



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2017/0014

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50625795
Dated: 5 January 2017**

Appellant:

MICHAEL FAGAN

Respondent:

THE INFORMATION COMMISSIONER

Before

Annabel Pilling (Judge)

Subject matter:

FOIA – Whether information is held – s.1

Representation:

For the Appellant:

Michael Fagan

For the Respondent:

Nicholas Martin

Decision

For the reasons given below, the Tribunal allows the appeal. This Decision is to be treated as a substituted Decision Notice.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 5 January 2017.
2. The Decision Notice relates to a request made on 15 January 2016 by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to Worcester City Council (the 'Council').
3. The Council refused to comply with the request, on the basis that it was vexatious under section 14 of FOIA. It upheld this position during its internal review.
4. The Appellant complained to the Commissioner who investigated the way in which the Council had dealt with the request. The Council amended its position and told the Commissioner that it does not hold the information requested. It communicated this to the Appellant. The Commissioner concluded that on the balance of probabilities the Council does not hold the information requested and has therefore met its obligations under FOIA. She did not consider the Council's original reliance on section 14.

The appeal to the Tribunal

5. The Appellant appeals against the Commissioner's decision, maintaining that there must be further information falling within the scope of his request.
6. This is an appeal that can be heard by a Judge sitting alone under Practice Statement 11.
7. The parties agreed that this was a matter that could be dealt with on the papers without the need for an oral hearing. The Council was not joined as a party and took no part in the appeal. In advance of the hearing, the Tribunal was provided with an agreed bundle of material, and written submissions from the parties.

The issues for the Tribunal

8. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
9. Where an applicant complains to the Commissioner, or the Tribunal, that a public authority, here the Council, has wrongly determined that it does not hold any further information falling within the scope of a request for information under FOIA this raises an issue of fact for the Commissioner, or the Tribunal. The Tribunal will review the evidence and make a finding of fact on the balance of probabilities.

The evidence

10. The Appellant's request for information under FOIA was made on 15 January 2016 in the following terms:

"I am aware that all Councillors, senior staff and the local MPs have received an e-mail setting out serious allegations against the Managing Director of the City Council. These allegations, if correct, would clearly make her entirely unsuitable for her role in heading up the Council. Presumably, she will have been very anxious to rebut the allegations. Similarly, I presume that the Council will have been equally anxious to be seen to have taken all reasonable steps to investigate the matter so that it would be able to satisfy the people of Worcester that there was no truth in the allegations.

1 What statements has the Managing Director made to refute these allegations?

2 What steps has the Council taken to investigate the matter?

3 In what manner has the Council informed Councillors and staff of the Managing Director's response to the allegations?"

11. I have not been provided with a copy of the e-mail referred to in the request for information but it appears to be agreed that this was sent on or around 1 January 2016 by the Appellant and makes allegations of wrongdoing against the newly appointed Managing Director of the Council during her time as Chief Executive of Knowsley Council.

12. During the Commissioner's investigation, the Council has told the Commissioner that it *"is aware that [the Appellant] carried out a prolonged campaign against the Managing Director during her tenure at Knowsley Council and that the allegations he made were fully investigated and that there were no findings of fault on the part of the Managing Director. The Council is also aware that due to his persistent campaign against the Managing Director that Knowsley Council classified him as vexatious."* (The Appellant disputes this and has advised the Council, and the Commissioner, that this is a false statement made by/attribution to Knowsley Council.)

13. The Council wrote to all the recipients of the email and other staff to advise them not to correspond directly with the Appellant and informing them that a response on behalf of the Authority would be provided in due course.

14. The Council wrote to the Appellant advising him that the matters he raised related to historical matters at Knowsley Council and that the Council had no jurisdiction to investigate those matters. It was against this background that the request for information, set out above, was made by the Appellant.

15. This was the information provided to the Commissioner during her investigation. She accepted what she had been told by the Council. She noted that the Council does not appear to have carried out any searches for any related information and assumed that as the staff had been told not to respond to the Appellant's original e-mail the Council is satisfied that it does not hold any information within the scope of the request. She concluded that given the background to the request, the Council's submission and the nature of the information requested, on the balance of probabilities the Council does not hold the information requested.

16. The Appellant maintains that the Commissioner has failed to consider relevant points he raised, accepted without challenge the statements of the Council and has failed to specifically consider his "supplementary request" which he made to the Council on 15 February 2016 during the internal review stage. This request was in the following terms;

"I refer to my earlier request on this topic which is now the subject of an internal review.

Please provide copies of all recorded information that the City Council holds in this matter.

On reflection, my first request should have specifically stated this so please accept my apologies for that oversight and any inconvenience it may have caused."

17. I agree with the Appellant that the Commissioner failed to consider the points he raised, and that she accepted the information provided by the Council without any further consideration. At no stage did she seek information as to how the Council came to be "aware" of the information referred to in paragraph 12 above. This was a significant failing and resulted in the Commissioner accepting at face value an assertion from the Council that needed a proper explanation.

18. It was only during the preparation for responding to this Appeal, that the Commissioner asked the obvious question to the Council on 28 February 2017 of *"How and when (with a specific date if possible) did the Council become aware of the previous allegations concerning the Managing Director, and the actions by Knowsley Council?"* (the Commissioner's emphasis). Mr Martin, on behalf of the Commissioner, explained that this is *"important in understanding why no information is held within the scope of the first request regarding whether any statements were made to refute the allegations; if the Council became aware of the matters only as a result of the Managing Director explaining them in response to the email setting out the allegations, any recorded information held explaining the situation potentially may be within the scope of the request (although the Commissioner would need to review the matter and consider the specific terms and scope of the request further)."*

19. The Council responded that it was unaware of any historic allegations before the Appellant sent the e-mail on or around 1 January 2016. There were no grounds to investigate the unsubstantiated allegations outside the Council's jurisdiction. It is relevant that the Council appears to have interpreted item 2 of the request as a request for information in respect of steps the Council itself has taken to investigate the substance of the actual allegations of wrongdoing as opposed to what steps the Council has taken to investigate "the matter" more broadly, such as to ascertain whether these allegations had been made, whether they had been investigated and, if so, what had been the outcome. On 28 February 2017 the Deputy Director of the Council told the Commissioner that he had spoken "briefly" to the Monitoring Officer at Knowsley Council and was advised that allegations by the Appellant had been investigated a number of years earlier. He provided no information as to when this conversation had taken place, how it had been initiated or who by and whether any notes had been made at the time or subsequently.

20. The Commissioner needed to ask for yet further information from the Council, and requested the Council to confirm whether a note or record of that conversation had been made, what searches had been undertaken in that respect, if a note was still held, if a copy of the telephone call was held and to provide a copy of any retention policy should these no longer be held. The Commissioner also asked the Council to confirm whether any further steps were taken in relation to the allegations and whether the staff of the Council had been advised not to

respond to the Appellant before or after the conversation with the Monitoring Officer from Knowsley Council.

21. The Council indicated that no written note was made of the telephone call and that the date of the call is not recorded. The only details relating to that telephone call are contained within the knowledge of the Deputy Director who had the conversation. The information apparently passed on during that conversation has been recorded in a confidential file note, seen by the Appellant, and which appears to form the basis of the Council's submissions to the Commissioner during her initial investigation.

22. The e-mail to the staff instructing them not to respond directly to the Appellant was made on 2 January 2016 and the Council accepts was before any conversation with the Monitoring Officer from Knowsley Council. At the stage the Council instructed staff in respect of the Appellant and his e-mail, on its own evidence, it did not know anything about the Appellant or about any allegations he had made previously concerning the Managing Director. At that stage, from the information before me, the Council was unaware of any allegation against the Managing Director stemming from her time at Knowsley Council, unaware that these had been investigated, and that there were no findings of fault. It was unaware that the Appellant had been regarded as "*conducting a single-handed campaign*" against her, or that Knowsley Council regarded him as vexatious.

23. This does not appear to me to be a credible explanation of how events unfolded in response to the e-mail of 1 January 2016. It is clear that within 24 hours the Council took the step of issuing instructions for staff not to respond to the Appellant, yet appears to submit that there is no recorded information of any conversation or e-mail correspondence as to how to respond, nobody made any recorded note of the decision to do so, or of any enquiries of the Managing Director to establish whether she was aware of the allegations or the individual concerned. In the

Decision Notice the Commissioner points out that the Council does not appear to have conducted any searches and the only search conducted subsequently relates to the conversation with the Monitoring Officer of Knowsley Council. I find that the Council has been far from thorough in its dealings with this matter and I am not satisfied that an adequate search has been conducted.

24. On the balance of probabilities I am satisfied that the Council must hold further information falling within the scope of the request, which includes the "supplementary request" sent on 15 February 2016 to the extent that it clarifies that the Appellant requests any recorded information held within the scope of the subject matter of the questions set out in the request of 15 January 2016. I therefore allow the appeal.

25. I cannot order any specific disclosure as the Council will have to consider what further information is held, whether there is any basis for not complying with the request or whether any part 2 exemption might be applicable.

Judge Annabel Pilling

18 May 2017

Promulgation date: 21 June 2017