IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2014/0024**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50505952 dated 2.1.14

Before

Andrew Bartlett QC (Judge)

Anne Chafer

Andrew Whetnall

Determined on the papers

Date of decision 2 June 2014

APPELLANT: **K**

RESPONDENT **INFORMATION COMMISSIONER**

Subject matter:

Freedom of Information Act – interpretation of request made under s1 – whether Act applicant or motive blind – absolute exemption s21 (information accessible by other means) – whether s21 exemption applied where information on public authority's website

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal. The Tribunal declares:

(1) The Commissioner should not have held that the section 21 exemption applied.

(2) The Council did not have a records retention policy relating to child protection records. The Council should have so informed K pursuant to FOIA s1(1)(a). The Council should also have provided to K pursuant to FOIA s1(1)(b) the draft Retention & Disposal Guidelines and Policy Statement. The Commissioner should have so held.

No further action is required.

REASONS FOR DECISION

Introduction

1. In this appeal we consider whether the presence of documents on the website of Northumberland County Council ("the Council") made them "reasonably accessible" within the meaning of the exemption in the Freedom of Information Act ("FOIA") s21, and whether the particular documents fell within the request that was made.

2. We also qualify the commonly stated proposition that FOIA is applicant blind and motive blind.

The request, the public authority's response, and the complaint to the Information Commissioner

3. In December 2011 the appellant made a request to Northumberland County Council ("the Council") to delete certain personal data which it held, because he was concerned about data that he believed arose from misuse of child protection powers. Because of this background we have anonymised his identity to "K" in this published judgment. The deletion was resisted by the Council, which in May 2012 made reference to its records retention policy, said to be based on the RGLA 2003.[1] K sought judicial review. The Council's response to the judicial review proceedings referred to its reliance upon retention periods of certain kinds of records for 35 years or 70 years. In January 2013 K was refused permission by the High Court to proceed to a hearing on the ground that there remained an alternative avenue open to him, which was a request to the Council under s10 of the Data Protection Act. K promptly submitted a s10 request to the Council. The Council refused to comply with the request, claiming that it had revisited its data retention periods, while also offering to destroy documents relating to K's family 6 years after case closure.[2]

[1] General Disposal Guidelines for Local Authorities 2003, prepared by the Local Government Group of the Records Management Society of Great Britain.

[2] This paragraph reflects information from K. It is not contradicted by information from the Commissioner or from the Council. We record, however, that the Council was not a party to the appeal and made no submissions to us.

4. K responded to this news by asking the Council on 5 February 2013 (by email) where he could view the Council's information, record retention and data protection policies. He repeated his request on 12 February 2013 in the following terms:

> Further to our recent correspondence I wish to make a formal freedom of information request and to formally request sight of the Councils [sic] record management and personal data policies.
>
> Given that the information requested is contained within your publication scheme (see below for relevant extracts) I would expect a prompt response to my request ... ..."

5. The extracts indicated that the publication scheme provided access to all the Council's policy documents, and referred specifically to "Records management and personal data policies".

6. The Council's response of 12 March 2013 stated that the Council held "information in relation to the Councils [sic] record management and personal data policies". It provided its data protection policy but refused disclosure of the records retention policy, relying upon the exemption in FOIA s22 (information intended for future publication), and stating:

> On balance, as this is a working project and we are currently in the process of completing our Corporate Records Retention guide, we have concluded that the public interest is best served by the planned future publication of the information you have requested and by maintaining the exemption at section 22(1) at this time."

7. K replied, asking that the Council proceed to internal review, and stating:

> To avoid confusion could you please confirm that you currently do not have a Corporate Records Retention guide and that you have never had a Corporate Retention Record policy. ... ... It beggar's [sic] belief that you have an explicit statement on your website, that you will allow access to this information, and when a request is made you refuse to publish the information. Also could you remove this false claim from your website.

8. The internal review response (9 April 2013) reaffirmed that the Council's corporate records retention guide and policy were under development and maintained the Council's reliance on the s22 exemption.

9. K complained to the Commissioner. During the Commissioner's investigation, the Council informed him in late November 2013 that since 2009 the Council had had on its website two draft documents, being a "Records and Information Management Policy Statement" and a "Records Retention and Disposal Policy and Schedule", and provided links. (The actual title on the front of the latter document is "Retention & Disposal Guidelines for the unitary authority of Northumberland County Council - Draft". The draft Policy Statement was a short general document which raises no separate issues and we do not need to discuss it.) The Council stated its continued reliance on s22 in relation to these, although it appeared that the draft Guidelines were in fact in use. The Council also explained that new policies were in

preparation. The data protection and information governance officer stated: “at the time of K’s request we were unaware of the older documents which were on our website”.

10. After some prompting from the Commissioner the two draft documents which had been on the website were provided to K.

11. In his Decision Notice the Commissioner held that at the time of the request the Council had a records retention policy, which was contained in the two draft documents (because, although inadequate and under review, they were available for staff to use), but that the information was exempt under s21 (reasonably accessible by other means) because the documents were available on the Council’s website pursuant to its publication scheme. He further held that the new draft for a revised policy was outside the scope of K’s request, because what K was asking for was the policy that was in actual use. He did not uphold the Council’s use of s22.

The appeal to the Tribunal and the questions for the Tribunal’s decision

12. K appeals to the Tribunal. His notice of appeal covers a range of matters, including the data protection aspects which particularly concern him. We confine ourselves to the matters which fall within our jurisdiction. It is not within our statutory remit on this appeal to decide what steps the Council ought to take in order to be in full compliance with its obligations under data protection legislation; our only jurisdiction in this appeal is to consider the Commissioner’s decision concerning the Council’s compliance with the Freedom of Information Act in response to K’s information request. As we understand K’s position on the matters within our jurisdiction, in summary he is contending-

    a. The Commissioner should not have held that the Council was entitled to refuse the request on the basis of s21 (information reasonably accessible by other means), because the links provided in November 2013 were not available at the time of K’s request.

    b. More fundamentally, the Commissioner ought to have decided that, despite the assertions made in the publication scheme, the Council did not have a policy of the kind that he was seeking, namely, a policy in relation to Record Retention for Child Protection. The policy was therefore not available under the publication scheme or at all, and s21 has no relevance.

13. The Commissioner contests both of these points.

Analysis: accessibility for purposes of s21 exemption

14. There is a dispute of fact between K and the Commissioner over whether the website links (to the incomplete policies that were in use) actually worked at the time when K made his request. This arises because K and the Commissioner place different interpretations on what the Council has said.

15. We do not consider it is necessary for us to resolve this particular difference of view. This is because, even if valid links existed at the time of the request, we do not consider that in the circumstances of this case such links made the two documents "reasonably accessible" to K. At the time of the request the documents were stored in an obscure part of the website which was difficult to find – so difficult that even the Council itself (including its data protection and information governance officer and the senior officer who dealt with the internal review) was not aware that the documents were accessible via its website, and this fact was only discovered many months later.

16. A well-organised website will normally make documents reasonably accessible to members of the public who are able to conduct web searches. But the circumstances of the present case are not normal in this respect. We therefore disagree with the Commissioner's application of s21.

<u>Analysis: whether the Council held a policy answering to K's request</u>

17. K contends that it was obvious in the context of his correspondence with the Council that what he was wanting to see was the part of the Council's records retention policy which dealt with child protection.

18. The Commissioner resists this contention on the ground that a request must be read objectively and is applicant and motive blind. While he concedes that the request commenced with the words "Further to our recent correspondence ...", he argues that the actual wording of the request was not unclear or ambiguous and that it did not specifically ask for the part of the records retention policy which dealt with child protection.

19. We are aware that it is often stated that the Act itself, or a request under the Act, is 'applicant and motive blind', but we consider that this is a misleading oversimplification. It is true in the limited sense that an applicant does not have to demonstrate any particular characteristic or reveal any motive in order to make a valid information request under FOIA. But the identity of the applicant and the nature of the applicant's motive come into consideration in many different aspects of the application of FOIA to information requests. Where a responsible public interest group makes a request for information, the motives of the group may shed light on the public interest balance under s2. Section 8 requires the applicant's true identity to be stated. The identities and motives of applicants can be relevant for the purposes of applying the costs limit under s12 (with its applicable regulations) and for the purposes of deciding whether a request is vexatious within s14. An important part of a public authority's duty under s16 to give advice and assistance may be to find out what the requester is really after, so that advice can be given on how to formulate a request in a manner which will best serve the requester's purpose or avoid costs limit problems. Under s21 the fact or the degree of accessibility to the particular applicant by other means than FOIA may depend upon the applicant's personal identity or characteristics. The exemption under s40(1) depends upon the identity of the applicant, and there are various ways in which the exemption under s40(2) may be affected by the purposes for which and circumstances in which the information is sought.

20. Where an applicant has been in communication with a public authority over matters of concern and then makes a particular information request in writing, there is no principle which requires the request to be divorced from its context. The meaning of the request is the meaning which would be apparent to a reasonable reader in the factual context. In the present case it seems to us to be plain to the reasonable reader that K was asking for the records retention policy which was in use and that what he was particularly seeking was the section that contained the policy on retention of records relating to child protection matters.

21. The draft "Retention & Disposal Guidelines" which were in use at the time of the request contained no guidance on retention of records relating to child protection matters. Whether they amounted formally to a Council policy at all is in our view open to doubt, since they did not have the formal approval required to bring such a policy into force.

22. FOIA s1(1)(a) sets out the right to be informed whether a public authority holds information of the description specified in the request. Section 1(1)(b) sets out the right to have the held information communicated to the requester. In our view, the Council should have answered the information request by telling K pursuant to s1(1)(a) that it understood that what he was particularly seeking was the retention policy relating to child protection records and that it did not have such a policy. It should also have supplied to him the records retention policy that was in actual use pursuant to s1(1)(b). Neither the s21 nor the s22 exemption applied.

<u>Conclusions and remedy</u>

23. In our judgment the Decision Notice was not in accordance with law for the following reasons:

    a. The Commissioner should not have held that section 21 was applicable.

    b. The Council did not have a records retention policy relating to child protection records. The Council should have so informed K pursuant to FOIA s1(1)(a). The Council should also have provided to K pursuant to FOIA s1(1)(b) the draft Retention & Disposal Guidelines and Policy Statement. The Commissioner should have so held.

24. Since it is now clear that the Council did not hold a records retention policy relating to child protection, and K has received the two draft documents, no remedy is required other than to allow the appeal and declare as above.

Signed on original

Andrew Bartlett QC
Tribunal Judge

2 June 2014