



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

Appeal Reference: EA/2018/0041

**Heard at Bristol Civil and Family Justice Centre
On 3 August 2018**

Before

**JUDGE HAZEL OLIVER
MS ANNE CHAFER
MS MARION SAUNDERS**

Between

MR DAVID ORR

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

The Appellant – in person

The Information Commissioner did not attend

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. This appeal concerns information sought under the Freedom of Information Act 2000 (“FOIA”) about a merger between Taunton Deane Borough Council and West Somerset Council (the “Councils”).

3. On 10 January 2017 the appellant requested the following information from the Department for Communities and Local Government (now renamed the Ministry of Housing, Communities & Local Government, for ease of reference in this decision “DCLG”):

“Taunton Deane Borough Council (TDBC) voted to “merge” with financially non-viable neighbouring authority West Somerset Council (WSC).

At TDBC a Full Council Vote was taken in July 2016 to proceed with the merger without any prior public consultation.

TDBC are now belatedly seeking to gauge public opinion by consulting after the formal merger decision by the Council has been taken.

The consultation has no authentication of the responders (to ensure that the consultation applies only to TDBC citizens and taxpayers), does not require a name and address to be recorded and is open to anyone (anywhere in the world) who can access the internet.

Q1. From 1/1/2016 to current date, please disclose all correspondence (including letters, emails, meeting minutes or notes, phone notes, legal opinions etc) between TDBC and DCLG that relate to the merger proposal (between TDBC and WSC).

Q2. Please disclose all relevant TDBC/WSC merger correspondence from other parties e.g. MPs, Sedgemoor District Council, Boundary Commission, Somerset County Council etc.

Q3a. Please disclose any guidance (or provide internet links) as to how the DCLG would expect a public consultation to be undertaken (under the Devolution Act).

Q3b. Would the DCLG expect public consultation (under the Devolution Act) to be undertaken prior to a formal decision to proceed by Council(s)?”

4. DCLG responded on 3 April 2017, withholding the information in reliance on the exemption provided in section 35(1)(a) FOIA – information relating to the formulation and development of government policy.

5. On 4 April 2017 the appellant requested an internal review. In this request, he stated that he “*would like to narrow my FOI request to focus on the lobbying and communication around the decision to use the Devolution Act and suspend the existing involvement of the Boundary Commission to impartially review boundaries*” (the “First Narrowed Request”). The request explained the appellant’s concerns, and then stated, “*for the above reasons, I wish the DCLG to conduct an Internal Review and answer those FOI questions wherever possible and to narrow down the request for disclosure of all communications to those that surround the use of the Devolution Bill [later corrected to “Act”] over the established principle of using the impartial Boundary Commission*” (the “Second Narrowed Request”).

6. DCLG gave the outcome of its review on 29 April 2017. It stated that the exemption was correctly engaged, it remained engaged under the narrowed request, and the public interest supported maintaining the exemption.

7. The appellant complained to the Information Commissioner (“IC”) on 9 May 2017. The IC first responded to the appellant on 10 October 2017, setting out the original request and the wording of the First Narrowed Request, and asking the appellant to confirm that this accurately reflected his complaint. This letter did not include the wording of the Second

Narrowed Request. The appellant confirmed that the summary of the complaint and referral was correct by email on the same day. The IC also requested full details from DCLG on 10 October 2017 within 20 working days.

8. DCLG did not reply to the IC until 18 December 2017. In its reply, DCLG maintained its position in relation to the exemption. It also provided three documents which it said consisted of *“the information held by the Department which falls within the scope of the narrowed down request received on 4 April 2017”*. In this letter (paragraph 5) DCLG quotes the wording of the Second rather than the First Narrowed Request.

9. On 2 January 2018 the IC wrote to DCLG setting out again the wording of the First Narrowed Request, and asking further questions about the information that had been provided. The IC’s email stated, *“I need to ensure that I have all of the recorded information held falling within the scope of this request. You have identified a limited amount of information falling within the scope of this request and one letter appears to fall outside scope. Could you clarify why there would not be any other information please?...Were there any other internal communications related to using the Devolution Act? If not, please explain why. Please consider whether any further information was held and if so, please provide that to me.”*

10. In its reply, DCLG confirmed that at the date of the request it did not have any further correspondence *“relating to the criteria”*. DCLG stated, *“The reason for this is that the vast majority of correspondence received on this subject did not relate to use of the Devolution Act over the use of the Local Government Boundary Commission for England (LGBCE). As the request was limited to those pieces of correspondence which addressed this issue, we were unable to provide anything further. There was little internal communication regarding this because the use of the LGBCE was never proposed by the local councils involved and therefore such communications were not triggered.”*

11. By decision notice dated 13 February 2018 (FS50680668), the IC decided that DCLG had incorrectly applied the exemption and the withheld information should be disclosed. Although the information did engage the exemption, the public interest in maintaining the exemption was not outweighed by the interest in favour of disclosure. In making this decision, the IC considered the specific nature and content of the withheld information as provided by DCLG.

12. DCLG did then provide the withheld information to the appellant, consisting of two letters from Sedgemoor District Council. The appellant wrote to DCLG on 7 March 2018 complaining that his questions 1, 3a and 3b remained unanswered, and there had only been partial disclosure against question 2. The appellant also wrote to the ICO on the same date, asking for help and stating *“surely there are a lot more docs, notes etc to disclose than two letter [sic] already in the public domain via newspaper reports”*.

13. The IC provided an apology to the appellant for the length of time his case took to conclude. This was explained as being due to the ICO caseload, which delayed the initial allocation of the case, and the length of time that DCLG took to provide all that was needed to form a view on the case.

The Appeal

14. The appellant appealed to this Tribunal on 8 March 2018. The outcome he is seeking from the appeal is given as:

1. *A full disclosure by the DCLG of all documents, notes etc that fall within the scope of my FOI.*
2. *The ICO to review how they failed to determine the correct scope of my FOI and then issue a Decision Notice covering all of the missing documents, notes etc.*

15. The appellant complains that questions 1, 3 and 3b remain unanswered, and question 2 appears to be only a partial disclosure. He complains that after a 10 month wait the IC case officer failed to properly determine the scope of his request. He says that DCLG are expected (at the time of the appeal) to make a decision shortly, and the excessive delay and error by the IC means that the documents will arrive too late to support the public interest.

16. The IC resists the appeal. The IC says that they and the DCLG proceeded on the basis that the appellant had chosen to narrow his initial request, as set out in his letter of 4 April 2017. This narrowed scope was set out by the IC in correspondence with the appellant. The IC says that the appellant has not provided any explanation as to why he considers further information should be held, and has no reason to doubt the information provided by DCLG.

Applicable law

17. The relevant provisions of FOIA are as follows.

1 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 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

35 Formulation of government policy, etc.

- (1) *Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—*
- (a) *the formulation or development of government policy,*

.....

- (4) *In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.*

.....

58 Determination of appeals.

- (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.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

18. Section 35 is a qualified exemption, meaning that under section 2(2)(b) the information should only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Evidence and submissions

19. We had an agreed bundle of open documents. This included the appellant's reply to the IC's response, full written case notes from the appellant, and a new FOIA request from 9 May 2018 together with DCLG's reply and subsequent correspondence. We had a written statement from Ian Liddell-Grainger (MP for Bridgwater and West Somerset) and Ian Morrell (Councillor on Taunton Deane Borough Council). We heard oral submissions from the appellant at the hearing. At the hearing the appellant also provided a copy of a letter from DCLG to him dated 31 July 2018 in response to a new freedom of information request dated 17 July 2018. We accepted this as evidence although it had not previously been seen by the IC.

20. We have taken all of the evidence and submissions into account in making our decision.

Appellant's case

21. The appellant's case as explained at the hearing can be summarised as follows.

22. The appellant was concerned about the merger of the two Councils through use of the Devolution Act rather than the independent Boundary Commission. This was the first time the Devolution Act had been used for this purpose. He was particularly concerned because this involved a merger of two Conservative-controlled Councils, being overseen by a Conservative Minister at DCLG, in circumstances where he says there was no proper consultation process. He was seeking information at the time in order to use it as part of the debate about this process, which he says was in the public interest. The merger has now happened. However, he says that the information remains of public interest at a national

level, as this potentially sets a precedent for future mergers using this method. This is shown by the concerns expressed in the House of Lords Secondary Legislation Scrutiny Committee report (26th report of 2017-19 session) about the consultation process.

23. The appellant says that the information disclosed cannot be the totality of the information held within the scope of his narrowed request. He explained that he narrowed his original request in order to show that he was requesting information in the public interest, as DCLG had relied on section 35 to withhold the information. He had intended that all of his original questions should still be answered, within this narrowed scope around the decision to use the Devolution Act.

24. The appellant says that all he received after the IC's decision was two letters from Sedgemoor District Council, which was not one of the councils involved in the merger. His main point is that this cannot possibly be all of the correspondence relating to the decision to use the Devolution Act. For example, there must have been some communication between DCLG and the Councils about this decision when it was made. DCLG's email to the IC in response to the IC's questions of 2 January 2018 says that use of the LGBCE was never proposed by the councils involved. If this is the case, use of the Devolution Act must have been proposed by DCLG or by the Councils – and this must have been communicated between them at the time. More widely, he was expecting to see items such as discussions with the Councils and local MPS, including about public consultation

25. The appellant says that this is supported by the statement from Ian Liddell-Grainger. Mr Liddell-Grainger's statement confirms that there were many meetings and communications between the Councils and officials and Ministers at DCLG. He also says that he attended such a meeting himself, and knows that formal Civil Service notes were taken at the time. He says that there were "many meetings and much correspondence".

26. Although the appellant's complaint was upheld by the IC, he is dissatisfied with the IC's approach in this case. He says that the IC failed to exercise sufficient professional curiosity in relation to the very limited disclosure provided by DCLG. He also says that the IC should have contacted him to discuss the level of disclosure and scope of his request before issuing the final decision notice, as it had done with DCLG. He said that the IC had spoken to him in relation to previous FOIA complaints before issuing a decision.

27. The appellant also complains about the delays in the process, which meant any information would have been provided too late to influence the debate. This includes the delays by DCLG in responding to his original request, and in responding to the IC. He also particularly complains about the delay of 10 months between his complaint to the IC and the matter being allocated to a case officer.

28. Since issuing this appeal the appellant has submitted further FOIA requests to DCLG. He says that he sought professional advice from the Chief Executive of the Campaign for Freedom of Information in framing a new request. This asked for "any information held" in connection with the merger which relates to the use of procedures under the Devolution Act or the holding of a public consultation. DCLG initially asked for clarification, the appellant explained that the request was not ambiguous, and DCLG then replied confirming that they held the information but it would be too costly to locate, retrieve and extract it.

29. The appellant says that this request substantially covers the same information as his original request. DCLG's response has gone from producing only two documents to saying there is so much information that it would be too costly to provide it. He has since sent a further FOIA request to DCLG asking about emails, document management and note-taking/minutes. This was responded to in the letter of 31 July 2018 (produced as additional evidence at the hearing). The letter also reminds the appellant of the vexatious provisions in FOIA, and states "*Should the Department receive from you further substantially similar requests which have not been re-focused along lines previously suggested by the Department they will be deemed as vexatious and refused by way of the Section 14 provisions*".

Discussion and conclusions

30. The appeal is dismissed. We explain our reasons below, and also make a number of observations about the way this matter has been handled by DCLG and the IC.

31. This is an unusual appeal, as the IC had found in the appellant's favour and required disclosure of the requested information. The appellant takes issue with the information which was then disclosed, and the IC's lack of investigation.

32. In his appeal document, the appellant asks for full disclosure of all information from DCLG, and for the IC to review how they failed to identify the correct scope of his request and issue a decision notice covering the missing information.

33. We also asked the appellant at the hearing what he wanted by way of an outcome. The appellant explained that he wanted: (a) a formal decision about delays by the IC, drawing attention to the lack of resources; (b) an explanation of why the IC did not speak to him before issuing the decision notice; (c) for the IC to go back and have a proper trawl of the information he had asked for; (d) for the IC to focus on the Second rather than the First Narrowed Request; (e) if the IC is not asked to redo the decision notice, permission to ask for the same information again without it being regarded as vexatious.

34. The Tribunal's remit in an appeal is as set out in section 58 of FOIA. The Tribunal can allow an appeal or substitute a notice if: the notice against which the appeal is brought is not in accordance with the law; or (to the extent that the notice involved an exercise of discretion) if the IC ought to have exercised her discretion differently. Otherwise the Tribunal shall dismiss the appeal.

35. We are not able to require the IC to re-take her decision in this case. The Decision Notice was in the appellant's favour and was in accordance with the law, and there was no exercise of discretion involved which should have been exercised differently. The appellant's requests for us to order the IC to conduct a review, to issue a decision notice covering the missing information, to require an explanation from the IC, to require the IC to focus on a different request, and/or to require the IC have a further trawl for the requested information, do not fall within the Tribunal's powers in these circumstances.

36. DCLG is not a party to this appeal, and the Tribunal cannot order it to disclose additional information. The Tribunal does not know what additional information may fall within the scope of the appellant's request, and how any FOIA exemptions may apply to this information. The IC viewed the information that was provided by DCLG in order to determine that

disclosure was in the public interest. The Tribunal cannot order disclosure of unknown information.

37. We would note that the appellant's case was presented to us in a balanced and coherent way, and backed up by the evidence from Mr Liddell-Grainger's statement about meetings and other communications. It does appear self-evident that there must at least be some communications between DCLG and the Councils (and potentially third parties) about the decision to use the Devolution Act for this merger – even if this is limited to one party proposing this approach and the other agreeing. This is information that appears to be covered by the First Narrowed Request.

38. There was some confusion between the First and the Second Narrowed Requests. The appellant intended that all of his original questions should still be answered. They were not answered in DCLG's original reply of 3 April 2017. This was not clear from the wording of the First Narrowed Request, which only refers to lobbying and communication. DCLG quoted the Second Narrowed Request in their correspondence. However, we note that the wording of the First Narrowed Request was put to the appellant by the IC in the letter of 10 October 2017, and he agreed that this summary was correct. The IC also attempted to verify with DCLG that they had disclosed all relevant information on 2 January 2018, so some further investigation was conducted. Although the IC did question the small amount of information disclosed, she then accepted DCLG's explanation without going back to the appellant for his comments.

39. We have sympathy for the appellant in relation to the delays in the process. We note that this was particularly unhelpful in a FOIA case where the information requested was in the public interest in relation to an issue that was happening at the time. The IC did apologise for its own delay, but did not address the delay on the part of DCLG in either responding to the original request or responding to the IC. A delay of 10 months on the part of the IC was very regrettable. The explanation provided by the IC was their caseload – *“As our funding and capacity plans are being reviewed we are always looking for ways to maximise the reduced funds received from Government to deal with our Freedom of Information regulatory function in the face of rising demands for our services”*.

40. It is notable that the appellant's later FOIA request on the same topic has been refused on the basis of cost. As the requests are similar and on the same topic, this suggests that there would appear to be significantly more information which falls within the scope of the appellant's original narrowed request, as properly interpreted.

41. The appellant was quite clear at the hearing as to what information he was expecting to receive in response to his narrowed request and what he thinks is missing. We would expect DCLG to provide advice and assistance as required by section 16 of FOIA if the appellant makes a further re-focused request, as referred to in the letter from DCLG of 31 July 2018. In the circumstances it seems unlikely that such a request on this topic would be vexatious.

Signed Hazel Oliver

Judge of the First-tier Tribunal

Date: 6 August 2018