First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0138

Decided without a hearing: 21 December 2020

BEFORE

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ANNE CHAFER AND PAUL TAYLOR

BETWEEN

LINDA WARDLAW

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

MILTON KEYNES COUNCIL

Second Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The mode of hearing is 'P'.

DECISION AND REASONS

The appeal is allowed. The Council is required to take the act stipulated in paragraph 73 within 28 days.

NB Numbers in [square brackets] refer to the open bundle originally before the Tribunal. The Council subsequently provided a further bundle with its Response: references to these documents are [MKC/number].

1. This is the appeal by Ms Linda Wardlaw against the rejection by the Information Commissioner (the Commissioner) on 3 March 2020 of her complaint that Milton Keynes Council (the Council) had wrongly failed to disclose certain information to her under regulation 5 of the Environmental Information Regulations 2004 (EIR). The Council's position is that it has disclosed all that it holds within the scope of the request and some additional information as well.

2. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber**)** Rules 2009 (as amended). [1]

The background

3. The background to the request relates to a planning application for the demolition of a warehouse known as Blakelands and its replacement by a larger warehouse. In fact, there were two applications for the same development. Following the first application, in November 2016 (the 2016 application), a planning case officer (who will be referred to as ST) omitted to include a number of the conditions the Council had intended to attach to the permission when communicating the decision. This was in January 2018. [2] The planning applicant subsequently made a repeat application in September 2018 (the 2018 application). This was eventually granted, despite the objections of the residents' group of which Ms Wardlaw is a leading light, Blakelands Residents Association.

4. There have been internal and external inquiries into what went wrong with the 2016 application. Ms Wardlaw also brought a judicial review, which was settled by consent. Both ST and the Chief Planner (whom we will refer to as BL) left the Council around this time, although it is not clear whether in either case this was related to the error. The Tribunal is not directly concerned with any of these matters but notes that the planning applications have excited considerable controversy, with national as well as local media coverage. Whether information is held by a public authority – the issue in the present appeal – is a question of fact, unaffected by whether the information is important or not. However, where information is or may be important the Tribunal must be particularly assiduous in ensuring that information is correctly identified as being held. The purpose of the EIR, like its

[1] SI 2009 No 1976

[2] See the undated briefing note for Corporate Director Place (exhibit LW1 to Ms Wardlaw's Reply)

sister legislation the Freedom of Information Act 2000 (FOIA), is to facilitate the accountability of decisions taken by public bodies and informed public debate, and it is obvious that those twin objectives cannot be met if important information is wrongly withheld.

The request and the Council's response

5. On 13 February 2019, Ms Wardlaw made this request of the Council:

> '*Please send me the following information in relation to planning application 18/02341/FUL*
> 1. *The pre-application advice provided by [ST] and [BL] with the applicant and their agents*
> 2. *The covering letter that was submitted with the planning application*
> 3. *All correspondence between the Council's officers and the applicant and their agents in relation to this application*
>
> *…*'.

6. Ms Wardlaw made the request under FOIA and the Council initially treated it as a request under that legislation. Prompted by the Commissioner, however, it later agreed that the information was 'environmental information' within regulation 2 of the EIR.

7. The Council responded on 18 March 2019 to the request. In relation to the first part, it maintained that it did not hold any information. It provided the letter the subject of the second part. It also provided considerable information relating to the third part. In addition, it gave a weblink to its planning portal.

8. Ms Wardlaw made a review request on 17 April 2019 **[45]**: 'It is quite clear that the response to this request is incomplete as there clearly would have been a significant amount of communication between officers and the applicant/agents. To be clear, I would like to see all correspondence between Council officers in relation to this application and all correspondence between Council officers and the applicant/applicant's agents'.

9. This provoked the Council into exploring with Ms Wardlaw the intended scope of the third part of the request. During a telephone call on 23 April 2019, she maintained that it extended to internal as well as external correspondence. On 10 May, at the Council's request she delineated the periods she wanted the first and third parts to cover: January to September 2018 and September to December 2018 respectively.

10. On 5 July 2019, the Council provided further information, in four files containing 583 pages. It wrote: 'Having reviewed and from speaking with yourself MKC has agreed to respond, as part of our review, to your wider request for all correspondence regarding this planning application between MKC officers,

applicants and agents from January 2018'. The Council later clarified that it did not accept that it was *obliged* to comply with the 'wider request' but decided to do so to be helpful. The Tribunal returns below to the scope of the requests.

11. According to evidence from the Council in the course of the appeal, Ms Wardlaw has made other requests for information touching on the planning applications. In March 2018, she requested emails relating to both planning applications. The Council says that it complied with that request and Ms Wardlaw has not contradicted this. In August 2019, she requested information about non-disclosure agreements entered into with employees of the Council's Development Control Department over the previous two years. The Council declined to disclose the information, relying on the exemption in section 40 FOIA (personal information) given that it related to just one individual. Finally, in November 2019 Ms Wardlaw made a request about the alleged deletion of ST's emails, an issue which is also relevant to the present case. The Council regarded the request as a repeat request within section 14(2) FOIA. The Commissioner upheld her complaint in August 2020. [3]

Proceedings before the Commissioner

12. Still dissatisfied with the Council's response to the first and third parts of the present request, Ms Wardlaw submitted a complaint to the Commissioner on 5 July 2019 **[50].**

13. The Commissioner made detailed enquiries of the Council, which responded on 25 November 2019 and 17 February 2020. The Council explained the searches it had made, both paper and electronic. It also discussed the deletion of emails by ST and BL prior to Ms Wardlaw's request, the absence of backups of those emails and its unsuccessful attempts to recover them. All Council officers involved in the 2018 application had been contacted, it said. In its email of 17 February 2020, it proffered explanations why particular documents Ms Wardlaw said she would have expected to see did not in fact exist (see further below).

The Commissioner's decision

14. The Commissioner gave her decision on 3 March 2020 **[1]**. She concluded that the Council had carried out all the necessary searches for the requested information and had disclosed everything it held, albeit not in a timely manner. The Commissioner criticised the Council's delay in dealing with the review and said that its clarification of the scope of the third part of the request provided no excuse. The Commissioner did not herself comment on the proper scope.

[3] FS50897101

The Notice of Appeal and the Commissioner's Response

15. Ms Wardlaw based her appeal on two grounds. First, more internal correspondence should have been disclosed. The searches carried out by the Council were inadequate – for example, there was no evidence that searches had been made of other departments which would have been involved in the planning process, such as Environmental Health and Highways. She again gave examples of documents she would have expected to see (discussed below).

16. The second ground related to the deleted emails. Ms Wardlaw referred to a conference call initiated by the Service Director of Growth Economy and Culture (whom the Tribunal will refer to as TD) on 8 May 2019. TD had explained that the planning case officer [ST] had deleted her entire mailbox before leaving the Council and that attempts to recover the emails had been unsuccessful. The backup had already been overwritten. However, Ms Wardlaw said that she had now been informed that ST categorically denied deleting her entire mailbox: she had only deleted personal emails. Ms Wardlaw also suggested that the Council's claim that retention of emails was at the discretion of the officers concerned conflicted with its retention policy: the policy said that all emails in an officer's inbox were automatically archived after three months for three years and all emails in subfolders over a year old were also automatically archived for three years.

17. The Commissioner in her Response made the point that the question was not what documents the Council should have had but what it did in fact have. If the Tribunal required further clarification, it would need to join the Council as a party or require it to provide submissions.

Case Management Directions (CMD)

18. The Tribunal did join the Council, via CMD issued on 18 August 2020. It said this about the scope of the first and third requests:

> '*With regard to **Part 1**, the Tribunal is minded to construe the request as extending to (i) any written communication between Council planning officers and the applicant or their agents relating to the second application, whether or not a particular communication includes advice; and (ii) any note of a telephone or face-to-face discussion between the officers and the applicant or their agents about that application, in each case before the application was submitted.*
>
> ***Part 3** may be more problematical. On its face, it may be said to encompass only (external) correspondence between officers and the applicants or their agents and not also internal officer correspondence.* [4] *Following its initial response, the Council sought clarification from Ms Wardlaw as to the scope of the request. She said she wished to see internal as well as external correspondence. The Council said that it regarded this as widening the scope of the request but agreed to provide internal*

[4] including, in each case, notes of discussions

correspondence in order to be helpful. It duly provided much internal correspondence but Ms Wardlaw says there are gaps.

The scope of a request crystallises when it is made, though clarification may be sought later. On general principles, a request may not be expanded later, certainly after the public authority has made its initial response. If the requester wishes to have additional information, she must make a fresh request.

The question here is whether Part 3 can reasonably be construed as extending to internal correspondence or whether this represents an impermissible extension'.

19. The Tribunal also directed witness statements by the Council, including one from a senior IT officer, addressing specified matters.

The Council's Response and witness statements

20. In its Response, the Council said that it had now conducted searches of departments other than the planning department. It disclosed a significant volume of documents, although many were in fact duplicates of documents already disclosed. Its justification for not earlier searching emails held by other departments was that they would also have been held by the planning officers.

21. The Council addressed the scope of the first and third parts of the request. In relation to the first, it said that the term 'pre-application advice' had a specific and established meaning in the planning context: it usually referred to formal pre-application advice for which a fee was paid, although it could also extend to informal queries and responses about the practicalities of making planning applications. It did not, however, extend to general correspondence of any nature.

22. The question was nevertheless academic because the Council had carried out searches in line with the Tribunal's provisional view of the scope of the first part and had now disclosed all general pre-application correspondence.

23. In relation to the third part, the Council's position was that it did not include internal correspondence. However, the question was again academic because the Council had disclosed such correspondence. Further attempts were being made to recover deleted emails from the backup server. If successful, they would be disclosed.

24. Sarah Gonsalves, Director of Policy, Insight and Communications at the Council, made an undated witness statement in response to the CMD. She addressed the Tribunal's directions about specific documents (see further below). More generally, in relation to the deletion of emails she exhibited and quoted from the Council's email policy *Mailbox Management*, updated in February 2019 (which, no doubt coincidentally, was around the date of Ms Wardlaw's request):

'***Email systems are not suitable for long term document management***. *Messages should only be managed in email applications for a short period before being either* ***deleted or transferred*** *to a line-of-business system application, document management system, or a managed file share like any other business document. Data should not be held for longer than is necessary for the purpose. In order to comply with legislation it is imperative that unwanted emails are deleted. As a baseline the following controls should be implemented:*

- *All mail that has not been moved into inbox subfolders or other line of business applications/file shares after 12 months should be deleted*

…'.

(The emboldened sections are in the policy; the underlining is Ms Gonsalves' save for the 'not' in the bullet point which is in the policy).

25. The policy also says that personal emails are no longer permitted and that the Council reserves the right to monitor emails.

26. Ms Gonsalves also exhibited an undated document entitled *MKC Retention Schedule for Corporate File*. This sets out the retention period for different types of documents along with any legal or other basis. The document is not easy to read because of the way it has been presented. However, there is a general category, 'Emails', the legal basis for retention of which is said to be 'public duty'. Under the heading 'Security Classification', the entry is 'Protectively marked according to their content'. Under the heading 'Retention/review period', the following text has been struck through (with nothing to replace it):

'*All mail that has not been moved into inbox subfolders or other line or business applications/file shares after 3 months will automatically be archived for 3 years and then deleted.*
All mail in inbox subfolders over 1 year old will automatically be archived for 3 years and then deleted.
(taken from Corporate Email policy on Intranet)'.

27. This passage, it will be recalled, Ms Wardlaw relied on in her Grounds of Appeal. Ms Gonsalves offers no explanation as to why the passage has been struck through or when this happened. There appears to be no specific policy in relation to planning documents but in her statement Ms Gonsalves says that the Council usually keeps planning information for 15 years – she says this is as per the retention policy but does not identify which part – and does not currently delete published planning application information as a matter of practice. This would not extend to internal emails.

28. In paragraph 20 of her statement, Ms Gonsalves said, somewhat elliptically:

'*… Reviews of the inbox in question [ST's] were carried out as part of this exercise and gaps in correspondence have been identified. In the interests of candour, there does appear to be correspondence missing from the inbox where the Council would expect to*

see activity. But that does not mean that such correspondence was necessarily missing: or if it was, that it was improperly deleted, for the reasons set out above.
We are unable to identify exactly what was deleted and therefore we cannot be certain of what was deleted or why. The entire inbox was certainly not deleted (not that there is any requirement for it not to be), and there has never been any suggestion that this was an attempt to cover up wrongdoing'

29. Hazel Lewis, Head of IT and Print at the Council, also made a witness statement, on 17 September 2020. She explained that verbal requests were made by her department to recover suspected deleted emails. None was recovered, it appears because deletion had taken place more than 28 days before the attempt was made: after 28 days, deleted items are no longer archived and are removed from the server via an automated process.

30. Ms Lewis then said this:

> '*I note the retention schedule at page 105 of the appeal bundle and the comment that emails are archived. I can confirm that this process was never undertaken as a decision was made not to undertake the archiving process. As a result, emails are retained as I describe above and there is no ability to recall emails that have been deleted for more than 28 days*'.

31. In fact, p105 of the appeal bundle does not contain a retention schedule and it is not clear to what Ms Lewis is referring.

Reply by Ms Wardlaw

32. The Tribunal invited Ms Wardlaw to reply to the Council's Response and witness statements.

33. She made a number of points. First, she said that, on 20 July 2020, she had made a complaint to Thames Valley Police of misconduct in public office in relation to the planning applications. A 207-page dossier had been passed to the Economic Crime Unit. She said she understood that the police were considering whether potential evidence of wrongdoing had been intentionally deleted and whether this amounted to a criminal offence. The Tribunal has no further evidence about the police investigation.

34. In relation to the scope of the third part of her request, Ms Wardlaw said her intention had been to include internal Council correspondence. She acknowledged that it could have been expressed more clearly.

35. Ms Wardlaw disputed the claim by Ms Gonsalves that there was no suspicion that officers had acted in an inappropriate way. An email from the Interim Development Management Manager to colleagues on 14 November 2018 – recently disclosed by the Council and now exhibited to Ms Wardlaw's Response as 'LW2' – recorded that '[redacted but thought to be ST] unhelpfully deleted all of her email in all folders

and wiped her h:drive … IT have disabled her accounts from today so that she is not able to access them remotely. Given that she is still employed by the Council until 28 December 2018 (but using up leave etc), is what she has done a breach of conduct and if so what are the consequences?' The author also sought authorisation for IT to attempt recovery of deleted emails.

36. In addition, the Corporate Director Place had sent an email to BL, copied to TD, on 4 September 2018, after an internal audit had been commissioned, suggesting: 'Audit need to be aware this could turn into a serious disciplinary issue and they have to gather evidence in that light'.

37. Ms Wardlaw's point is that it is surprising – to put it mildly – that ST and BL were allowed to delete emails in the context of the controversy which was still brewing. She exhibits a briefing note for the Corporate Director Place (which is undated but which Ms Wardlaw suggests was written in late August 2018) by BL, the Chief Planner, in which he notes that ST and her manager failed to pick up the missing planning conditions despite five checks and training and says that Counsel's Opinion had been commissioned.

38. Ms Wardlaw also says that Ms Gonsalves was wrong to say, in an exhibit to her statement, that ST and BL had left the Council in November 2018. ST may have physically left then but her contract continued until 28 December 2018. Ms Wardlaw exhibited an email from BL to the residents' group – the copy is undated but Ms Wardlaw says it was sent in January 2019 – referring to the postponement of a planning committee meeting scheduled for 7 February 2019. Ms Wardlaw argues that this shows that BL may still have been employed by the Council after she made her request on 13 February 2019.

39. Ms Wardlaw notes that, contrary to Ms Lewis's claim that IT had been unable to recover *any* deleted emails, an email from the Interim Development Management Manager to colleagues on 22 July 2020 now disclosed by the Council reported that 'IT did recover everything that they could after it was authorised but there was nothing Blakelands related left in there'. That indicates that *some* emails were recovered.

40. Ms Wardlaw expresses surprise that there were no backups of emails beyond 28 days and that the decision was taken not to archive emails in accordance with the Council's retention policy. Her main criticism, however, is of the thoroughness of the searches carried out by Council. She identifies further documents she believes it should hold (discussed below).

41. The Tribunal had asked Ms Wardlaw to evidence her claim that ST had, contrary to the Council's claim, only deleted personal emails prior to leaving. In her Reply, Ms Wardlaw explained that this information had been given to her in confidence by a third party. In addition, the police had told her that her contacting ST could

prejudice its investigation. She suggested that the Tribunal direct ST to produce a witness statement if relevant to the appeal.

42. Importantly, however, Ms Wardlaw now appears to acknowledge, in light of the email from the Interim Development Management Manager on 14 November 2018, that ST had indeed deleted her entire inbox and wiped her 'h' drive, certainly in relation to Blakelands.

Discussion

EIR

43. The first question for the Tribunal is whether the request is governed by the EIR or by FOIA. That in turn depends on whether the requested information constitutes 'environmental information' within regulation 2(1) of the EIR. [5] If it does, section 39 FOIA exempts the request from that Act.

44. The definition of 'environmental information', though not limitless, is very wide. In *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*, [6] the Court of Appeal looked for a sufficient connection between the information requested and the environment.

45. The Tribunal accepts that there is a sufficient connection here, given that the information relates to a planning application for a large industrial building. In fact, however, its decision would be the same if viewed through the prism of FOIA.

The relevance of the police investigation

46. The Tribunal considered whether it should stay the appeal pending the investigation by Thames Valley Police. It has decided that it would not be appropriate to do so. Ms Wardlaw's complaint to the police appears to relate to the

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[5] '*"environmental information" has the same meaning as in Article 2(1) of the Directive [Council Directive 2003/4/EC], namely any information in written, visual, aural, electronic or any other material form on –*
(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
…
(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)
…'.

[6] [2017] EWCA Civ 844: see especially paragraphs 13-17

deletion of emails rather than the wrongful failure to disclose information which is held.

47. It is always possible that a police investigation into why emails were deleted might throw up documents which still exist and which should have been disclosed under the request, but that is speculation. The appeal has been outstanding for some time and needs to be brought to a resolution. The Council has committed to disclosing any further information it comes across.

The duty to disclose under the EIR

48. Regulation 5(1) of the EIR provides:

> '*(1) Subject to paragraph (3) [personal data] …., a public authority that holds environmental information shall make it available on request*'.

49. In addition to personal data, there are various exceptions to the duty to provide information, set out in regulation 12, but the Council has not relied on any of these.

50. Under the EIR, members of the public therefore have a qualified right to information held by public authorities on request. The information must be in 'written, visual, aural, electronic or any other material form'. [7] It is self-evident that a public authority can only disclose information which it holds.

51. The fact that an authority might be expected to hold particular information is not determinative but could indicate that it does, in fact, hold it. Equally, if one would not expect an authority to hold the information, that might be a good indication that it does not hold it. Ultimately, however, an assessment has to be made, on the balance of probabilities, whether in all the circumstances the authority holds the requested information.

52. It is also important to understand that there is no obligation under the EIR (or FOIA) on a public authority to obtain or create information so that it can be supplied to a requester, however easy that would be to do. The obligation is limited to disclosing what an authority holds around the time of the request. That could extend to deleted electronic information, if recoverable.

Scope of the requests

53. Before the Tribunal – and indeed, a public authority and the Commissioner – can consider whether information is held, it is necessary to delineate the scope of a request. The Commissioner fell into error in failing to delineate the scope of the third part of Ms Wardlaw's request given the disagreement about scope.

[7] See the definition of 'environmental information' in regulation 2(1)

54. As noted above, the Tribunal gave an indication of its thinking about the scope of the first and third parts in the CMD issued on 18 August 2020.

55. It has decided that the first part – 'The pre-application advice provided by [ST] and [BL] with the applicant and their agents' - does indeed extend to (i) any written communication between Council planning officers and the applicant or their agents relating to the second application, whether or not a particular communication includes advice; and (ii) any note of a telephone or face-to-face discussion between the officers and the applicant or their agents about that application, in each case before the application was submitted.

56. In particular, it has not given the phrase 'pre-application advice' any technical meaning. Ms Wardlaw, as an unrepresented requester, cannot be expected to have known about that meaning. As the CMD noted, requests for information under the EIR or FOIA are to be construed liberally, in line with guidance given by the House of Lords in *Common Services Agency v Scottish Information Commissioner*. [8]

57. There are limits, however, to liberality of construction. The Tribunal has decided that the third part of the request – 'All correspondence between the Council's officers and the applicant and their agents in relation to this application' – encompasses only the external correspondence which the Council had with the planning applicant and its agents and does not extend to internal communications. It is syntactically impossible to construe it as including internal communications.

58. The Tribunal accepts that Ms Wardlaw may well have intended her request to extend to such communications. Indeed, her review request **[46]** proceeded on the basis that she did. However, requests have to be construed objectively according to the words used, not subjectively in line with what the requester says was her intention, albeit that the surrounding circumstances as well as common sense can aid objective construction. It is also true that, under regulation 9(1) of the EIR, public authorities have a duty to provide advice, where reasonable to do so, to requesters and prospective requesters. Had the Council explored the scope of the third part with Ms Wardlaw on receipt of the request, as it did when she requested a review, she would no doubt have provided the clarification then that she did later. However, the fact that the Council may have been in breach of regulation 9(1) – the Tribunal makes no finding about this [9] – does not assist the Tribunal with construing the third part.

[8] [2008] UKHL 47

[9] In her request, Ms Wardlaw said: 'If this request is too wide or unclear, I would be grateful if you could contact me as I understand that under the Act, you are required to advise and assist requesters'. The Council would no doubt say that the request was not unclear and that it was only when Ms Wardlaw signalled in her review request that she had expected to see internal correspondence that it realised there was an issue about scope. Indeed, Ms Wardlaw described the request as 'straightforward and simple' in her email of 16 May 2019 **[47]**

59. Where a requester has second thoughts, after the public authority has given its initial response, that she would like more information, the correct course is to make a further request. Indeed, it has now emerged that the Council assigned a new number to what it regarded (correctly) as the expansion of Ms Wardlaw's request as originally formulated (see **[MKC/C24]**).

60. The Council says that all this is academic because it has in fact provided all the information within the scope of the first part of the request as construed by the Tribunal and has provided all the information it holds within the third part, even internal communications. The Tribunal has considered whether particular internal communications which Ms Wardlaw has highlighted as missing are held, in case it is wrong about scope.

Particular information Ms Wardlaw has highlighted

61. In her first ground, Ms Wardlaw complains about the inadequacy of the Council's searches. In its CMD issued on 12 October 2020, the Tribunal asked her to identify documents which she thought were still missing (following the further disclosure by the Council). These are the documents Ms Wardlaw identified in her Grounds of Appeal and Reply:

    i. In paragraph 10 of her Grounds of Appeal, she points out that an email from BL to the Head of Urban Design and Landscape Architecture on 28 September 2018 referred to 'previous correspondence'. No such correspondence has been disclosed. On the Tribunal's construction of the third part of the request, the information is out of scope.

    In paragraph 19 of her witness statement, Ms Gonsalves says that most of the planning team worked physically very close to each other and it was therefore easy for information to be shared verbally without the need for email confirmation or meeting notes. She suggests that, although the word 'correspondence' may have been infelicitous, it was intended to encompass verbal communications.

    This is not an entirely convincing explanation but the Tribunal accepts, on the balance of probabilities, that the Council's searches, which after much prompting have eventually been comprehensive, have not revealed any written communications to which BL might have been referring. It is possible that, if they ever existed, they have been deleted.

    ii. In paragraph 11 of her Grounds of Appeal, Ms Wardlaw makes the point that an email sent on 7 November 2018 by Elizabeth Woodhouse, the Council's Senior Landscape Architect **[87]**, stated that she had reviewed a planting plan and the email response from the planning applicant's agent which had been forwarded to her earlier that day. The agent's email had not been disclosed.

The email is within scope on any basis. It has now been disclosed **[MKC/C138]**

iii. In paragraph 12 of her Grounds of Appeal, Ms Wardlaw expresses surprise that only one email from the Council's CEO has been disclosed. She would have expected greater involvement from the CEO and/or the Corporate Director Place given the serious error made by the planning case officer.

Any internal communications from the CEO or the Corporate Director Place would be outside the scope of the third request. In any event, the Tribunal accepts, on the balance of probabilities, that there are no other communications from either officer. Despite the controversy, it is plausible that neither would have got involved to any significant extent with the planning application the subject of the request.

iv. In paragraph 18a of her Reply, Ms Wardlaw says that there were a number of letters and emails between the Council's legal officers and the planning applicant's agents. She exhibits two letters disclosed by the Council in the context of her judicial review (exhibit LW6 to the Reply). These are letters from DLA Piper dated 21 November 2018 and 9 January 2019 to the Council's legal officers. Each is responding to specified letters from the officers.

The letters under reply fall within the scope of the third part of the request. They have not been disclosed. They should be along with any other correspondence between the Council and DLA Piper in relation to the 2018 application – as noted above, no exception is claimed by the Council in respect of any documents falling within scope. Some correspondence into which DLA Piper was copied has, in fact, been disclosed.

v. In paragraph 18b of her Reply, Ms Wardlaw referred to the possibility of enforcement action against the planning applicant (should it begin work on site) discussed in an email from TD to ST and BL on 11 September 2018 (exhibited in LW7 to the Reply). Ms Wardlaw's point seems to be that other correspondence about enforcement, whether mooted or actually taken, should have been disclosed.

Any such correspondence would be outside the scope of the third part. In any event, whether it exists is a matter of speculation. The likelihood is that it does not. TD made the point that enforcement would not be appropriate if a second application was made. It was, soon afterwards. There is no reason to think that there was any further written discussion about enforcement.

vi. In paragraph 18c of her Reply, Ms Wardlaw points out that there were at least two meetings between the Council and the planning agents, in September and October 2018, and argues that there must be some record of the meetings, whether in minutes or emails. There is indeed a reference to a meeting on 3 September 2018 at **[MKC/C23]**.

The Council does not appear to have disclosed any notes of meetings, whether internal or external. Any that exist would fall within the scope of the first or third request and should be disclosed.

62. In addition, in her email to the Commissioner at **[76]** Ms Wardlaw makes the point that ST was asked in an internal email on 23 August 2018 **[77]** a number of questions. There is no reply in the disclosed documents. Any reply would be out of scope of the third request. In any event, although the email clearly expected a written response (because it asked for the response to be copied to named individuals), it is possible that ST replied verbally. The Council told the Commissioner **[81]** that the email's author had not found any response and the Tribunal accepts this.

Deleted emails

63. The deleted emails form the second ground of Ms Wardlaw's appeal.

64. There is no doubt that the Council's approach to the deletion of emails has been unsatisfactory. It is unclear what its policy is or that it has applied it in a consistent manner.

65. What is the policy? The *Mailbox Management* policy, updated in February 2019, says that unwanted emails should be deleted as soon as possible and, in particular, all emails that had not been moved into inbox subfolders or 'other line of business applications/file shares' after 12 months should be deleted. On the other hand, the *MKC Retention Schedule for Corporate File* suggests under *Emails*, that emails not moved into inbox folders or other line of business applications/file shares after *three* months should be automatically archived for three years and then deleted, with all mail in inbox subfolders over one year automatically archived for three years and then deleted. However, that passage has been scored through in the version exhibited by Ms Gonsalves, with no explanation as to why or when the striking through took place. This is clearly unsatisfactory.

66. Elsewhere the Council says that deletion is entirely at the discretion of the officers concerned. As Ms Wardlaw has commented, it is very surprising that, given the controversy relating to the 2016 application (and therefore the 2018 application), the officers were allowed to delete all their emails. In fact, the email from the Interim Development Management Manager to colleagues on 22 July 2020 referred to above indicates that some emails were recovered, albeit nothing in relation to Blakelands.

67. Ms Lewis says that archiving did not take place as contemplated but does not explain why. She claims that deleted emails cannot be recovered after 28 days. It is not clear when BL left and there is some doubt whether prompt action on receipt of the request could have recovered his emails. The Council appears to have made no attempt to contact either BL or ST to see if they can throw any light on the issues.

68. Ms Wardlaw's frustration is entirely understandable. Ultimately, however, the Tribunal has to assess whether, at the time of the request on 13 February 2019, deleted emails within scope either have been or could have been recovered. The Tribunal has concluded, on the balance of probabilities, that they have not been recovered and could not have been. The Council is no doubt aware that, under regulation 19 of the EIR, an offence is committed if information falling within a scope of the request is (*inter alia*) erased with the intention of preventing disclosure by the public authority. The offence is committed both by the authority and the person responsible. The Council's actions have been under intense internal and external scrutiny and continue to be so. There is insufficient evidence of a cover-up – which is essentially what Ms Wardlaw is alleging - for the Tribunal to conclude that emails have either been deliberately deleted in the context of the request or not recovered when they could have been.

69. In its letter of 25 November 2019 to the Commissioner **[71]**, the Council says it does not believe that any information within scope was deleted between receipt of the request and the review request, and no information intentionally deleted. The Tribunal accepts its evidence in this regard.

70. More fundamentally, internal correspondence – including recoverable deleted emails – is outside the scope of the third part of the request.

71. Ms Wardlaw suggests that ST be required to give a witness statement. The Tribunal has decided not to. There is no independent evidence to support the claim, which is hearsay, that ST deleted only personal emails. It is for Ms Wardlaw to provide evidence in support of her appeal, albeit that she may be constrained by confidentiality in this instance. More importantly, deleted internal emails fall outside the scope of the third part of the request and, whilst it is conceivable that some might fall within the scope of the first part, it would be disproportionate to pursue a speculative line of inquiry which is really only relevant if the Tribunal is wrong about scope.

72. In any event, as noted above Ms Wardlaw is now edging towards accepting that ST's emails, and presumably also BL's emails, were deleted. Her focus has moved to the motivation behind the deletion.

Conclusion

73. For these reasons, the appeal is allowed. That is inevitable given that the Council has disclosed further documents in the course of the appeal. The decision is unanimous. The Council should, within 28 days, disclose any further information falling within paragraph 61(iv) and (vi) above. If it comes across any other information within scope, it should of course disclose that as well.

74. Ms Wardlaw has drawn the Tribunal's attention to a public apology issued by the Leader of the Council on 15 December 2020 with respect to the planning applications:

> *'The incomplete record keeping and processes of Milton Keynes Council at the time did not reach a standard I would expect from this authority. The inability of this council to be able to provide proper case notes on important internal management decisions and the subsequent failure to maintain or retain important records means that we are unable to fully satisfy, to a standard I would expect, reasonable questions on how we managed or operated our processes'.*

75. The Tribunal echoes those comments in relation to the way the Council has dealt with the request. Additional documents falling within scope have had to be prised out of it, showing that its initial searches were inadequate, and even now there may be further documents. Ms Gonsalves' and Ms Lewis' statements beg as many questions as they answer. The document retention policies are unclear and appear to have been applied inconsistently. It is surprising that no backups of emails were available 28 days after deletion. These are concerns shared by the Conservative spokesperson for Planning, Transport & Highways. [10] In fairness, it should be acknowledged that the Council did provide considerable internal correspondence under the third part of the request even though it considered that it had no obligation to do so.

76. All that said, with the disclosure of any further documents identified above the Council will, in the Tribunal's judgment, have complied with the request.

77. A final point. Some of the documents the Council has disclosed to Ms Wardlaw may include her special personal data within data protection legislation. The Council should bear that in mind should it receive a further request for the same information.

Signed

Judge of the First-tier Tribunal
Date: 18 February 2021

[10] In an email on 8 May 2019 to officers (exhibit LW9 to Ms Wardlaw's Reply)