



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

**EA/2015/0162**

**ON APPEAL FROM  
The Information Commissioner's Decision  
No FS50552416 dated 1 July 2015**

**Appellant: Leslie Howell Lord**  
**Respondent: The Information Commissioner**  
**Date and place of hearing: On the papers**  
**Date of decision: 4 February 2016**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Narendra Makanji and David Wilkinson  
Panel Members**

**Subject matter**

FOIA section 41 - whether exemption is engaged.

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

**Case No EA/2015/0162**

**SUBSTITUTED DECISION NOTICE**

**Dated:** 4 February 2016

**Public Authority:** Isle of Anglesey County Council

**Address of Public Authority:** Council Offices, Llangefni, Anglesey,  
LL77 7TW

**Name of complainant:** Mr Leslie Howell Lord

The Tribunal finds that the Disputed Information (as identified at paragraph 15 of the Tribunal's decision), is not exempt under section 41 of the Freedom of Information Act 2000. Within 20 working days of the Tribunal's decision being promulgated, the Public Authority must disclose the Disputed Information to the Complainant.

Except as set out above, the Commissioner's Decision Notice dated 1 July 2014 shall remain in effect.

**The Confidential Annex will not be provided to the Complainant, nor published on the Tribunal's website or elsewhere, without leave of the Tribunal.**

**Signed**

**Anisa Dhanji  
Judge**

**IN THE FIRST-TIER TRIBUNAL  
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**REASONS FOR DECISION**

**Introduction**

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 1 July 2015.
2. It arises from a request for information made under the Freedom of Information Act 2000 (“FOIA”), by Mr Leslie Howell Lord (the “Appellant”), to the Isle of Anglesey County Council (the “Council”).
3. The Appellant is or at the time of the request was a member of the Standards Committee of the Council. On 27 April 2014, he sent an email to certain Councillors who were members of the Council's Planning Committee, asking whether they supported a proposed turbine installation on Anglesey. On 30 April 2014, a letter written by the Appellant was published in The Mail, a local Anglesey newspaper. The letter concerned proposals for the storage of nuclear waste on Anglesey.
4. On 8 May 2014, the Chair of the Standards Committee (the “Chair”), wrote to the Appellant expressing the view that the above communications were not appropriate, given that the Appellant was a member of the Standards Committee.
5. By a letter dated 8 May 2014 (which he later clarified should have been dated 9 May), the Appellant took issue with the Chair's letter of 8 May 2014. On 10 May 2014, the Appellant sent a further letter, requesting certain information in relation to the Chair's letter. On 19 May 2014, the Chair replied to the Appellant saying that he considered the matter to be closed.
6. On 6 June 2014, the Appellant wrote to the Council, stating that he was now seeking a formal reply, under FOIA, to the information he had requested.

**The Request**

7. The Appellant's requests, made in his letter of 10 May 2014 related to the Chair's letter of 8 May 2014, and was made on the following terms:
  - I. With reference to the Wind Turbine item would you please advise me on the sequence of events which occurred after the two e-mails were received by my elected Councillors?
  - II. The persons who took part in the drafting this item in your letter?

- III. Confirm that you were not involved in the drafting of this item in your letter?
- IV. With reference to The Mail item would you please advise me on the sequence of events which occurred after my letter was published in the Mail and your letter being drafted?
- V. Who took part in the drafting of this item in your letter?
- VI. How the item in The Mail was brought to the attention of the person drafting your letter?
- VII. Confirm that you were not involved in the drafting of this item of your letter?"

*The requests have been numbered for convenience to correspond with the numbering used by the Council.*

- 8. The Council responded on 18 June 2014, advising the Appellant that disclosures made under FOIA are deemed to be made to the world at large, and seeking his confirmation that he wished to pursue this course of action, given that the matters to which his requests related were largely personal to him. The Appellant confirmed that he did indeed wish to pursue his requests under FOIA.
- 9. On 17 July 2014, the Council replied to the Appellant's requests. It provided some information, but refused to disclose other information on the basis of the exemptions in sections 36(2)(c), 41 and 42 of FOIA.
- 10. More specifically, in relation to the individual requests:
  - I. The Council provided some information, including that the Council's Head of Function/Monitoring Officer had provided advice to the Councillors. The Council stated, however, that the advice was subject to legal professional privilege, and relied on section 42 to withhold its disclosure.
  - II. The Council confirmed that it did hold certain information, but withheld it on the basis of section 36(2)(c).
  - III. The Council stated that it did not hold this information.
  - IV. The Council stated that it did not hold this information. It did, however, hold an email addressed to the Council's Head of Function/Monitoring Officer. The Council was unclear whether this was part of "the sequence of events", but it regarded the email as being exempt from disclosure under section 41.
  - V. The Council stated that it held this information, but withheld it on the basis of section 36(2)(c).
  - VI. The Council stated that it did not hold this information.
  - VII. The Council stated that it did not hold this information.
- 11. On 12 August 2014, following an internal review, the Council upheld its original responses.

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

12. On 21 August 2014, the Appellant complained to the Commissioner. He said that he had been provided very little of the information which he had sought. He explained that what he wanted to know what caused the letter of 8 May 2014, to be written, and who wrote it.
13. For the reasons set out in his Decision Notice, the Commissioner made the following findings in respect of the individual requests:
  - I. The Council had correctly relied on section 42 to withhold the information.
  - II. The Council had wrongly relied on the exemption in section 36(2)(c). The Council was required to disclose this information.
  - III. In its initial response, and internal review, the Council had stated that it held no information relevant to this request. However, during the course of the Commissioner's investigation, the Council stated that more information had not been provided because it was felt that the Appellant was attempting to undermine the Chair. The Commissioner considered that this response contradicted the Council's response to the Appellant and decided therefore, that the Council had failed to comply with its obligations under section 1(1) of FOIA to inform the Appellant whether it held the information requested. The Council was required to issue a fresh response to this request.
  - IV. The Council had correctly relied on section 41 to withhold the email it had identified.
  - V. The Council had wrongly relied on the exemption in section 36(2)(c). The Council was required to disclose this information.
  - VI. The Commissioner accepted that it was unlikely that a public authority would record such information.
  - VII. The Commissioner regarded this request as being the same as the request in III, and for the reasons set out above, required the Council to provide a fresh response in relation to this request.
14. Except as regards II and V, the Commissioner was satisfied, on a balance of probabilities, that the Council did not hold any further information beyond what it had identified in its response.

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

15. The Appellant has appealed to the Tribunal. He has not identified precisely which part of the Commissioner's Decision Notice he is disputing. In his Response dated 3 September 2015, the Commissioner has set out his understanding that the Appellant is only challenging the Decision Notice in relation to the e mail referred to above, coming within the scope of request IV, which was withheld under section 41. From our reading of the Grounds of Appeal, we agree with the Commissioner's understanding, and indeed the Appellant has not indicated otherwise. We will refer to the email in question as the Disputed Information.
16. The Appellant has requested that this appeal be determined on the papers without an oral hearing. and the Commissioner concurs. 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.
17. We have received an open and closed bundle of documents. The closed bundle has been prepared by the Commissioner, and the Appellant has not had sight of it, although certain items have been provided to him in redacted form. We have considered all the documents received, even if not specifically referred to in this decision.
18. The Council has not appealed against the Commissioner's Decision and has not applied to be joined as party to this appeal.
19. Although for the reasons set out below, our decision is that the Disputed Information must be disclosed, we have only referred to the Disputed Information in detail in a separate Confidential Annex. If we did so in the open part of this decision, it would defeat the purpose of any onward appeal there might be.

### **Issue**

20. The only issue before us in this appeal is whether the Council was entitled to withhold the Disputed Information under section 41 of FOIA.
21. The Appellant already knows that the email comprising the Disputed Information was sent to the Council's Head of Function (Council Business)/Monitoring Officer, because the Council has said so (in its letter of 17 July 2014, to the Appellant). The Appellant also knows that the email was sent by a Councillor. What the Appellant does not know is which Councillor sent the email, and he does not know the contents of the e mail.

### **The Tribunal's Jurisdiction**

22. 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.

23. 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.

### **Findings**

24. 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.

25. The duty under section 1 does not arise if any of the exemptions set out in FOIA apply. The exemption being relied on in the present case is that contained in section 41 (information provided in confidence). The Council has said that the email comprising the Disputed Information is marked confidential. It considers that the author of the email has a reasonable expectation of confidentiality.

26. Section 41(1) provides as follows:

*“(1) Information is exempt information if -*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*

27. The Commissioner noted that section 41 could only be engaged if the information was obtained by the public authority “from any other person”. It considered that this had to be a third party, separate from the public authority (para 25 of the Commissioner’s Response). In its Decision Notice, the Commissioner noted that the Council had confirmed that the information in question had been provided by one of its Councillors and had argued that the information was therefore from a third party (para 77 of the Decision Notice).

28. The Commissioner agreed with the Council on this. His reasoning is set out at paras 78 *et seq* of the Decision Notice which for convenience we have reproduced below:

- 78 *The Commissioner must first consider whether the Councillor is in fact a third party. In the event that the individual is not a third party, section 41 cannot be engaged.*
- 79 *When considering whether the Councillor is a third party, it will depend on in what capacity the Councillor provided the information to the Council.*
- 80 *The Commissioner has previously considered the various roles fulfilled by Councillors in his decision notice against the London Borough of Camden (FS50422800).*
- [https://ico.org.uk/media/action-weve-taken/decision-notices/2012/713050/fs\\_50422800.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2012/713050/fs_50422800.pdf)
- 81 *Briefly, Councillors may have three different roles within the Council to which they have been elected.*
- 82 *Firstly, they may sit on various committees, carrying out the Council's functions and in this case, any information held will be held on behalf of the Council and therefore caught by the FOIA.*
- 83 *However, Councillors also perform the role of an elected representative for their ward, holding surgeries and corresponding with constituents. This role is distinct to any role a Councillor may have on a committee and any information held by a Councillor in respect of this role is considered to be as part of their role as an elected individual, as opposed to a public authority. Any information held in respect of this role is not therefore covered by the FOIA. It should also be noted that even if it is held in email addresses owned by the Council itself, the information is not held by the Council but held on behalf of another person as stated in section 3(2)(a) of the FOIA.*
- 84 *Finally, a Councillor may also represent a political party and information of a party political business could not be considered Council business and therefore would not be held on behalf of the Council or therefore covered by the FOIA.*
- 85 *Similarly, it will depend in what capacity the Councillor provided the information to the Council. The Commissioner notes that in this case, the Councillor in question was not a member of the Standards Committee and had received the information from the complainant as one of three Councillors on the Council who represent the Ward where he lives. The Commissioner therefore considers that the Councillor's response was solely in respect of his role as a Ward Councillor and accepts that he can be considered a third party. He has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence.*
29. The Commissioner then went on to consider the requirements for a breach of confidence claim to succeed. He found that all necessary



elements were present, and concluded therefore, that the Council had correctly applied the exemption in section 41.

30. In our view, even on the Commissioner's analysis, the Councillor in question cannot be regarded as a third party. The Commissioner appears to have made a simple factual error in this regard. In order to explain this further, we need to make reference to the Councillor's role. To do so, would disclose his identity and therefore disclose part of the Disputed Information. We have therefore set out this aspect of our decision in a short Confidential Annex.
31. It follows from what we have said in the Confidential Annex, that we find that the requirements of section 41(1)(a) are not met, and therefore, the exemption is not engaged. Having reached this finding, it is not necessary to go on to consider whether the requirements of section 41(1)(b) are met.
32. This determines the only issue before us. No other exemptions have been claimed in relation to the Disputed Information. It follows that the appeal is allowed.
33. The decision we have reached in this appeal is of course specific to the facts of this case and the particular exemption relied upon. Since the Council has not appealed against the Decision Notice, we express no view as to any other part of the Decision Notice relating to the other requests made by the Appellant.

### **Decision**

34. The Appellant's appeal is allowed.
35. Our decision is unanimous.

**Signed**

**Date: 4 February 2016**

**Judge Dhanji**