



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice: FS50819323**

Appeal Reference: EA/2020/0005

Heard on CVP platform
19 March 2021

Before

JUDGE CHRIS HUGHES

Between

MATTHEW CLARK

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

HARROGATE BOROUGH COUNCIL

Second Respondent

Representation

The Appellant: in person, assisted by his brother Simon Clark
The First Respondent: did not appear
The second Respondent: Ms Laura John

DECISION

This appeal succeeds in part – the emails of August and September 2017 between two Council officers (Mr Noble to Mr Kemp) transmitting a file for the Appellant should have been disclosed in response to the request but were only sent to the Appellant when the Council filed its response and evidence. Therefore, no steps are necessary.

REASONS

Background

1. This appeal arises out of planning enforcement action which the Second Respondent took against the Appellant. A complaint was made about his property in 2007 and the record of this was relevant some years later when the council took enforcement action which resulted in a Planning Inspector requiring the removal of a residential caravan from the Appellant's land in a decision of 25 June 2015. He failed to comply, was prosecuted and fined £12,000 on 19 February 2018.

2. A server backing up the planning department's records experienced a failure on 30 May 2014 and the council subsequently replaced it. A decision was taken at the time not to retrieve the data from the back-up files as there was no business need to do so, since the day to day operations of the department did not require it. In the course of the planning dispute a council officer informed the Appellant that the 2007 record had been amended. On 16 January 2015 the Appellant wrote to that officer seeking information from the Council relating to electronic back up data for previous versions of the enforcement file to demonstrate what alterations took place on the file after it had been closed. The council believed that the back-up was not held for the relevant period due to the server failure and that it was not possible to do this. He then sought "a copy of the root cause analysis report, plus any emails and notes etc, in connection with the Council's server failure in May 2014." These requests came before the tribunal which decided on 27 January 2017: -

"17. We were not persuaded by the Appellant's arguments that we should regard the Council officers' statements to the Information Commissioner as untrustworthy. We understand the Appellant has taken that matter up with the police.

18. We did not have sufficient evidence before us to understand how the Council's dual backup system worked and whether this cast doubt on the Council's (and therefore the Information Commissioner's) case.

19. It is not the role of this Tribunal to take a view as to whether the Council should have recorded information about the server failure. We understand the Appellant has taken this matter up with the Local Government Ombudsman.

20. We have considered carefully the Appellant's submissions and evidence described at paragraph 16 above. We note that the terms of the information request are broad: information "in connection with the Council's server failure" seems to us to include within its scope the correspondence between Mr Clothier and the Appellant and the further enquiries to which it refers. We are satisfied that the Council held this information at the time of the Appellant's information request.

21. In the circumstances, we are not satisfied on the balance of probabilities that the Information Commissioner's Decision Notice was correct. We consider that it was based on an incorrect assessment of the facts and accordingly this appeal is allowed.

22. *The step that the Council is required to take is to respond to the information request on the basis that it does hold information within the scope of the Appellant's request.*"

3. In parallel with the information requests the Appellant pursued a complaint through the Council's complaints procedure during which the Council gave explanations about the contents of the record, the poor quality of record keeping and other matters of complaint. The escalation of the complaint to the Local Government Ombudsman (LGO) (referred to in the previous tribunal decision) was unsuccessful; on 18 June 2016 the LGO decided not to investigate since the issues of complaint about the 2007 record had been a matter for the Planning Inspector and were therefore outside the LGO's jurisdiction.
4. As a result of the tribunal decision the Council carried out further searches and supplied information to the Appellant on 7 March 2017. Further explanations were provided to him and he met the Council's ICT manager (Mr Clothier). Two Council lawyers and two members of the ICT department attended a meeting with the Police on 22 August 2017 as part of a police investigation into his complaint against the Council. One of those attending Mr Alistair Noble (an ICT analyst) who had previously not been directly involved with Mr Clark's complaints wrote to his Council colleagues (one of whom was Mr Kemp) on 30 August 2017 having identified a way forward in understanding what had happened to the record:-

"At the meeting last Tuesday (22 August) I learnt that the record had been changed in 2014 and Mr Clark's issue relates to that change. I suspected that there might be an old backup still recoverable from before that time which will then show what changes had been made. I did not want to give false promises or hope at the meeting so didn't not want to speak out until I had checked for myself.

What I have found is that the Uniform server recoverable from an earlier backup from 2012 which I have now done and that the case record it holds has not been amended since 2008. I have used an adaptation of the query that David Clothiers team ran and looked up the case record and its reports that "Case updated" 14.02.2008. 15:32:28 whereas the current record has the "Case updated" date of 03/02/2014 14:34:15. "

5. The following day he sent a further email to his colleagues: -

"After a bit more investigation I have looked at the information I can pull out of the old server (the excel spreadsheet attached) and compared it to the report provided by planning (the PDF attached)

It appears that there is a slight modification to the text relating to the survey in the original case as it stated "usable as a dwelling" and in the amended version in 2014 it appears to read "usable as dwelling" – basically missing the "a" in the later version – possibly deleted by mistake or something?

I have so far not been able to look at the entire case in the same way that we would look at normal case but the data in both the report is directly extracted from the respective old new and databases so I believe they show the information we require."

6. Mr Noble sent the recovered information together with an explanation of his actions to Mr Kemp on 8 September 2017, who then sent it to Mr Clark on 20 November 2017.
7. Following this there was further contact from the Appellant and he emailed Mr Noble repeatedly seeking information. On 21 August 2018 Mr Kemp (a legal adviser who dealt with information requests) wrote asking him not to contact Mr Noble directly.

The request

8. On 24 August 2018 the Appellant made an information request, writing to Mr Kemp: -

I already did know the name of one of the members of ICT staff that attended the meeting on 22/8/17 before you released his name that is a Mr Noble.

It is fine I will request documents I thought it would be easier and more cost-effective for the L.A. for the officers involved just to answer a few informal questions to clear up a few outstanding issues surrounding the service failure and subsequent clear information supplied to the ICO

I hope you will accept my apology

As it has not been possible to ask the officer involved direct questions there are a number of documents that would aid me in answering some of those questions.

Firstly to recover the tape from of site would require[sic] a formal request.....Please provide this request and the log to show the dates the tape was out of secure storage.

Secondly to recover the data from the backup tape would require an incident, change control document.

Please provide these documents

Thirdly The recovered file was sent to yourself prior being forwarded on to me please provide the email or communication that explained to you what they were sending and why.

[4] The work required[sic] to recover the data from the tape in the way describe[sic] in the note/ report by MR Noble needed specialised comvault support " at a cost" Please provide the invoice for the work carried out, the request for this help and the support and guidance given and by whom(company).

[5] This work would also require[sic] clearance for the personal to work on a government system. Please provide this document.

[6] The meeting of the 22nd of August 2017 created actions please provide all documents relating to those actions and communications relating to those actions.

[7] It has previously been stated that the indexes to the backup tape and file had been lost.

Please provide the record of this fact "where this is recorded " .

Mr Noble worked on this server failure and it appears was unaware of the loss of the indexes"

9. The Council's solicitor responded on 7 September 2018 explaining for a variety of reasons that no information was held: -

"1) I am informed that no formal written request or log was required and no such documents are held by the Council

2) Similarly there is no 'incident control change' document because the work carried out by the council's ICT Business Analyst did not affect a live system.

3) The only documents produced by the council's ICT Business Analyst have already been sent to you.

4) There is no invoice of the type to which you refer. The work was done at no cost. There was no external intervention by any 'company'

5) The work was done by authorised personnel within the Council and employed by Harrogate Borough Council. There is no requirement for any 'government' clearance and no documents exist in relation to this.

6) The meeting of 22 August 2017 created no 'actions' for the Council and there is no record of the same. Following the meeting the police went away to consider how, if at all, to progress their investigation. As you know the decision was not to pursue your complaint further.

7) So far as the 'loss of the indexes' is concerned and the relevant server failure to which you refer I am satisfied that in response to you previous FOIA requests you have been sent all the information which the Council holds."

10. The Appellant was dissatisfied and complained to the Information Commissioner. She considered the arguments of the Appellant and the explanations put forward by the Council and concluded on the balance of probabilities that no information was held.

The appeal

11. In his notice of appeal Mr Clark claimed that the responses of the Council and Mr Noble to the Information Commissioner were inaccurate. He argued that the work carried out by Mr Noble would have required authority from the head of ICT, that access to the processes of Comvault would have required specialist support at a cost. that the Council had over the previous years made it clear that the file could not be recovered. The Council had claimed that there were no actions to result of the meeting with the police, yet an officer claimed that he decided to recover the file. Before the file was sent to him it was sent to Richard Kemp and that email should have been provided to him in response to this request.
12. The Information Commissioner resisted the appeal. The Council was joined as a Respondent and in its response, it gave a detailed history and provided detailed witness evidence from Mr Noble and Mr Kemp providing explanations of the various issues raised by the request and the appeal. It

explained how the information the Appellant had wanted originally had been recovered by Mr Noble identifying a different route to access it. Mr Noble suggested that the original incorrect statement to the Appellant that it was not possible to provide the information was that a failure of communication between the lawyers and the ICT department meant that there had not been a fully shared understanding of the issue. The Council apologised for the confusion this had caused. One exhibit to Mr Noble's witness statement was the email of 8 September 2017 which sent to Mr Rich the file Mr Noble had generated for onward transmission to the Appellant. This had been sought by request 3. Also supplied were the two previous e-mails from Mr Noble to Mr Kemp.

13. Attempts were made by the Council to clarify what the Appellant's case was in the light of the detailed information provided by the witness statements. On 25 August 2020 the tribunal directed the Appellant to set out what further undisclosed information the Council held in response to this request by 9 September 2020, the parties had to indicate if they could agree a consent order disposing of the case by 7 October and if the case were to proceed the Appellant should file any witness evidence by 21 October.

14. On 9 September the Appellant served a list of 13 points on the Council, to which the Council responded on 22 September explaining why, in its view the matters raised were either not within the scope of the request or were too imprecise or had been addressed in the witness evidence filed. On 24 September the Appellant wrote to the Council: -

"I do recognise that some of the information requested does not fall within my request but as instructed by the case management directions 24th of June that all parties should cooperate with each other in the interests of the overriding objective.

I have requested information that will be necessary to show what information the council are legally required to hold and for how long. Which will be needed to make a full assessment of what information should have been provided under my initial request."

15. Despite extensive correspondence it was not possible to agree a consent order and the Appellant filed no witness evidence.

16. In the hearing Mr Clark's brother (who has knowledge of computer systems) asked technical questions of Mr Noble based on his understanding of how systems he had worked on were administered. He attempted to demonstrate the existence of anomalies in the computer file which Mr Noble had created, and which had been provided to his brother. Mr Noble considered that the changes of format could have created anomalies. The Council had consulted the system developers who had been unable to explain satisfactorily why the system had behaved as it had. The Appellant accused Mr Noble of forgery. Mr Noble with great composure assured the tribunal that he had done nothing

improper. He modestly acknowledged that “the process I have done may be unsatisfactory”. The Appellant then alleged that he had forged the emails he purported to have sent. Mr Noble confirmed “my job is to provide data as I find it” he had had no active involvement with dispute or with the individuals concerned and had been asked to attend the meeting with the police. All his actions had been subject to the scrutiny of his superior in the ICT department. There was no reason to believe that anyone else had modified his work. The process of putting the data into an excel spreadsheet could have caused changes.

17. Mr Kemp’s witness statement exhibited in excess of 1600 pages of background documents which the Council had supplied to the appellant since January 2015. In his statement he noted that since 2014 the Appellant had corresponded with the Council seeking information, including under FOIA and DPA. His requests had been voluminous, often of a technical nature, repetitive and of very limited public interest. The Council had twice relied on s14(1) of FOIA. In questioning Mr Kemp, the Appellant was hostile about the delay in sending him Mr Noble’s file. He sought to explore issues around the differences between the two versions of the planning enforcement file, Mr Kemp explained that his role had been to manage disclosure and nothing more.
18. In his closing submission the Appellant argued that for the council to succeed it had to prove that the documents that it had provided were correct. He asserted that he had established that the documents were flawed and had anomalies. The Council should investigate the anomalies. As the Council had not, the Council did not have the information, therefore he must succeed on the balance of probabilities. He intended to seek “a full audit” of the Council.

Consideration

19. The issue for the tribunal in this hearing was to determine whether or not the Information Commissioner’s decision notice was correct in law. There was a 7-part request for information, the Council had provided answers explaining that for parts 1,2,4,5 and 6 no information was held. Mr Noble’s witness statement gave a very full explanation of why the material was not held. Nothing submitted by the Appellant in writing or in argument suggested any reason why it should be held. Request 7 was for the record that the indexes had been lost, the reply was that all the information that the Council held had already been sent. Mr Noble explained very clearly in his witness statement that this was a misunderstanding as the back-up tapes did not rely on the same indices and so there was no record that they were lost because they had not been. Nothing filed by the Appellant or raised in the oral proceedings addressed this issue and the explanations that he had been given. The Council’s initial response to Request 3 misinterpreted it as being for the substantive file prepared by Mr Noble, however that has long since been rectified and the emails have been supplied to the Appellant.

20. While Mr Kemp's witness statement detailed the searches carried out as a result of the previous tribunal hearing; this case is somewhat different from usual cases where the existence of information is in dispute and the issue is the adequacy of searches carried out by the public authority. In its concern to resolve this appeal the Council has provided further information, out with the scope of the request, to help the Appellant understand the processes which Mr Noble followed to recover the information in the format it was sent to the Appellant.
21. In this case there have therefore been no substantive challenges to the adequacy of searches and no coherent arguments as to why further undisclosed documents should exist. The approach of the Appellant in this hearing was to mount an attack on the work Mr Noble had carried out to recover the information. Despite the endeavours of Mr Simon Clark to argue for different systems of controls and to suggest that there are "anomalies" in the material supplied by Mr Noble such arguments take the Appellant nowhere. The Appellant put forward no evidence that there should be more procedures and controls, Mr Simon Clark in questioning, opined on the basis of his experience of different systems in different contexts, this is not evidence. The evidence of Mr Noble on this point was coherent. There is no basis for thinking that the explanations given by Mr Noble are not correct. The argument as to "anomalies" in the file supplied by Mr Noble are entirely irrelevant since that file was not the subject matter of Request 3, which was for *"the email or communication that explained to you what they were sending and why"*. In any event the explanations which Mr Noble gave as to "anomalies" were entirely credible.
22. In the absence of the submission of any evidence by the Appellant or any coherent case following the Council's disclosure in response to Request 3 the Appellant chose to continue this case to an oral hearing which he used to make a totally unjustified and scandalous attack on the character of Mr Noble.
23. The Appellant has wholly failed to advance any case since the Council's response in April 2020 but has misused the processes of the tribunal and abused a Council officer who acted professionally and courteously in difficult circumstances.
24. The parties are reminded of the provisions of rule 10 of the GRC rules.

Signed Hughes
Judge of the First-tier Tribunal
Date: 23 March 2021
Promulgated Date: 24 March 2021