



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

EA/2016/0085

**ON APPEAL FROM:
The Information Commissioner's Decision No: FER0601794
Dated: 8 March 2016**

Appellant: Stephen Baker

Respondent: Information Commissioner

Second Respondent: Liverpool City Council

Hearing: Field House, 21 September 2016

Date of decision: 20 April 2017

Promulgation Date 24th April 2017

Before

**Anisa Dhanji
Judge**

**Mike Jones
Roger Creedon
Panel Members**

Representation:

For the Appellant: in person
For the First Respondent: no attendance
For the Second Respondent: no legal representative

Subject matter:

EIR regulation 5(1) – whether information is held

SUBSTITUTED DECISION NOTICE

Dated: 20 April 2017

Public Authority: Liverpool City Council

Address of Public Authority: Liverpool Town Hall, Dale Street,
Liverpool L2 2DH

Name of Complainant: Mr Stephen Baker

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 8 March 2016.

The correspondence coming within the scope of paragraph (2) of the Appellant's request comprises e-mail communications. These are held by the Council and must be disclosed.

Any additional information coming within the scope of the Appellant's request, in the possession of Mott McDonald is not held by the Council for the purposes of the Environmental Information Regulations 2004.

The information required to be provided to the Complainant has now been provided to him, and therefore, no further steps are required to be taken.

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Stephen Baker (the “Appellant”), against a decision notice issued by the Information Commissioner (the “Commissioner”), on 8 March 2016.
2. The Appellant’s appeal concerns the response he received to the request for information made to Liverpool City Council (the “Council”), under the Environmental Information Regulations 2004 (“EIR”). The request was in relation to a draft report about bus lanes and related correspondence.
3. The Appellant’s request relates to recommendations that certain bus lanes be removed and others be retained. The Appellant was concerned that the bus lanes that were recommended to be retained were selected on the basis of the revenue they generated from Penalty Charge Notices.

The Request for Information

4. On 10 July 2015, the Appellant wrote to the Council and requested information on the following terms:
 - (1) *Please provide a suitably redacted copy of the draft report by Mott McDonald dated 5 September 2014 as referred to at page 5 here: <http://councillors.liverpool.gov.uk/documents/s140386/Appendix%203%20%20Mott%20McDonald%20Bus%20Lane%20Review%20Documents.pdf>*
 - (2) *Please provide suitably redacted copies of all correspondence between Liverpool City Council and Mott McDonald for the period 1st July 2014 to 31st December 2014.*
5. In response to paragraph (1) of the Appellant’s request, the Council refused to provide the information, relying on the exceptions in regulation 12(5)(e) (adverse effect on the confidentiality of commercial information), and regulation 12(5)(f) (adverse effect on the interests of the person who provided the information).
6. In response to paragraph (2) of the Appellant’s request, the Council said that the information was not held.
7. At the Appellant’s request, the Council carried out an internal review, but maintained its position.

The Complaint to the Commissioner

8. The Appellant complained to the Commissioner.

9. In relation to paragraph (1) of the request, the Commissioner considered that that while there might well be a case to be made for withholding the information under regulation 12(5)(e), the Council had not made out its case. As to regulation 12(5)(f), the Commissioner considered that the purpose of this exception was to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. The Commissioner noted that Mott McDonald, the organisation commissioned to produce the report, was contractually obliged to provide it, and since the information had not been provided voluntarily, this exception was not engaged. Having found that neither exception was engaged, the Commissioner did not go on to consider the public interest factors.
10. The Commissioner required the Council to disclose the information coming within the scope of paragraph (1) of the Appellant's request.
11. In relation to paragraph (2) of the request, the Commissioner asked the Council several questions. Based on the answers provided, the Commissioner was satisfied, on a balance of probabilities, that the information was not held.

The Appeal to the Tribunal

12. The Appellant has appealed to the Tribunal against the decision notice. The Council also appealed, but that appeal was later withdrawn. The Council is a party to the Appellant's appeal.
13. After the appeal was lodged, but prior to the hearing, the Council informed the parties that in fact, it did hold information within the scope of paragraph (2) of the request. The Council then disclosed copies of that correspondence, although it said it was redacting the names and contact details of certain of its staff, as well as third parties, in particular, employees of Mott McDonald. The Council explained that these redactions were made on the basis of regulations 12(3) and 13 of the EIR (personal data). The Council further said that it considered that the individuals whose details were being redacted were not of such level of seniority or public exposure to be expected to be named or identified in any correspondence disclosed to the public. The Commissioner accepted this argument and invited the Tribunal to issue a substituted decision notice recording that the Council holds information coming within the scope of paragraph 2 of the Appellant's request, and that the information redacted comprises personal data that is exempt under regulation 13 of the EIR.
14. The Appellant did not accept that all the redactions amounted to personal data. He also pointed out that while e mail correspondence had been provided, several of the e-mails referred to attachments which had not been provided, and that the Council claimed that it did not hold those attachments. He disputed the Council's assertion that those attachments were not held. Having consulted Mr Colin Thomas, a retired IT specialist, the Appellant argued that there had to be serious doubts as to whether any IT data storage programme could be

configured so as to exclude links to any attachments. He also argued that it was reasonable to assume that the person(s) to whom an e-mail with an attachment was addressed, would have downloaded such an attachment. He further pointed out that when he had sent an e mail to the Council to request the attachments, it had taken the Council only six minutes to reply, and he argued that in that very short period of time, they could not have established that none of the attachments had been retained in any form. In addition, the Appellant argued that even if the Council did not itself hold copies of the attachments on its own systems, it could approach Mott McDonald to supply copies of the attachments because Mott McDonald held the documents comprising those attachments on the Council's behalf.

15. The Appellant went on to quote from the Council's data retention policy and argued that the Council's position was inconsistent with its own policy. He was not satisfied that the Council had exhausted all options in its attempts to supply documentation pursuant to his information request, and requested that there be an oral hearing so that these issues could be properly examined. There was no further response from the Council.
16. Prior to the hearing, we were provided with an open bundle of documents, and a separate closed bundle. The closed bundle contains unredacted copies of the e-mail correspondence between the Council and Mott McDonald.
17. Following the hearing, we received a number of further items of evidence and submissions, in response to directions made, although some material submitted by the Appellant has been outside the scope of those directions. The Appellant also requested that the Tribunal issue directions that would allow both him and the Commissioner to put questions to the Council which should be answered with witness statements from the relevant people, and further invited the Tribunal to consider whether it should reconvene the hearing. We consider it would be disproportionate to accede to the Appellant's request. The hearing concluded with limited issues to be dealt with by way of further directions. Although it took some time (until December) for these issues to be dealt with, that was largely because of delays in seeking voluntary production from other parties.

The Appeal Hearing

18. The Commissioner did not attend the hearing, but relied on written submissions. The Appellant attended in person and represented himself. He gave evidence and called Mr Colin Thomas as an expert witness.
19. Mr Michael Jones attended on behalf of the Council. He is the Deputy Head of Democratic Services and Information Manager for the Council, a role which encompasses responsibility for oversight and compliance with information requests. It was intended that only Mr James Penter would give evidence on behalf of the Council. Mr Penter is a Senior Platform Architect for the Council whose responsibilities include the

design, implementation and support of the Council's ICT infrastructure, including e-mail communication platforms, data storage, data retention and back-up, server management and related technologies. In the event, it became clear during the hearing that there were certain matters on which Mr Jones was best placed to answer questions from the Appellant and the panel, so he, too, gave evidence on certain points.

20. At the start of the hearing, we pointed out to the Council that having reviewed the 73 pages of e mails in the bundle (covering the period 16 July 2014 to 7 November 2014) between various individuals at Mott McDonald and various individuals at the Council, it seemed that certain redactions did not appear to relate to any personal data, but included, for example, the Council's business address and the address of Mott McDonald. In addition, the redactions from the correspondence were inconsistent. For example, the names of senders and recipients had been redacted in some cases, but not in all. Phone numbers had also been redacted in some, but not in all cases. Mr Jones explained that he had recently taken over conduct of this matter at the Council, and that having considered the redactions, the Council was now prepared to disclose the e mail correspondence in their entirety, without any redactions. This was done on 23 September 2016, following the hearing.
21. It is of course regrettable that the e mails referred to in paragraph 13 were not located sooner. It is also regrettable that the unredacted e mails were not provided to the Appellant prior to the hearing. However, the fact that these issue were addressed and conceded early in the hearing meant that the oral evidence could focus on the remaining issues.
22. Mr Thomas adopted his witness statement. In brief, he says that since 1987, he has been an IT specialist in Her Majesty's Diplomatic Service. He notes that within six minutes of the Appellant's e-mail dated 24 June, Mr Jones replied to say that "... the e-mails retained and disclosed where (sic) NOT retained with any attachments at all in any form". Mr Thomas said that he has considerable experience in the way computer systems store and back up information and cannot accept Mr Jones's statement. In his experience, if Mr Jones' statement was true, then the Council's data retention policy and computer systems must be an almost unique, bespoke design, and he believes that this is extremely unlikely. He went on to set out a series of questions which he considered needed to be answered in order better to understand how it was possible for the Council to store e-mail text while destroying attachments to the same.
23. Mr Penter gave evidence as to why the Council could not provide the e-mail attachments, and some additional clarification was provided by Mr Jones. Mr Baker, supported by Mr Thomas, cross-examined them. In brief, Mr Penter explained that because of data capacity constraints, the Council requires staff to take positive steps to retain any attachments to e-mails; otherwise, they are automatically deleted after

90 days. The Council backs up its whole database, including e-mails less than 90 days old. This is intended to allow for recovery in the event of a major IT failure. All data backed up is held for 30 days, after which, it is overwritten.

24. As to how the Council had been able to ascertain in just six minutes that no attachments had been saved, Mr Jones explained that in fact, the checks had already been carried out before the Appellant's e mail of 24 June. In total, Mr Jones had asked 27 different individuals to check whether they had saved any of the attachments, and he had personally undertaken checks to verify that the attachments had not in fact been saved. It was through that process that the e-mails (albeit without attachments), had been identified.
25. As regards paragraph (1) of the Appellant's request, Mr Jones explained that the Appellant had been provided with the only version of the report which the Council held, and that this was the final, rather than the draft report. Mr Baker pointed out that the Council's letter to the Commissioner dated 24 February 2016 and reproduced at page 71 of the open bundle, purports to enclose a copy of the report "referred to in point [one] of Mr Baker's request". He queried how it is that the Commissioner could have been provided with a document which the Council now says it had not retained. In response, Mr Jones maintained that that was the final version of the report, but undertook to provide the Appellant, following the hearing, with exactly the same document it had provided to the Commissioner on 24 February. We understand that the Council did so on 23 September 2016. Mr Jones also undertook to try to obtain any other versions of the report that may have been retained by Mott MacDonald.
26. In submissions, Mr Baker argued that to the extent that the information he had requested was not physically held by the Council, the Council could obtain it from Mott McDonald who should be taken to hold it on behalf of the Council. He referred, in this regard, to the Commissioner's decision notice FS50118044. In that case, the complainant had requested copies of the responses given to a market research exercise undertaken by Swift Research Limited ("Swift") on behalf of Leeds City Council ("Leeds"). The Council had taken the position that it did not hold the requested information, but the Commissioner had found that the information was held by Swift on behalf of the Council. Having considered the decision, we drew the parties' attention to the basis for the Commissioner's findings (at paragraphs 45 and 46 of the decision notice, in particular), which concerned the terms of the contractual arrangements between Swift and Leeds. We asked Mr Jones what the contractual arrangements were between the Council and Mott McDonald, and in particular, whether those contractual arrangements might shed light on the question as to whether Mott McDonald could be said to hold the information on behalf of the Council. Mr Jones said he did not know.
27. However, Mr Jones said he would make enquiries both of Mott McDonald as well as third parties who might hold the documents which

comprised attachments to the e mails to see if they would provide them to the Council voluntarily. If so, the Council would provide them to the Appellant. Mr Jones stated that the Council's position now was that any such information should freely be provided to the Appellant, and that it would not be seeking to rely on any exceptions, whether those relied on previously, nor any others.

28. Following the hearing, Mr Jones informed the Tribunal and the Appellant, in a series of e-mails, as to his efforts to obtain that information from a number of different parties. After a number of efforts on his part, and extensions of time granted by the Tribunal, he informed the Tribunal that he had been unsuccessful in those attempts. Subsequent directions were made for Mr Jones to clarify the contractual relationship (if any) between the Council and Mott MacDonald.

The Tribunal's Jurisdiction

29. Regulation 18 of the EIR provides that the enforcement and appeals provisions of the Freedom of Information Act 2000 ("FOIA") shall apply for the purposes of the EIR (save for the modifications set out in the EIR).
30. Under section 58(1) of FOIA, if the Tribunal considers that a Decision Notice is not in accordance with the law, or to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, if the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
31. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Statutory Framework

32. The EIR implements Council Directive 2003/4/EC on public access to environmental information. There is no dispute that the information requested in the present case constitutes "environmental information" as defined in regulation 2(1), and therefore comes within the scope of the EIR.
33. A public authority which holds environmental information must make it available on request (regulation 5(1)). It must make the information available as soon as possible, and no later than 20 days after receiving the request.
34. Under regulation 12(1), a public authority may refuse to disclose information in certain circumstances. In the present case, the public

authority has said that it has provided all the information coming within the scope of the Appellant's request that it holds. The Council says, in effect, that it has complied with the request, even if it had not done so at the time of the Commissioner's decision. The only issue before us is whether the Council has in fact provided all such information as it holds.

Findings

35. As already noted, since the Appellant's appeal was lodged, there have been developments which impact the scope of this appeal.
36. First, the Council has disclosed to the Appellant a copy of the report he requested in paragraph (1) of his request. Although the Council says that this is the final report and not a draft report, we are satisfied that the Council has disclosed the only version of the report it holds. There is no basis to find that it holds any other version.
37. Second, the Council has also said that contrary to what it had previously asserted, it does in fact hold e mails coming within the scope of paragraph 2 of the Appellant's request. These, too, have now been disclosed.
38. The only information in issue is now the attachments to the e mails. The Council maintains that the e-mails retained and disclosed were not retained with any attachments; otherwise they would have been disclosed.
39. We are satisfied with the explanations given as to why the Council does not hold (and at the time of its response to the Appellant's request, did not hold), on its own servers, the attachments to the e mails. The Council's evidence in this regard though surprising in some respects, is nevertheless credible. There was nothing of concern that emerged, in cross examination, nor in response to our questions. We make no findings as to whether the Council's data retention policy is appropriate. That is a matter outside the scope of our jurisdiction.
40. We note that the Appellant appears no longer to challenge the Council's evidence that it does not hold the attachments, nor to dispute that the Council has now provided him with all the information coming within the scope of his request that it has in its possession. What the Appellant says, is that information comprising the e mail attachments, if held by Mott MacDonald, is held by them on behalf of the Council.
41. This issue was not addressed in any detail during the course of the hearing. As already noted, Mr Jones said he was not aware of the contractual terms between the Council and Mott MacDonald that might shed light on the issue. However, he would try to obtain voluntarily, any such information held by Mott MacDonald and other parties. We have seen the e mail communications following the hearing which show not only that Mr Jones made these efforts, but that he did so repeatedly, albeit eventually without success.

42. It therefore falls to us now to decide if any information that may be held by Mott MacDonald within the scope of the Appellant's request is held by it on behalf of the Council.
43. A public authority is required to give access only to information which it holds. Under regulation 3(2), information is held by a public authority if it is held by another person on behalf of the authority. FOIA, which applies to information other than environmental information, contains an equivalent provision (section 3). In effect, a public authority cannot evade the requirement to comply with a request for information just because its information is held by a party who is not a public authority, and therefore not subject to the EIR or FOIA.
44. To the extent that Mott MacDonald holds some or all of the information comprising the e mail attachments in issue, does it hold that on behalf of the Council?
45. We have considered the evidence and submissions on this issue that have been lodged after the oral hearing.
46. We have also been referred to the Commissioner's guidance document on Outsourcing and Freedom of Information. While not binding on the Tribunal, the analysis it offers is helpful. We have also considered the separate guidance on Information Held by a Public Authority for the Purposes of the EIR. As this explains, there are several circumstances in which information may be held by another person on behalf of a public authority and therefore held by the public authority for the purposes of the EIR, including, of relevance here, where information is held by a third party as a result of contractual arrangements. In such cases, the contract may indicate whether the information is held on behalf of the public authority. The guidance gives the example of a contractual relationship in which the following provision applied to a market research project:

"Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the council, with no copy remaining – electronic or paper – external to the council. The council has full ownership of the data..."

This is the case referred to at paragraph 26 above, and as noted there, the Commissioner decided that data generated by the contractor was held on behalf of Leeds City Council.

47. In the present case, however, the relevant contract (dated 18 May 2012) is not between Mott MacDonald and the Council, but between Mott MacDonald and Merseyside Passenger Transport Executive ("Merseytravel"). The explanation provided by the Council, which we have no reason not to accept, is that Merseytravel is the executive arm of the Integrated Transport Authority for Merseyside with responsibility for a range of transport functions, and is part of the Liverpool City Region Combined Authority, a local government body in its own right. The Council, together with other Merseyside councils, are constituent

members of the Liverpool City Region Combined Authority but are distinct from it. As such, we are satisfied that even if under the contract between Mott MacDonald and Merseytravel, the information is held by Mott MacDonald on behalf of Merseytravel, it does not follow that the information is held on behalf of the Council. The appellant's appeal must, therefore, fail on this issue.

Decision

48. This appeal is allowed to the extent set out in the Substituted Decision Notice, but for all the reasons set out above, we do not require the Council to take any further steps.
49. Our decision is unanimous.

Signed

Date: 20 April 2017

**Anisa Dhanji
Judge**