and report were prepared and provided an EIA as a response to question 6 "please provide details of the assessment presented to the cabinet when the decision to terminate HWRA's contract was taken on 11/10/12". In a follow up question to 5-8 of the original information request on 16 August 2014, Mrs Ruder asked:-

*Were the two equalities impact documents attached to the reply presented to the cabinet of 11/10/12?*

18. The EIA (bundle pages 51-62) is signed by two officers (a head of service and the chief operating officer of the Council). In his decision notice the ICO considered the account the Council gave of the genesis of the EIA and its progress through the workings of the Council. He concluded (dn paragraph 32 -33):-

*“There is no evidence therefore to contradict the council argument that this was EIA document which was presented to scrutiny committee and then reported to cabinet on or before 11 October 2012 as background information to the decision to be taken. Although the report itself may not have been presented the results of the draft EIA has already been put before the scrutiny committee prior to that point and therefore already been taken into consideration.*

*The Commissioner considers that it would seem highly unlikely for the council to create the EIA in time for the above meetings but not make them available to feed into the decisions to be taken. The Commissioner therefore considers that on the balance of probabilities the information is the information falling within the scope of the requests and the council has therefore complied with these parts of the request.”*

19. In her appeal Mrs Ruder stated that she did not believe this was credible without the documentary evidence to support it. The Council:-

*“has not supplied a date on which this happened, a copy of a Committee report referencing the results of the Impact Assessment or a minute recording this.”*

20. While these are interesting arguments to advance what Mrs Ruder had asked for was details of the EIA and this had been provided. She had not asked for this “corroborative evidence” as to the handling of the report and therefore to the extent to which it was not within the scope of the information request there was no reason for the Council to provide it. In challenging the ICO’s decision she has challenged the veracity of explanations given to the ICO.

21. In any event on 12 February 2015 in response to the follow up enquiries she was making the Council replied (bundle page 80):-

*“The Scrutiny Working Party had before it a draft EIA and transition plan to enable it to make recommendations to Cabinet.*



*I have looked at the papers that went before Cabinet including the recommendations of the Scrutiny working party which were based on the transition arrangements and EIA provided to them”*

22. In responding to these arguments the ICO relied on his findings in the decision notice at 28-34 explaining the course the EIA took in being reported to the Cabinet. The ICO noted that his conclusion that the EIA is information within the scope of the request did not amount to a finding of fact that the Cabinet had been presented with that specific document; commenting that if it had not the information had been taken into account by the Scrutiny Committee and the recommendations presented to Cabinet were based in part on it (bundle page 33 paragraph 27).
23. In her reply of 15 December 2015 Mrs Ruder argued (bundle page 37) that there was an absence of reference to the EIA in other documents such as minutes and therefore on a balance of probabilities the information had not been presented to the Cabinet. The Council had therefore misled the ICO.
24. The tribunal found Mrs Ruder’s arguments unconvincing. The Council’s senior officers had prepared the EIA in August exploring the possible consequences for vulnerable users of the service as part of the preparation of options for members to consider in the light of the financial difficulties which HWRA faced. As part of their professional responsibilities they would have placed the information before members making the relevant decision. As a response to the ICO’s further inquiries in response to the appeal to the tribunal; the Council sent him copies of an email exchange between a senior council officer and the Council’s auditors of 4 February 2013 (bundle pages 188, 189). That officer was a signatory of the EIA. She confirmed that she wrote the EIA in August 2012, and had concluded that it would be important to consult if it became clear that the contract would cease:-

*“...and most importantly to secure alternative provision as soon as possible. Members asked me to work up proposals for securing both an interim provision and a longer-term alternative provision in the event that the contract with HWRA did cease, so that the impact would be mitigated as far as possible. I worked up a number of proposals for securing alternative provision, which went before the Scrutiny Committee as part of its deliberations before making its recommendation to cabinet. I attach this first EIA and the brief action plan.”*

25. Whatever the uncertainties Mrs Ruder has perceived in Council records she has accessed, this is clear confirmation that the findings of the ICO on this point are correct. The EIA and associated mitigation proposals were prepared and placed before members in the way the ICO described and therefore his conclusion that the EIA provided to Mrs Ruder was the proper response to her information request is correct.

26. The tribunal is therefore satisfied that this ground of appeal also fails.

Conclusion and remedy

27. The two key grounds of attack identified by Mrs Ruder in her appeal fail and (subject to the amendment identified above) the tribunal upholds the decision of the ICO as correct in law and dismisses the appeal.

28. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 25 July 2016