

Freedom of Information Act 2000

Determined on 20th February 2006

Decision Promulgated

.....20th March 2006.....

Before

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

DAVID MARKS

and

LAY MEMBERS

Peter Dixon and Suzanne Cosgrave

Between

JEFFREY SMITH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal dismisses the Appeal.

Reasons for Decision

1. This is a decision of a fully constituted Tribunal. This judgment follows as a result of written submission only, there having been no oral hearing.
2. The Appellant's Notice of Appeal, received by the Tribunal on 21 December 2005, is against the decision of the Information Commissioner ("the Commissioner") served on him on 25 November 2005. Before turning to the terms and basis of the Appellant's Notice, it is perhaps important to set out the factual background. For the purposes of such background, the Tribunal gratefully adopts what the Tribunal regards and hopes are certain non-contentious passages in the Commissioner's formal Reply to the Notice of Appeal, the reply being dated 11 January 2006.
3. The Appellant is Vice President of The Kingsbury-North West Jewish Youth and Community Centre, which is known as Kinnor. Kinnor formerly leased a property from the Brent Borough Council ("the Council") at Stag Lane, Kingsbury ("the Property"). In the late 1990s, the Council sought to sell its residual freehold interest in the Property. The Council at that time outsourced its property activities to Amey Facilities Management ("AFM"). In June 1998, AFM, on behalf of the Council, stated it was prepared to offer a long lease at a premium to Kinnor.
4. According to the Council at least, Kinnor replied expressing an interest in buying the freehold of the Property. No agreement was reached. The Property was eventually sold at auction in February 1999. It seems that Kinnor continued to occupy the Property on a leasehold basis. However, following the raising of a back rent review and issues regarding dilapidations by the new freeholder, Kinnor had to vacate the Property.
5. There is a factual dispute as between the Appellant and the Council as to whether Kinnor, whether in the person of the Appellant or otherwise, was offered and then refused an opportunity to purchase the freehold in the Property. As will be explained below, it is not necessary for the Tribunal to express any concluded view on this issue.
6. On 4 January 2005, the Appellant made a request under the Freedom of Information Act ("the Act") for seven documents relating to the disposal of the Property. For the sake of completeness, these are described in the following terms by the Appellant on Kinnor's behalf, namely:

"(i) The letter which offered us the freehold as opposed to a long lease.

- (ii) The reply, which turned down the freehold.*
- (iii) Report 14/99 to the Financial Management Sub-Committee on 28 January 1999.*
- (iv) Minutes of the above meeting.*
- (v) Report to the Community Development Committee 2 February 1999.*
- (vi) Minutes of the above meeting.*
- (vii) Details of the property supplied to Athawes."*

7. After some delay, the reasons for which are not material, on 21 February 2005, the Council provided the information sought save with regard to items (i) and (ii) in the above list. It stated that it did not have copies of any such letters.

8. On 23 February 2005, the Appellant wrote to the Council stating that he did not accept that the two letters, which constituted items (i) and (ii) were not held by the Council. The reason for this belief appears to have stemmed, at least in part, from two newspaper articles shown to the Tribunal and forming part of the grounds in the Notice of Appeal, the first being from the Wembley & Willesden Observer of Thursday, 9 August 2001 in which it was said that a "spokesman" for the Council had stated as follows, namely:

"We did give the group the first refusal. As with similar property transfers, we offered them very generous terms. But they refused after very protracted negotiations."

The second article referred to by the Appellant dated 2 January 2003 is from the Wembley Observer with particular reliance being placed upon remarks again made by a "spokesman" of the Council framed in similar terms.

9. On the same date, i.e. 23 February 2005, the Appellant wrote a further letter to the Council rejecting its contention that the two letters he sought were not held by it. That in turn prompted an internal review by the Council and on 8 April 2005, the Council duly confirmed that the review had been carried out and that no such letters had been found.

10. Following a formal complaint to the Council on 17 May 2005, the Commissioner issued a Decision Notice made under s.50 of the Act, in effect expressing its satisfaction that the Council did not hold the information sought.

11. The Notice of Appeal, as the Commissioner's Reply recognises, in effect, restates the basic complaint made to the Commissioner. Reliance is placed not only on the two newspaper

articles, but also a number of other documents, including board minutes and correspondence tending to show that some form of negotiation took place.

12. The Tribunal, however, agrees with the Commissioner and duly finds that the only issue before the Commissioner regarding which the Tribunal is now called upon to review is whether the Commissioner could properly find on the materials before him that the two letters requested by the Appellant had not been nor were held by the Council.
13. Section 1(1) of the Act provides for a general right of access to information held by a public authority on the part of the person making the request for such information. There can be no duty on the part of the public authority to communicate such information if it does not, or has never, had it.
14. After receipt of the Notice of Appeal, the Commissioner made further enquiries of the Council. A Ms Catherine Best, the Council's Corporate Information Manager, carried out a further review and duly confirmed that the Council did not hold copies of the two letters. The head of the Council's Property Services also confirmed as much.
15. Against the matters set out in the preceding paragraph, however, the Tribunal feels that it is only fair to point out that according to the Commissioner's Reply, the Council also informed the Commissioner that it did not routinely receive copies of all correspondence made by AFM. In addition, one of the documents relied on by the Appellant is a letter from PriceWaterhouseCoopers dated 30 December 2002 which stated that information on file "appeared" to suggest that negotiations between the Council and Kinnor about the freehold had taken place. The letter did not, however, say that PriceWaterhouseCoopers had in fact seen the letters requested by the Appellant.
16. Section 57 of the Act entitles a complainant to appeal against a Decision Notice. Under s.58 of the Act, the Tribunal shall allow an appeal if the Notice is not in accordance with the law, or to the extent that the Notice involved an exercise of discretion by the Commissioner, if the Tribunal determines that the Commissioner ought to have exercised his discretion differently. With regard to both questions, s.58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice was based.
17. There is no question of any error of law in this case. On the question of discretion, the Tribunal finds no grounds to justify any finding that the Commissioner ought to have exercised his discretion differently. Moreover, his Notice was based on factual findings,

which were unimpeachable both at the time of the original Notice as well as at the time when the Commissioner served his Reply.

18. In all the circumstances, it follows and the Tribunal duly finds that this appeal must be dismissed.

Signed

Date: 20th March 2006

David Marks
Deputy Chairman

Peter Dixon
Lay Member

Suzanne Cosgrave
Lay Member