



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

Appeal Reference: EA/2017/0292

Determined, by consent, on written evidence and submissions

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Ms Melanie Howard
and
Mr Henry Fitzhugh

Between

Patricia Whitmarsh

Appellant

And

Information Commissioner

Respondent

DECISION AND REASONS

BACKGROUND

1. The complainant wrote to the London Borough of Enfield (the Council) on 5 February 2017 in the following material terms;-

I sent my EDA Breach of Service Level Agreement Formal complaint etc., to the Council not EDA – and am requesting Martin Rattigan’s investigation report into those complaints be sent to me immediately [...]

If the Council will not informally send the report directly to me [...] please make this a FOI/DPA request.

2. The background to this request is that the Appellant had made a complaint to the Council that Enfield Disability Action (EDA) was in breach of its Service Level Agreement (SLA) with the Council. The details of the complaint are not relevant to this decision.
3. After some delay the Council sent the Appellant on 3 April 2017 a heavily redacted version of a letter dated 9 February 2017. The date of the letter is of some significance as it post-dates the request for information by four days. The Council relied on s43(2) FOIA (prejudice to commercial interests) to justify the redactions, and also referred to third-party personal information. Some further information was disclosed after an internal review, but the Appellant exercised her right to complain to the Commissioner about the disclosure of the information. The Commissioner considered the 9 February 2017 letter and issued a decision notice dated 7 November 2017 which decided that only a very limited amount of information could be withheld under s43(2) and s40(2) (personal information) of FOIA. As a result, and in accordance with the decision notice, a lightly redacted version of the letter was disclosed to the Appellant.
4. The Appellant appealed on 17 December 2017 in the following terms:-

Enfield Council disclosed their previously heavily redacted document, at the end of October 2017. Mr Mehan (ICO) undertook his decision notice 7/11/17. It seemed thorough and satisfactory. But when the document was finally LBE disclosed to me (*sic*) on 13/11/17, I realised that by ‘sleuth’ of hand Mr Foster/LBE had

switched documents - which Mr Mechan had not realised. I realised this is why Mr Foster sent his late DPA/FOI response on 3/4/17 so heavily redacted as to be meaningless.

5. The Appellant referred to a longer typed document which explained the position more fully. On the appeal form she stated that the outcome she sought was:-

LBE to disclose the document I requested 5th and 8/2/17. This document is the full conclusions of Martin Rattigan's investigation into the Enfield Disability Action Complaints. This was sent to LBE officers/CEO 10/1/17. And is not his 9/2/17 letter to EDA.

6. Alerted to this issue, the Commissioner accepts in her response to the appeal (dated 16 February 2018) that the 9 February letter cannot be the information sought by the Appellant as it was not in existence at the date of the request, and cited section 1(4) FOIA which makes it clear that section 1(1) FOIA duties only apply at the time of the request.

7. The Commissioner goes on to say that:-

The Appellant is correct to state that Mr Rattigan emailed a 'report' internally, to the Council's Health, Housing and Adult Social department on 10 January 2017. He has confirmed this in an email to the Appellant on 26 January 2017 at 9.17am. By an email at 11/16 that day, he further informed the Appellant that he had sent the 'report' to the Chief Executive of the Council.

From correspondence with the Council, the Commissioner understands that 'the report' that was attached to Mr Rattigan's email of 10 January 2017, and to his email to the Chief Executive of 26 January 2017, were in fact earlier drafts of the Letter [of 9 February] that was (*sic*) addressed not to EDA but to the Appellant herself and referred to her in the second person.

The Commissioner is satisfied that Mr Rattigan's 'report' always took the form of undated letters, setting out his review of the Appellant's allegations that were attached to the emails...

8. The Commissioner noted that by an email dated 30 January 2018 to the Appellant (a year after the email activity described above and after the Appellant's appeal had been filed), the Council accepted that it had incorrectly interpreted her request, and that the Council has now sent the Appellant the draft (undated) letters attached to the emails of 10 January 2017 and 26 January 2017, referred to above. The Council has informed the Commissioner that there is no other 'report' apart from these letters. The Commissioner has noted there are minor difference between the draft letters themselves and further differences with the letter of 9 February 2017. The Commissioner has further noted that the two January 2017 draft letters have been redacted in a way that is consistent with the redactions sanctioned by the Commissioner in the 9 February letter, other than that the Council has actually disclosed some of the personal data that the Commissioner considered to be exempt under s40(2) FOIA , and 'a small amount of information that the Commissioner found to be exempt under s43(2) FOIA in respect of the draft letter of 10 January 2017'.
9. As a result of all this, the Commissioner accepts that the decision notice was incorrect to treat the 9 February 2017 letter as being within the scope of the request, and notes that initially the date of the letter, as disclosed to the Appellant, was redacted. However, the Commissioner states that she is now satisfied that all the information within scope has been disclosed, but she has no power to revoke or vary the decision notice issued. She requests that we issue a substituted decision notice, in exercise of our powers under s58(1) FOIA, recording that the correct requested information was the drafts of 10 and 26 January 2017.
10. It does not seem that the Appellant responded further to the Commissioner's response prior to the consideration of the appeal. Both parties had indicated that it would be appropriate to consider the appeal on the basis of the papers and written submissions. The Tribunal

considered the appeal on 26 July 2018, but found it difficult to identify the relevant January 2017 letters in the bundle and requested further assistance from the Commissioner by way of directions. The Commissioner then identified the undated draft letter at pp340-349 of the bundle as being the document attached to an email of 10 January 2017, and the undated letter at pp370-380 of the bundle as being the letter attached to an email dated 26 January 2017.

11. The Appellant responded to the Commissioner's comments by pointing out that, in her view, there were more than 'minor differences' between the two drafts, and providing details. She also noted that the local government ombudsman (in different proceedings) was having difficulties in obtaining information from the Council.

12. The Appellant sent a second email in which she argued that:-

I do not believe that letter (or any of the drafts) disclosed Mr Rattigan's full EDA complaint investigation conclusions, which I repeatedly requested from Enfield Council.

Mr Rattigan's full investigation conclusions to LBE would have detailed the concerns he repeatedly stated to me, that Enfield Council had failed to Monitor EDA appropriately as value for money and failed to put EDA's services out to tender -since 2005.

The Appellant notes that the end of the draft letter sent to her makes reference to 'recommendations made by Martin in respect of the Services concerned' but which she says are not included in the letter sent to her.

DISCUSSION AND DECISION

13. It is accepted that there was a crucial oversight in this appeal which meant that the wrong document was provided by the Council and considered by the Commissioner. The Appellant had no way of knowing the date of the letter disclosed until its date was unredacted at the end of the process.

14. However, two very lightly redacted drafts have now been disclosed to the Appellant which the Council says, and the Commissioner accepts, represents all the information available for disclosure in response to the request. We have no evidence upon which to doubt that there is further information which has been withheld by the Council, or to disagree with the Commissioner.
15. In response to the Appellant's additional points made by email, there may well be more than minor discrepancies between the various versions of the letter now disclosed, but the Appellant is now able to see these and decide what to make of these.
16. It seems to us that the letters disclosed do contain recommendations from Mr Rattigan, which are listed at the end of the report and have been disclosed in full. Whether or no Mr Rattigan stated concerns to the Appellant about the failure of the Council to monitor EDA, it is clear that any such concerns were not recorded in the letters drafted and, as stated above, there is no evidence that there is further information which is undisclosed.
17. Finally, we note that the Appellant's appeal did not take issue with the light redactions that remained to the 9 February 2017 letter, and which the Commissioner says are reflected in the drafts now disclosed. We do not consider these issues as part of the appeal, but for completeness, the s43(2) FOIA exemptions which remain are dealt with in paragraph 44 of the decision notice, and we agree with the reasoning set out therein.
18. Therefore, as requested, we formally allow the appeal and we issue a substituted decision that the correct information for the Council to have disclosed was the two undated letters referred to above attached to emails dated 10 January 2017 and 26 January 2017. As these letters have now been

sent to the Appellant (by emails dated 8 February 2018 and 30 January 2018) there is no need to order any further steps to be taken. It is our view that the Appellant has obtained the outcome sought in her appeal form, as set out above.

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 6 September 2018.

(Case considered by Panel on 25 July 2018).