



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

**EA/2014/0168**

**ON APPEAL FROM  
The Information Commissioner's Decision  
No FS50515944 dated 19 June 2014**

**Appellant: Pip Martyn**

**Respondent: The Information Commissioner**

**Second Respondent: St Alban's City and District Council**

**Date and place of hearing: On the papers**

**Date of decision: 7 May 2015**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Andrew Whetnall and Narendra Makanji  
Panel Members**

**Subject matter**

FOIA section 1(1) - whether information was held

**SUBSTITUTED DECISION NOTICE**

**Dated:** 7 May 2015  
**Public Authority:** St Alban's City and District Council  
**Address of Public Authority:** St Peter's Street, St Albans, AL1 3JE  
**Name of complainant:** Ms Pip Martyn

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 19 June 2014.

The Public Authority failed to comply with sections 1(1)(a) and 1(1)(b) of the Freedom of Information Act 2000 in respect of the information referred to at paragraph 41 of our Decision.

However, since this information has now been provided to the Complainant, the Public Authority is not required to take any further steps.

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

**Signed**

**Anisa Dhanji  
Judge**

## REASONS FOR DECISION

### Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 19 June 2014.
2. It arises from a request for information made under the Freedom of Information Act 2000 (“FOIA”) by the Appellant, Ms Pip Martyn, to the Second Respondent, St Albans City & District Council (the “Council”).
3. The Appellant lives on Marquis Lane in Harpenden, adjacent to a play area for children and an open space (the “Open Space”), as well as Batford Springs Local Nature Reserve (“Batford Springs”). In 2009/2010, concerns were expressed about damage to the grass verge boundary of the Open Space resulting from parking by visitors to these amenities, as well as more general concerns about congestion and the lack of parking for the residents of Marquis Lane. In response, the Council carried out a consultation exercise with residents of properties bordering the Open Space to consider options for resolving these issues.
4. In May 2012, ownership of the Open Space and Batford Springs transferred from the Council to Harpenden Town Council.

### The Request

5. The Appellant’s request, made on 25 May 2013, was for e mail correspondence between Councillor Dean Russell and other parties relating to Marquis Lane. Specifically, the request was made on the following terms:

*“...If possible, I would like to request to see any email correspondence between Councillor Dean Russell and the following – Harpenden Town Clerk (John Bagshaw), Councillor Pawle, Cillr Leadbeater and the general public with the words Marquis Lane in since July 2011...”*

6. At the time of the request, Dean Russell was a St Albans District Councillor for Harpenden East, Albert Pawle was a St Albans District Councillor as well as a Harpenden Town Councillor, and Simon Leadbeater was a Harpenden Town Councillor.
7. On 24 June 2012, the Council informed the Appellant that although information within the scope of the request was held within the e mail accounts of individual Councillors, it considered that this related not to the Councillors’ executive roles as part of the Council Cabinet, but to their “private political or representative” purposes, and therefore, that the information was not “held” by the Council for the purposes of FOIA.

8. The Appellant sought an internal review. On 16 August 2013, the Council notified the Appellant that having conducted an internal review, it was upholding its earlier decision.
9. On 12 February 2014, the Council disclosed a number of e mails which it had obtained from Harpenden Town Council which fell within the scope of the Appellant's request and which it considered were now in the public domain. However, the Council maintained that it did not hold these e mails at the time of the Appellant's request, nor indeed at the time of the internal review, and therefore that it had no obligation to provide them.

### **The Commissioner's Decision**

10. The Appellant complained to the Commissioner. For the reasons set out in its Decision Notice, the Commissioner found that the information was not held by the Council.
11. In brief, the Commissioner reviewed the e mails held within the e mail accounts of individual Councillors, and agreed with the Council that these did not relate to Council business. They related either to the Councillor's role as Ward Councillor, or personal matters, or to business external to Council activities.
12. The Commissioner accepted that the e mails which the Council had obtained from Harpenden Town Council and had passed on to the Appellant, were not held by the Council as at the date of the request.

### **The Appeal to the Tribunal**

13. The Appellant has appealed to the Tribunal against the Decision Notice. The Tribunal joined the Council as a Second Respondent, pursuant to Rule 9 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
14. All parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.
15. We have considered all the documents received even if not specifically referred to in this determination, including in particular, the documents in the agreed bundle, and such written submissions as have been received from the parties. None of the parties relies on any witness evidence.
16. We have also considered the parties' replies to certain specific questions we asked during the course of our deliberations.
17. The Appellant made a separate request to Harpenden Town Council. That was the subject of a separate appeal (EA/2014/0139), which has already been determined.

## **The Tribunal's Jurisdiction**

18. The scope of the Tribunal's jurisdiction in dealing with an appeal against the Commissioner's Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's 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.
19. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

## **Issues**

20. The only issue to be determined in this appeal is whether, as at the date of the request, the Council held any information within the scope of the request, for the purposes of FOIA.

## **Findings**

21. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(b), he is entitled to have that information communicated to him. The duty under section 1 does not arise if any of the exemptions set out in FOIA apply. No such exemptions are being relied on in the present case. The Council simply says that as at the date of the request, it did not hold the information.
22. The right of access established by FOIA applies only to information held by the public authority. The only question in this appeal is whether, as at the date of the request, the Council held the information requested.
23. There are two parts to this question in the context of the present appeal. The first is whether the Council held certain information in the sense of having it, physically. The second question is whether, even if the Council had certain information physically, it "held" it for the purposes of FOIA.
24. FOIA does not define what is meant by "held". It does not use terms such as "power, possession or control" that are found in other legal contexts, nor does it adopt the language in the Environmental Information Regulations 2004 which provide that "held" means information that "is in the authority's possession and has been produced or received by the authority." What it does do, however, is to exclude from the disclosure requirements of FOIA, information that is held by a public authority on behalf of another person. By virtue of section 3(2), such information is not "held" by the public authority for the purposes of FOIA.

25. Section 3(2) provides as follows:

*(2) For the purposes of this Act, information is held by a public authority if-*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority*

26. The Council does not dispute that as at the date of the request, there were e mails on its server relevant to the request, in particular, e mails sent or received by Councillor Dean Russell. However, the Council says that the information was not held by the Council, on its own behalf, because these e mails related to issues concerning the Councillor's ward function rather than Council matters. Accordingly, by virtue of section 3(2)(1), the Council says that it did not hold this information for the purposes of FOIA, but held it on behalf of another person.

27. By way of further explanation, the Council says that Councillor Russell's Council e mail address was set up to hold, only temporarily, e mails before forwarding e mails to his own private e mail account(s). This was because he could not access e mails sent to his Council e mail address unless he was actually in the Council building. The e mails were sent to his private e mail account(s) so that he could respond from other locations.

28. The Commissioner agrees with the Council as regards the distinction between a Councillor's ward function and executive function. He draws a parallel with information held by a public authority about an MP's parliamentary work and his constituency work. He has also drawn attention to one of his previous decision notices (FS50422800) in which he said, in relation to the role of Councillors:

*"...[Councillors] will act as a representative of residents of their ward e.g. holding surgeries, corresponding about particular constituents' issues and looking into complaints. However, this is not an executive function of the councillor as an individual representative. Information held by councillors in this role is not therefore covered by FOIA as it is not information held by (or on behalf of) the council..."*

29. We note that the distinction between a Councillor's ward and executive functions, and its implications in relation to FOIA requests, is also explained in the Commissioner's guidance on "Information held by a public authority for the purposes of the Freedom of Information Act". This states as follows, at paragraphs 28 *et seq*, under the heading "Local Councillors":

*28. Having discussed the two legal principles set out in FOIA at section 3(2)(a) and (b), it may be useful to consider the position of councillors in local government because information held in relation to them can involve both these principles. This derives from the fact that elected members of a council are likely to have a number of different roles. Some will relate to their function as elected members (for example, corresponding with residents in their ward, discussing council business*

*with fellow members in the context of voting strategy or campaigning on behalf of a political party) and some will relate to the functions of the local authority (for example, being a cabinet member and having executive responsibility for a service area, carrying out administrative functions or representing the authority, such as on a regional forum).*

*29. Information produced or received by councillors may be held on their own computers or in their own homes or offices, or it may be held on local authority premises or computer systems. However, the purpose of the information and the capacity in which it is being held is more helpful when deciding whether information is covered by FOIA.*

*30. Local authorities are public authorities for the purposes of FOIA, but individual elected members are not. Therefore, information held by councillors for their own purposes will not be covered by FOIA, but information they hold on behalf of, or as part of, the local authority will be covered (section 3(2)(b)).*

*31. Information created or received by a councillor but held on a local authority's premises or computer system will be covered if it is held by the authority on its own behalf (section 3(2)(a)). It will not be covered by FOIA if it was produced by the councillor for private or political purposes and the authority is just providing storage, office space or computing facilities (ie the authority is not holding the information to any extent for its own purposes).*

30. However, although we accept this distinction between a Councillor's ward and executive functions, we consider that in practice, the distinction will often be less clear-cut in the context of local government than say, Westminster, where there is likely to be a clearer separation between parliamentary and constituency business.
31. The appellant does not dispute the distinction, but disputes whether the information in issue in fact related to non-executive functions. She is not persuaded by the Council's explanation that e mails relating to ward functions were sent to Councillor Russell's Council e mail address only because he could not access his e mails externally, particularly since, as she points out, that he works in the information technology field. Be that as it may, it is the nature and content of the e mails and whether they relate to the Councillor's executive function on the Council, or to his representative functions, not their location, that determines whether they are "held" for the purposes of FOIA.
32. The Commissioner has said, at paragraph 18 of his Decision Notice, that having examined the e mails in question, he considers that none of them are about Council business. In response to our request to have sight of those e mails, the Commissioner has clarified (and the Council has confirmed), that the e mails were the same ones obtained from Harpenden Town Council (referred to at paragraph 9 above).
33. As already noted, those e mails have now been provided to the Appellant, and copies have been included in the agreed bundle. Nevertheless, if they were

“held” by the Council, they should have been disclosed from the outset, so the question as to whether they were held is one that still needs to be addressed.

34. The e mails in question primarily cover the period from 22 July 2011 to 24 May 2013. They are from Councillor Dean Russell and others, or to him and others. As to whether they relate to executive or ward matters, in our view, it would be disproportionate to attempt to apply the distinction to every e mail individually, and indeed, since the Appellant now has the information, there would be little to be gained from such an exercise. We have also not been invited to distinguish one e mail from another, and none of the parties have themselves referred to any specific e mails, or parts thereof, in support of their positions. In our view, the only sensible approach is to view these e mails as a whole. Viewed in that way, we consider that the e mails are follow ups from a meeting on 19 July (which we will refer to further below), representing efforts by Councillors to find a more satisfactory solution to concerns raised by constituents. On that basis, we are satisfied, on a balance of probabilities, that they relate to ward rather than executive functions.
35. In support of her contention that Councillor Dean Russell was acting in his executive capacity, the Appellant refers to a meeting she attended on 19 July 2011 (i.e., just before the period covered by the e mails in question), which she says was convened as part of a planned District Council led consultation process regarding parking. She says that this meeting was chaired by Mr Deakin, the Council's Environmental Compliance Officer, that there were at least three Councillors present, and that it is unreasonable to dismiss the meeting as having no Council status. She further says that Councillor Russell was a District Councillor and that his engagement since that meeting would have required further consideration of District matters in relation to parking and parking enforcement. She says she fails to understand how this was not Council business.
36. The Council says that the meeting on 19 July 2011 was not in fact a District Council meeting, and that the Councillors were not attending as representatives of any District Council function. The Council refers to the letter at page 5 of the bundle which it says indicates that the meeting was a public consultation meeting arranged by Steve Deakin in his capacity as a Parking Services Manager for the Council. It further says that Councillor Russell attended as a Ward Councillor, and the e mails that followed were therefore discussions in his Ward Councillor capacity.
37. We consider that the status of that meeting is not entirely clear. As an exercise in seeking a closer understanding of the residents' views, we consider that it was ward business. If, as it appears, it was convened and chaired by an officer of the Council, then it looks less like a matter simply between Councillors and their electorate. Nevertheless, we do not consider that this is determinative of the status of the e mails that followed. As we have already indicated, we are satisfied, from their content, that those are fairly characterised as relating to ward business.
38. The Appellant has also said that the e mails in question are not the whole picture, and that at the time of her request on 23 August 2013, the Council

also held other information coming within the scope of the request. She says, in this regard, that the Council disclosed some relevant e mails to another individual in response to his information request. As we understand it, she is referring here to information provided pursuant to a request submitted by her partner's father in July 2013. That request was made on the following terms:

*"...If possible, I would like to request to see any email correspondence and their attachments between Mr Steve Deakin and the following – Harpenden Town Clerk (Mr John Bagshaw), Cllr Julian Daly, Cllr Dean Russell and Cllr Mike Wakely in relation to Marquis Lane since Jan 2009..."*

39. On 23 August 2013, the Council confirmed, in response to the above request, that

*"...an email search was carried out on Steve Deakin's archive using the above criteria. Approximately 500 messages and attachments were found, the results of which are attached to this letter..."*

40. The Appellant contends that some of these e mails also fall within the scope of her request, for example, an e mail sent from Councillor Dean Russell to John Bagshaw, which was copied to Steve Deakin. She argues that if the Council was able to disclose this information in August 2013, it must have held the information at the time of her request in May 2013.
41. The Commissioner put this point to the Council. In reply the Council confirmed that it had erred in stating that it did not hold any relevant information at the time of the Appellant's request. It accepts that these e mails were held in Mr Deakin's email account at some point and should have been disclosed. As to why the Council had not disclosed them in response to the Appellant's request, it says that Mr Deakin had checked his e mails and informed the Council at the date of the request, that he did not hold e mails within the scope of the Appellant's request. The Council further says that Mr Deakin left the Council some months ago, and that his e mail account has now been deleted.
42. The Appellant complains that the Council did not conduct a thorough initial search or chose not to release the information in response to her request, and then deleted an archive of information which was relevant not only to an on-going FOIA request, but also relevant to an on-going investigation by the Local Government Ombudsman. The Council strongly refutes any suggestion that it hid or deliberately destroyed information coming within the scope of the Appellant's request.
43. We make no findings of impropriety on the part of the Council for not disclosing these e mails sooner. We are sympathetic to the Appellant's frustration, and we recognise that those requesting information are often at a disadvantage when challenging a public authority which says it does not hold certain information, because they are not able to inspect for themselves the public authority's files. It may be that the Council could and should have been more thorough in its inquiries. However, there is no evidence to support a

finding that it deliberately withheld this information, nor indeed that it is withholding any other information.

44. We find, however, that the Council failed to comply with section 1(1)(a) and 1(1)(b) in failing to confirm that it held the e mails referred to at paragraph 41 above, and in failing to provide them to the Appellant. Since these e mails have now been provided to the Appellant, no further steps are required to be taken.

*Other points*

45. There are a few further points we should address. In relation to the e mails that the Council obtained from Harpenden Town Council, the Appellant says that the Council should have obtained these at an earlier stage. That argument is misconceived. A public authority has no obligation to obtain information that it does not hold in order to respond to a request. If the information is not held by it, there is no duty to obtain the information in order to disclose it.
46. Second, during the course of replying to our further inquiries, the Council has said that it discovered that the e mails it sent to the Appellant on 12 February as having been received from Harpenden Town Council, do not correspond exactly to the e mails in the agreed bundle which were intended to be copies of those same e mails. On the basis that the appellant has been provided with all the e mails in question, whether on 12 February or by way of inclusion in the agreed bundle, we do not consider that anything further is required.
47. Third, the Appellant has pointed to what she says are shortcomings on the part of the Council or individual Councillors. For example, she asserts that the Council failed to consult residents appropriately, she criticises the Council's current schemes in neighbouring areas, and she says that Councillor Dean Russell failed to use his e mails appropriately or communicate effectively. However, these are not issues that we can deal with; we have no jurisdiction under section 58 of FOIA to consider matters which are unrelated to whether the Decision Notice is in accordance with the law.

**Decision**

48. Except as set out at paragraph 41 above, The Appellant's appeal is dismissed.
49. Our decision is unanimous.

**Signed**

**Date: 7 May 2015**

**Anisa Dhanji  
Judge**