



**Appeal number: EA/2016/0191**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**MATTHEW CLARK**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Mr PAUL TAYLOR  
Ms ANNE CHAFER**

Promulgation date 30 January 2017

**Sitting in public at Harrogate Justice Centre on 10 January 2017**

## DECISION

1. The appeal is allowed. The public authority is required to respond to the information request on the basis that it does hold the requested information.

## REASONS

### *Background to Appeal*

2. On 15 January 2015 the Appellant had made a request to Harrogate Borough Council (“the Council”) for information relating to the electronic back up data for a planning enforcement file, to show what alterations had been made to the file after it was closed.

3. It was accepted by the Council that the computer system showed the file to have been altered after it had been closed, and it has offered various possible explanations for this. However, the Council refused the information request on the basis that it did not hold the requested information. It explained that this was because there had been a computer server failure in May 2014 which meant that back up tapes were no longer held for the relevant period.

4. On a date “on or around 28 January 2015” (see Decision Notice paragraph 6<sup>1</sup>) the Appellant made a further request for information regarding the server failure. This was understood by the Council to be a request for “*a copy of the root cause analysis report plus any e mails and notes etc in connection with the Council’s server failure in May 2014*”.

5. The Council replied that it did not hold the requested information because the plan of action regarding the server failure had taken the form of a face to face meeting between relevant staff and the priority had been to get the system working again rather than recording why the server had failed.

6. It is this further request for information about the server failure which is the subject-matter of this appeal.

7. The Respondent issued Decision Notice FS50608263 on 12 July 2016, upholding the Council’s decision that it did not hold the requested information.

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<sup>1</sup> After the hearing, the Appellant wrote to the Tribunal and suggested that the date of his request was much later than this. We have not determined that issue, as it was raised for the first time after the hearing and the other parties had not received notice of the Appellant’s submission. However, the date of the request will be an important matter for the Appellant and the Council to establish and agree between them before taking the steps we have required the Council to take. As the date the Appellant suggested he had made the request was later than the date referred to in the Decision Notice, it does not affect the decision we have made here.

*Appeal to the Tribunal*

8. The Appellant's Notice of Appeal dated 15 August 2016, relied on grounds to the effect that the Information Commissioner was wrong to be satisfied on the balance of probabilities that the information was not held because (a) there was no proof that  
5 the server failure had occurred; (b) it was not credible that the Council would allow such information to be lost as there is a business need to retrieve information; Also (iii) the standard of proof to be applied should be beyond reasonable doubt; and (iv) the Council had told him that its computer system was run to the same standards as GCHQ which cannot be correct.

10 9. The Information Commissioner's Response dated 27 September 2016 maintained the analysis as set out in the Decision Notice. This was, in summary, that the Information Commissioner was satisfied that the Council had conducted reasonable searches for the requested information, including asking its officers to search their own records, and undertaking a computerised search of all networked  
15 computers. In view of the Appellant's contention that there was no proof that the server failure had occurred, the Information Commissioner had asked the Council how it knew the date of the server failure. The Council responded that it has the date that the new backup server commenced work. The first entry in its history is the date it went back online. The Information Commissioner submitted she was correctly  
20 satisfied on the evidence and to the standard of the balance of probabilities that the information requested was not held. The Information Commissioner explained she cannot comment on whether the information should be held, only whether it is held.

10. The Council was not made a party to the appeal. The Appellant requested an oral hearing but the Information Commissioner did not attend.

25 11. We had before us an open bundle of 122 pages, plus a number of additional documents provided by the Appellant. These had been served on the Information Commissioner and provided to the panel pursuant to the Registrar's directions. Neither party relied on oral evidence.

*The Legal Framework*

30 12. A public authority is under a duty to comply with the Freedom of Information Act 2000 ("FOIA"). S. 1(1) (a) of FOIA provides that a person making a request for information is entitled to be informed in writing by the public authority whether it holds information within the scope of the request. S. 84 of FOIA defines information as "information recorded in any form". There is no requirement for a public authority  
35 to take steps to record information if none is held at the time of the request.

13. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*"If on an appeal under section 57 the Tribunal considers -*

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(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,

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*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.*

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

14. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

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#### *Submissions*

15. The Appellant made the following submissions at the oral hearing. Firstly, if a person tells a thousand lies, then it is more likely than not that one additional statement is untrue. He asked us to infer that the Council’s conduct of these matters showed it to be untrustworthy. Secondly, there was evidence from the Council (see page 105 open bundle) that it runs “*two identical server rooms to provide business continuity and resilience*” and that “*our data is stored asynchronously on a NetApp system and we operate a live mirror system*”. The Appellant’s submission was that if there are two servers which mirror each other, how could the server failure the Council has described lead to a complete loss of data?; Thirdly, that the Council did not properly answer all the Information Commissioner’s questions, so how could the Information Commissioner be satisfied with its answers?; Finally, that it is not credible that there are no documents held which mention the server failure.

16. The Appellant also directed the Tribunal’s attention to two e mails from the Council’s officer Mr Clothier, dated 19 January 2015 (document 14, additional materials). He submitted that, as these emails themselves contain information falling within the scope of his information request, the Decision Notice was wrong to conclude that no information was held. The emails stated “*I have checked with our ICT section who have confirmed that our backups do not go back this far, and therefore it is my understanding that there is no way of knowing exactly what the changes were. I am however engaging with our suppliers (IDOX) to establish if this is possible and I will update you once I have a response from them*” and later “*I have now heard back from our suppliers who have confirmed...*”. The Appellant submitted that these e mails suggest that there is further correspondence between Mr Clothier and IDOX which may fall within the scope of his request, so that relevant information was held by the Council at the time of his request. The Appellant told the Tribunal that he had made a follow-up request for this further correspondence but the Council had told him his request was vexatious.

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*Conclusion*

17. We were not persuaded by the Appellant's arguments that we should regard the Council officers' statements to the Information Commissioner as untrustworthy. We understand the Appellant has taken that matter up with the police.

5 18. We did not have sufficient evidence before us to understand how the Council's dual backup system worked and whether this cast doubt on the Council's (and therefore the Information Commissioner's) case.

10 19. It is not the role of this Tribunal to take a view as to whether the Council should have recorded information about the server failure. We understand the Appellant has taken this matter up with the Local Government Ombudsman.

15 20. We have considered carefully the Appellant's submissions and evidence described at paragraph 16 above. We note that the terms of the information request are broad: information "*in connection with the Council's server failure*" seems to us to include within its scope the correspondence between Mr Clothier and the Appellant and the further enquiries to which it refers. We are satisfied that the Council held this information at the time of the Appellant's information request.

21. In the circumstances, we are not satisfied on the balance of probabilities that the Information Commissioner's Decision Notice was correct. We consider that it was based on an incorrect assessment of the facts and accordingly this appeal is allowed.

20 22. The step that the Council is required to take is to respond to the information request on the basis that it does hold information within the scope of the Appellant's request.

**(Signed)**

25 **ALISON MCKENNA**

**DATE: 27 January 2017**

**PRINCIPAL JUDGE**