



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

**Appeal Reference: EA/2020/0102 P**

**Decided without a hearing  
On 11 January 2021**

**Before**

**JUDGE HAZEL OLIVER  
ROGER CREEDON  
RAZ EDWARDS**

**Between**

**TONY GALLAGHER**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**DECISION**

The appeal is dismissed.

**REASONS**

**Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 11 February 2020 (FS50861261, the “Decision Notice”). It concerns information sought from Hampshire County Council (the “Council”) about correspondence to the Council’s Monitoring Officer.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 17 June 2019 the appellant made a request for information under the Freedom of Information Act 2000 (“FOIA”) to the Council as follows (the “Request”):

*“Please can you confirm that this ongoing breach of the council’s statutory duty has been brought to the attention of the Monitoring Officer and provide copies of the correspondence together with any responses.”*

4. The breach of statutory duty referred to by the appellant relates to delays in the handling of statutory complaints made about the Children’s Services Department.

5. The Council initially responded on 18 July 2019, but treated the Request as a “business as usual” matter rather than a FOIA request. There was further correspondence and an intervention by the Commissioner. On 12 August 2019 the Council advised the appellant that there were no separate records of conversations, and provided three related documents. The appellant complained about this response, and the Council conducted an internal review. It sent the outcome to the appellant on 28 August 2019. The review upheld the way the Council had dealt with the matter. The review also confirmed that the Council did not hold any correspondence with the Monitoring Officer regarding delays to statutory complaints. It stated that the information already provided *“demonstrates that the Monitoring Officer and senior management are aware of the delays to the statutory complaints”*.

6. The appellant initially complained to the Commissioner on 25 July 2019. After concluding the investigation process the Commissioner decided:

- a. The Council had carried out appropriate and reasonable searches for the requested information, and complied with section 1 FOIA by informing the appellant that it does not hold that information.
- b. The Council did not meet the requirement under section 10 FOIA to respond within 20 working days as it made an error in relying on its “business as usual” procedure.
- c. The Council contravened its duty to provide assistance to the appellant under section 16 FOIA as it could have provided further explanatory information to the appellant.

### **The Appeal and Responses**

7. The appellant appealed on 8 March 2020. The grounds of appeal can be summarised as follows:

- a. The Commissioner did not carry out a sufficiently robust investigation.
- b. This shown by the statement, *“By complaining to the Local Government & Social Care Ombudsman your complaint was automatically brought to the notice of the Monitoring Officer”*. This notification is unlikely to have been done through a phone call.
- c. This is also shown by the statement, *“the Children’s Services Complaints Team also regularly report this information to them as part of their monitoring role”*. This does not sound like an action that can be carried out through informal discussions or phone calls.
- d. Complaints are recorded in an Annual Complaint Report. This recorded information would have been seen by the Director of Children’s Services and brought to the attention of the Monitoring Officer, as it would contain details of breaches of law.

- e. There was no search of the Monitoring Officer’s records or those of the Director of Children’s Services.
  - f. The Commissioner decided the Council breached section 16 FOIA but has not asked them to take steps to remedy the breach.
8. The Commissioner’s response maintains her decision.
- a. The appellant’s request is limited to information amounting to correspondence or responses about a particular ongoing breach of statutory duty. This breach is the delay in arranging a date for the Stage Three Complaint Review Panel. The appellant had made a complaint to the Local Government & Social Care Ombudsman (“LGSCO”) about this delay.
  - b. She has asked the Council further questions as part of preparing the response. The Council provided further detail, which included explaining that issues such as statutory complaint delays are escalated to the Monitoring Officer in monthly one to one meetings.
  - c. The appellant has not discharged the burden of showing her findings are incorrect.
  - d. The appellant’s complaint about section 16 FOIA is not a valid ground of appeal as it does not say why the Commissioner was wrong or what prejudice there is to the appellant. The Commissioner was also entitled to decide not to require the Council to take any formal steps as the information had already been communicated to the appellant or would be clarified in the Decision Notice.

**Applicable law**

9. 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 Duty to provide advice and assistance.**

- (1) *It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*

.....  
**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.*

10. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

11. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, 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. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*"

12. The duty to provide advice and assistance requires public authorities to clarify the nature of the information requested by an individual, where this is needed because the request is not clear. The Freedom of Information Code of Practice (4 July 2018) says: "*There may also be occasions when a request is not clear enough to adequately describe the information sought by the applicant in such a way that the public authority can conduct a search for it. In these cases, public authorities may ask for more detail to enable them to identify the information sought.*" (paragraph 2.8).

### **Issues and material before the Tribunal**

13. The issues are:

- a. On the balance of probabilities, did the Council hold further information within the scope of the Request?
- b. Is the appellant's complaint about section 16 FOIA a valid ground of appeal and, if so, should the Commissioner have required the Council to take further steps?

14. We had an agreed bundle of open documents, which we have read and taken into account in making our decision.

### **Discussion and Conclusions**

15. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

16. **On the balance of probabilities, did the Council hold further information within the scope of the Request?** The information asked for by the appellant is "correspondence" and any "responses" in which the breach of statutory duty was brought to the attention of the Monitoring Officer. The first part of the email in which the Request was made has been

redacted in the material provided to the Tribunal (presumably for issues of confidentiality). Our understanding is that the breach of statutory duty is the delay in arranging a date for the Stage Three Complaint Review Panel, and the appellant made a complaint about this to the LGSCO. This was explained in the Commissioner's response to the appeal.

17. The Council provided information to the Commissioner about the scope of its searches in a letter of 31 January 2020. This stated that, "*The County Council has confirmed that the Monitoring Officer is aware of the delays but that copies of correspondence are not held. The information he is requesting was shared verbally and the Performance Report (which has been disclosed to Mr Gallagher) is seen by the Monitoring Officer as this is presented to Cabinet.*"

18. The letter also explained the extent of the Council's searches for the requested information. Both the Customer Relations and Complaints Manager and the Data Information Manager within Children's Services were approached for information. The Council explained that these members of staff are instrumental in the handling of complaints and reporting any information to the appropriate senior managers. They confirmed that no information was held. The Council went on to say that this response was reviewed by the Director of Children's Services who confirmed that the information included was accurate. The Director of Children's Services is the statutory officer who takes responsibility for Children's Services, and any reporting to the Monitoring Officer (outside of issuing the Performance Report) would be done as part of this statutory role.

19. The Council provided the following additional information in response to questions from the Commissioner when she was preparing her response to the appeal:

- a. The Monitoring Officer would have been made aware of delays with statutory complaints and the reasons for this by verbal communication from the Head of Risk and Information Governance.
- b. The Children's Services Complaints Team ("CSCT") works closely with the Corporate Information Governance Team ("CIGT"). The Information Governance Manager from CIGT has weekly meetings with the Complaints and Customer Relations Manager from CSCT to discuss Children's Services complaints including LGSCO cases and statutory complaint delays. The Information Governance Manager discusses concerns about issues raised in these meetings with the Head of Risk and Information Governance in CIGT.
- c. The Head of Risk and Information Governance escalates certain issues to the Monitoring Officer in monthly 121 meetings. Information about the appellant's stage three complaint, including the delay, would have been passed on at this type of meeting. There was no evidence in the submission to indicate that these meetings are documented.
- d. The Monitoring Officer was informed of the outcome of the appellant's LGSCO complaint by email sent on 6 September 2019.

20. The appellant refers to the statement from the Council, "*By complaining to the Local Government & Social Care Ombudsman your complaint was automatically brought to the notice of the Monitoring Officer*". He says that this notification is unlikely to have been done through a phone call. The Council has explained that the CSCT's understanding was that all LGSCO complaints were brought to the attention of the Monitoring Officer by the CIGT Team. As set out above, this would have been done verbally in 121 meetings between the Head of Risk and Information Governance from CIGT and the Monitoring Officer.

21. The appellant refers to the statement from the Council, "*The Children's Services Complaints Team also regularly report this information to them as part of their monitoring role*". The appellant says that his does not sound like an action that can be carried out through informal discussions or phone calls. We have considered the explanations provided by the Council, including answers to the additional questions from the Commissioner. The answers from the Council are quite clear that the CSCT provide information to the Information Governance Manager at weekly meetings, this information is passed on to the Head of Risk and Information Governance, and some matters are then escalated to the Monitoring Officer at weekly 121 meetings. The Council says that information about the delays in the appellant's stage three complaint would have been passed on verbally in this way. It therefore appears that this information is reported verbally at meetings, rather than contained in written communications. There is no evidence submitted to suggest this is done in a written form.

22. The appellant says that complaints are recorded in an Annual Complaint Report. This recorded information would have been seen by the Director of Children's Services and brought it to the attention of the Monitoring Officer, as it would contain details of breaches of law. We understand that there is an annual Performance Report, which will be seen by the Monitoring Officer as it is presented to Cabinet. The Council has confirmed that the Director of Children's Services has reviewed its response that no information was held and confirmed this is accurate. This indicates that the Director of Children's Services did not create any correspondence with the Monitoring Officer on this issue.

23. The appellant says that there was no search of the Monitoring Officer's records or those of the Director of Children's Services. This is correct. Only the Customer Relations and Complaints Manager and the Data Information Manager within Children's Services were asked whether any information was held. However, these are the individuals who handle complaints and report information to the senior managers, so we accept that they were appropriate officers to ask about any correspondence. The Director of Children's Services also reviewed the response and confirmed that it was accurate to respond that no information was held.

24. We are to decide on the balance of probabilities whether the Council held further information within the scope of the Request. The information is correspondence with and responses from the Monitoring Officer about a breach of statutory duty, which was the delay in arranging a date for the Stage Three Complaint Review Panel. Having considered all of the evidence available to us, we find on the balance of probabilities that the Council did not hold further information.

25. The searches carried out by the Council could have been more thorough. They did not search for correspondence such as emails, but instead relied on information from various officers that no such information would have been generated. However, we accept that appropriate officers were asked about this. Although there was no search of the Monitoring Officer's emails, these officers would have had knowledge about any written correspondence with the Monitoring Officer. In particular, the Director of Children's Services would have known if any concerns had been reported by them to the Monitoring Officer in writing. The Council has also explained how information is communicated by the Head of Risk and Information Governance to the Monitoring Officer at 121 meetings, and in particular that this reporting is done verbally. We have no evidence of materials elsewhere which point to the existence of further information within the Council which ought to have been disclosed. Our task is to decide whether the requested written information is held – not whether it ought to have been generated.

We therefore find that the Council did not hold further information which should have been disclosed under FOIA.

**26. Is the appellant's complaint about section 16 FOIA a valid ground of appeal and, if so, should the Commissioner have required the Council to take further steps?**

27. The Commissioner asserts that this complaint is not a valid ground of appeal. The Commissioner applied for the appeal to be struck out. This application was refused. The appellant provided additional information about his section 16 point as part of his representations as to why the appeal should not be struck out. He says that by breaching section 16, the Council have been able to withhold information that might otherwise have been released. He says the Council should have been required to provide meaningful advice and assistance so that his request could have been rephrased. He complains that the Council took a very narrow view of his request and did not consider alternative interpretations. He says this would not have been an issue if they had complied with section 16. We accept that the appellant has provided reasons and so this is a potentially valid ground of appeal.

28. We find that the Commissioner should not have required the Council to take further steps. The Commissioner's decision says that the Council should have provided certain information to the appellant at an earlier stage as part of providing advice and assistance. This information was provided to the appellant later. The appellant now says that the Council should have clarified the scope of his request. However, the Commissioner did not find that the Council should have clarified the scope of the appellant's request. We also find that the appellant's request was clear. This is not a situation where the Council was required to provide advice and assistance to clarify the information sought by the appellant in order to search for it. The appellant had asked for copies of "correspondence" in which the relevant breach of statutory duty was brought to the attention of the Monitoring Officer, together with any responses. There was no misunderstanding from the Council about what the appellant was asking for.

29. The appellant has complained that the Council took a narrow view of the Request and did not consider alternative interpretations. He says that recorded information in the record of complaints is used to inform monthly meetings, which in turn inform the Monitoring Officer, and this is part of "correspondence" which informs the Monitoring Officer. Similarly, a letter or email from LGSCO is part of correspondence which informs the Monitoring Officer. However, we do not agree that the Request was ambiguous, or should be given the wide interpretation now put forward by the appellant. The Council was entitled to regard the Request as asking for direct correspondence to the Monitoring Officer, and any responses from the Monitoring Officer.

30. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 21 January 2021  
Promulgated: 21<sup>st</sup> January 2021