



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

Appeal No: EA/2012/0044

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50371162

Dated: 26 January 2012

Appellant: Tony Sutton
Respondent: The Information Commissioner
2nd Respondent: Nottingham City Council
Heard at: Field House
Date of Hearing: 16 August 2012
Date of Decision: 31 October 2012

Before
Christopher Hughes OBE
Judge
and
Dave Sivers and Andrew Whetnall
Tribunal Members

Attendances:

For the Appellant: in person
For the Respondent: did not appear
For the 2nd Respondent: Mr Hopkins

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 January 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction:-the request for information

1. On 29 November 2010, Mr Sutton made the following request for information under FOIA (Commissioner's letter at page 306 of the open bundle):

"Could you please provide me with copies of all written communications in the last 12 months, including emails and any associated documents to and from' the following individuals 'relating to processes and procedures for Freedom of Information Requests':
 - a. Carol Mills Evans
 - b. Paul Martin
 - c. Council Corporate Directors"
2. There were 42 e-mails within the scope of Mr Sutton's request and a large majority of these were disclosed by the Council during the ensuing months following the involvement of the Commissioner. However the Council maintained that 5 of these e-mails should not be disclosed relying upon section 36(2)(b)(i) and (ii) FOIA, which provides that:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

...

(b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation...”
3. Before section 36 (2) can be engaged a qualified person (in this case the Council's Monitoring Officer) has to consider the matter. The Monitoring Officer considered the documents and the evidence of the Council's Information Governance Officer

in relation to certain of the e-mails and concluded that disclosure of the requested information would be likely to inhibit the free and frank provision of advice and free and frank exchange of views for the purpose of the Council's deliberations. He noted that the advice provided and the views set out in the e-mails were expressed in a strong and forceful manner. He himself was one of the officers concerned and he concluded that if the officers knew that their advice and views could be made public there was a real likelihood that they would be inhibited from further participation and debate which could be detrimental to the effective management of the Council functions.

The complaint to the Information Commissioner

4. In the light of this opinion the e-mails were not disclosed, and Mr Sutton accordingly complained to the information Commissioner. The Commissioner gave his decision on 26 January 2012. In his investigation the Commissioner concluded that the Council's Monitoring Officer had considered all the withheld information and he was satisfied that in coming to his opinion he only took into account relevant matters. While he noted Mr Sutton's argument that the Council's " Disposal and Retention Schedules V3 March 2009 " which dealt with records held by the Council envisaged the possibility that material could be released; he did not consider that this fatally undermined the argument advanced by the Council since any disclosure of material under FOIA was always subject to the application of exemptions and the Council officers concerned would be aware of this protection from disclosure.
5. He concluded that the Monitoring Officer's opinion was reasonable and the exemptions were engaged. In assessing the balance of the public interest he considered the public interest in knowledge of how the new procedure had been developed but in balancing this against the argument with respect to the effective management of the Council's functions he concluded that the public interest was on the side of ensuring that there was a robust process of deliberation and he concluded that the information which had not been disclosed had been correctly withheld under 36 (2) (b) (ii).

The appeal to the Tribunal

6. In his appeal Mr Sutton argued that there had been disclosure of similar material, that there was a warning on all e-mails of the possibility of disclosure, and that disclosure could not create the possibility of inhibition of free and frank exchange because this plus the possibility of disclosure was known to exist. He further argued that forceful remarks by an officer were not a justification for exemption and that the officer would have put forward the same arguments but in different terms if she had known that they would be disclosed; therefore a free and frank exchange would not be inhibited. He argued that there was a widespread public concern that the Council mishandled requests with unreasonable delays and inappropriate use of exemptions as well as the possibility of political interference.

Evidence

7. The tribunal was assisted by the evidence of Mr Paul Martin a senior officer for the Council and who at the time of the request was the acting IT director for the Council.
8. The context of the request was that shortly before there had been a FOIA request relating to "details of the amount of money spent on refreshments" by the Council. The way this request had been handled had resulted in information being released which conflated various aspects of expenditure on refreshments and created a misleading impression. There was disquiet in the Council as a result of this and a new process for handling FOIA requests was adopted which strove to ensure that all relevant departments were involved, that there was sufficiently senior sign off of the disclosure and that leading councillors and the press office were informed of what was going on. Full details of the new procedure had been disclosed to Mr Sutton who was therefore fully aware of how the new process worked and the reasons it was adopted. The Council was keen to ensure that it was able to explain its activities and finances in ways that were accurate, informed and fair to all parties.
9. At the time of the request of the e-mail exchange was very recent and officers were concerned at the prospect of publishing their frank opinions on a live or very recent

issue. Mr Martin felt that officers' wariness could be particularly acute when discussing policy decisions with potential political dimensions. In fact this policy was not political but was connected to FOIA and was therefore important in terms of the transparency of the Council and the democratic engagement with the public. He was satisfied that if officers did not have a safe space in which they could comfortably express themselves without fear of premature public disclosure they would either avoid providing any input at all or would be reluctant to express themselves as frankly or would avoid committing frank views to e-mails thereby make it harder for their input to be circulated and considered. The disclosure of e-mails such as those within the scope of the request which had been withheld were likely to have these consequences.

10. He also gave evidence with respect to e-mails from one individual which in his view provided a significant light into what was the core of her professional life and as such he said she regarded the public disclosure of these e-mails as an intrusion into her privacy and into confidential communications between her and her employer.
11. In his evidence Mr Sutton referred to a number of other FOIA applications, and stories in the local newspaper and argued that it was in the public interest to know that there were differing views among officers as to the correct policy. He noted that the biographical details of the officer most concerned were publicly available since she spoke at national conferences and her details were included in the conference programmes.

Conclusion and remedy

12. The tribunal accepted the evidence of Mr Martin. There had clearly been difficulties and tensions arising from FOIA applications to the Council. The tribunal accepted that some of these applications had been delayed and that on the occasion which gave rise to the change in practice somewhat misleading information had been put out because it had not taken into account all relevant sources of information within the Council and this had created some embarrassment. However the Council had responded to this by putting in place what it hoped would be a more effective procedure for handling requests and this

procedure was publicly available. There was no evidence of improper manipulation of the FOIA process.

13. Part of the deliberation process leading to the new arrangements had involved very frank e-mails which the Council's Monitoring Officer had properly considered to fall within the section 36 exemptions. Mr Sutton, in his evidence and submissions, did not produce any substantive argument to show there is a significant public concern about this issue or that there was any meaningful public benefit to be obtained from further and more detailed disclosure. There was a clear need for a safe space in which issues such as this could be debated in a free and frank fashion and without such debate the effective administration of the Council would suffer. The Tribunal was therefore satisfied that the section 36 exemptions were appropriately invoked by the Council and upheld the Information Commissioner's decision on that basis. The Tribunal was also satisfied that the biographical elements within certain of the e-mails (which were distinct from the biographical details routinely printed in conference programmes) attracted the protection of section 40 and it would not be a fair processing of those e-mails to disclose them to the public.
14. The Tribunal upheld the information Commissioner's notice for the reasons stated.
15. Our decision is unanimous.

[Signed on original]

Judge C Hughes

31 October 2012