



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

Appeal Reference: EA/2017/0178

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50653612

Dated: 18 July 2017

Decided without a hearing

On: 20 March 2018

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S) MRS ANNE CHAFER AND MR DAVE SIVERS

Between

NEIL KENT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

CARDIFF COUNCIL

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 1 (Whether Information Held)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Mr Neil Kent, applied for Council Tax Class C Exemption for a property he co-owned which was unoccupied. This was initially granted but then revoked by the Cardiff Council (the Council) pending an inspection. Mr Kent wanted the inspection to take place on a Sunday which was refused. In an email dated 27 February 2012 a Council Officer wrote "I can confirm that it is Council policy to inspect properties to establish whether a Class C Exemption is applicable, without a visit you will be billed at the full rate based on the assumption the property is unoccupied and furnished."
2. Mr Kent raised FOIA requests resulting from this information. A First-tier Tribunal decided following a paper determination on 23 January 2014 that the Council had not conducted a sufficient search to satisfy FOIA and the Tribunal required the Council to reconsider Mr Kent's request. That request was then refused on the grounds of cost of compliance.
3. A different First-tier Tribunal held a hearing in Cardiff on 3 November 2015, where Mr Kent attended. The grounds of appeal were, in essence, that the Council could have adopted a more cost effective method of searching using computer search facilities. The Tribunal dismissed Mr Kent's appeal on the grounds that the refusal by the Council under S.12 was correct.
4. Following on from that decision, Mr Kent made this request on 14 June 2016. It contained four separate elements. In line with the decision of the First-tier

Tribunal of 3 November 2015, the Council refused the first three elements on the grounds of cost. The Council stated that in respect of element four a search did not produce any results. The fourth element was a request for emails sent by, or received by, a named Council Officer between January and March 2012.

5. Mr Kent's appeal is that this information exists and that the Council's search is inadequate, in part because the search was only of the 'live' system.
6. Following enquires by the Information Commissioner (ICO) the Council produced emails which were stored on the Council's 'I' World system. These have now been disclosed.
7. Mr Kent remains dissatisfied with the disclosure and the extent of the email search conducted by the Council.

Request, decision notice and appeal

8. On 14 June 2016 Mr Kent made a request under FOIA in the following terms in relation to request No.4:

"Since it is a matter of record, and of evidence submitted to the VT-W that this specific individual twice made reference to the policy around February 2012, and since my request to search for all e-mails for references to this policy was considered too broad, I very specifically ask: please provide a copy of all emails sent from or to this particular individual Council Officer during the period of January to March 2012 which make reference to the Council policy/process of inspecting properties in relation to a discount/exemption from Council Tax."

9. The Council responded on 22 July 2016:

"A search of the email system has been conducted in line with the parameters that you have requested and I can confirm that no data is held."

10. Mr Kent complained to the Information Commissioner under Section 50 of FOIA. In a decision notice dated 18 July 2017 the Commissioner held, while criticising both the search and the explanation, that she is “satisfied that no additional relevant (information) is held, and that the Council has now complied with its obligations under section 1(1) of the FOIA. However, its failure to locate and provide this information at the time of its initial response and internal review, represents a breach of section 1(1) of the FOIA.”
11. Mr Kent appeals to this Tribunal stating that the Council has not performed a reasonable search for emails as requested. The Council has described a back up policy of 15 days, but in Mr Kent’s view this is a retention setting and that the Council has not provided evidence that it has searched any of its back up systems. Mr Kent makes reference to other Tribunal decisions which suggest that normally restoration from back up tapes and trash can and recycle folder should be attempted. Mr Kent also states that, while the Employee may have left the Council, he was employed at the time of the request.
12. All the parties have agreed that this decision should be made without a hearing and relying on the written material provided. However, Mr Kent has written that if the Tribunal is unclear about the distinction between a ‘live’ search and a search of backup and archive mailbox databases then he requests a hearing. The Tribunal considered this request, the wishes of the parties and the proviso set out by Mr Kent. The Tribunal also considered the information in the documents which number 110 pages which include two previous First-tier Tribunal decisions and decided that it should proceed to determine this appeal.
13. The Tribunal first considered the appeal on 16 January 2018 and decided that further information was needed. The Tribunal added Cardiff Council as the

second respondent to this appeal and directed that the Council provide the information set out in the adjournment notice.

14. In response, Cardiff Council has submitted a witness statement from Andrew Horner-Seddon, ICT and Compliance Manager for the Council, dated 13 February 2018.
15. This statement was issued to the parties, who were given the opportunity to provide a response. No further submission has been received from any of the parties.

Conclusions

16. The issue in this appeal is whether additional emails from January to March 2012 exist. The Tribunal accepts Mr Andrew Horner-Seddon's statement that the Council does not keep a back up of emails for longer than 60 days. However, an individual employee may keep an email for longer periods in his or her inbox or folder, including the deleted items folder. If that individual then deleted the email completely it would then remain for a further 60 days in the back up system. When an individual leaves the Council, that person's email becomes inactive for 30 days, then deleted so it remains accessible for a total of 90 days. The Council itself does not know which emails are retained by individuals and which are deleted.
17. In addition some emails and documents of importance are saved to the Council's I world through customer accounts. At the request of the ICO further searches of Mr Kent's Council Tax account revealed emails which were then disclosed.
18. Mr Kent maintains that, even if deleted, there are searches which can be undertaken which can retrieve deleted emails. However, the clear statement

from the Council is that there is no computer system either live or back up which has retained emails from January to March 2012.

19. In response to Mr Kent's claims of the Council's ability to retrieve emails, the Tribunal directed the Council to further explain its procedures and its ability to retrieve information. The Council has complied with these Directions and the statement from Mr Andrew Horner-Seddon is clear and answers the questions the Tribunal had. There have been no further submissions.

20. Mr Kent's appeal states that the Council has failed to properly search the backup systems and the Tribunal is satisfied from the evidence that the emails requested are not in the possession of the Council.

21. In the circumstance, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

Date Promulgated: 26/03/2018

R Good

Judge of the First-tier Tribunal

Date: 20/03/2018