



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0128

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS 5052 6973
Dated: 29 April 2014

Appellant: KENNETH KOLB

First Respondent: INFORMATION COMMISSIONER

Second Respondent: BUCKINGHAMSHIRE COUNTY COUNCIL

Heard at: OXFORD SSCS

Date of hearing: 3 SEPTEMBER 2014

Date of decision: 28 SEPTEMBER 2014

Date of promulgation: 30 SEPTEMBER 2014

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and SUZANNE COSGRAVE
Tribunal Members

Attendances:

For the Appellant: Mr Kenneth Kolb in person.
For the first Respondent: no attendance. Written submissions by Ms Elizabeth Kelsey, Counsel instructed by the Information Commissioner.
For the second Respondent: Ms Heather Emerson, Counsel instructed by Buckinghamshire County Council.

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Case No. EA/2014/0128

Subject matter: FOIA 2000

Whether information held s.1

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 April 2014 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The background to this appeal – about whether information is held by Buckinghamshire County Council (BCC) – arises from a planning application for a proposed waste incinerator and correspondence which began in October 2012 between Mr Kenneth Kolb (the Appellant) and BCC.
2. Essentially the Appellant believes that BCC held and continues to hold information that it has not disclosed to him.

The request for information

3. On 19 September 2013 the Appellant wrote to BCC complaining about the way in which his complaint of 2012 had been handled. He made the following information request:

On 18 October 2012 at 16.13 [KB] advised me that the complaint had been passed to [AD]. May I please see copies of all internal emails and memos following the sending of that complaint showing what progress was made in considering the complaint. Where there are gaps in the memos or emails can a summary be provided of the actual progress made. Can this include the dates on which the legal advice was sought and received as described by [Mr B] in subsequent emails and also any memos or minutes, which lead to the conclusion that this advice was needed or how the advice

received was to be acted upon or which give advice on the reasons for the delay.

Any material showing advice that [AD] or [Mr B] took from colleagues on the progress of the complaint to be included please. Can there also be a statement showing what action [AD] or [Mr B] took at any stage to accelerate the progress when it became evident that the 28 day timescale was unlikely to be met.

On 16 March 2012 [Mr G] accepted by complaint. Please provide copies of all emails memos and notes of meetings or other communications which took place between then and the first action of [Mr J] on 1 May. Please fill any gaps with summaries of known actions or reasons which led to action being commenced on 1 May. Please include any evidence which suggests or gives reasons why no action was taken in this period.

4. BCC responded to the request on 18 October 2013 identifying six elements. These were:
 - (1) Internal records relating to the processing of his Stage 3 complaint (by AD), including information in relation to information on the progress made in considering the complaint (after 18 October 2012).
 - (2) Where there are gaps in the memos or emails, can a summary be provided of the actual progress made.
 - (3) Dates on which (external) legal advice was sought and received.
 - (4) A statement showing what action (AD) and (Mr B) took at any stage to accelerate the process.
 - (5) Internal records relating to the process of the complaint (by RJ), including in relation to information on the progress made in considering the complaint (between 16 March 2012 and 1 May 2012).
 - (6) Please fill any gaps with summaries of known actions or reasons which led to action being commenced on 1 May 2012.
5. BCC provided information to the Appellant in respect of points (1), (3) and (5). In respect of points (2), (4) and (6) it stated that it did not hold the requested information and noted that FOIA “does not require the Council to create information”.

6. The Appellant sought a review of that response on 25 October 2013 and BCC replied on 20 November 2013 seeking to clarify whether the Appellant sought to make a further information request.
7. On 25 November 2013 the Appellant contacted the Information Commissioner for advice and subsequently emailed BCC stating that, in his view, there were no new issues which would require an additional request to be made and asking for the review to be progressed.
8. On 21 January 2014, after the Information Commissioner became involved and intervened, BCC wrote to the Appellant setting out the product of its internal review. That internal review had concluded that:
 - (1) Having reviewed the Appellant's original request it believed that on the whole reasonable efforts had been made to respond fully to the request.
 - (2) There was some doubt as to whether the request had been responded to as far as it concerned "Stage 2" of BCC's handling of the Appellant's 2012 complaint. However, as the Appellant had indicated "date parameters" in the information request it had been a reasonable assumption for the response to be so limited.
 - (3) It was unable to look into allegations made by the Appellant that certain information had been withheld by BCC because the Appellant had not provided specific information about those allegations. BCC advised the Appellant to request the information he alleged was missing, providing as much information as possible, and told him that such a request would be considered under the requirements of FOIA.

The complaint to the Information Commissioner

9. The Appellant's complaint to the Information Commissioner was made on 29 January 2014.
10. It is of note that, ahead of the oral appeal hearing on 2 September 2014, in a communication to the Tribunal dated 20 August 2014 the Appellant states at Paragraph 4 that he had "at no time made a complaint to the ICO. I only asked for their advice." This matter is dealt with later in the paragraphs 22 and 23 of the Conclusions and Remedy portion of this decision.

11. He explained the background that had led him to make the information request and set out the reasons for which he found BCC's review to be unsatisfactory. Those reasons can be summarised as follows:

- (1) BCC had refused to consider intelligence the Appellant had gleaned as a result of discussions with its officers (that further information was held by BCC). He stated that in conducting the internal review BCC should, as a minimum, have asked officers about additional material they claimed existed.
- (2) Officers had told him certain requested information – which BCC stated it did not hold – was, in fact, held.
- (3) BCC had failed to ask officers what material had been deleted at the time of his request.
- (4) Certain emails he had been provided with had been edited and, because of this, further versions of those emails with which he had not been provided must therefore exist.
- (5) The reviewing officer had failed to ask him for further information, if such had been necessary.
- (6) BCC's advice that he should clarify his request or submit a further request was in fact a "veiled threat" that if he made further requests they would be rejected as being vexatious.
- (7) He considered further information must be held by BCC in relation to particular aspects of the handling of his complaint. He had set out his reasons why he considered certain information must be held by BCC. He believed that detailing such instances in full to the council was unlikely to be successful in obtaining in full the information sought in his request.

12. On 17 March 2014 the Information Commissioner wrote to BCC requesting among other things detailed information about any searches BCC had conducted and about any deletion of relevant information. BCC responded on 11 April 2014 with a detailed explanation of the searches it had conducted and its reasons for concluding that further information beyond that provided to the Appellant was not held.

13. In the decision notice the Information Commissioner noted that he had put a number of questions to BCC. BCC had explained that the Appellant had been in contact with them in four overlapping ways throughout the time period in question.

14. Oral and written communication had been held with several officers to establish what information was held. BCC collated the material located after “all reasonable searches” and a further check was made with two officers and no additional information was found.
15. BCC stated it had a very comprehensive retention schedule that would cover complaints records but any information that was destroyed would not have been considered a “declared” record but rather it would have been a Standard Operating Procedure record not intended for retention.
16. BCC provided the Information Commissioner with an extract from its Records Management Policy.
17. On that basis the Information Commissioner was satisfied that BCC had undertaken sufficient steps to determine whether it held the requested information and concluded that, on the balance of probabilities, the Appellant had been provided with all the information held by BCC within the scope of his request.

The appeal to the Tribunal

18. Mr Kolb’s Grounds of Appeal run to 72 paragraphs and 18 pages.
19. We heard Mr Kolb’s oral submissions for over an hour at the appeal hearing having drawn to his attention that we had already read the Grounds of Appeal and the additional written information that he provided on the day of the hearing itself.
20. The following is a précis of the main points that he asked the Tribunal to consider both from the Grounds of Appeal and at the oral hearing in Oxford on 3 September 2014.
 - (1) The decision had been reached without any investigation into the facts by the Information Commissioner. The Appellant had not been given an opportunity to present evidence or to test the evidence offered by BCC. The Appellant’s letter dated 29 January 2014

[Document 4 bundle page 64] to the Information Commissioner was not mentioned in the Decision Notice. That explained why the Appellant considered an internal review conducted by BCC was inadequate. He was, in effect, asking advice from the Information Commissioner on how to proceed with his complaint.

- (2) The explanation given by the Information Commissioner in the Decision Notice was illogical and inconsistent with the documentary evidence and relied in part on an extract from BCC's Record Management Policy.
- (3) BCC had not provided an explanation about its processes for holding and sending information and, without that explanation, it was impossible to make a judgement on the balance of probabilities.
- (4) The context in which the request had been made was not properly reflected when assessing whether, on the balance of probabilities, the information was held.
- (5) No account had been taken in the Decision Notice of the fact that BCC had changed their reasons for saying that further information was not held.
- (6) There was evidence – including evidence of deletions – that on the balance of probabilities further information was in fact held by BCC at the time of the information request. The Appellant referred to various matters which he contended established that – on the balance of probabilities – BCC held other information at the time of the request.

The questions for the Tribunal

21. The Tribunal has to determine – on the balance of probabilities – whether the information requested by the Appellant that forms the

subject of this appeal was in fact held at the time of the information request.

Conclusion and remedy

22. It is necessary to consider whether there is a valid appeal before the Tribunal because the Appellant stated in his communication of 20 August 2014 that he was not making a complaint to the ICO but only seeking advice.
23. The fact is that he submitted Grounds of Appeal in respect of the Information Commissioner's decision notice. On that basis there is the formal, legal structure for the Tribunal to consider this appeal within the statutory structure of FOIA.
24. There is a document dated 11 April 2014 which goes to the heart of the review conducted by BCC at pages 72/74 of the Appeal bundle from Mr Neil Doling, BCC's Freedom of Information Officer, responding to the Information Commissioner's staff's request for its comments.
25. Mr Doling believed that the Appellant's request was intended to establish the reasons for the delay in the handling of his complaint at Stage 1 and Stage 3 and – as far as that information was held – the information had been provided. Mr Doling observed that the Appellant may have unintentionally but unambiguously limited the scope of his request, quite literally, by the language he used.
26. In terms of the searches that he completed on behalf of BCC, in terms of the Stage 3 material, he spoke to and emailed to one named individual (who had in turn spoken to another named individual) and he had been provided with the material that fell within the remit of this portion of the Appellant's request. The two individuals mentioned were fully aware of the requirements of FOIA/EIR and he had no reason to believe that other information was held that was not provided.

27. In relation to Stage 1 material he had emailed and subsequently met one named individual who provided him with information, most of which post-dated 1 May 2012 ie outside the timeframe specified in the request. He then contacted three further named officers and met one of them who provided further information about searches done in respect of her account.
28. He stated: "Through this process, I also reviewed material available in *Respond* (which I have access to) and material relating to Stage 2 of the complaints' process (which had not been requested but which I nevertheless checked to make sure no material relevant to the request was included therein). At this stage I had spent a substantial amount of time in trying to locate information relevant to the request and I felt I had exhausted all reasonable search avenues, had spoken to/corresponded with the key officers and had collated the material relevant to the request held. Notwithstanding this, I did give consideration as to whether there was other information held that would fall within the remit of the request."
29. Mr Doling then states: "Just to clarify, the reason I haven't responded to his complaint is that we had instructed counsel to do so, but for reasons I'm still not sure about this assistance was not forthcoming. This compounded an already existing delay. Mr Kolb then made application for Judicial Review and I understood from that point that I was not to correspond with him any further."
30. It is clear that BCC had explained to the Information Commissioner (only for the purposes of his investigation) why it considered so little information was held and that was because there had been little progress in the timeframes Mr Kolb had specified and most of what did exist had been supplied to the Appellant. BCC had carried out searches of paper records, electronic records (including searches by

relevant officers) and a database search as well as a computerised check of its current and archived data through its IT section.

31. The Tribunal notes that the searches undertaken by BCC's IT department included searches of email accounts even though the accounts themselves had been deleted.
32. The Appellant's reading of the various email chains and telephone calls convinces him that various people at and on behalf of BCC held information within scope of his request that was not being revealed to him.
33. The Tribunal is not satisfied to any standard that Mr Kolb's belief is warranted and finds that, on the balance of probabilities, all the information within the scope of his request has been revealed to him. It is not for the Tribunal to consider what information a public authority should hold simply what it did hold at the date of the request.
34. The Tribunal finds that the Appellant's Stage 1 complaint was determined on 6 July 2012 and was not upheld. It was then considered, at the Appellant's request, under Stage 2 of the Complaints Procedure and again was not upheld. The Appellant took it to Stage 3 – as was his right – and a decision was made by BCC's Head of Legal Services that external Counsel should be instructed to respond to the matter.
35. The Head of Legal Services delivered the Appellant's written complaint to Counsel in person on a date that does not appear to have been recorded.
36. Another person – not the Appellant in this instance although he did make an application for judicial review on 8 November 2012 - had made an application for Judicial Review and it would seem that the priorities of dealing with the judicial review issues were given precedence by that Counsel over responding to the Appellant's complaint.

37. The Appellant's application for judicial review was heard 14 March 2013 and, on 29 April 2013, Lindblom J held the claim was not properly arguable on any of the grounds advanced by the Appellant in his written and oral submissions and had in any event been brought too late. On that basis the Appellant's request for permission to apply for judicial review was refused.
38. Earlier, on 7 January 2013 the Appellant telephoned BCC and had been told BCC would no longer reply to his Stage 3 complaint because he had bought parallel legal proceedings about substantially the same issues.
39. It is clear to the Tribunal that the Information Commissioner investigated the matter fully and arrived at conclusions which were both reasonable and sustainable on the balance of probabilities.
40. Nothing that the Appellant has put before this Tribunal persuades us otherwise.
41. There was a narrow issue to be determined – whether BCC had complied with its obligation to the Appellant in the light of Section 1 FOIA – and the Tribunal finds that both BCC (in respect of providing the Appellant with all the information it had within the scope of his request) and the Commissioner arrived at the correct conclusions in respect of this.
42. For all these reasons the Appellant's appeal is dismissed.
43. Our decision is unanimous.
44. There is no order as to costs.

Robin Callender Smith

Information Rights Judge

28 September 2014