



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0038

Appellant: Barrie Pennington

Respondent: Information Commissioner

Date of Decision: 28th May 2014

Date of Promulgation: 30th May 2014

Before

Melanie Carter

(Judge)

and

Alison Lowton

David Wilkinson

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal arises from a request to Wigan Council for information made under the Freedom of Information Act 2000 ("the Act") for "copies of all correspondence (including electronic) between Mr X and the Director of Education (latterly Children and Young People's Services) for 2005, 2006 and 2007".
2. The Council responded on 23 February 2011 requesting that the Appellant clarify what information he was seeking. An officer wrote *"I need you to clarify further what information you require. The time span is large, and you have not indicated any specific subject within the correspondence. Please clarify what subject matter your request is relating to, in order for me to proceed with the request"*. The Appellant did not reply to this letter, a copy of which was emailed again to him on 19 August 2011. The Appellant complained to the Commissioner.
3. On 21 May 2012 the Commissioner issued a Decision Notice (FS50392234) in respect of the Council's handling of the Appellant's request dated 27 January 2011. The Commissioner found that the Council was not obliged to comply with it because the Appellant had not provided the clarification sought by the Council.
4. The Appellant appealed against the Decision Notice to this Tribunal. The Appellant's appeal was dismissed on 31 December 2012 (*Pennington v Information Commissioner & Wigan Council* EA/2012/0126). However, agreeing with submissions made by the Commissioner in the appeal, the Tribunal found that the Appellant's request dated 27 January 2011 had not in fact needed any clarification and the Council should have responded to it. The Tribunal therefore substituted the Decision Notice requiring the Council to either provide the information requested or issue a valid refusal notice under section 17 of the Act.

5. On 6 February 2013 the Council issued a further response in compliance with the Tribunal's substituted Decision Notice. It confirmed that emails were only retained on the Council's email system for a period of 5 years. Any emails that may have once been held by the Council relating to the years 2005-07 would therefore have been deleted. The Council did locate some emails, which had been stored in a separate folder outside of its central email system by the personal assistant of the Director of Children and Young Persons' Services. These were provided to the Appellant. However, the Council confirmed that this was all of the information that it now held falling within the scope of the Appellant's request. The Council upheld its position on internal review.

6. In the course of correspondence with the Commissioner, the Council confirmed that:
 - (i) Emails were automatically, in accordance with its own Records Management Policy, deleted from the Council's email system after a period of 5 years. No record or log was kept of what emails were deleted.

 - (ii) At the date of the request (27 January 2011) the Council *could* have held more information falling within the scope of the request. However, this could not now be confirmed either way.

 - (iii) The Council had not thought it necessary to take any action to prevent the deletion of potentially relevant emails because, until the date of the Tribunal's substituted Decision Notice, it had considered that it had properly dealt with the request.

 - (iv) The Council made an annual back up of all the data on its systems, including emails that would have been deleted. The purpose of this backup was purely disaster recovery. To restore any emails that may or may not have been held

would require specialist external contractors and software and incur considerable costs.

7. The Commissioner issued a Decision Notice in which he concluded that the Council had breached section 1(1) and section 10(1) FOIA in that it had not provided the information that it did hold within the statutory time limit. However, the Commissioner concluded that, on the balance of probabilities, the Council did not now hold any further information falling within the scope of the Appellant's request.

8. The Appellant sent a notice of appeal to the Tribunal dated 13 February 2014.. The Appellant makes a number of issues in his grounds of appeal:
 - (i) It is wholly improbable given the role of Mr X in education in the area, that the Council would not have kept one or more files on him.

 - (ii) The Council's records management processes are flawed.

 - (iii) The Council should have taken action to prevent the deletion of potentially relevant emails particularly in light of the then ongoing proceedings before the First Tier Tribunal and also the prospect of other employment related litigation.

 - (iv) The Council took too long to comply with the Tribunal's substituted Decision Notice and conduct its internal review.

 - (v) Offences may have been committed under section 77 FOIA.

 - (vi) The Commissioner has not done anything to prevent the Council or other public authorities from breaching FOIA in respect of some future requests.

 - (vii)The Council has failed to comply with local authority guidelines or other statutory requirements in relation to the retention of information.

9. Only the first issue above falls within the jurisdiction of the Tribunal which is limited by virtue of its statutory powers. Thus the only question before this Tribunal is whether the Commissioner was correct to conclude that the Council had disclosed all of the information that it now holds. As noted above, the Council provided the Appellant with some emails with its response dated 6 February 2013. These emails

had not been deleted in accordance with the Council's retention policy as they had been stored outside the Council's email system in a separate folder by the personal assistant of the Director of Children and Young Persons' Services.

10. The Commissioner specifically asked the Council whether any other relevant emails could have been stored separately in this way by the personal assistant or secretary, However, the Council explained that the Director was not actually employed by the Council nor received any administrative support from the Council. Therefore, any potentially relevant emails would not have been stored separately in the way that the PA had retained the emails provided to the Appellant.
11. The Appellant suggests that the explanation given by the Council is "implausible" and that the Commissioner may have been misled. He says that it is "highly unlikely that [the Director] did not communicate in writing with [Mr X] on matters of finance, contracts and resourcing and it is highly likely that such correspondence was retained in a specific folder in hard copy and digital formats".
12. The Tribunal was of the view, that it may well have been the case that Mr X corresponded with the Director during the period in question as suggested by the Appellant. However, the Tribunal was not able to discern any evidence to suggest that such correspondence would have been retained in a specific folder held by the Council. On the contrary, given that Mr X was not employed by nor provided with any administrative support from the Council, the Appellant's proposition actually seemed unlikely.
13. It was notable that the Council had contacted staff who were employed at the time in question to determine whether any information had been stored outside of the Council's email systems. Whilst this search resulted in the discovery of the emails that were provided to the Appellant, no other relevant information was located.

14. It appears there is no evidence to refute the position taken by the Council that it did not hold any further information falling within the scope of the Appellant's request. The Appellant relies upon the improbability of the situation rather than actual evidence that any information does exist. The Tribunal took the view that whilst it might be categorised as undesirable and arguably not best practice that there be so few records held and that emails/documents may have been automatically deleted, this was beyond its jurisdiction (which as explained extends only so far as to the assessing of what information, on the balance of probabilities, is actually held).
15. The Commissioner was not required, in every case, to carry out a forensic investigation, perhaps on site, into what information is stored, kept and the manner in which it is organised. He has to rely upon the evidence of the public authority and indeed it is reasonable for him to do so, unless there is some reason for the authority's assertions not to be believed. In this case, despite the evidence of the Appellant as to the improbability of the lack of records, the Tribunal did not feel this met the threshold to trigger a further investigation on the Commission's part. As already noted, Mr X was not actually employed by the Council and as such it was plausible that the normal record keeping in an employment scenario that one might have expected to find, would not necessarily arise. Whilst the Tribunal had sympathy for the Appellant in relation to the outcome of his request, given the sequence of events and particularly since the Council was saying further information might have existed prior to the routine deletion, given that he had not responded at the appropriate time to the request for clarification, the Tribunal could not conclude that the Council had set out to avoid its obligations under the Act.
16. The Tribunal held that, on the balance of probabilities, no further information was held. As such, this appeal is dismissed by the unanimous decision of the Tribunal.

Signed

Melanie Carter

Judge