



**FIRST – TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Information Rights**

**Appeal Number:** EA/2013/0194  
**Appellant:** Patricia Fender  
**Respondent:** The Information Commissioner  
**Second Respondent** The County of Herefordshire District Council

**Before:**

**Brian Kennedy QC (Tribunal Judge)**  
**Paul Taylor (Tribunal Member)**  
**Henry Fitzhugh (Tribunal Member)**  
**Hearing: Hereford on 11th March 2014.**

**Appearances:**

**The Appellant**  
**Sam Smith, Legal Executive, for the Second Respondent**  
**Subject matter:** Freedom of Information Act 2000.

## **DECISION**

The Tribunal upholds the decision notice dated 19 August 2013 and dismisses the appeal.

## **REASONS**

### **Introduction:**

1. The Appellant contacted the Respondent on the 20<sup>th</sup> November 2012 to complain about the way her request for information had been handled. She said that KPMG (accountants) had read out recommendations, accompanying an audit report, over the telephone to her and the recommendations provided in the draft report did not match those sent to her by the second respondent.. She considered that the recommendations provided by the council may be recommendations produced by they council rather than those provided by KPMG. She asked the Respondent to consider whether the Second Respondent holds a copy of the recommendations (“the requested information”) made by KPMG.
2. The respondent, fairly, did not doubt the genuine belief of the appellant that recommendations other than those provided to her by the second respondent were produced by KPMG. However the respondent accepted, on the balance of probabilities, the categorical denial by the council that there were no “other recommendations” or disputed information. The respondent helpfully suggested that the Council be joined as a second respondent. This was done and an oral hearing took place.
3. The evidence at the hearing both from the second respondent and witnesses from KPMG explained “the lack of clarity surrounding the information provided” and has persuaded this Tribunal that there were no other recommendations or information pertaining to such and the respondent was correct in the decision notice.
4. For the avoidance of doubt, and by way of a full explanation of the evidence at the hearing, the second respondent has provided a detailed explanation of how the confusion arose in their report dated the 18<sup>th</sup> March 2014 (attached hereto). This report includes a sincere and fitting apology to the Appellant
5. The Tribunal wish to acknowledge the manner in which the parties presented their case to us. In particular we wish to compliment the Appellant, who as a personal litigant was most straightforward and frank in her genuine and conscientious presentation of an important debate on the accountability and transparency of public affairs.

Brian Kennedy QC

15 April 2014.

## **ATTACHED REPORT**

**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**EA/2013/0194**

**BETWEEN:-**

**PATRICIA FENDER**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**And**

**THE COUNTY OF HEREFORDSHIRE DISTRICT COUNCIL**

**Second Respondent**

**And**

**KPMG**

**Witness**

**Report by Herefordshire Council To The First Tier Tribunal (Information Rights) On  
Events Surrounding the Provision of Copies of the Audit Report On Herefordshire Carers  
Support  
To Mrs P Fender in 2012**

### **Chronology**

1. 11 March 2012 – The Appellant met with officers from Herefordshire Council to discuss concerns relating to Herefordshire Carers Support.
2. 17 February 2012 - A draft audit report was provided to the Chief Officer (Finance & Commercial Services) This document is MK1/3 / Document C referred to in the Tribunal papers.
3. 20 February 2012 – The same draft report was e-mailed to Herefordshire Council's Programme Manager (Maximising Independence)
4. 28 March 2012 - The Chief Officer (Finance & Commercial Services) provided the Appellant with two copies of an amended draft report, Document A.
5. The Appellant subsequently spoke to KPMG who confirmed that the original draft audit report was 16 pages long and contained 3 pages of recommendations.
6. 9 May 2012 - The Appellant made a Freedom of Information Request for a full copy of the audit report, including amendments.

7. 5 July 2012 - The office of the Chief Officer (Finance & Commercial Services) supplied for release a copy of the finalised audit report, Document B.
8. 5 July 2012 – Document B was supplied to the Appellant.
9. 14 July 2012 - the Appellant requested an internal review of the Freedom of Information Request, stating that KPMG had told her that there were recommendations to the report.
10. Following further internal requests for information the office of the Chief Officer (Finance & Commercial Services) confirmed that recommendations were included in the original draft report (MK1/3 / Document C) but that as such recommendations had not been part of the original brief they had not been included in the final audit report.
11. 12 October 2012 - The original draft report, with recommendations, (Document C) was then supplied for release to the Appellant.
12. November 2012 - The Appellant referred the matter to the Information Commissioner.
13. 19 August 2013 - The Information Commissioner concluded that on the balance of probabilities Herefordshire Council had provided the Appellant with the information falling within the scope of her request.
14. 3 September 2013 - The Appellant subsequently appealed to the First Tier Tribunal (Information Rights)
15. 11 March 2013 - The matter was heard by the Tribunal on 11 March 2013.

## **Background**

16. The Appellant had raised concerns with Herefordshire Council relating to expenditure on the service provided by Herefordshire Carers Support.
17. On 11 January 2012 the Appellant met with Herefordshire Council's Chief Officer (Finance & Commercial Services); Herefordshire Council's Special Projects Lawyer; and a KPMG Officer who at that time was seconded to Herefordshire Council to assist in running the Council's Internal Audit Section. The minutes of this meeting can be found at page 94 of the bundle.
18. Following the concerns raised by the Appellant the Council's Chief Officer (Finance & Commercial Services) requested a review of the matter.
19. A review was undertaken and a draft audit report was given to Herefordshire Council's Chief Officer (Finance and Commercial Services) on 17 February 2012 and e-mailed to Herefordshire Council's Programme Manager (Maximising Independence) on 20 February 2012 [MK1/4]. This draft audit report is shown at MK1/3, and it is confirmed at point 14 of the first witness statement of M Khangura to be virtually identical to Document C in the bundle (page 70), the sole difference between the two documents being the formatting.
20. Document C / MK1/3 is dated February 2012 and is marked as Draft on the front sheet and in the footer of the document.
21. Document C contains in paragraph 23 (page 75) a table headed "Summary of Recommendations" which shows that there are 4x Priority 2 and 1x Priority 3 recommendations.
22. Document C contains 3 Appendices. Appendix 1 (page 85) contains a table headed Action Plan which contains columns headed: Rec No; Observation; Risk; Recommendation; Man-

agement response; Officer(s) responsible and target action date. The latter two columns are blank. Appendix 2 (page 89) contains a table headed Opinion – Definition of Assurance Grading. Appendix 3 (page 90) contains a table headed Recommendation – Definition of Priority.

23. The recommendations are given in column 4 of the table contained in Appendix 1 of Document C, the original draft audit report (pages 85 – 88).
24. The Appellant has stated that on 28 March 2012 Herefordshire Council's Chief Officer (Finance & Commercial Services) met with the Appellant and gave her a draft copy of the audit report, referred to as Document A in the bundle (page 44). The Appellant has confirmed that a further copy of Document A was forwarded to her by post shortly after this meeting.
25. Document A is dated March 2012 and is marked as Draft in the footer of the document.
26. Document A is an amended version of MK1/3 / Document C. Paragraph 23 and the appendices have been removed. Changes have also been made to the text in a number of paragraphs. The removal of paragraph 23 in Document A altered the numbering of the document, for ease of reference the corresponding paragraphs to which changes were made are listed below:

Document C	Document A
19	19
92	91
95	94
96	95
99	97
100	98
105	103
111	109

27. There is no recorded explanation regarding the changes / status of the amended draft audit report Document A. In a letter to the Appellant dated 30 May 2012 Herefordshire Council's Chief Officer (Finance & Commercial Services) states "Can I be clear that the decision to commission the report arose because of the extensive period of time that you have sought an explanation to questions raised with the Council ... At the meeting [on 28 March 2012] I shared a copy so that you could gain a better understanding of the position. I stressed the unusual nature of this course of action and that I did not want the report to be shared with anyone else." This letter is shown at page 98 of the bundle.
28. Until finalised draft documents are fluid and subject to change.
29. On 21 April 2012 the Appellant wrote to KPMG (page 99 of the bundle), who by this time were contracted to provide internal audit services to the Council, querying a discrepancy in the figures shown in paragraph 97 of Document A (paragraph 99 of Document C). This letter is contained in page 100 of the bundle.

30. Exhibit MK1/5 is a KPMG internal e-mail dated 23 April 2012 in which the Audit Manager confirms to the Director that an error has been made. The e-mail confirms the text of paragraph 99 of Document C, gives an explanation for the error and then repeats the text but with the correct figure included. Attached to this e-mail is an electronic copy of document MK1/3 / Document C.
31. By letter dated 26 April 2012 (page 99 of the bundle) a Director of KPMG responded to the Appellant, confirming that the figure given in the draft report was incorrect and giving the correct figure in the context of the text set out in paragraph 99 of Document C (page 83 of the bundle). Some of this text has been deleted from the corresponding paragraph in Document A (paragraph 97 at page 55 of the bundle). The Director concludes the letter by stating "...the above error does not impact on my conclusions, please accept our apologies for any inconvenience this has caused".
32. The Appellant has stated that following receipt of Document A she subsequently spoke to a Director at KPMG about the report. The Appellant confirms that she was told that the audit report was 16 pages and included 3 pages of recommendations, which were read out to her during the telephone conversation.
33. The Appellant confirmed this telephone conversation with the Director in her letter to him dated 31 July 2012 "You told me that recommendations are included in the audit you read them to me...". A copy of this letter was supplied to the Tribunal at the hearing.

#### **Freedom of Information Request**

34. On 9 May 2012 the Appellant made a Freedom of Information Request to Herefordshire Council for "a full copy of the audit to include amendments – dated March 2012". On the same date the Appellant also wrote to the Chief Officer (Finance & Commercial Services), again referring to amendments "... awaiting a copy of the amendments omitted from my 2 copies of the audit" (page 96 of the bundle).
35. Enquires were made with the office of the Chief Officer (Finance & Commercial Services) who subsequently supplied a copy of the finalised, fully amended Audit Report, Document B (page 57 of the bundle) for release to the applicant with the confirmation that it was the report that the Appellant was requesting and that it was the final version as accepted by the Chief Officer (Finance & Commercial Services).
36. Document B is the final version of the audit report on Herefordshire Carers Support. It is dated February 2012 and "FINAL REPORT" printed on the cover sheet. The changes to the text made in Document A have been removed, the text of Document B returns to that set out in Document C, however the references to recommendations made in Document C have been removed (ie paragraph 23 and appendices).
37. Document B was supplied to the Appellant on 5 July 2012.
38. On 14 July 2012 the Appellant requested a review of the Freedom of Information Request (page 107 of the bundle) and confirms that she is seeking a copy of the document containing recommendations: "I am not satisfied with responses from Hereford Council so I require an internal review ... KPMG told me that there are recommendations included in this document. They have not been sent."
39. Further internal requests for information were made to the office of the Chief Officer (Finance & Commercial Services), specifically concerning the existence of the recommendations referred to in the Appellant's letter of 14 July 2012. Confirmation was given in September 2012 that recommendations had been included in the original draft report (Document C). It

was stated that recommendations had not been included in the brief for the review and so they had not been recognised as part of the report and had not been included in the final version, Document B, which had been supplied to the Appellant in answer to her original request.

40. A review response was sent to the Appellant on 12 October 2012. Document C was released to the Appellant with the following explanation "I have made further enquiries with the department concerned. Please find attached the recommendations. Please note that these recommendations were only included in the draft report, and not the final version which was previously provided to you on 5 July".

### **ICO Investigation**

41. In or around November 2012 the Appellant referred the matter to the Information Commissioner for investigation as she did not consider that she had been supplied with the correct document. The Appellant's letter to the Information Commissioners Office of 20 November 2012 refers (pages 32 and 33 of the bundle).
42. The Information Commissioners Office conducted an investigation and on 20 June 2013 wrote to Herefordshire Council asking for clarification "We need you to consider whether the information which was disclosed to Miss Fender on 12 October 2012 was incorrect and whether the council holds a copy of the recommendations which the complainant has requested". This letter is shown at pages 40 and 41 of the bundle.
43. Herefordshire Council responded to the Information Commissioners Office on 3 July 2013 (page 43 of the bundle) "The information disclosed to Mrs Fender was correct. The draft report was sent to the council by KPMG containing recommendations. When the report was agreed in its final format it was without recommendations, because the recommendations were not part of brief given to KPMG for producing the report and as such are not recognised by the council as forming part of the report. This final report was the one originally sent to Mrs Fender in response to her request under the Freedom of Information Act." The Council also confirmed that "No other recommendations are held".
44. The Information Commissioner concluded that on the balance of probabilities no other information is held by Herefordshire Council that falls within the scope of the Appellant's request (pages 1 – 4 of the bundle).
45. At paragraph 11 of the decision notice (page 3) the Information Commissioners Office states that "...The Commissioner does not doubt the genuineness of the complainant's belief that other recommendations were produced by KPMG. There is however no other evidence to refute the council's categorical statement that the recommendations it provided to her were those it received from KPMG with the draft report and no evidence to suggest that those recommendations reported verbally by the third party were actually received by the council in this instance".
46. The matter was subsequently referred to the First Tier Tribunal (Information Rights).

### **Summary**

47. Following a review of matters relating to Hereford Carers Support a draft audit report was produced which contained recommendations. This is Document C as referred to in the bundle and document MK1/3 referred to in the first witness statement of M Khangura of KPMG.
48. As recommendations were not part of the original brief for the report they were deleted from the subsequent draft and final report.

49. Further text amendments were made to the draft audit report and a copy of this amended, working draft (Document A) was supplied to Appellant on 28 March 2012.
50. The Appellant subsequently made a Freedom of Information Request for a “full copy of the audit to include amendments – dated March 2012”.
51. In answer to this request the Appellant was supplied with Document B, the final amended version of the audit report as approved by the Chief Officer (Finance & Commercial Services).
52. The Appellant asked for the matter to be reviewed and confirmed that she was seeking a copy of the audit report containing recommendations, the existence of which had been confirmed to her by KPMG.
53. A copy of the original draft report which contained the recommendations, Document C, was supplied to Appellant with the explanation “...please note that these recommendations were only included in the draft report, and not in the final version which was previously provided to you on 5 July” (page 104).
54. With no clear explanation that Document A was a working draft and that Document C was the original draft document it would appear that the Appellant believed that the information she was seeking had not been supplied.
55. The matter was considered by the Information Commissioners Office who decided that on the balance of probabilities all information relating to the Appellants request held by Herefordshire Council had been supplied to the Appellant.
56. The matter was referred to the First Tier Tribunal (Information Rights).
57. Prior to the Tribunal hearing further searches were undertaken by Herefordshire Council, no other versions of the audit report and / or recommendations were located.
58. The two witness statements of M Khangura of KPMG confirm that prior to the Tribunal hearing searches were undertaken at KPMG and no other versions of the audit report and / or recommendations were located.

## **Conclusion**

59. Herefordshire Council holds three versions of the audit report into Herefordshire Carers Support and copies of these have been supplied to the Appellant.
60. Herefordshire Council has no knowledge of the document which the Appellant states was described to her by a Director of KPMG during a telephone conversation.
61. Documents C, A and B are not numbered and there is no version log to clearly show the changes made to the document before it was finalised.
62. No clear explanation was given to the Appellant that Document C was the original draft containing recommendations while Document A was a further, amended, working draft. A detailed explanation of the documents provided may have assisted the Appellants understanding of the reports and the order in which they evolved.
63. This lack of explanation as to the status of the documents has led to a protracted period of time during which the Appellant has been put to the time and trouble of seeking redress through the office of the Information Commissioner and the First Tier Tribunal (Information



Rights). This may have been avoided had the information provided by Herefordshire Council been adequately explained to the Appellant.

64. Herefordshire Council wishes to offer a sincere apology to the Appellant for the lack of clarity surrounding the information provided, for the time it has taken to provide the information requested and fully explain the nature of the same.

Sam Smith  
18 March 2014