



Neutral Citation Number: [2024] UKFTT 00421 (GRC)

Case Reference: EA-2023-0404

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard: on the papers  
Heard on: 14 May 2024  
Decision given on: 24 May 2024

Before

TRIBUNAL JUDGE BUCKLEY

TRIBUNAL MEMBER SUSAN WOLF

TRIBUNAL MEMBER DAVE SIVERS

Between

LIAM MCCARTHY

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

**Decision:** The appeal is dismissed.

## REASONS

### **Introduction**

1. The parties and the tribunal agreed that this appeal was suitable for determination on the papers.

2. This is an appeal against the Commissioner’s decision notice IC-241557-S3Q3 of 22 August 2023 which held, on the balance of probabilities, that the Chapel-en-le-Frith Parish Council (the Council) held no information within the scope of the request.

### **Background to the appeal**

3. This appeal arises out of the appellant’s interest in the role and actions of certain parish councillors in the period prior to and after proceedings were commenced against the Council under section 82 of the Environmental Protection Act 1990 about alleged noise nuisance arising from the use of play facilities in Chapel-en-le-Frith Memorial Park.

### **Requests, Decision Notice and appeal**

#### ***The Request***

4. This appeal relates to a request made to the Council on 7 May 2023 for information contained in emails between Councillors Sizeland, Gourley and Adshead and two of the applicants in the section 82 legal proceedings or one of the applicants’ solicitors. The request is contained in paragraph 4 of the Commissioner’s decision notice and is not set out here because of its length.
5. Each of the 14 paragraphs in the request follows a similar structure, so for example, paragraph 4 reads:

“All email correspondence sent by Cllr Chris Sizeland from the email address [redacted]@[redacted].com to Dr Merren Jones using the email address [redacted]@[redacted].ac.uk. Any attachments to such emails should also be provided.”

#### ***The response***

6. In the Council’s response on 1 June 2023 the Clerk to the Council stated that ‘I have contacted Councillors Adshead, Gourlay and Sizeland and they have confirmed that they are not holding any information that should be disclosed under the Freedom of Information Act 2000/Environmental Regulations Protection Act 1990.’
7. The Council upheld its position on internal review, stating that:

“I have undertaken an internal review and sought advice from the ICO, as the councillors involved do not hold information on behalf of the Parish Council and do not have parish council email addresses the request is not subject to the FOIA, there is therefore no information that should be disclosed under the Freedom of Information Act 2000/Environmental Regulations Protection Act 1990.”

#### ***The Decision Notice***

8. In a decision notice dated 22 August 2023, the Commissioner concluded on the balance of probabilities that the Council did not hold any information within the scope of the request.

#### ***Notice of Appeal***

9. The Grounds of Appeal are, in essence, that the Commissioner was wrong to conclude that the Council did not hold the requested information. In particular the appellant argues that:
  - 9.1. The Commissioner failed to take account of the evidence produced by the appellant that suggested relevant emails existed.
  - 9.2. The Commissioner failed to consider whether emails were held by the councillors on behalf of the Council.
  - 9.3. The Commissioner failed to take account of his own guidance on official information held in private email accounts.
  - 9.4. The Commissioner was wrong to simply accept the assertions of the councillors.

### ***The Commissioner's response***

10. The main points of the Commissioner's response are:
  - 10.1. The conduct of the Commissioner's investigation is outside the remit of the tribunal.
  - 10.2. The evidence provided by the Council was sufficient in showing that no further relevant information was held.

### **Legal framework**

11. Section 1(1) FOIA provides:

“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.”

12. The scope of a request is determined objectively, in the light of all the surrounding circumstances.
13. The question of whether information was held at the time of the request is determined on the balance of probabilities.

### ***The role of the tribunal***

14. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### ***Issues***

15. The issue for the tribunal to determine is:

15.1. On the balance of probabilities did the Council hold the requested information?

### **Evidence**

16. The tribunal read an open bundle.

## **Discussion and conclusions**

### ***Complaints about the adequacy of the investigation***

17. The conduct of the Commissioner's investigation is outside the remit of the tribunal. The tribunal is not reviewing the procedure adopted by the Commissioner in reaching his decision. The tribunal conducts a full merits review, standing in the shoes of the Commissioner and, and can take into account evidence that was not before the Commissioner. The tribunal has no power to remit the matter to the Commissioner for further investigation (**Information Commissioner v Malnick and ACOBA** [2018] UKUT 72 (AAC)).

### ***Was the information held by the Council?***

18. Information held by councillors in their personal email accounts in their role of councillor may be, but is not necessarily, held on behalf of the Council. Councillors are not council employees. They may act on behalf of the Council when, for example, acting as a cabinet member or drafting the Council's response to a consultation. However, they may instead be acting as an elected representative when, for example, corresponding with residents of their ward and seeking to resolve their problems. When acting as an elected representative they are not acting on behalf of the Council.

19. The Commissioner's guidance is a useful illustration of where the dividing line falls.

20. The Commissioner's guidance on 'Official information held in private email accounts states:

"Information held in non-work personal email accounts (e.g. Hotmail, Yahoo and Gmail) may be subject to FOIA if it relates to the official business of the public authority. All such information which is held by someone who has a direct, formal connection with the public authority is potentially subject to FOIA regardless of whether it is held in an official or private email account. If the information held in a private account amounts to public authority business it is very likely to be held on behalf of the public authority in accordance with section 3(2)(b).

This can apply to any public authority. For example, a councillor may hold information relating to local authority business in his/her private email account on behalf of the local authority."

21. The Commissioner's guidance on 'Information you hold for the purposes of FOIA' states that FOIA covers:

"Information held by local councillors **only** when carrying out functions of a local authority. This includes circumstances in which councillors:

- hold information in their role as cabinet members,
- have executive responsibility for a service area,

- represent the local authority in relevant forums, eg a regional forum, and
- carry out relevant administrative public functions.

It **does not** include circumstances in which local councillors hold information when performing their function as elected members. That is, when corresponding with residents of their ward, when discussing council business with fellow councillors in the context of a voting strategy or when campaigning on behalf of their political party.”

22. We are not bound by the Commissioner’s guidance but we agree with and adopt that approach. Information that is held by councillors for the purposes of their role as elected members would not, in our view, be held on behalf of the Council.

23. We find that the information requested by the appellant is, if held at all, likely to be information held by the councillors for the purposes of their functions as elected members. We note the description of the correspondence that the appellant expects to exist:

‘information [on] the role of three parish councillors in a legal action for noise nuisance generated from use of a facility in a local park. The councillors appeared to have supported and provided confidential information to ...those bringing the legal action’

24. Further insight into the nature of that correspondence is provided in an email from Mr. Gourlay to the Council dated 17 August 2023:

‘Before Merren Jones initiated legal action against Chapel Parish Council, she asked me to represent her views to the parish council concerning antisocial behaviour. The emails from that time are not disclosable to the ICO, even though they formed part of the legal disclosure during the court case. They are councillor’s casework, and I would never disclose such emails either to the parish council, to the ICO.’

25. We find that emails sent to residents relating to supporting them in their complaint against the Council are not part of a councillor carrying out the functions of a public authority. They are ‘councillor’s casework’ sent in their role as an elected member.

26. Each of the three named councillors was sent a copy of the request for information. In a later email they were also given the following information:

“FOIA only applies to public sector organisations, so in your case, only data held by the Parish Council, or on behalf of the Parish Council will be within scope.

Information held by individual councillors in that capacity is not covered by the FOIA. The following linked guidance explains who's covered and confirms this point, which maybe helpful: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/#3>”

27. In addition, the councillors were forwarded emails from the Commissioner which stated ‘You will need to get the named councillors to send you any emails relating to council business that you hold. They should be aware that the deliberate deletion of information held for the purpose of council business is a criminal offence under section 77 of FOIA.’

and ‘The councillors need to supply all emails which pertain to council business and relate to the complainant’s request’.

28. Their replies were as follows:

Councillor Adshead:

‘I did mail Sue, having looked at my mails, there is nothing to disclose’

‘In my opinion, there are no emails that fall into the category that require passing onto yourself...I am however prepared to forward the few mails I have for you to make your mind up’ (p D107)

Councillor Gourlay: ‘...I hold no disclosable emails. Before Merren Jones initiated legal action against Chapel Parish Council, she asked me to represent her views to the parish council concerning antisocial behaviour. The emails from that time are not disclosable to the ICO, even though they formed part of the legal disclosure during the court case. They are councillor’s casework, and I would never disclose such emails either to the parish council, to the ICO.’

Councillor Sizeland: ‘I am supposing your below email means we do not have to do anything.’

Notwithstanding that, all my email exchanges were submitted to yourself for inclusion in the evidence pack for the court case, though they didn’t appear in the evidence pack that we subsequently received a copy of. I assume that our legal team found them not relevant evidence.

The only other document that may be relevant is the email evidence from the complainants of the meeting in the park that appeared in the legal pack.

I attach a copy. As it a document submitted to the court in evidence, it presumably is now in the public domain and disclosable.’

29. It is clear from Councillor Gourlay’s response that he does hold correspondence with Merren Jones, but the correspondence is part of his function as an elected member rather than relating to business of the Council as a public authority.

30. Councillor Adshead’s email was sent in response to an email from Peter Leppard attaching the ICO’s email cited above. The reference to ‘emails that fall into the category that require passing on’ must therefore be a reference to the category of emails ‘relating to council business’. His response is therefore that he does not hold any emails ‘relating to council business’.

31. Councillor Sizeland’s response is more ambiguous. He states ‘I am supposing your below email means that we do not have to anything’. The ‘below email’ is an email from Sue Stockdale that states that ‘only data held by the Parish Council or on behalf of the Parish Council will be in scope’. This must, in the tribunal’s view, mean that he considered that he did not have to do anything because he did not hold any information on behalf of the Parish Council, as opposed to information held in his capacity as an individual councillor.

32. When assessing whether information is held on the balance of probabilities, we take account of the quality and the rigour of the searches carried out. In this case the Council sent the councillors sufficient information to allow them to ascertain if they held any information on behalf of the Council. It forwarded the warning from the Commissioner in relation to section 77 of FOIA. Having been informed by each councillor that they did not hold any information on behalf of the Council, we do not think that it was incumbent on the Council to read all the councillors' private emails to ascertain for itself whether that was the case.
33. We accept that it is likely that some of the councillors hold emails to some of the relevant individuals set out in the request, but we do not accept that these are likely to be held on behalf of the Council for the reasons set out above.
34. For that reason we find, on the balance of probabilities, that the Council did not hold any information within the scope of the request.

***The appropriate regime***

35. Although the Council responded to the request under FOIA and EIR, the Commissioner considered the case under FOIA. In our view the request is for 'environmental information' and therefore the Commissioner was wrong to consider it under FOIA. This was not raised by the appellant.
36. Having considered how we would have approached the matter under EIR we have concluded that the outcome would be the same.
37. Under regulation 12(4)(a) a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
38. Regulation 3(2)(b) provides that environmental information is held by a public authority if it is held by another person on behalf of the authority.
39. The question of whether information is held under EIR is applied in a similar way to the question of whether information is held under FOIA, including the question of whether information is held on behalf of a public authority.
40. The only significant difference is that, in theory, the public interest balance applies to this exemption. However, it is not possible to undertake a meaningful public interest test when a request is refused on the basis that the information is not held.
41. We would therefore have reached the same conclusion, i.e. that the Council did not hold the requested information.
42. For those reasons, the Commissioner's error in considering the matter under FOIA was not material to the outcome and we do not allow the appeal on this alternative basis.

Signed Sophie Buckley

Date: 21 May 2024

Judge of the First-tier Tribunal