



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2017/0138

Before

JUDGE BRIAN KENNEDY QC

Between

JOHN CAMPBELL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 6 June 2017 (reference FS50634137), which is a matter of public record.

2. The Tribunal sat to consider this case on 30 November 2017.

Factual Background to this Appeal:

3. Full details of the background to this appeal, Mr Campbell's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Education Authority Northern Ireland ("EANI") held the requested information.

CHRONOLOGY

4 April 2015	Appellant's request for information regarding details of a particular meeting regarding, and information pertaining to, a heating installation project for Victoria College, Belfast
29 April 2015	EANI provides some information and states that it does not hold the remainder
13 May 2015	Appellant requests copies of specific emails between two parties in a certain time frame
	EANI discloses one further email but states that it held nothing else
10 Aug 2016	MoD provides some information and withholds some under ss42(1) and 40(2)
17 June 2016	Appellant complains to Commissioner
6 June 2016	Commissioner's Decision Notice FS50634137 rejecting Appellant's complaint

RELEVANT LEGISLATION

s1 FOIA Information held or not held

- (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.

S77 Offence of altering etc. records with intent to prevent disclosure.

- (1)Where -
- (a) a request for information has been made to a public authority, and
 - (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section, any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of

preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this section shall be instituted—

(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

COMMISSIONER'S DECISION NOTICE

4. The Commissioner must decide on the balance of probabilities whether the public authority holds the requested information. The Appellant sought emails, which he considers should be held by the EANI. In response, the EANI explained that it searched its systems both electronically and manually for the two specific emails to no avail. While the EANI has a policy of encouraging emails to be deleted every three months and not keeping sensitive or confidential information for longer than necessary, it conceded that it had previously produced and viewed the emails in manual form. The fact that the emails could not be found in the search led the EANI to conclude that they had been deleted, and it was investigating this. The Commissioner was satisfied with this explanation, and expected the EANI's internal investigation procedures to be followed.

NOTICE OF APPEAL

5. The Appellant explained the motive for his request; he was the subject of an overturned disciplinary case by the EANI and had launched a grievance case against them, and considered that his efforts to obtain all information and potential evidence was being "continually frustrated". He provided details of four further FOIA requests that were made by him or on his behalf regarding these matters, and promises of access to information that never came to fruition. The delay occasioned by the Commissioner's protracted investigation, and the apparent unwillingness to disclose information by the EANI, led to the Appellant being suspended from his work for 49 weeks and dismissed for 4 weeks until his reinstatement.

6. The Appellant also criticised aspects of the Commissioner's investigation. He had asked the Commissioner to have her enforcement team forensically examine the EANI's computer

systems rather than permitting them to conduct their own searches. In light of the deletion of what he considers crucial material, he disputes the propriety of permitting the EANI to conduct its own searches or investigations. The Appellant believes that the email in question may have been deleted after the FOIA request.

COMMISSIONER'S RESPONSE

7. The Commissioner adopted the conclusions of her decision notice, adding that just because information existed at one stage does not mean that the information is still held. Additionally, it appears that the Appellant has now somehow come into possession of one specific email that the EANI claimed had been deleted, so the Commissioner questioned what was the desired outcome of the appeal. To the extent that the Appellant alleges criminality on the part of EANI by deleting information, the Commissioner advises that this is outwith the jurisdiction of the Tribunal. Where the Appellant desires an oral hearing and the calling of witnesses from EANI, the Commissioner advised that she had no intention of calling witnesses, and was satisfied that the matter could be considered on the papers.

APPELLANT'S RESPONSE

8. The Appellant repeated his request for an oral hearing, stating his intention to produce several hundreds of pages of evidence that he believed required contextualised at oral hearing. He also requested a direction requiring the attendance of various individuals from the EANI and the Commissioner's office; some of whom he believes held the requested information at the time of his request.

9. The Appellant stated his intention to prove that the requested information was indeed held by the EANI in "recorded form" i.e. on the disk to which he had been promised access. As a longstanding employee of the EANI, he advised that he was not aware of any policy encouraging the deletion of emails after three months. Had the Commissioner acceded to his request to conduct the investigation themselves, the Appellant believes that the information would have been recovered. He characterised the relationship between the Commissioner and the EANI as one of "cosy coffee conversations" without any meaningful investigation by the Commissioner.

10. Regarding the relevance of his other FOIA requests, the Appellant was shocked by the Commissioner's assertion that they should not be considered in his appeal. He stated that he hand-delivered a substantial amount of supporting information to the Commissioner's office, and is of the opinion that if this was always the Commissioner's approach then it should have been communicated to him before the response to his appeal. He was highly critical of the Commissioner's lack of engagement with him in the course of her investigation.

11. The Appellant posed seven queries that he wished answered by the Tribunal:

- i. Did the EANI fail to comply with its duties under FOIA in dealing with the Appellant's requests?
- ii. Is the EANI still in breach by withholding information from the Appellant's requests?
- iii. Was the requested information deliberately withheld or destroyed following the Appellant's request?
- iv. Were there systemic failing by EANI in response to the requests?
- v. Did the EANI breach the Data Protection Act by providing the Appellant's details to the Labour Relations Agency without his consent?
- vi. Did the EANI act appropriately in the application of a s36 exemption to some information?
- vii. Do the EANI's procedures satisfy FOIA requirements?

COMMISSIONER'S REPLY

12. The Commissioner referred the Tribunal to *Bromley v ICO & Environment Agency EA/2006/0072*, reasserting the application of the balance of probabilities as the appropriate test when considering whether information is held. The factors to be considered include "*the quality of the public authority's initial analysis of the request, the scope fo the search... and the rigour and efficiency with which the search was then conducted. Other matters [include]... the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light*".

13. The Commissioner accepted that an email initially was inappropriately withheld by the EANI from the Appellant, however she remained satisfied that the EANI's searches were reasonable in the circumstances. She also confirmed that the ICO's Criminal Investigation Team manager, who concluded that there was no evidence to substantiate the Appellant's allegation, had investigated the allegations of criminality.

APPELLANT'S REPLY

13. The Appellant questioned the conclusions of the Criminal Investigation Team; he noted that the methodology used in reviewing the concerns was not provided, and queried whether the ICO investigator had discussed the existence and location of the disk with any EANI employees. As a result of the Commissioner's allowing the EANI to conduct its own investigations, the Appellant has no confidence in this investigation. As such he stated his

intention to make a formal complaint to the police in order to have them investigate the alleged breach of FOIA.

14. The Appellant disputed the application of the *Bromley* case to these facts, as he alleged that the named EANI employees knew exactly where the information was held. He was not provided with the methodology for the EANI search, and so cannot be satisfied that it was appropriate. He again disputed the three-month timeframe for the retention of information, noting that some of the information that the EANI had released to him was, by the stage of his request, 14 months old. The withheld email that was subsequently disclosed was described as “the most important and crucial email, which made the initial allegations against the appellant” which led to the disciplinary process. He queried as to why this specifically was withheld before being disclosed. He speculates that the second email (of which he now has possession, but which the EANI denies retaining) was intentionally deleted because it contradicted the first email, and undermined the author.

CASE MANAGEMENT DIRECTIONS

15. The Tribunal confirmed that it would only consider the first of the Appellant’s seven questions; namely, had the EANI breached its duties under FOIA. It also refused the request for five witnesses to be compelled to appear and give oral evidence.

APPELLANT’S FINAL SUBMISSIONS

16. The Appellant explained that, at the time of his suspension on the basis of allegations, he had no access to any documentation for use in his own defence. He claimed that the Head of Infrastructure and Procurement stated that he would receive full disclosure of all information pertaining to the case and assured him, but his repeated requests for such were ignored. He turned then to FOIA requests to obtain this information to allow him to defend himself.

17. One of these requests from October 2015 was for a CD-ROM containing specified emails that had been prepared for and examined by the preliminary investigation panel. The EANI had initially given the Appellant assurances that it would provide the disk in a read-only format, but subsequently reneged on that and refused access without citing any exemptions. The Appellant alleged that the EANI withheld this disk and a number of emails from him without telling him that the information was held or being withheld from him.

18. The Appellant repeated his criticisms of the Commissioner’s investigation. He claimed that the Commissioner did not accede to a meeting that he had requested to contextualise his request, had not posed any questions nor sought any clarification. The willingness of the

Commissioner to accept the EANI's explanation at face value leads the Appellant to consider her conclusion to lack "independence or credibility".

CONCLUSION

The question for the Tribunal to consider is did the EANI fail to comply with its duties under FOIA in dealing with the Appellant's requests? The Respondent has set out clearly in the DN the test to be applied and this Tribunal accepts the Bromley test as applied by the Respondent in this case is correct that is to say the Commissioner was satisfied on the balance of probabilities the information is or is not held. At hearing it was evident that the Appellant may well have had reason to believe that the public authority, at one time held information, which was not disclosed. In fact the Respondent accepts that it is highly likely that the public authority did hold Email One at the time of the April request but considered that the public authority searches were reasonable and this information was not revealed until the more detailed May request provided the necessary detail to locate Email One which was then provided to the Appellant. The Respondent considered the searches reasonable in the circumstances and was satisfied that on the balance of probabilities no further requested information was held. However unsatisfactory this may seem to the Appellant this Tribunal accepts and adopts the Commissioners' reasoning above and the decision that on the balance of probabilities no further information was held at the time of the request.

Signed

Brian Kennedy QC

Date: 08 August 2018

Promulgation Date: 9 August 2018