



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0240

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50578076

Dated 30th September 2015

BETWEEN

Mr Joe Fernandez

Appellant

And

The Information Commissioner

Respondent

Determined on the papers on 29th April 2016.

Date of Decision 26TH July 2016

Date Promulgated 28th July 2016

BEFORE

Ms Fiona Henderson (Judge)

Dr Henry Fitzhugh

And

Mr Steve Shaw

Subject: s1 FOIA information held

Case law: *Bromley v IC and the Environment Agency EA/2006/0072*

DECISION OF THE FIRST TIER TRIBUNAL

The Appeal is allowed in part.

- i. We are satisfied that s40(1) FOIA has been correctly relied upon and with regards to the complaints against the Appellant that appears in the closed bundle, the appeal fails.

- ii. In relation to the rest of the information request, the appeal is allowed. And we substitute the following decision notice in place of Decision Notice FS50578076 dated 30th September 2015.

SUBSTITUTED DECISION NOTICE

Date: 26TH July 2016
Public Authority Queens Park Community Council
Complainant Mr Joe Fernandez

Substituted decision: For the reasons set out below the public authority did not deal with the complainant's request for information in accordance with Part I FOIA in that they ought to have supplied him with such information that they held within scope or provided him with a compliant refusal notice pursuant to s17 FOIA.

Action Required: QPCC are required to reconsider the FOIA request (excluding the complaints against the Appellant) in light of the Tribunal's findings set out below and in the closed annex within 35 calendar days of the date of this decision issue a fresh response under FOIA which should include where applicable either:

- i. Disclosure of the information within scope that is held and in relation to which no exemption is claimed.
- ii. If an exemption under FOIA is relied upon a refusal notice compliant with s17 FOIA should be issued setting out the grounds for refusal.
- iii. If the information is no longer held but was held at the date of the request, the refusal notice should explain who had it and why none of those hold it now including the date and circumstances of its deletion if applicable.
- iv. If no information was held at the time, confirmation should be included of the searches undertaken in accordance with the findings set out below.
- v. If (in light of the tribunal's definition of the scope of the request) s12 FOIA is relied upon in accordance with The Freedom of Information and data Protection (Appropriate Limit and Fees) Regulations 2014 this should be cited and supported with calculations in terms of assessment of time that would be taken to comply.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50578076 dated 30th September 2015, which held that Queen's Park Community Council (QPCC) did not hold some of the requested information and was entitled to apply s40(1) FOIA (personal information) to withhold the remainder. He also identified a series of procedural shortcomings relating to delay¹ and failure to issue a valid refusal notice². The Commissioner required no steps to be taken.

Background

2. According to their website:

*"QPCC is the first Community Council in London. We came into existence following the May elections in 2014 after local residents voted for the first London Community/Parish council to be established."*³

3. The Appellant is an elected Councillor of QPCC. The Paddington Development Trust (PDT) was involved in the setup of QPCC. According to information PDT provided in a grant application⁴ it: *"is one of a national network of development trusts across the country and is a member of Locality.*

... It has established the first Community Council in London, with powers to levy local taxes...."

The Appellant has concerns that PDT's involvement is financially motivated and that some Councillor's involvement in QPCC is not apolitical (which it is required to be). He believes that he is subject to a campaign against him for bringing up these issues.

Information Request

4. On 30th January 2015 the Appellant requested information from QPCC under FOIA:

"I should like to request the following information, Email or handwritten communication including minutes between the Community Council, Councillors of

¹ S1 and s10 FOIA

² S 17 FOIA

³ <http://www.queensparkcommunitycouncil.gov.uk/council>

⁴ the City Bridge Trust grant request meeting 09/01/2014 p48 OB

the QPCC including the Director and the Paddington Development Trust, Karen Buck MP, [named individuals x 3] relating to the Queens Park community Council's budget, Vision, Elections, structure, funding, Financial problems/issues with current councillors between the dates of 1 September 2013 and 30 January 2015 held by yourselves or originated by yourselves.

Further please provide me with copies of the alleged complaints against me which you stated at the full council meeting and the subsequent explanatory email from [named individual] of A2 Dominion...

If the information requested contains sections of confidential information, please blank out or remove these sections, and mark clearly that they have been removed... ”⁵

5. The Appellant chased the request and in correspondence with QPCC suggested that they should look at [the former Director of QPCC]'s own personal computer which the Tribunal understands was used by her in her official capacity as Director of the QPCC⁶ and suggested two other named individuals who should be asked.

6. It is apparent that the QPCC had not considered this as they stated on 25th March 2015⁷:

“Re the FOIs, if you mean [former Director of QPCC's] own personal email account then there is no way I can access that. I can only give you what is on the official Director's account”

7. The Appellant received a substantive response dated 15th April 2015 stating:

“I have reviewed the email account belonging to the Director of Queen's Park Community Council, as well as any hard correspondence that the Council has, and can advise you that the search did not provide any results within the parameters of your request”.

8. Following the intervention of the Commissioner which included guidance on the search of the Former Director's private email account⁸, QPCC indicated that they had asked the

⁵ P75 OB

⁶ P83 OB

⁷ P79 OB

⁸ Letter of 15th April 2015 p 84 OB

Previous Director to send them any information she may hold on her personal account for its records, and that they would then “*perform your FOI request on that information*”.

9. As at 13th May 2015 QPCC the Appellant had still not received confirmation that this had been done.

Complaint to the Commissioner

10. The Appellant complained to the Commissioner indicating that:

- i. QPCC’s response did not take into account the private email address of the previous Director which they used for official QPCC business,
- ii. He also argued that they had not provided him with copies of complaints about him.

11. On 21st May the Commissioner accepted the case (QPCC having indicated that they did not propose to carry out an internal review). Following submissions from QPCC as to the extent of the search the Commissioner concluded on a balance of probabilities that no further information was held. In relation to the complaints he concluded that it was the Appellant’s personal data and as such the information was correctly withheld under s40(1) FOIA.

Appeal

12. The Appellant appealed on the grounds that:

- i. *s40(1) FOIA* - Complainants in another case were publicised to all Councillors therefore failure to disclose the names of the complainants in his case was double standards and discrimination.
- ii. *s1 FOIA information not held* - The experience of the previous Director as an experienced parish Director and the assistance provided by the National Association of Local Councils ought to mean that the systems for document handling were of a high standard.
- iii. He has provided copies of documents which he believes were in scope and which ought to have been revealed by the QPCC search (e.g. draft business plan from the Paddington Development Trust created for QPCC and an application for grant money from City Business Trust).

- iv. He argues that in light of the involvement of PDT there must be documentation relating to the setting up of QPCC.
- v. He argues that there were many meetings between the direction of QPCC and the Chairman of the PDT as well as meetings between their organisations, the implication being that there could be expected to be documents reflecting this.
- vi. They held further information that had not been considered for release under FOIA.

13. This case was listed for a determination on the papers on 29th April 2016. The Tribunal was in receipt of an open bundle of some 125 pages and a closed bundle of some 6 pages. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules. The Tribunal has made reference to the contents of the closed bundle in a closed annex to the open decision.

S 40 (1) FOIA

14. In his decision Notice the Commissioner found that any complaints against the Appellant were his own personal data and s40(1) FOIA was engaged, he recommended that the Appellant use the correct access regime namely s7 Data Protection Act. In his grounds of appeal the Appellant does not dispute that s7 DPA is the correct access regime but he raises arguments as to why he should be provided with the complaints information. The Tribunal has no jurisdiction to determine subject access under the DPA and is confined to consideration of disclosure under FOIA.

15. S 40(1) FOIA provides:

(1)Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

The Appellant gives examples of another case where those making complaints about another Counsellor were identified. This is not material to the Tribunal's consideration of disclosure under FOIA, as Pursuant to s2 (3)(f)(i) FOIA, s40(1) is an absolute exemption.

16. The definition of personal data is set out in s1 DPA:

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

17. The tribunal has had regard to the closed bundle and from this the Tribunal is satisfied that complaints about the Appellant constitute his personal data and that s7 DPA therefore is the correct access regime. The Tribunal acknowledges that the information may also be the personal data of others e.g. those making the complaint, however, in our judgment it is not possible to disentangle this information from the Appellant’s personal data since it only arises in the context of what was said when a complaint was being made about the Appellant.

18. The Appellant has proposed that disclosure be made to his Solicitor for them to check legality without him viewing the complaints. Unfortunately, this is not possible under FOIA which is disclosure to “the world at large” and no restriction upon circulation can be placed upon information disclosed pursuant to FOIA.

Whether further information is held

19. s1 FOIA provides for the general right of access to information held by Public Authorities:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14

20. When investigating the sufficiency of the search, the Commissioner wrote to QPCC on 22nd May 2015 asking:

- What searches were carried out for information falling within the scope of this request?
- If searches included electronic data, whether the search included information on personal computers used by key officials (including laptop computers) and on networked resources and emails?
- Was any recorded information ever held relevant to the scope of the request deleted/destroyed?
- What does the Council's formal records management policy say about retention and deletion of records of this type?

21. On 1st June 2016 QPCC replied stating:⁹

I carried out a number of searches in the inbox and sent items for the Director's email account including Paddington Development Trust, Karen Buck MP and [the 3 named individuals] as well as searching in our filing cabinet for hard copies. I then checked the results against anything relating to Queens Park Community Council's budget, Vision, Elections, structure, funding, Financial requests, financial planning, policy, management structure [between the relevant dates]. The search yielded no results within these parameters.

There was only one computer in the office at the time of the request which belongs to the Director of the Council. I have requested that the previous Director hands over any information that she may have on her personal computer relating to the Council...

No record has been deleted to my knowledge and I have not deleted anything. The Council does not have a formal policy on this issue as it is only a year old and this was not something that was considered by my predecessor when she arranged the Council's policy documents..."

22. On 10th August 2015, the QPCC sent copies of the correspondence between them and the former Director relating to this FOIA request. The Tribunal notes that the original request was addressed to the former Director who it would appear was still in post at that

⁹ P108 OB

time and as such it appears that she was an officer of QPCC at the relevant date. There is no evidence that she ever responded to the FOIA request and it was left to her successor to answer the request.

23. QPCC emailed her on 30th April asking:

“I need to enquire whether you have any of this information on your personal email account¹⁰. I have conducted an FOI on the Director account but if you have anything on your personal account then we need it for our records.”

This was chased on 19th May and on that date she responded:

“I am still looking and will send you what I have but it is only the complaints re [Appellant] I don’t have anything relating to all the other stuff and certainly not involving the MP”¹¹.

24. The Appellant asserts that the former Director used her personal email account for QPCC business. This does not appear to be disputed by QPCC who wrote to her to ask for information in her possession, and is consistent with the letter on p119 where it is accepted that she had retained some QPCC information relating to the complaints. We are satisfied that any information retained by her at the relevant date emanating from her official role as Director of QPCC was being held on behalf of the Council.

25. Their case was that the searches were all that could reasonably be expected in the circumstances and that on a balance of probabilities no further information was held and there were no further useful searches that could be undertaken.

26. We are satisfied that the test to be applied is not one of absolute certainty but the balance of probabilities. We have considered¹²:

- The quality of the original analysis of the request,
- The scope of the search,

¹⁰ Emphasis added

¹¹ 19.5.15 p119 OB

¹² The Tribunal is not bound by *Bromley v IC and the Environment Agency EA/2006/0072* but agrees with its approach

- The rigour and efficiency with which the search was then conducted,
- The discovery of materials elsewhere,
- The content of material that points to the existence of other material.

The quality of the original analysis of the request.

27. The Tribunal is not satisfied that an adequate search has taken place. From the evidence before us the search appears to have been restricted to information held centrally by the Director, no consideration appears to have been given to asking the named individuals that the Appellant suggested might hold information (as per email of 24th March 2015¹³). The Council includes Officers, Councillors¹⁴, employees and the Director, there is no evidence that any other individuals have been asked what they have retained pursuant to their role as part of the QPCC. In particular from the evidence it does not appear that any Councillors were asked despite being specified in the information request. From the correspondence it is apparent that the former Director has not had the full scope of the request spelt out to her. There is no evidence any recycle bins have been checked, neither have any other officers or employees been asked for any copies that they hold.

28. The Draft Operations Manual and Business Plan dated March 2014¹⁵ envisages a multi-layered structure of working groups and subcommittees all of which form part of the Council. Records of their meetings, correspondence between the members, agendas and background papers sent would all appear to be in scope if there was any involvement and hence communication of that information as encompassed within the request, yet none of the members appear to have been asked. Although paper records centrally filed appear to have been searched (as set out below we are satisfied that it is likely that the parameters of that search were too narrowly construed) but additionally there is no evidence of any search of hard copy documents and diaries and handwritten notes kept by individuals

¹³ P79 OB

¹⁴ In relation to councillors there is a distinction between information held on behalf of the public authority (e.g. as a result of membership of a subcommittee or a working group) as opposed to private correspondence in their constituency role.

¹⁵ Provided by the Appellant and at p 21 OB

rather than centrally filed. If information is held as a result of their duties for the Council it is in scope.

The scope of the search.

29. We are satisfied that the objective construction of the request encompasses electronic or hard copies of communication between on the one hand:

i the Community Council, Councillors of the QPCC including the Director
and on the other hand:

ii the Paddington Development Trust, Karen Buck MP, [named individuals x 3].

The search appears to have focused upon email correspondence and hard copies of documents retained. It is accepted that the terms of the request are for “*Email or handwritten communication including minutes*” however, in our judgment this is far wider than a request for emails and letters. The objective reading of “communication” in our judgment would include anything sent or received by QPCC during the relevant time window from or to the individuals identified on any of the topics identified in the request. In addition to the objective understanding of what is meant by “communication” we are supported in our finding by the inclusion of “minutes” in the definition of communication.

30. In our judgment the scope of the request would therefore include attachments to minutes, or agendas, background documents or reports sent, and notes or diary entries of conversations. There is no evidence that the Director or former Director have checked the hard drive for documents or attachments saved there, or the “recycle bin” on their computers for deleted documents or emails. There is also no evidence of whether any backups were kept or retained.

The rigour and efficiency with which the search was then conducted.

31. The QPCC told the Commissioner that they had contacted the former Director “many times” and that she does not respond. The only response that has been provided to the Tribunal to indicate the rigour and efficiency with which the search for material retained by the former Director appears in the email of 19th May 2015.¹⁶

¹⁶ P119 OB

32. No information has been provided detailing what search terms she used, what filing system was used by her for recording documents and whether there is clarity about which documents have been considered. It is not apparent whether document folders have also been checked for saved copies of attachments or documents received or sent. Neither has she provided any information about whether a backup was kept, the recycle bin checked or whether she can confirm that items have been deleted and if so what and when (of particular relevance in this case since almost 5 months had elapsed between the FOIA request and the former Director responding to requests for information during which time the former Director has left the QPCC). This is particularly striking in the absence of a documents management policy.
33. The Appellant relies upon the fact that the previous Director who was instrumental in setting up QPCC was an experienced Parish Director and assistance was had from National Association of Local Councils so he argues that systems would have been of a high standard including document handling. Under FOIA the Tribunal can only address information that is held at the date of the request, (rather than information that ought to be held) and there is no evidence to suggest that there was a formal documents management policy to counter QPCC's evidence that there was not. Additionally, we note that the QPCC was still in its infancy, however, we have also had regard to the documents that have to be retained in order to function (e.g. budgets and minutes) in concluding that it is improbable that more information is not held.

The discovery of materials elsewhere/The content of material that points to the existence of other material.

34. The Commissioner argues that :

“there is no compelling evidence to cast doubt on the representations made to him by the Council. The Commissioner was entitled and was correct to take those representations at face value.¹⁷ ...

The material annexed to the grounds of appeal do not contradict the Commissioner's findings relating to the circumstances at the time this information request was made.

¹⁷ ICO reply para 47

Whilst the Appellant appears to believe that the council must have held more information in relation to his request, the Commissioner sees no evidence for this.”¹⁸

35. The Tribunal disagrees and is satisfied that QPCC’s case (in particular in relation to the information that may have been retained by the former Director) amounts to bare assertion in the face of inherent improbability. In light of the breadth of the request, the Tribunal finds it astonishing that nothing within scope would have been retained since it amounts to a total corporate history and includes minutes, agendas, background papers, handwritten notes, correspondence, reports, agreed action plans as long as they were communicated to “*the Paddington Development Trust, Karen Buck MP, or [named individuals x 3]*” which in light of the support PDT gave to the set up of the QPCC in our judgment is likely. It may be that some of these are publicly available, however, if that is the exemption relied upon it should have been pleaded and the appellant signposted to where these documents might be found. If the QPCC are correct, they have retained no information relating to their budget for example during this period that was ever sent or received from any of those identified in the request. On a balance of probability this is not credible.

36. The Appellant has provided a copy of documents relating to consideration of an application by PDT for a grant from the City Bridge Trust¹⁹ which includes the following information provided by PDT:

*“Your grant has funded a Neighbourhood Manager in Queen’s Park who has recruited, trained and supported a diverse cohort of 70-80 “active citizens” engaged in various aspects of PDT’s work. This has included the local campaign to establish London’s first community council as outlined above. **This involved extensive, regular consultation over several months**”²⁰.*

37. We are satisfied that this document points to the likelihood of extensive communications within scope and within the relevant period. We are also satisfied that this is likely to have continued as indicated by the Officer’s appraisal:

¹⁸ ICO reply para 50

¹⁹ Grant request meeting 09/01/2014 p48 OB

²⁰ Emphasis added

“The establishment of the community council would have been less likely to have happened without your support of the Neighbourhood Manager’s salary and it is important that PDT is able to continue to provide it with support...”²¹

Additionally, the Appellant has provided a copy of the Draft Operations manual and Business Plan dated March 2014. The circulation of this document is “To: Development Group”. Contact for this report “Interim Director”. This document is clearly within scope and if the draft document has not been retained, the finalised document must have been retained as it would be in use. With prima facie evidence that this communication has taken place and the likely probably business case for its retention by way of reference and continuing use we are satisfied that the documents provided by the Appellant do support his contention that further information is held.

Steps to be taken

38. The Tribunal has considered (in light of its findings above that the scope was too narrow and the searches insufficient and that on a balance of probabilities further information is held) whether it would be appropriate for them to join QPCC in order to require them to carry out the searches envisaged above in light of the Tribunal’s definition of the scope of the request. We are not satisfied that this is appropriate or necessary in light of the steps available to remedy this under FOIA.

39. S50 FOIA provides:

*(4)Where the Commissioner decides that a public authority—
(a)has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
(b)has failed to comply with any of the requirements of sections 11 and 17,
the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.*

From this we are satisfied that the Commissioner could have required QPCC to issue a fresh response taking into consideration the scope and searches that are reasonably required to comply with the legislation.

²¹ The City Bridge Trust grant request meeting 09/01/2014 p48 OB

40. Pursuant to s58 FOIA:

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

*the Tribunal shall allow the appeal or substitute **such other notice as could have been served by the Commissioner**; and in any other case the Tribunal shall dismiss the appeal. ...*

Consequently in light of the extensive searches still required, we are satisfied that the remedy in this case is to substitute such other notice as could have been served by the Commissioner to ensure that a fresh response is issued taking into account the Tribunal's findings.

41. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of Court. If any of those holding information on behalf of QPCC do not co-operate with the process, the Tribunal takes into consideration the Powers of Entry and Seizure as set out in Schedule 3 FOIA (which apply pursuant to s55 FOIA).

Conclusion

42. For the reasons set out above we allow the appeal in part. We are satisfied that s40(1) FOIA has been correctly relied upon in relation to the material in the closed bundle and in regards to this information the appeal fails. However, we are satisfied that QPCC breached s1 FOIA in that on a balance of probabilities further additional material in scope is held to which the Appellant is either entitled to have disclosure under s1 FOIA or in relation to which there is no valid refusal notice pursuant to s17 FOIA.

43. The Tribunal has therefore issued a substitute decision notice and requires the QPCC to comply with this within 35 calendar days of the date of this decision.

44. This decision is unanimous.

Dated this 26th day of July 2016

Fiona Henderson
Tribunal Judge