



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

Case No EA/2018/0059

**ON APPEAL FROM:
The Information Commissioner's Decision Notice
No FS50681766 dated 20 February 2018**

Appellant: Anthony Morris
Respondent: Information Commissioner
Date of hearing: 7 August 2018
Hearing: Field House
Date of decision: 8 October 2018

Before

Anisa Dhanji
Judge
and
Stephen Shaw and Nigel Watson
Panel Members

Subject matter

FOIA section 1 – whether information requested is held by the public authority.

DECISION

The Information Commissioner's decision is upheld, and this appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This is an appeal by Anthony Morris (the "Appellant"), against a Decision Notice ("DN"), issued by the Information Commissioner (the "Commissioner"), on 20 February 2018.
2. It concerns a request for information made by the Appellant to the West Sussex County Council (the "Council"), seeking information about the the creation of specific posts, and associated costs. The Appellant's request is driven by his concern that costly senior management posts were created without proper process and scrutiny, resulting in considerable cost to the taxpayer.
3. The Council provided what it said it held. The Appellant maintains that the Council must hold more information than it has provided.

The Request

4. On 1 April 2017, the Appellant made a request to the Council as follows:

"I will be grateful if you would provide a copy of the business case that supported the Chief Fire Officer role and the Executive Director for Communities & Public Protection role becoming a single post. [part 1]

I would also be grateful for a copy of the current business case supporting the separation of the Chief Fire Officer and the Executive Director for Communities & Public Protection roles in to two separate posts [part 2]

Please also provide full cost details, including salary, benefits, provided vehicles, accommodation, and support staff costs for the current single post, plus similar full cost details of the planned new separate posts". [part 3]

For convenience, we have adopted the Commissioner's approach in numbering the requests as parts 1-3.

5. For part 3, the Council provided the costings. For parts 1 and 2, it said that no information was held.
6. The Appellant requested an internal review. In that request, the Appellant clarified that his request for information for a "business case" in parts 1 and 2 of his request, was a reference to the justification, rationale and costs for each change, rather than a formal business case. He maintained that whoever gave approval for the changes in 2014 and 2017, must have done so in response to documentation setting out such justification.
7. He also did not consider that he had received the full costings requested in part 3 of his request, specifically about a certain individual's monthly pension payments and lump sum, He further took issue with the Council's failure to provide costings about vehicles, accommodation and support staff. He considered that these would be available and should be provided.
8. In its response, the Council maintained its position that no further information was held. In response to the Appellant's specific points, the Council said that:
 - As regards the pension payments, the lump sum would have been from the Firefighter's pension scheme and so this would not have had any relevance for the proposed post. This is because the lump sum payment is a benefit and entitlement from the scheme to the individual, not a cost to the Council.
 - No monthly payments would have been made from the pension schemes as the rules on appointment would have meant a full abatement of such benefits during the currency of the post.
 - With regard to the vehicles, accommodation and support staff costings, no information was held because there was no separate accommodation, support staff or vehicles associated with the post
9. The Council also indicated that it considered the Appellant's clarification (referred to at para 6, above), was not part of the original request.

The Complaint to the Commissioner

10. The Appellant complained to the Commissioner under section 50 of FOIA about the handling of the request by the Council. The Commissioner investigated the complaint. Both the Appellant and the Council provided the Commissioner with additional information to do so.
11. On 20 February 2018, the Commissioner issued a Decision Notice, upholding the Council's refusal. On a balance of probabilities, having considered the explanations and assurances provided by the Council, and in the absence of evidence suggesting that further information was held by the Council, the Commissioner accepted that the Council held no further information in recorded form within the scope of the request.

12. The Commissioner found that the Council had failed to respond to the request for information within the 20 days provided for in section 10(1) of FOIA. She noted that the request was made on 1 April 2017, and the Council did not respond until 8 August 2017. However, since the Council had by then responded, the Commissioner did not require any further steps to be taken.

The Appeal to the Tribunal

13. The Appellant has appealed against the Commissioner's Decision Notice. The Council has not been joined as a party in this appeal.
14. The parties have lodged an open bundle and the Appellant has lodged further written submissions. We have considered all the material before us, and we will refer to it as needed.
15. The Appellant has requested that his appeal be determined on the papers without an oral hearing. The Commissioner has agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we were satisfied that the appeal could properly be determined without an oral hearing.

Grounds of Appeal and the Commissioner's Response

16. In brief, the Appellant's grounds of appeal are that:
 - The Commissioner was wrong to conclude that no further information within the scope of the request was held by the Council because this conclusion was based upon "inaccurate and misleading information from the Council"; and
 - The Commissioner should have found that the Council failed to comply with section 16 of FOIA (duty to advise and assist).

The Tribunal's Jurisdiction

17. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
18. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

Statutory Framework

19. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

20. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. No exemptions have been invoked by the Council.

Issues

21. The key issue before us is whether the Council holds (or at the date of the request, held), further information coming within the scope of the request.

Evidence and Findings

22. The obligation on a public authority under FOIA to provide the information requested applies only to the extent that it holds the information.
23. Some public authorities have good records management systems and policies, and some do not. A person who is aggrieved as a result of a public authority's poor record keeping may have other channels of recourse, but FOIA imposes no obligations, and offers no remedies, in the case of poor record-keeping practices of a public authority. As was stated in Metropolitan Police v Information Commissioner and McKenzie [2014] UKUT 479 (AAC), *FOIA is not a statute that proscribes any particular organisational structure or record-keeping practice in public authorities*. This is the case even where the public authority is subject to and fails to comply with record-keeping obligations imposed by another statute: Cruelty Free International v Information Commissioner [2017] UKUT 318 (AAC).
24. However, while poor record-keeping is not itself a breach of FOIA, it is implicit in the obligation on a public authority to provide the information that it holds, that an assertion that it does not hold the requested information must be made responsibly, and only after a proper search. The Commissioner's guidance on "Determining whether Information is Held" states correctly, in our view, that when investigating whether a public authority holds information, it is necessary to consider whether the public authority has conducted sufficient searches for the information.
25. The Commissioner must reach a decision based on the adequacy of the public authority's search for the information, and any other reasons explaining why the information is not held, such as there being no business need to record it. The Commissioner is entitled to accept the word of the public authority, and not investigate further where there is no evidence as to an inadequate search, nor of any reluctance to carry out a proper search or any motive to withhold information actually in its possession: Oates v Information Commissioner EA/2011/0138, at para 11.
26. Having set out these general principles, we turn now to the facts of present case.
27. As already noted, the Council has said that it holds no further information coming within the scope of the request. We need to consider why the Appellant believes that the Council holds further information, and the explanations the Council has provided as to why it holds no further information. We also need to consider the adequacy of the searches the Council says it has carried out.

28. The Appellant says that costs have always been determined for office space, provision of IT, etc, to allow internal recharging, and therefore, figures should be available. He also says that senior management posts usually have personal assistants to support them and that those costs can be identified;
29. The Council says. However, that no information is held as regards accommodation, personal assistant or vehicle costs relating to any particular service or post, and that for many years, such costs have been dealt with as a corporate cost.
30. More specifically, as to support staff costs, the Council says that it has an outsourcing contract for PA support to be provided to the Corporate Leadership Team via a pooled arrangement. This cost of the PA team is not allocated to different individuals or positions. It also says that no additional support staff were required as a result for the Chief of Fire Officer role and the Executive Director for Communities & Public Protection role becoming a single post.
31. The Appellant says that vehicles are provided for the specific posts in issue. He says that in fact, one was provided to the person in the combined post and that the new Chief Fire Officer has also been provided with a vehicle. He further argues that even if the new Executive Director is not being given a vehicle, his request was for costs in respect of all the posts mentioned in the request.
32. In response, the Council says that neither post qualifies for a vehicle. However, the Chief Fire Officer has an emergency response function, and therefore does have a car allocated from the corporate fleet. This is for business use only and if any private mileage is undertaken, there is a charge of 20p/mile. The cost associated with the fleet car are not allocated to the specific post, but is regarded as a corporate cost to the Council in running the fleet cars, regardless of whether a fleet car is used by only one individual or a number of different individuals.
33. With regards to the pension information, the Appellant says that with this particular pension scheme, payments are made direct from the Council's funds. He provided the Commissioner with a link to the Council's Statement of Accounts to support his position.
34. In response, the Council says that its Statement of Accounts does not show that these payments are made from its own funds. It says that its accounts simply explain that the Firefighters pension scheme is not a funded scheme. The Council goes on to say that in fact, since the pension scheme costs are not a cost to the Council, they do not come within the scope of the request.
35. In considering whether a public authority holds information, the test to be applied is not certainty but the balance of probabilities: Bromley v Information Commissioner & the Environment Agency EA/2006/0072, at para 13. We accept the Council's explanation on these matters, to this standard. The answers given are plausible and there is no evidence to suggest that any relevant information is, in fact, held.
36. We have had some concerns, however, as to whether the Council had taken on board the Appellant's clarification about what he meant by "business case", given that the Council had said, initially at least, that the clarified meaning of "business

case” was not within the scope of the original request. The Council later confirmed that even on the clarified basis, it did not hold any relevant recorded information.

37. However, we have found it surprising that there are no written records about the type of decision in issue here. Like the Appellant, we considered that it was reasonable to expect some information to exist in relation to the justification for the posts. The Council’s explanation for the absence of such information in this case, is that the decision was not driven by overall senior management design planning, but by the particular requirements at the time in relation to the individuals in these particular posts. It further says that there may have been an exchange of correspondence between the senior officers making the decision, but that no such records have been identified. We would have thought it basic good practice for any public authority to maintain such records in order to demonstrate a proper justification for its decisions, and to be able to account for its expenditure of taxpayers’ funds.

38. For the avoidance of doubt, we directed the Council to answer the following questions:

Does the Council hold (or as at the date of the request did it hold), any committee agendas, reports or minutes relating to the rationale, justification or business case concerning:

- (a) the Chief Fire Officer role and Executive Director for Communications and Public Protection becoming a single post; and*
- (b) the separation of the Chief Fire Officer and Executive Director for Communications and Public Protection roles into two separate posts.*

Has the Council withheld any information coming within the scope of Mr Morris’ request in reliance upon any exemptions under the Freedom of Information Act?

39. The Council replied that it does not hold, nor did it hold at the date of the request, any committee agendas, reports or minutes relating to the rationale, justification or business case. It added that this would not have been the responsibility of any of the Council’s committees. It also confirmed that no information has been withheld in reliance of any exemptions.

40. While the Council’s position called for an explanation, and while its latest response may reflect surprisingly poor record keeping practice, that is not evidence that the Council holds further information. We accept, on a balance of probabilities, that it does not.

41. As to the adequacy of the searches it has carried out, the Council says that as no formal documentation amounting to a business case was found, nor any indication that any existed. Email and meeting records between the relevant officers would be the only source of any relevant information. Therefore, enquiries were made with the officers who would have been responsible for the proposal and implementation of the posts. The Council further explained that the number of individuals involved would have been very limited, and that searches were carried out on their laptops and shared sites. Those searches and enquiries did not yield any information coming within the scope of the request. While the

Council says that it is not aware of any relevant information being deleted or destroyed, it also says that this could not be fully verified as some individuals no longer work for the Council.

42. The Appellant raises a number of further points (including in his email dated 11 May 2018), which questions whether the Council has carried out proper searches, and whether its replies have been accurate. However, the Appellant's premise is largely based on what he maintains must or should have been done. He says, for example, that it would be normal for the Appointing Committee to be given the justification and rationale for any post changes. He also says that in view of the Council's document retention policy, it is incorrect for the Council to say that there would have been no requirement for communications relevant the request to be retained.
43. It may be that the Appellant's expectation as to what the Council holds is entirely reasonable and rational. It may reflect what the Council has done in the past or what other similar public authorities do, or even what the Council is required to do. However, although some of the matters the Appellant has raised has been helpful to the Tribunal in assessing the Council's responses, as already noted, the Tribunal does not have jurisdiction to address what information the Council should hold; just whether the information requested is held. On that, having carefully considered what the Council has said, we are satisfied as to the adequacy of its searches, and we find, on a balance of probabilities, that the Council holds no further information coming within the scope of the Appellant's request.
44. Finally, the Appellant's grounds of appeal assert that the Council failed to comply with its duty under section 16(1) of FOIA. This requires a public authority to provide advice and assistance, "so far as it would be reasonable to expect the public authority to do so" to anyone who has made a request for information. The Appellant has not said what kind of advice or assistance he thinks it would have been reasonable for the Council to provide. We agree with the Commissioner that not every request requires refining. We also do not consider that any such dialogue would have assisted the Appellant or led to a different outcome in this case. It follows that we agree with the Commissioner that on the facts of this case, the Council was not in breach of section 16(1).

Decision

45. This appeal is dismissed. Our decision is unanimous.

Anisa Dhanji

Judge of the 1st Tier Tribunal

Decision Date: 8 October 2018

Promulgated date 10 October 2018