



**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Appeal Reference: EA/2020/0245**

**Decided without a hearing  
On 19 August 2021**

**Before**

**JUDGE HAZEL OLIVER  
ROGER CREEDON  
MICHAEL JONES**

**Between**

**MICHAEL HUBERT WALLIS**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

## **DECISION**

The appeal is dismissed.

## **REASONS**

### **Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 10 July 2020 (FS50883285, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about email correspondence from two named council officers and Kingston Seymour Parish Council (“KSPC”) requested from North Somerset Council (the “Council”).

2. The parties opted for paper determination of the appeal. 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).

3. On 26 April 2019, the appellant wrote to the Council and requested the following information (the "Request"):

*"Could I see the emails from NSC officers [name redacted] and [name redacted] of the Engineering & Design team A, transport to Kingston Seymour Parish Council for the period 16<sup>th</sup> May 2018 to 4<sup>th</sup> July 2018."*

4. The appellant was a councillor at KSPC. The Request arises from proposals for traffic calming in the village. A meeting took place on 16 May 2018, and it was agreed to ask the Council to send traffic planning officers to a new meeting to draw up proposals. The two officers named in the Request attended a meeting on 4 July 2018, and provided a plan for traffic calming at the end of August. The appellant was concerned about a set of road markings shown in the plan in rural areas away from the village, which he says are all on a proposed cycleway between Weston-Super-Mare and Clevedon. KSPC agreed to pay for the plan at a meeting on 14 November 2018. The appellant says that the Council and not KSPC should pay for the road markings on the cycleway. He alleges that the two officers were wrongly using the plan for the benefit of the Council.

5. The Council responded on 24 May 2019 and provided 16 pages of emails, with third party information redacted. The appellant replied on 16 July 2019, saying "*There appear to be unexplained gaps in the sequence of emails*". This was treated as a request for an internal review. The Council provided the outcome of the internal review on 31 July 2019. The Council had explained that the two named officers had been asked to provide their emails. As part of the review the IT team had run a search for relevant emails. The appellant was provided with all emails obtained through this search. The review explains that one or two additional emails were missing from the original disclosure. It also explains that one or two emails are missing that the appellant was previously provided with, and they can only assume that these were deleted between the original disclosure and the IT search.

6. The appellant complained to the Commissioner on 16 October 2019. The Commissioner investigated whether, on the balance of probabilities, the Council was correct to state it did not hold any further information. The Commissioner decided that no further information was held, based on assurances from the Council and the absence of evidence suggesting that additional recorded information was held.

### **The Appeal and Responses**

7. The appellant appealed on 4 August 2020. His grounds of appeal are that he believes not all emails have been disclosed. In particular, he believes that emails have been deleted by the two officers named in the Request. He says that this is shown by the fact important emails were deleted between the initial response to the Request and the outcome of the internal review, and there is no way of knowing if other emails have been deleted. He complains that the Commissioner did not investigate this issue fully, and did not take into account the reasons for his complaint.

8. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner says that she is entitled to accept the responses of a public authority at face value unless there is some reason why she ought not to do so. She conducted a diligent investigation, and the appellant has not set out any arguments as to how searches undertaken by the Council were deficient. In relation to items deleted between the Council's original response and the internal review, the appellant has the information requested, and it is a matter for the public authority whether or not to retain information and for how long.

9. The appellant submitted a reply which maintains that the Commissioner failed to consider his reasons, evidence and arguments. He says that there was a failure of procedure by the Council, as the Request should have been dealt with centrally. By obtaining the emails from the two named officers there is a risk that any emails they do not wish to be disclosed will not be provided and will be deleted. He says there was a motive for the two named officers not to disclose all the information.

### **Applicable law**

10. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

.....

(4) The information—

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

.....

**58 Determination of appeals**

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
  - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

11. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a FOIA request is not held somewhere in a large public authority's records. The Tribunal should look at all of the

circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with section 1(4), the information is that held at the time the request is received.

12. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*"

### **Issues and evidence**

13. The issue in this case is whether, on the balance of probabilities, the Council held further information within the scope of the Request.

14. We had an agreed bundle of open documents, which we have read and taken into account. We also had final written submissions from the appellant.

### **Discussion and Conclusions**

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

15. The appellant has provided considerable background detail in his appeal documents and submissions. He alleges that there has been a deception involving the two named Council officers and the clerk of KSPC. This deception is about arrangements for KSPC to pay for road markings on a proposed cycleway that should have been paid for by the Council. He believes that the officers added these road markings to the original proposal provided by KSPC to the Council. He does not accept the clerk to KSPC's explanation that he acted alone in proposing the locations for the road markings. He further alleges that emails between those officers and KSPC have been deleted to cover this up, because these emails contradict the version of events now given by KSPC and the Council.

16. It is important to note that we are not investigating whether the allegation of a deception is correct, or what happened in relation to the proposed road markings. Our role is limited to deciding whether the Council held further information within the scope of the Request which should have been disclosed to the appellant. If we decide that the Council does hold further information, we can issue a decision requiring the Council to disclose this information to the appellant.

17. The Commissioner obtained information from the Council about the searches carried out for information within the scope of the Request:

- a. The initial search was done by asking the two named officers to forward all relevant emails sent and received within the timeframe. The handling officer also searched the case file for any other emails within scope. All emails provided by the officers were released to the appellant.
- b. On internal review the IT team was asked to run an independent automated search of both mailboxes, using the search terms - *All emails SENT by [named officer] and [named officer], between 16/05/2018 and 04/07/2018, to 'Town & Parish Chairman Kingston Seymour', 'Town & Parish Clerk Kingston Seymour', or containing the words 'KINGSTON SEYMOUR'*. The Council accepts that this automated search should have been done in addition to the manual search.
- c. Any email which added value to a case will have been kept and would have been disclosed. Emails of no value may have been deleted. They are held in back-up for one month. Most of the correspondence between the officers and KSPC was routine and did not need to be held, except for reference as the project developed. Emails relating to the specific details of the proposals and their funding arrangements should be retained until the works were completed and accounts settled.

18. We have considered the adequacy of the searches conducted by the Council. We agree that the first search was not adequate, and this is shown by the fact that the second automated search found additional information. However, we do find that the two searches together were sufficiently rigorous. Combining an automated search with a request to the two named individuals was a practical way to find all relevant information. The Council should have conducted the automated search as well in response to the initial request, rather than on internal review after a complaint from the appellant.

19. The appellant says that there should have been a mailbox search first and then a search involving the two officers, to avoid the risk of emails being deleted. We do not agree that this is necessary. It is common for the individuals named in a FOIA request to be asked to identify and provide information within scope of that request, in addition to automated searches. It is up to a public authority how to conduct its searches. A public authority is not expected to proceed on the basis that its officers will delete relevant information if they are aware of a FOIA request.

20. The Commissioner followed her usual process in this case, which is to send a detailed request for information and explanations to the public authority. The Commissioner expects public authorities to be honest in their responses, and does not carry out further detailed investigation unless there is evidence of dishonesty or malpractice.

21. The appellant says that four important emails were missing from the emails disclosed to him after the internal review (as listed at page A55 of the open bundle). These emails were provided to him in the initial response to his Request. The Council said in the internal review that they assume these had been deleted between the original disclosure and the IT search. The appellant alleges that these are of value to the case and so the types of emails which ought to have been kept, and there is no way of knowing if the officers have also deleted any other emails not included in the first Request.

22. We note that the appellant's Request asked for emails from the named officers to KSPC. Only two of the four emails listed are from the named officers – the others are from KSPC. In any event, these emails had been provided to the appellant in response to his original Request. They are in the agreed bundle. The Council has complied with FOIA by providing these emails to the appellant. This is not affected by any later deletion of those emails.

23. The appellant argues that the deletion of emails between the original response to his Request and the internal review outcome indicates that further emails had been deleted and not disclosed at all. We do not agree. This is a serious accusation. We note that the officers themselves had provided the emails that the appellant complains were deleted later. We do not see that this provides any evidence that there had been wider deletions to cover up wrongdoing by those officers and/or KSPC. It is highly implausible that these emails were deleted in order to cover up wrongdoing, as they had already been disclosed to the appellant. The fact that this happened does not show that other emails were deleted and never disclosed in order to cover up wrongdoing. The appellant has given an explanation as to why he believes there was a deception relating to payment for road markings. However, this is not evidence which would enable us to make a finding that two officers had deleted emails which should have been disclosed under FOIA.

24. The appellant complains that the Commissioner failed to take account of his reasons for the complaint, evidence and arguments. This Tribunal's role is to reconsider the case, not examine the process followed by the Commissioner. We have reviewed the case and made our own decision, and have taken all of the appellant's reasons, evidence and arguments into account.

25. Having taken all of the above matters into account, we find on the balance of probabilities that the Council did not hold further information within the scope of the Request. We dismiss the appeal.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 21 August 2021

Promulgated: 17 February 2022