



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

EA/2016/0126

**ON APPEAL FROM:
The Information Commissioner's Decision No: FS50597140
Dated: 28 April 2016**

Appellant: Mike Henson

Respondent: Information Commissioner

Second Respondent: Keighley Town Council

**Hearing: 11 October 2016, Fleetbank House, London
25 November 2016, by teleconference**

Date of decision: 23 May 2017

Before

**Anisa Dhanji
Judge**

**Marion Saunders and Pieter De Waal
Panel Members**

Subject matter:

Freedom of Information Act 2000 – whether the public authority had correctly applied the exemptions in sections 21 and 22

SUBSTITUTED DECISION NOTICE

Dated: 23 May 2017

Name of Complainant: Mr Mike Henson

Public Authority: Keighley Town Council

Address of Public Authority: Keighley Civic Centre
North Street
Keighley
West Yorkshire
BD21 3RZ

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 28 April 2016

The Public Authority holds information coming within the scope of the request.

The exemptions in sections 21 and 22 are not engaged.

The exemption in section 40(1) is engaged, but the personal data of the Complainant can be redacted.

We direct that the information identified in the Tribunal's decision to be provided to the Complainant, must be provided to him within 28 days of this decision being promulgated, subject to the personal data of the Complainant being redacted.

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Mike Henson (the "Appellant"), against a decision notice issued by the Information Commissioner (the "Commissioner"), on 28 April 2016.
2. The Appellant's appeal concerns a request for information he made to Keighley Town Council (the "Council"), under the Freedom of Information Act 2000 ("FOIA"). The request was for information relating to MH-P Internet Limited, of which the Appellant is a director.
3. MH-P Internet Limited had entered into a contract to provide internet/website services to the Council. The Appellant contends that the Council breached that contract. MH-P Internet Limited has brought proceedings against the Council in the County Court.

The Request for Information

4. On 3 August 2015, the Appellant wrote to the Council and requested:

"...copies of all committee and council documents including working papers, reports and internal emails from 31st July 2014 to 31st July 2015 that make reference to mh-p internet Limited or the website that Keighley Town Council commissioned from mh-p internet Limited on 31st July 2014".
5. The Appellant did not receive a reply, and on 22 September 2015, he wrote to the Council again, requesting it to provide him with:

"copies of the agenda, minutes and all background and pre-reading papers submitted to the Civic Centre Committee and the Policy and Governance Committee relating to mh-p between 31st July 2014 and 31st July 2015".
6. The Council said it had not received the Appellant's request of 3 August 2015.
7. On 30 September 2015, the Council replied to the Appellant's request of 22 September 2015. It refused to provide the information requested, citing the exemptions in section 21 of FOIA (information accessible to applicant by other means), and section 22 (information intended for future publication). The Council said that it did not have an internal review procedure for FOIA requests.

The Complaint to the Commissioner

8. On 22 October 2016, the Appellant complained to the Commissioner.

9. During the Commissioner's investigation, the Council also cited the exemption in section 40(1) of FOIA (personal data of which the applicant is the data subject).
10. The Council's position was that:
- the requested information was exempt under section 21, because as part of the County Court proceedings, the information had been sent to the Appellant by the Court prior to, or around the time of the Appellant's request on 22 September 2015;
 - the requested information was also exempt under section 22, because at the time of the Appellant's request, that material was being held for future publication;
 - the Council had always intended to publish all the requested information on its website, and to do so within the timeframe provided for in the Local Government (Access to Information) Act 1985;
 - the requested information was now available to be downloaded from the Council's website at www.keighley.gov.uk, and the Appellant could also view hard copies of it at the Council's offices; and
 - much of the requested information was also exempt under section 40(1) FOIA, because it was the personal data of the Appellant. The Appellant was "inexorably linked" with his company and also, much of the e-mail correspondence referred to the Appellant by his name.
11. The Commissioner found, as set out in his Decision Notice, that:
- the Council had correctly applied the exemption in section 22. It clearly had a settled intention to publish its agendas, minutes of meetings and background information. This was evidenced by the inclusion of this class of documents in the Council's publication scheme;
 - the Council's delay in publishing this information was because the Appellant had been responsible for the Council's website and was engaged in legal action against the Council, but that delay had now been rectified;
 - the remaining information was likely exempt under section 21 FOIA on the basis that the Appellant had already received it from HMCTS by way of disclosure in the County Court proceedings; and
 - the information relating to the Appellant's company was exempt under section 40(1). In fact, disclosure of this information under FOIA would likely constitute a breach of the Data Protection Act

1998 ("DPA"). because it would place the Appellant's personal data into the public domain.

The Appeal to the Tribunal

12. The Appellant has appealed to the Tribunal against the Decision Notice.
13. The Appellant and Commissioner both requested that the 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 were satisfied that the appeal could properly be determined without an oral hearing. The Council did not apply to be joined as a party to the appeal, although was subsequently joined by the Tribunal (see below).
14. In determining this appeal, we have considered all the documents and written submissions received from the parties (even if not specifically referred to in this decision), including the documents contained in the agreed open bundle of documents, the documents in the closed bundle, and the further material received from the parties in response to the Tribunal's directions or on the parties' own initiative.
15. In his grounds of appeal, the Appellant contends that:
 - the requested information was not part of the Council's bundle submitted to the County Court;
 - the requested information was not reasonably accessible to the Appellant by other means, and in particular, it was not available on the Council's website, and it was not practicable to travel from the Appellant's home in High Wycombe to Keighley to view the information at the Council's offices;
 - the Commissioner had failed to enforce the time-limits for the publication of information, and had also erred in concluding that those time-limits were provided by the Local Government (Access to Information) Act 1985, rather than the Localism Act 2011;
 - the Council had sent information to the Commissioner which the Appellant had not seen, and therefore could not verify that it was complete;
 - the Council's assertion that it holds no further information is untrue;
 - the Commissioner had erred in concluding that certain of the requested information was exempt under section 22 since the Council had failed to provide the Commissioner with details of its consideration of the public interest test under section 2(2)(b);
 - the Appellant and his company were not "*inexorably linked*". The Appellant is a director of the company not a proprietor. The

requested information is not the personal data of the Appellant and is therefore not exempt under section 40(1); and

- the Council had not been honest in its dealings with the Commissioner, and the Commissioner had been naïve in taking the Council's word at face value without investigating the details and specifics of the case.

16. Not all the points raised by the Appellant are matters within the Tribunal's jurisdiction. We can consider only whether the Council was entitled to rely on the exemptions cited.

Evidence

17. The open bundle contains the decision notice, notice of appeal, the Commissioner's reply, and various items of correspondence between the Appellant, Commissioner and Council relating to the Appellant's request.

18. The closed bundle comprises 106 pages and is described simply as "withheld information". It contains the Council's defence dated 2 September 2015 in the County Court proceedings brought by MH-P Internet Limited against the Council. The Council's defence lists various items of "documented evidence" which it numbered 001 to 025. The rest of the bundle contains copies of those documents which relate to the dealings between the Appellant's company and the Council, concerning the Council's website. Although it is described as a closed bundle it seems likely that the information it contains has been provided to the Appellant as part of the County Court proceedings. The bundle does not appear to contain information coming within the scope of the Appellant's request.

19. Having considered all the papers, it was not clear to us what information the Council held, what information it was relying on section 21 in respect of, what information it was relying on section 22 in respect of, nor the basis of any such reliance. It has proved surprisingly difficult to obtain clarification about these matters from the Council. We have summarised below the various steps taken, and the outcome in each case.

20. On 20 October, the Tribunal made the following directions:

The Tribunal is currently dealing with an appeal brought by Mr Mike Henson against a decision notice of the Information Commissioner dated 28 April 2016 (reference FS50597140). It concerns a request for information made by Mr Henson to Keighley Town Council.

More specifically, on 22 September 2015, the Appellant asked the Council to provide him with "copies of the agenda, minutes and all background and pre-reading papers submitted to the Civic Centre Committee and the Policy and Governance

Committee relating to mh-p between 31st July 2014 and 31st July 2015”.

The Council has not requested to be joined as a party to this appeal. However, the panel hearing the appeal considers it would be assisted by certain information from the Council. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, in particular Rule 5(d), enables the Tribunal to require any person to provide documents, information or submissions to the Tribunal. Accordingly, the Tribunal directs that the Council provide the following:

(1) A list of all items of information the Council held, as at the date of its refusal of Mr Henson's request, coming within the scope of that request.

(2) An indication in respect of each of the above items as to whether the Council is relying on Section 21 or Section 22 of the Freedom of Information Act 2005 or both.

(3) In respect of each item on which the Council is relying on Section 21, please specify whether this is on the basis that that item is included in the papers relating to Mr Henson's court proceedings against the Council or whether the Council is saying that it is accessible to Mr Henson on any other basis, and if so on what basis.

(4) In respect of each item on which the Council is relying on Section 22, please confirm whether this is solely on the basis that the information is published on the Council's website and was, as at the date of the refusal, intended to be published on the Council's website. Please confirm whether each such item is currently on the Council's website.

At this stage, the panel has not formed a view as to the outcome of this appeal, and nothing in these directions is intended to suggest otherwise.

You are directed to comply with these directions by Thursday, 3 November 2016.

21. On 2 November, in response to these directions, the Council sent a one page schedule listing only two items of information, namely:
- Policies and Governance minutes dated 30 July 2014 (minute reference 2014/171(PG)); and
 - Policies and Governance minutes dated 1 April 2015 (minute reference 2014/260(P&G)).

In respect of each, the Council indicated reliance on both section 21 and 22. It also said that both were “in the court papers”.

22. This response clearly fell well short of complying with the directions. On 4 November, the Tribunal reiterated its directions. The Council was given until 7 November to comply, and was invited to seek clarification, if any was needed.
23. On 4 November, the Appellant sent an e mail to the Tribunal stating *inter alia* that in fact, there were no Council reports or minutes included in the bundle submitted by the Council to the County Court, and further that according to the Council's website, there was no meeting of the Policy and Governance Committee on 1st April 2015 (although there was "a void" in documentation for this committee from December 2014 to January 2016).
24. On 7 November, the Council responded to the Tribunal's further directions, reiterating that as at the date of the Appellant's request, the information held by the Council was that set out at para 21 above. It went on to say that this was "*inclusive of all copies of agendas, minutes and all background and pre-reading papers submitted to the Civic Centre Committee and the Policy and Governance Committee relating to mh-p internet ltd between the 31st July 2014 and 31st July 2015*".
25. It further stated that the Council was relying on section 21 because the information had been provided to the Appellant's company to upload on the Council's website, and it was also relying on section 22 because the information was intended for future publication, and also because they were included in the papers sent to the court. It went on to say that the Appellant's e mail dated 4 November was requesting "different documentation".
26. On 10 November, the Appellant sent an e mail to the Tribunal stating, amongst other things, that the Council's letter of 7 November lacked clarity, and that the reason the relationship broke down was because the Council had refused to send agendas and minutes for uploading on to their website. He also said that it was not credible that the Council would have agreed to spend money on the contract with his company without proper documentation, and he suggested reasons why he thought that the Council did not want to provide the information he had requested. He also said that he had now made a subject access request under the DPA and was awaiting a reply. In addition, he provided what he described as the final version of the "meetings page" produced for the Committee which he said showed that there are "many agenda and minutes missing".
27. The panel reconvened on 25 November. We considered that the Council's responses had been unclear, that it had not complied with the directions. We decided that the Council should be joined as a party which would provide the Tribunal with clearer case management powers. Directions were made accordingly. The Council was given until 6 January 2017 to provide a response to the Notice of Appeal, and was also directed again to provide the information it had previously been directed to provide.

28. Following further e-mail communications from the Council, we expressed our concern that the Council was still not engaging with the directions that had been made. The Council was given a further and final extension of time.
29. In a letter dated 16 December 2016, the Council contended that:
 - it had provided the Tribunal with all the information that it held falling within the scope of the Appellant's request;
 - the Council only held the two items of information between 31 July 2014 and 31 July 2015 that related to "minutes, background pre-reading papers that were submitted to the Civic Centre committee and the Policy and Governance committee"; and
 - it did not hold any other information at the time of the request within the scope of that request.
30. The Council also provided a list of all the information that it held in respect of MH-P Limited/Mike Hensen. It listed some 35 documents, but stated that all the items, except Nos. 8, 17 and 37, fell outside the scope of the Appellant's request.
31. In respect of item No. 8, the Council stated that this was dated 30 July 2014, and described it as "Council minutes from the Policies and Governance committee".
32. In respect of item No. 17, the Council stated this was dated 23 March 2015, and described it as "Council memo from the Deputy Town Clerk (memo dated 23/03/2015) to the Policies and Governance committee who were scheduled to meet on the 01 April 2015".
33. In respect of item No. 37, the Council said that this was dated 1 April 2015, and described it as "Policies and Governance minutes dated 01 April 2015 (minute reference 2014/260 (P&G) including report from the Deputy Town Clerk dated 23/03/2015".
34. The Council said that it was relying on sections 21 and 22 in respect of all three items. It went on to explain that the Appellant had been forwarded all the documentation to upload on the website, and therefore had, in his possession, all the information from all Council committees. That was the basis of the Council's reliance on section 21.
35. In addition, the Council said that at the time of the Appellant's request, all these 3 items of information were intended for future publication, and in fact, all the information is on the Council's website. The Council stated that all these documents were also included in the papers sent to the court and were disclosed to the Appellant under the court's disclosure rules.
36. On 19 December, and in response to the Council's letter of 16 December, the Appellant said that it was not credible that the Council had made a decision to spend several thousands of pounds on a new

website based only upon the documents provided. He provided the Tribunal with documents which he said came into his possession recently, and which showed that the Council had not been entirely open in their submissions. He said that the documents themselves refer to "briefing notes", and "briefing documents", which are claimed not to exist.

37. He refutes the Council's allegation that MH-P Internet Limited was in possession of all Council documents that should have been uploaded, and says that the Council should provide proof of this assertion.
38. On 23 January 2017, at the Commissioner's request, the Council provided the items numbered 8, 17 and 37 to the Tribunal and to the Commissioner, on a closed basis.

The Tribunal's Jurisdiction

39. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that a Decision Notice is not in accordance with the law, or to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, if the Tribunal considers that 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.
40. 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.

Statutory Framework

41. Under section 1(1)(b) of FOIA, a person who has made a request for information to a public authority is entitled to be provided with the information if the public authority holds it.
42. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
43. In the present case, the Council has relied on the exemptions in section 21, 22, and 40(1) of FOIA.

44. Section 21 provides an exemption if the requested information is reasonably accessible to the applicant by other means. The purpose of the exemption is to ensure that there is no right of access to information under FOIA if it is reasonably accessible to the applicant through another route. The exemption is absolute.
45. The Council contends that the Appellant had been provided with copies of the information to maintain and update the Council's website. The Council also contends that most of the documents he is seeking were part of the Court proceedings against the Council, in relation to which the Appellant was the claimant, and that he would have received them in that context, and further that hard copies were available at the Council's offices.
46. Section 22 of FOIA provides an exemption if the public authority intends to publish the information in issue, in the future. It provides as follows:

22 (1) Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

47. For section 22 to apply, at the time of the request, the public authority must hold the information and must intend to publish it at a future date, even if that date is not known. This is a qualified exemption and therefore, it is subject to the public interest test. In refusing the Appellant's request, the Council contended that all documents from committee meetings were awaiting publication on the Council's new website. However, the Council did not indicate any public interest considerations.
48. The Council has also relied on section 40(1) of FOIA. Under this provision, personal data of the applicant is exempt. The exemption is absolute. However, such information can be requested by the data subject by making a subject access request under section 7 of the DPA, and as noted, the Appellant says he has now done so.

Findings

49. This appeal has been made unnecessarily difficult and protracted because of the Council's lack of cooperation. As noted above, it took repeated directions and the eventual joinder of the Council for the Council to engage with the Tribunal's directions and to state clearly

which documents it held coming within the scope of the Appellant's request, and which exemptions it was relying on in relation to those documents. The Council has made almost no effort to provide any evidence to support its reliance on sections 21 and 22. The Council does not object to the Appellant having the information requested; its position is simply that it does not have to provide it because the Appellant already has it. In these circumstances, the Council might have been expected to display greater pragmatism, and some regard for the waste of public funds incurred in this appeal.

50. The two documents that the Council identified on 2 November and which it claimed were "in the court papers", are not in fact in the closed bundle. Also, although the Council has repeatedly asserted that these documents had been provided to the Tribunal, they were only provided on 23 January 2017 (see para 38 above). In addition, as already noted, on 16 December 2016, the two documents which the Council had repeatedly said were the only documents it held coming within the scope of the Appellant's request, became three documents, without any explanation for this change.
51. Unsatisfactory though the Council's responses have been, there is no evidence before us to support a finding that the Council holds any further information coming within the scope of the request. The Appellant's contention that the Council holds further information amounts to no more than saying that he thinks it must do. That does not amount to evidence that it does. Also, although in his e mail of 19 December 2016 to the Tribunal, the Appellant asserts by reference to his "undisclosed documents" schedule that these show that the Council holds additional documents, the items listed on his schedule pre-date the period covered by the request. Likewise, the reference to "briefing notes" are in minutes that pre-date the period covered by the request.
52. In short, there is no evidence before us that could support a finding that the Council holds additional information within the scope of the request. We therefore accept, on a balance of probabilities, that the Council does not hold any other information coming within the scope of the request.
53. As already noted, the Council says that it is relying on both section 21 and section 22 in respect of all three documents. We find that it has not made out the facts necessary to rely on those exemptions. It says that it forwarded all the documentation to the Appellant to upload onto the website. The Appellant refutes this, and the Council has provided no evidence that in fact it had provided these particular documents to the Appellant. The Council also claims that at the time of the Appellant's request, the information was intended for future publication and that the information is in fact published on the Council's website. Again, it has provided no evidence that that is the case.
54. The Council further says that these documents were included in the papers sent to the County Court and would have been provided to the Appellant as the claimant in those proceedings. As already noted, they

do not form part of the closed bundle in this appeal. The Appellant says (see paragraph 23 above), that they were also not in the bundle submitted by the Council to the County Court. We do not know if the Appellant is referring to a different bundle, but the Council has provided no evidence that these documents would indeed have been provided to the Appellant. On that basis, we do not find that the Council has made out its case for relying on section 22.

55. Accordingly, we do not find that the exemptions in sections 21 and 22 are engaged.
56. We turn now to section 40(1). Whether the information requested comprises the personal data of the Appellant is not about whether the Appellant is "inexorably linked" with that company, but whether the Appellant can be identified from the data. Clearly, he can be, so we accept that section 40(1) is engaged. However, this is not a basis to refuse to disclose the information in its entirety. Any personal data relating to the Appellant can be redacted.
57. Subject to that being done, we direct that these documents be provided to the Appellant within 28 days of the date of this decision being promulgated. If the information has now already been provided to the Appellant in un-redacted form, in response to his subject access request, then he may not consider it necessary for the Council to provide them again in redacted form. That is a matter for the Council to clarify with the Appellant.
58. There are two further matters we wish to mention. First, it is not clear to us that the first document (item 17) comes within the scope of the request because it is dated 30 July 2014, whereas the period covered by the request begins from 31 July 2014. However, since the Council has identified this document as coming within the scope of the request, we consider that it should be treated as such.
59. Second, as already noted, the Appellant made a request on 3 August 2015 which the Council said that it did not receive. This appeal concerns the 22 September request. We are not concerned, in this appeal, with the request made on 3 August 2015, nor with any differences there may be between that request and the request made on 22 September 2015. We say this for completeness. None of the parties have raised any issue about the 3 August request.

Decision

60. This appeal is allowed. Our decision is unanimous.

Signed

Date: 23 May 2017

Promulgated: 23 May 2017

**Anisa Dhanji
Judge**