



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0297

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50591514
Dated: 9 November 2015**

Appellant: PETER HARVEY-BENNETT
Respondent: INFORMATION COMMISSIONER
On the papers at: EXETER MAGISTRATES' COURT
Date: 23 MARCH 2016
Date of decision: 28 APRIL 2016
Date of Promulgation: 29 APRIL 2016

Before

ROBIN CALLENDER SMITH
Judge

and

SUZANNE COSGRAVE and DAVE SIVERS
Tribunal Members

Written submissions:

For the Appellant: Mr P Harvey-Bennett

For the Respondent: Ms C Nicholson, Solicitor for the Information Commissioner

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Section 77 – Information erased or destroyed

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 November 2015 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Peter Harvey-Bennett (the Appellant) wanted to see a particular version of the balance sheet held by the Chittlehamholt , Warkleigh & Satterleigh Parish Council in respect of its accounts for 2013/2014.
2. He had asked the Parish Council for this in September 2014 and was provided with a copy of it (version B) signed off by a company called Davisons. He wanted to see the original.
3. There was correspondence between him and the Parish Council. It transpired that the Parish Council told him the original document had been destroyed.
4. The Appellant then asked about the date on which it was destroyed and any documents associated with it. He did not receive an answer in respect of that last question.

The request for information

5. On 2 March 2015 he made his formal request for the original as follows:

I wish to see the original of version B of the parish balance sheet which bears the original longhand certificate by [name redacted]. Please arrange for me to see this document within the next three days. Photo copies are not acceptable.

6. The chronology was that there was then further correspondence between the Appellant and the Council that led to a meeting on 27 May 2015 between the parties to seek to resolve issues between them. The Appellant was not given the opportunity of viewing the original document at that meeting.
7. On 4 June 2015 the Council told the Appellant that the document he was seeking was no longer held. It had apparently been destroyed "several months prior to our meeting with you in May 2015".
8. The Appellant then – without success - asked the Council for further information about the destruction of the document.

The complaint to the Information Commissioner

9. Unsurprisingly, the Appellant's complaint to the Information Commissioner related to his concern that the Council's actions may have amounted to an offence under section 77 FOIA.
10. Section 77 relates to the offence of altering etc. records with intent to prevent disclosure.

(1) Where—

(a) a request for information has been made to a public authority....

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this section shall be instituted—

(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

11. The Information Commissioner investigated the matter and concluded that he had not been provided with significant evidence suggesting that an offence under section 77 FOIA had occurred.

12. In paragraph 18 in the Decision Notice he concluded that he was not satisfied that there was evidence suggesting “any deliberate alteration of the document” that was provided to the Appellant in September.

13. He also concluded that there was no “convincing evidence” that the destruction of the original copy of “Version B” was carried out with the deliberate intention of preventing the Appellant from obtaining the information. This was on the basis that the Appellant “effectively already holds that information” and that the Commissioner found no evidence to corroborate the complainant’s suspicion that the document was altered.

14. When considering the matter under section 50 FOIA, the Information Commissioner’s investigation had focused on whether the original copy of Version B was still held and whether the Council had responded to the second part of the Appellant’s request – the date on which the original copy of Version B of the balance sheet was destroyed – and the requested information associated with that destruction.

15. In respect of that issue the Council told the Information Commissioner that, because it was sure that the original document had been destroyed, it had not carried out a search for the original document as requested by the Appellant. While it could not be specific in respect of the exact date on

which the document was destroyed it stated that it “would have been within a couple of days of having received a letter from Davisons with regard to the errors”. That letter from Davisons dated 26 February 2015 was received by the Council on 10 March 2015 and the presumption was that the document was likely to have been destroyed on the weekend following the receipt of that letter.

The appeal to the Tribunal

16. The Appellant has been concerned, in particular, that the Council’s “actions and inactions need to be censured and consideration given to section 77 action”.

17. He also believes that the Information Commissioner’s Office should “be instructed on the importance of examining evidence thoroughly and, where the concept of ‘balance of probabilities’ is needed to be resorted to, the relevant factors need to be presented in comparative form”.

Conclusion and remedy

18. In this appeal the Tribunal has been able to see the documentation relied on in the Information Commissioner’s investigation and has considered it most carefully.

19. It is not open to the Tribunal to take a different view from the Information Commissioner about whether there has been an offence committed under section 77 FOIA.

20. That is settled law: *Steven Sanders v Information Commissioner* (EA/2013/0283).

21. When documentation becomes unavailable from a public authority after it has been requested there is an inevitable shadow of doubt about why this should be so.

22. This is dealt with in some detail in the original Decision Notice. As is noted at Paragraphs 15 and 16:

The complainant says that he has evidence from the internal auditors that the document provided to him by the council has been altered. The evidence is a copy of the auditor's copy of Version B (which the complainant has called Version C), which he argues is different to the one he received from the council in September 2014. He provided this evidence to the Commissioner to consider.

Having considered this evidence however the Commissioner has been unable to identify the changes which the complainant considers identify that alterations have taken place. He considers that the two documents look identical, albeit that there are insignificant and very minor differences in marks which may be explained by the copying process. Davisons, the internal auditors', stamp is partially missing from the copy provided to the complainant by the council and the stamp includes [a] signed, dated section at the bottom of the document. All of the figures cited within the documents match perfectly however and the document otherwise appears to the Commissioner to be a perfect duplicate.

23. The reality here is that the information is clearly no longer held.

24. Bearing in mind the Appellant's critical comments in his grounds of appeal the Tribunal has looked at the documentation most carefully. It has arrived at the same conclusion as the Information Commissioner.

25. It, too, has done so on the balance of probabilities, which is the civil standard, and which is the well-established standard for the Tribunal (and the Information Commissioner) to use in such cases. The Appellant has not presented any further evidence which alters the Tribunal's opinion.

26. For all these reasons, the Appellant's appeal must fail.

27. Our decision is unanimous.

28. There is no order as to costs.

Robin Callender Smith

Judge

28 April 2016