



**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Appeal Reference: EA/2021/0004**

**Heard remotely by video conference  
On 21 June 2021**

**Before**

**JUDGE HAZEL OLIVER  
DAVID COOK  
ROSALIND TATAM**

**Between**

**DAVID JONES**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**and**

**BISHOP'S CASTLE TOWN COUNCIL**

Second Respondent

**Appearances on 21 June 2021:**

Appellant – in person

Respondent – did not attend

**Determined at a remote hearing via video (Cloud Video Platform) on 21 June 2021 and  
at a reconvened paper consideration on 17 September 2021.**

## **DECISION**

The appeal is upheld in part.

## SUBSTITUTE DECISION NOTICE

On the balance of probabilities, Bishop's Castle Town Council did hold further information within the scope of the appellant's request under the Environmental Information Regulations 2004 which it has failed to disclose. It is to conduct a further search and disclose all additional information within the scope of the appellant's request (whether in emails, records of telephone conversations or other relevant records), **including but not limited to:**

- (a) Emails sent or received by the appellant's wife.
- (b) Emails or records of other communications with the Tree Warden.
- (c) Emails to or from Councillor Carroll copied to other members of the Council, the Town Clerk or the Assistant Town Clerk.

## REASONS

### Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The appellant appeared in person. The Information Commissioner did not attend and was not represented. The Tribunal met separately to consider its decision after joining the second respondent as a party and receiving additional submissions.

### Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 9 December 2020 (IC-44903-S4G3, the "Decision Notice"). It concerns information about the felling of a birch tree on allotments owned by Bishop's Castle Town Council (the "Council").

3. On 12 July 2019, the appellant wrote to the Council and requested information in the following terms (the "Request"):

*"Now that the council has made a final decision regarding this matter, and the birch tree has been felled, I want to understand fully how this decision was arrived at..."*

*I am therefore making a formal request to see all of the records and documentation relating to this decision, covering the period from October 16 2018 (the date of my wife's initial request) to the date when the tree was felled, July 1st 2019.*

*The records I am requesting are:*

- *All relevant emails both to and from the Town Clerk, the Assistant Town Clerk and any councillors involved in this issue. As councillors use their own email addresses (as listed on the council website), any emails relevant to this issue to or from these addresses should also be included.*
- *All emails sent to/received from any allotment holders regarding the birch tree or in which the birch tree is mentioned.*

- *All correspondence/requests for quotations/quotation for work dealing with the tree with and from any of your contractors.*
- *All correspondence with and the full report from the Tree Warden referred to in the June council meeting.*
- *Any other relevant records not referred to above.”*

4. The Council provided some redacted emails on 8 August. The appellant complained that this was not all of the relevant emails. The Council replied on 19 August 2019, and withheld information on the basis it was provided in confidence (relying on section 41 of the Freedom of Information Act 2000). The Council provided some additional emails on 23 August 2019 after further correspondence from the appellant. The appellant requested an internal review on 8 September 2019. The Council replied on 9 September stating it was now relying on the Data Protection Act 2018, but did not provide a review outcome until 14 November 2019 after being contacted by the Commissioner. The internal review advised that all correspondence had been provided and that it had also considered the request under the Environmental Information Regulations 2004 (“EIR”). The Council said it had applied regulation 13 EIR (personal data) to withhold some information.

5. The appellant initially contacted the Commissioner on 11 October 2019 and she conducted an investigation into the complaint. The Commissioner’s decision was as follows:

- a. The Council had complied with its obligations under regulation 5(1) EIR. The Commissioner was satisfied that, on the civil standard of the balance of probabilities, the Council has provided all of the information that it holds in relation to the Request. The Commissioner noted her understanding that the appellant would have concerns about the Council not providing all the requested information due to the way it provided the response, in particular by initially failing to respond correctly.
- b. The Council was entitled to withhold personal data under regulation 13 EIR. The withheld information was names and email addresses. The appellant had legitimate interests for seeing the information, and disclosure was reasonably necessary. However, these legitimate interests were insufficient to outweigh the data subjects’ fundamental rights and freedoms, taking into account the individuals’ expectations that their details would not be disclosed. Disclosure would not be lawful, and the Council was entitled to withhold the requested information under regulation 13(1) by way of regulation 13(2A)(a) EIR.
- c. Some of the redacted information is not personal data and the Council was not correct to apply regulation 13 in order to withhold it. The Commissioner required the Council to disclose the information which is not personal data.
- d. The Council breached regulation 5(2) EIR by failing to respond in full to the Request within 20 working days. The Council also breached regulation 11(4) EIR by failing to provide an internal review response within 40 working days.

### **The Appeal and Responses**

6. The appellant appealed on 27 January 2021. His grounds of appeal are as follows. He provided additional detail in a background summary and supporting documents.

- a. The Commissioner incorrectly applied regulation 13 EIR. There was no justification for removing the majority if not all of the deleted information, and redaction was used to mask information that should be provided.
  - b. The Commissioner was wrong to conclude the Council had disclosed all information, as certain emails were deleted after his Request was made, and there are further emails which should have been disclosed,
  - c. The Decision Notice understates the extent of the Council's breach of EIR.
7. The Commissioner's response maintains that the Decision Notice was correct:
- a. Disclosure of personal data was not justified, whether that of Council officials or other third parties. She had ordered the Council to disclose redacted information that was not personal data, and any failure to comply with this is separate from this appeal.
  - b. She was entitled to find on the basis of the evidence available that no further information was held, and is not persuaded otherwise by the various points made by the appellant.
  - c. The Decision Notice did find several breaches of EIR, pointed to deficiencies in the Council's approach, and ordered disclosure of some of the withheld information.
8. The appellant submitted a reply which states he believes that the Council deliberately withheld emails and information because it did not want him to receive documented evidence of its actions. He provided detailed submissions about the alleged missing information, which is dealt with in our discussion and conclusions below.
9. We held a hearing with the appellant on 21 June 2021. He raised a number of specific points as to why he believed further information was held by the Council, based on the emails that had been disclosed by the Council. We decided it would not be possible to reach a fair decision on this point without joining the Council as a party to the proceedings and asking them to answer a number of questions about points raised by the appellant. We made Directions accordingly on 29 June 2021.
10. The Council replied to the Tribunal's questions, and the appellant provided a response. We sent further Directions on 27 August 2021 as the Council's response had been unclear. The Council replied on 8 September, and the appellant sent a further reply on 9 September.

### **Applicable law**

11. The relevant provisions of the Environmental Information Regulations 2004 are as follows.

2(1) ...*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the*

*environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

5(4) *For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.*

12. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

13. In determining whether or not information is held, the standard of proof is the balance of probabilities. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

14. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. In discussing the application of the balance of probabilities test, the Tribunal stated that, “*We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*”

## **Issues and evidence**

15. The issue in this case is whether, on the balance of probabilities, the Council held further information within the scope of the appellant’s Request.

16. The appellant’s appeal included a complaint about the redactions made to the information supplied to him, and whether it was right to redact personal data. At the hearing, the appellant did not include this point in his oral submissions, and he said this was no longer a major point. After discussion with the Tribunal, he said there was no need to go into this further. The Tribunal has therefore treated this aspect of the appeal as withdrawn.

17. In evidence we had an agreed bundle of open documents, which included the appeal, Commissioner's response, and appellant's reply. We had some additional submissions and supporting documents from the appellant. We heard oral submissions from the appellant at the hearing. After the hearing we asked the appellant to provide a written copy of his submissions at the hearing together with copies of the emails referred to in his submissions. We also had the additional replies from the Council and the appellant to our Directions.

## **Discussion and Conclusions**

18. The appellant's overriding concern is that the Council has not been held properly to account for various breaches of the EIR, and has deliberately withheld information which should have been disclosed.

19. Based on the appellant's submissions as to why he believes further information was held, we sent a number of detailed questions to the Council as follows. We have set out each question, the Council's response, the appellant's position, and our conclusions.

20. *Please confirm the search terms used to search for information within the scope of the appellant's request, including whether these terms were used singly or in combination. The documents give apparently different answers to this – "birch tree" (email to appellant of 30 August 2019, page 71 open bundle); "birch tree" and "allotments" (internal review outcome of 14 November 2019, page 94 open bundle); "birch tree" and "David Jones" (replies to Information Commissioner, page 140 open bundle).*

- a. The Council's response is that the appellant was insistent that the Council had not supplied "all" relevant emails on several occasions, and so it was agreed to use differing search terms.
- b. The appellant says that the Council's original search parameters of "birch tree" or "allotment" should have captured emails that were only disclosed to him later after different searches. He says this shows the Council were being selective and only provided further important emails after substantial pressure.
- c. The Council did not answer our question as to whether these search terms were used singly and in combination. We have assumed singly, based on the answer that more search terms were used after complaints from the appellant that all emails were not provided. The scope of the search appears to have been appropriate, based on these search terms. However, it also appears that some emails which should have been disclosed under the initial search terms of "birch tree" and "allotments" were not disclosed until later, and one has only been provided during these proceedings (see paragraph 24 below).

21. *The Council has said that Councillor Carroll had deleted some emails and so these could not be provided to the appellant. (i) Please confirm whether this deletion took place before or after the appellant made his initial request for information on 12 July 2019; (ii) If before, please explain why deletion took place when it did, in light of the appellant's position that he believes the tree was not felled until in or around early July 2019; (iii) If after, please explain why the deletion took place when it did and when the appellant's request was notified to Councillor Carroll. (iv) Were Councillor Carroll's emails retained on a backup system (whether as an automatic process or otherwise) and, if so, why could the backup copies not be retrieved and*

*provided to the appellant? (v) Were Councillor Carroll's emails copied to other individuals at the Council and, if so, why have these copies not been provided to the appellant?*

- a. The Council's response is that Councillor Carroll did receive emails in relation to the birch tree from various individuals as a member of the Council. She considered these as a matter of information, considered that the matter of the birch tree had now been concluded, and deleted them from her system before 12 July 2019. She does not have a backup system. She believes no emails were shared with other members of the Council but she cannot guarantee this recollection and has no way of checking as all emails from the relevant time have been deleted.
- b. The appellant believes that these emails were deleted after his Request was sent. He believes Councillor Carroll was opposed to felling the tree and the emails with allotment holders would not simply have been a matter of information. The appellant also says that Councillor Carroll would regularly cc emails to other Councillors, the Town Clerk and the Assistant Town Clerk.
- c. We understand that Councillor Carroll used her personal email for Council business, and so this is not an email system under the control of the Council. We have received a clear answer that her relevant emails were deleted before 12 July 2019, and have no evidence that this is untrue. However, the Council did not fully answer our question about whether her emails were copied to other individuals at the Council (including Council officers). Councillor Carroll cannot recall this, but it does not appear that the Council has asked other Councillors or the Council officers whether they have relevant emails.

*22. The appellant says that certain specific emails and events indicate that there are other emails or documents within the scope of his request which have not been disclosed to him. For each of the following items, please explain whether additional emails or documents exist and, if so, confirm that these will be disclosed to the appellant or explain the basis for withholding them. If the Council says these additional emails or documents do not exist, please explain the basis for this assertion... (i) Email of 22 March 2019, 08.18. This email makes an offer regarding pruning the tree and requests a response. No response has been disclosed. An email of 26 March 2019 from the Assistant Town Clerk was addressed, in the opening sentence of the body of the email, to the author of this email (amongst others), but appears to have not actually been sent to the author's email address. Was there a separate response from the Council to the author of the email of 22 March?*

- a. The Council's response explains that the Town Clerk contacted the author of the email by telephone in accordance with a resolution made at a Full Council Meeting on 16 April 2019.
- b. The appellant says it is untenable that the Council did not contact the author of the email until four weeks later, and says it is more likely that there was an email sent to the author, this is what the Assistant Town Clerk saw on the Town Clerk's computer (see paragraph 23 below), and it has not been provided because the Council did not want him to see it.
- c. The Council has given a response that there was no email in relation to this matter. We accept that the author of the email was contacted by telephone after the Council

meeting. In answer to additional questions from the Tribunal, the Council provided an email dated 25 March 2019 which appears to be a reply from the Town Clerk to the author of the 22 March email (see paragraph 24 below). This contradicts the Council's assertion that there was no email response.

23. (ii) *The appellant says that on 9 April 2019 his wife met the Assistant Town Clerk, who told her that on coming back into the office on Tuesday March 26th she had "seen something on the Town Clerk's computer and had to rush out an email to recover the situation". Was there an additional email or other document on the Town Clerk's computer that the Assistant Town Clerk was referring to during this conversation, which is held by the Council?*

- a. The Council's response is that the Assistant Town Clerk works part-time on Tuesday and Wednesday, so any email would only have been seen on 26 March, and this would have been the email of 22 March 2019 that has been disclosed.
- b. The appellant says this was not the 22 March email, but something different, probably a reply sent to the author of the 22 March email but not copied to anyone else. His wife had already been sent a copy of the 22 March email by the Assistant Town Clerk, on 26 March.
- c. Having considered the relevant dates and chain of events, on the balance of probabilities we find that it was the 22 March email that was being referred to by the Assistant Town Clerk. She would have seen this for the first time on 26 March, and she sent an email out on the same day to various people which included the content of the 22 March email. We note that the Town Clerk had sent an email to the author of the 22 March email on 25 March, copied to the Assistant Town Clerk, so she is likely to have seen this at the same time (see paragraph 24 below). However, this is simply a brief email which says he will make further enquiries.

24. (iii) *The appellant says that following a Council meeting on 16 April 2019, the Town Clerk was tasked with contacting the author of the 22 March 2019 email to discuss pruning of the birch tree. No email or other document from the Town Clerk contacting this individual has been disclosed, or any emails from this individual in response sent directly to the Town Clerk or the Council. Are there additional emails or other documents between the Town Clerk and/or Council and this individual?*

- a. The Council originally misunderstood this question, and replied that this was an email to the appellant's partner and so was already in his possession. In response to an additional question from the Tribunal, the Council replied that "*unredacted emails have been forwarded to the ICO when the enquiry started*" and a reply to the email of 22 March 2019 was included in that chain. The Council provided a copy of this email. It is dated 25 March 2019, from the Town Clerk to (presumably, as it is redacted) the author of the 22 March email. It is a brief email which says he is concerned the author should receive a reply as soon as possible, he had not heard any conversation about this tree, his "assistant" runs the allotments and he has very little to do with this, and he will make further enquiries.
- b. The appellant says this is the first time he has seen this email. He believes there is further email correspondence that has not been disclosed.
- c. This is clearly an email that is within scope of the appellant's Request. Although it appears to have been sent to the Commissioner, it was not provided to the appellant until late in these proceedings. The Council has not explained why it was not provided to the appellant. We note that the title of the email contains the key



words “allotments” and “birch tree” which the Council says it used in its initial search.

25. (iv) *Email of 17 April 2019, 12.39pm. The author states, “I don’t think [redacted] received my email in response to her initial correspondence to me, a copy of which I sent on to the Town Council.” Is a copy of this email held by the Council?*

- a. The Council’s response is that the recipient of the email was the appellant’s partner, and so the appellant was in possession of that email and a copy was not sent to him. The Tribunal sent a follow-up question to the Council as follows – *“This is a misunderstanding because the appellant’s partner never received this email (as is indicated by the quoted extract). Is a copy of this missing email held by the Council?”*. The Council did not provide a reply to this question.
- b. The appellant says he did not have a copy of this email as his wife did not have one. In addition, during the internal review process he asked to be supplied with all emails including those sent or received by his wife or himself. That request was ignored.
- c. It is disappointing that the Council did not respond to the Tribunal’s follow-up question on this point. Unlike under the Freedom of Information Act 2000, there is no exemption in EIR for information that is accessible to the requester by other means. The Council should have provided copies of emails that were sent to or from the appellant’s wife, even if these may have been available to the appellant through his wife.

26. (v) *Email of 17 April 2019, 15.03pm. The author refers to an “initial email” in which he suggested options should be considered. Is this email held by the Council?*

- a. The Council’s response says that the recipient of the original email was the appellant’s wife and so the appellant was in possession of that email and a copy was not sent.
- b. The appellant says he does not understand this response. He refers to another line in the 17 April email, *“..It’s worth noting that the TC said they had no knowledge of any conversation as regards felling the tree when I initially contacted them on this..”* He says this shows further correspondence that has not been provided.
- c. The original question may have been based on a misunderstanding by the Tribunal. The extract quoted from the 17 April email appears to refer to the email response from the Town Clerk to the author of the 22 March email, which has been provided during these proceedings (see paragraph 24 above). This newly disclosed email does show the Town Clerk saying that he did not have knowledge of any conversation about the tree.

27. (vi) *Email of 28 May 2019 from the Assistant Town Clerk. This states, “I have only just seen your email as it went to the Town Clerk not me”. Is a copy of this email held by the Council?*

- a. The Council’s response is that the Town Clerk was instructed to ask the tree warden for advice as shown in the resolution of the Council meeting on 17 April 2019. It is custom and practice to ask for advice on all tree matters. The Council says that, *“Following the conversation with the tree warden over various generic tree matters it was agreed that general advice would be forthcoming over all matters therefore this email was not relevant to the FOI request, however the*

*subsequent emails then became more relevant to the 'Birch Tree' These were all then included."*

- b. The appellant says the subject heading for the 28 May 2019 email is, "re allotment tree: and yew tree at Castle Square". Although it may also cover unrelated matters, this email refers specifically to the birch tree, and so the missing email is clearly relevant.
- c. It does appear that the missing email referred in part to the birch tree issue. The email of 28 May which refers to the missing email is clearly headed "re allotment tree". It is unclear why the Council says all of this email was not relevant to the Request. If part of the email referred to the birch tree issue as part of a wider email containing generic advice, this should have been disclosed.

**28. On the balance of probabilities, did the Council hold further information within the scope of the appellant's Request?** Having considered all of the above matters, we find on the balance of probabilities that the Council did hold further information within the scope of the appellant's Request which should have been disclosed to him.

29. The Council's initial analysis of the Request was inadequate. Only a small number of emails were disclosed to the appellant initially, and further documents were only produced after he had complained. The scope of the searches conducted were appropriate, in that they contained the relevant keywords. However, it appears that these searches were not conducted with sufficient rigour and efficiency. In particular:

- a. An email which the appellant has been asking for throughout these proceedings – a reply from the Council to the email of 22 March 2019 – was only produced in response to the second set of questions from the Tribunal. The Council had previously maintained that there had only been contact by telephone. This is despite the fact that this email is clearly within the scope of the Request, and contains two of the keyword terms that the Council used for its searches in prominent position within the email. The Council has not explained why this was not provided to the appellant (although it seems it was sent to the Commissioner during her investigation).
- b. The Council has not attempted to obtain copies of relevant correspondence with Councillor Carroll from other Councillors or the Council officials, who may hold a copy independently from Councillor Carroll.
- c. The Council has withheld correspondence from the tree warden which appears at least in part to fall within the scope of the Request (see paragraph 24 above), which indicates that the Council has been selective about what information it is willing to disclose.
- d. Taken together, this indicates that the Council does, on the balance of probabilities, hold further information within the scope of the Request.

30. It also appears that the Council has misapplied an exemption by withholding information that is available to the appellant through other means, by not providing correspondence which was from or copied to his wife. This exemption is not available under EIR.

31. The Council is to undertake a further search for information within scope of the appellant's Request, as set out in the Substitute Decision Notice above.

32. The appellant has asked for various things by way of an outcome to these proceedings (box 6 of his appeal document), including a revisiting of the case by the Commissioner who should deal with individuals at the Council other than the Town Clerk. These are outside the scope of what this Tribunal can do. Our role is to decide whether the Commissioner's decision was in accordance with the law. We find that it was not, because we disagree with her decision that the Council did not hold further information.

33. As a final comment, we have found this case frustrating because the Tribunal was not provided with unredacted copies of emails that it seems were provided to the Commissioner. Only redacted emails were provided to us in the open bundle, in no particular order. It seems that the Tribunal did not have copies of all of the information that was provided by the Council to the Commissioner. Although in many cases it is not necessary to have different copies of the same document in the bundle, in this case it would have assisted our understanding to have the unredacted emails that were seen by the Commissioner. It would also have assisted the appellant, as it appears that the email of 25 March 2019 (discussed in paragraph 24 above) was provided to the Commissioner but not to him.

34. We uphold the appeal in relation to whether the Council held further information within scope of the Request, and issue the Substitute Decision Notice set out above. The part of the appeal relating to redaction of personal data was withdrawn by the appellant.

**Signed: Hazel Oliver**  
**Judge of the First-tier Tribunal**

**Date: 19 September 2021**  
**Date Promulgated: 22 September 2021**