



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

EA/2016/0130

ON APPEAL FROM:

The Information Commissioner's Decision No: FS50604878

Dated: 9 May 2016

Appellant: Anna Christie

Respondent: Information Commissioner

Hearing: Field House, 16 November 2016

Date of decision: 28 April 2017

Before

**Anisa Dhanji
Judge**

Subject matter:

Freedom of Information Act section 1(1) – whether information is held

Representation:

For the Appellant: in person

For the Respondent: no attendance

SUBSTITUTED DECISION NOTICE

Dated: 28 April 2017

Public Authority: London Borough of Southwark

Address of Public Authority: PO Box 64529, London SE1P 5LX

Name of Complainant: Ms Anna Christie

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 9 May 2016.

Information coming within the scope of questions 1 and 6 of the Complainant's request is held by the public authority. The Complainant now has this information, and therefore, no further steps are required to be taken.

Information coming within the scope of question 5 of the Complainant's request is held by the public authority. Except to the extent that such information is already included in the agreed bundle of documents, the public authority must provide the information to the Appellant within 28 days of the date of this Substituted Decision Notice.

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

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by Ms Anna Christie (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 9 May 2016.
2. The Appellant had made a number of requests to the London Borough of Southwark (the "Council"), for information relating to the serving of section 146 notices under the Law of Property Act 1925.
3. This legislation provides, amongst other things, that a lessor may not enforce a right of re-entry or forfeiture until the lessor has served such a notice on the lessee, specifying the breach complained about and giving the lessee an opportunity to remedy the breach (if it is capable of being remedied).
4. The Appellant was served with a section 146 notice by the Council on 18 June 2012, and says that she suffered considerable hardship as a result. She considers the Council's use of such notices to be unlawful. Amongst other things, she contends that the Council is not legally entitled to serve such notices in respect of service charge arrears, that it first needs permission from the County Court and/or First-tier Tribunal, and further that section 146 notices are for use by landlords of private dwellings and therefore cannot be used by local authorities.
5. On 10 August 2015, she made a number of requests for information to the Council in relation, amongst other things, to its practice and procedures in relation to the issuance of section 146 notices.

The Request for Information

6. The Appellant's request for information from the Council was made on the following terms:
 1. *Please provide me with an explanation of the decision making process which the self employed solicitors – referred to as fee earners on their invoices – at the Legal Services Department apply when they decide to issue the s.146 notices with respect to major works and service charges debt (not current year's).*
 2. *Please state how the sum charged £222 in 2011/2012 and now £270 is calculated, is there a statutory legal set fee for this? This is a two page standard notice used 2,074 time in past 5 years and so it must be a routine notice (8 sent per week as per information previously supplied)*

3. *Please provide the checking process in place at LBS legal Services department to ensure the self employed fee earner Solicitor is not paid twice, once by the public purse and once again by the leaseholder after litigation has been finalised?*
4. *(a) Please provide the total cost of Barristers instructed in past 5 years in relation to s.146 notices and attendances at Court by Barristers and their charges, including (b) the cost of the Woelke case which the Council lost, in the Upper Tribunal, on 27 June 2013 claim number below.*
5. *Please state any legal requirements or statutory regulations a fee earner at Legal Services must check prior to issuing a leaseholder with a s.146 notice of the Law of Property Act 1925 i.e. Has the solicitor checked that the local authority has written permission from the FTT (First Tier Property Tribunal) to serve the s.146 notice (Commonhold & Leasehold Reform Act 2002 s.168(4)) and that a Tribunal has declared that a breach of the lease has finally been determined to have occurred in respect of major works and service charges (not current year's service charges).*
6. *Please state the local authorities decision making process to seek possession orders pursuant to the s.146 notice of the Law of Property Act 1925 in relation to major works and historic service charge arrears (not current year).*
7. *Please provide me with details of the procedure at LBS from the first stage of debt arrears (not current year) to the final stage of a leaseholders seeking relief from forfeiture, i.e. what is the trigger factor which results in the debtors file being sent from Home Ownership Unit to Legal Services in past 5 year's.*
8. *Please state how many files were passed from Home Ownership Unit to Legal Services in relation to major works and service charges after a resident leaseholder has been denied access to the Council's financial services (loans, charging orders) in past 5 years.*
9. *Please state whether the Invoices for major works and service charges are now provided on one single Invoice including all previous years debts in line with Martin Green QC's Upper Tribunal judgment in London Borough Southwark v Dirk Andrea Woelke (2013 UKUT 0349 – LC-) LVT Case LRX/6/2012 and please state, if these charges*

were implemented to serve major works and annual service charges on a combination notice at Home Ownership Unit, when this started?

10. Please state the decision making process in relation to the Council's action to introduce interest free loans in 2014 and please provide the reason the Council decided to offer this financial service.

7. The Council replied on 2 October 2015. In response to questions 2, 3, 7, 9 and 10, the Council provided an explanation which it considered answered the request, and also provided links to certain documents.
8. In response to questions 1, 5, 6 and 8, the Council stated it did not hold any relevant information.
9. In relation to question 4(a) and 4(b), the Council relied on certain exemptions in the Freedom of Information Act 2000 ("FOIA").
10. The Appellant requested an internal review, which the Council undertook, following which it provided some further clarification, but confirmed that it was maintaining its position.
11. The Appellant has made other requests for information to the Council regarding section 146 notices, but these do not form part of the present appeal.

The Complaint to the Commissioner

12. On 10 November 2015, the Appellant complained to the Commissioner. She took issue only with the Council's responses to questions 1, 4(a) and (b), 5, 6, 7, and 10.
13. During the Commissioner's investigation, the Council disclosed the information requested in question 4(b).
14. The Commissioner investigated the Appellant's complaint and asked the Council to provide further explanations of its response to the matters disputed by the Appellant. The Commissioner then issued a Decision Notice in which he set out his findings that the Council did not hold any, or any further information, within the scope of questions 1, 5, 6, 7 and 10.
15. More specifically, in relation to questions 1, 5 and 6, the Council said that it did not hold any information. The Commissioner considered the Council had satisfactorily explained the circumstances in which service of a section 146 notice may be triggered. After considering the explanations offered by the Council as to why the information was not held, as well as the Appellant's arguments as to why the Council did or should hold further information, applying the normal civil standard of the balance of probabilities, the Commissioner concluded that the Council did not hold the information requested.

16. In relation to questions 7 and 10, the Appellant argued that the Council must hold more up-to-date information, but the Council maintained that it had provided the most current versions of the relevant reports. It also explained that other than in specified circumstances, it had not reviewed the policies and reports in question, that it was not aware of plans to update the reports or policies, and that it continued to use the information provided in response to the requests. Based on these explanations, the Commissioner was satisfied that the Council had provided the information requested in questions 7 and 10.
17. In relation to question 10, in particular, the Commissioner considered that the Appellant had not explained why she contended that there was a fundamental change in the provision of interest free loans in 2014. From his own investigations, the Commissioner was not aware of any such change.
18. Although the Commissioner found that the Council had provided such information as it held, he considered that the Council had breached section 16 of FOIA (which imposes a duty on public authorities to provide advice and assistance in so far as is reasonable), in respect of question 4(a). However, as a result of the Commissioner's enquiries, the Council had provided an explanation as to how the request in question 4(a) could be narrowed, which the Commissioner concluded satisfied the section 16 requirement. At the hearing, the Appellant confirmed that she is no longer disputing the Commissioner's findings in relation to question 4(a).

The Appeal to the Tribunal

19. The Appellant appealed to the Tribunal against the Decision Notice. The Council has not been joined as a party.
20. In her grounds of appeal, the Appellant challenged the Commissioner's Decision Notice on various grounds, including that the Commissioner failed:
 - to take into account the relevant legal framework in relation to section 146, the Council's obligations under relevant housing law, and the requirement of proportionality under the Human Rights Act 1998;
 - to take into account that a number of other councils have never served section 146 notices;
 - to take into account the possible financial motivation for the issue of section 146 notices; and
 - to investigate why the number of interest free loans given by the Council increased in 2014, and the number of section 146 notices decreased.

The Appeal Hearing

21. The Appellant requested an oral hearing. Only the Appellant attended. The Commissioner notified the Tribunal in advance that he would not be represented at the hearing.
22. I explained the procedure of the hearing to the Appellant, and I also explained that she could ask me questions at any time.
23. I verified with her that I had all the documentary material on which she wished to rely. The Appellant explained that for various reasons, she was not as prepared for the hearing as she would have liked. She confirmed, however, that she was happy to proceed.
24. I also explained the scope of FOIA, in particular, that while FOIA requires a public authority to provide such information as it holds in recorded form (subject to any applicable exemptions), it does not require a public authority to produce information. Also, FOIA is not a mechanism to hold a public authority to account in respect of its actions or inactions, nor indeed, in respect of any information that it may be said it ought to hold. I further explained that certain of her grounds, for example, that the Council's approach to issuing section 146 notices is unlawful, are not matters on which the Tribunal can make any findings. The Appellant may consider that the Council's approach to section 146 is unlawful, but that is not a matter over which this Tribunal has any jurisdiction. Similarly, the Appellant may have an adverse view as to the Council's motives in serving a large number of section 146 notices, but that, too, is beyond the proper scope of this appeal.
25. I further explained that where there is a dispute about whether or not a public authority holds certain information, the decision is one that is made on a balance of probabilities.
26. The Appellant confirmed that the requests still in issue are questions 1, 5, 6, 7 and 10. Question 4(b) is no longer in issue. She then proceeded to explain why she disagreed with the Council's position in respect of these questions, and in doing so, she referred me to various pages in the agreed bundle. I will refer to her evidence and arguments, as relevant, when setting out my findings, below.

The Tribunal's Jurisdiction

27. 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 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.

28. 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

29. 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.
30. A public authority may refuse to disclose information in certain circumstances. In the present case, as already noted, the Council has relied, in respect of the information requested in question 4(b), on section 12 of FOIA.

Issues

31. The only issue before me is whether, at the date of the request, the Council held information coming within the scope of questions 1, 5, 6, 7, and 10 that has not been provided to the Appellant.

Evidence and Findings

32. In reaching my findings, I have considered all the documents and written submissions received from the parties (even if not specifically referred to in this decision), including, in particular, the documents contained in the agreed bundle.

Question 1, 5 and 6

33. These questions focus on the Council's processes and procedures in connection with serving section 146 notices.
34. The Council has said that it does not hold any recorded information on these matters. The Commissioner asked some specific questions to the Council which are reproduced, at paragraph 12 of the Decision Notice, together with the Council's replies.
35. In particular, in relation to question 1 about the decision making process the Legal Services Department applies when it decides to issue section 146 notices, the Council explained that it did not have any policy, checklist or guidelines relating to the serving of section 146 notices. The Council provided a flowchart which it explained relates to any action, and not just the serving of section 146 notices. It also explained that section 146 notices are served when payment of a judgment debt has not been received within one month.
36. The Appellant argues that the Council must know the reason why it serves these notices, that serving such notices is a serious matter, and that the Council must be able to explain its decision making process to an ombudsman or a judge if faced with a claim. She also says that the

Council must have the permission of the County Court and/or the First-tier Tribunal before serving such a notice.

37. At the hearing, the Appellant referred me to the section 147 notice issued against her (pages 151 and 152 of the bundle). She said that the Council had issued 2,074 notices from 2010 to 2015, and she wanted an explanation as to the decision making process from the time a file comes in, to the point in time when the Council decides to issue a section 124 notice. In her view, there must be policies and procedures set by the executive. She referred me to the Council's "Procedure Note" on Service Charge Collection and Arrears Recovery dated July 2015, at pages 205 to 224 of the bundle, and in particular, the section headed "Forfeiture" in which she says the Council acknowledges that issuing a section 146 notice is a measure of last resort. She also referred me to Appendix B of the same report which she says represents internal guidance for the different steps the Council can take, dependent on the amount of the arrears, including providing a discretionary service charge loan. She further referred me to the material in respect of such loans, at pages 191-192 and page 285 of the bundle, dealing with the criteria for granting loans in respect of service charge arrears. The Appellant's contention is that these policies should have been passed to the Council's solicitors and should have been implemented by them before they issued any section 146 notices. She also argued that the documentary material she had referred me to represented the Council's policies and procedures and should have been provided in response to her request.
38. As already noted, it is not for this Tribunal to make any findings as to whether the Council is acting properly in respect of issuing section 146 notices, nor whether it is applying its own policies.
39. As to whether the material to which the Appellant has referred me comes within the scope of the request, her request referred the decision making processes which the solicitors at the Legal Services Department apply when they decide to issue section 146 notices with respect to major works and service charges debts. There is nothing on the evidence to show that this material is *applied* by the Council's Legal Services Department before they issue a section 146 notice. However, Council's response was not limited to that aspect of the request. Indeed, during the Commissioner's investigations, the Commissioner specifically asked the Council whether it had any policy, checklist or other kind of procedural guidelines *not captured by the requests* that refer to the serving of a section 146 notice (emphasis added). The Council said that it did not. I find this to be incorrect. The material to which the Appellant has referred me is clearly relevant to the request and it should have been provided.
40. In question 5, the Appellant sought information about the legal requirements and statutory regulations that the Council's Legal Services Department must check prior to issuing a leaseholder with a section 146 notice. The Council said that it was not aware of any such

requirements or regulations, nor any other statutory instruments relevant to the serving of 146 notices.

41. The Appellant referred me to the section 146 notice which was served on her by the Council and which is reproduced at pages 151 to 152 of the bundle. She points out that the notice itself states that section 81 of the Housing Act 1996 applies. I note that the relevant part of the notice goes on to state that section 81 provides that a landlord may not exercise the right of re-entry or forfeiture for failure to pay a service charge unless the amount of the service charge is agreed by the tenant or has been the subject of a determination by a court or an arbitral tribunal.
42. The Appellant says that the Council is only entitled to issue section 146 notices after a decision is made by the First-tier Tribunal. She says that the Council must issue proceedings in the County Court which are then transferred to the First-tier Tribunal, and if the First-tier Tribunal determines that the service charge is owed, the matter is returned to the County Court which produces a final order, and it is only then that the Council can issue a section 146 notice. She says that the Council has issued 2,074 such notices in the past 5 years, and yet, she has only been able to find about 25 cases brought by the Council in the First-tier Tribunal. She concludes from this that the Council is routinely issuing section 146 notices before obtaining a decision as to the amount owed, and she says that this is unlawful.
43. I have read and considered section 146 of the Law of Property Act 1925, as well as section 81 of the Housing Act 1996, as amended. However, as the Appellant acknowledges, this is a complex and technical area of the law. I consider it would be unwise to attempt a summary. It is also not necessary. Sufficed to say that the purpose of a section 146 notice appears to be to give the recipient a formal warning and an opportunity to consider whether to admit and/or remedy the breach (if it can be remedied), before the lease is forfeited.
44. The Council's asserts (in response to the Commissioner's enquiries) that it is not aware of any legal requirements or statutory regulations that must be checked prior to the issuing of a section 146 notice or of any other statutory instruments that are relevant to the serving of section 146 notices. I recognise that the Appellant's request was specifically about legal requirements or statutory regulations *that must be checked prior to issuing a leaseholder with a section 146 notice* (emphasis added), and it may be argued that strictly speaking, there is nothing that *has to be checked*. However, it is clear from the Council's response to the Commissioner's question that quite rightly in my view, it did not seek to interpret the request on that narrow basis, but rather, understood the request to be asking about what legal requirements or statutory regulations were relevant to the issuing of a section 146 notice. It is also clear from the extracts of the various legislative provisions, reproduced at pages 153 to 161 of the bundle, that there are indeed provisions that are relevant to the issuing of a section 146 notice. Indeed, it would be surprising if it were otherwise. As the

Appellant has pointed out, the section 146 notice that was served on her by the Council itself refers to section 81 of the Housing Act 1996. In the circumstances, I find the Council's assertion that it was not aware of any relevant provisions to be incorrect. The Council must now provide this information to the Appellant, to the extent that it is not already included in the bundle. I note for completeness that the Council has not sought to rely on section 21 of FOIA (information reasonably accessible to the applicant by other means).

45. As regards question 6 (in which the Appellant asked about "the decision making process to seek possession orders pursuant to the s.146 notice of the Law of Property Act 1925 in relation to major works and historic service charge arrears"), the Council said, in its initial response (on 2 October 2015), that it did not hold any information relevant to the request. In response to the Commissioner's further inquiries, the Council said that that it had not been able to find any information about any change in policy in relation to possession orders in respect of these matters.
46. However, as the Appellant has pointed out, her request did not make any reference to a change in policy. She says (and I agree), that she cannot understand why the Commissioner's questions to the Council (as set out at paragraph 12 of the Decision Notice), asked about a departure in the Council's policy.
47. The Appellant also relies on the document referred to at paragraph 37 above, and in particular, to the part under the heading "Forfeiture". She says that this document sets out the decision making process in relation to section 146 notices. I find that the document does set out the requirements in relation to section 146 notices, including as to the content of the notice, what happens upon expiry of the notice timescales if the breach is not remedied, the relief from forfeiture that may be ordered by a court, and also that the Income Enforcement Team is required to instruct the Legal Services Department in order to commence possession actions.
48. I find that this information is clearly within the scope of the request in question 6. There is no explanation before me as to why this information was not provided to the Appellant in response to her request, nor why the Commissioner appears to have construed the Appellant's request as seeking information about a change in the Council's policy. I find that the Council did not provide the information that it held in response to the Appellant's request in question 6. However, since the Appellant now has the information, the Council is not required to take any further steps.

Questions 7 and 10

49. In request 7, the Appellant asked for details of the Council's procedures from the first step of debt arrears to the final stage of a leaseholder seeking relief from forfeiture. She asked, in particular, about the trigger factor which results in a debtor's file being sent from

the Home Ownership Unit to Legal Services. She asked for this information in relation to the past five years.

50. In its reply, the Council provided the Appellant with a copy of its "Service Charge Collection and Arrears Recovery and Report of the working party on the service charge arrears process". The first of these appears to be its Service Charge Collection and Arrears Recovery Procedure Note dated July 2015 starting at page 205 of the bundle (referred to above at paragraph 37). The second is not one which I have been able clearly to identify in the bundle.
51. The Appellant contended that the reports supplied are old report and did not give any information concerning current day-to-day procedures, and argued that there must be more up-to-date information. The Council explained that the information had been produced relatively recently, and in fact did concern current day-to-day processes.
52. In my view, there is nothing in the Appellant's written evidence, nor her oral evidence at the hearing, which would support a finding, on a balance of probabilities, that the Council holds any other recorded information coming within the scope of this request.
53. In question 10, she asked about the decision making process in relation to the introduction by the Council of interest free loans in 2014. In particular, she asked why the Council decided to offer this financial service.
54. In response, the Council provided its "Leaseholder Repayment Options – Assistance for Leaseholders in Respect of Service Charges for Major Works" and "Leasehold Service Charge Loans" reports dated 22 October 2002 and 4 May 2004, respectively.
55. The Appellant contends that the matter must have been discussed internally, and that there must be minutes of meetings on the subject. She also said that the information released did not answer her question in respect of 2014. The Council maintained that what it had supplied was the most up-to-date versions of the reports in question. The Council went on to clarify that the only policy amendment that has been formally approved since the reports provided was in November 2009, but that this did not deal with interest free loans. A report was drafted in May 2011 which proposed amendments to the interest free payment scheme available to resident leaseholders for major work service charges which would have extended the 36 month interest free period to a new term of 48 months in exceptional circumstances, but that report was never formally considered or approved. Notwithstanding this, a 48 month interest free repayment period has been given to resident leaseholders for invoices over £7,200.
56. At the hearing, the Appellant said that she thought she has seen a document in relation to the introduction of interest free loans in 2014, but she could not locate it.

57. In the circumstances, I consider there is no evidence to support a finding that the Council has any other information relevant to this request than it has provided.

Decision

58. This appeal is allowed to the extent set out in the Substituted Decision Notice, but except as set out at paragraph 44 above, the Council is not required to take any further steps.
59. This decision has been made by one judge, pursuant to paragraph 11(2) of Practice Statement 11.

Signed

Date: 28 April 2017

**Anisa Dhanji
Judge**

Para 22 has been altered on 18 May 2016 pursuant to Rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, which allows for the correction of clerical mistakes or accidental slips or omissions in a decision.