



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2011/0144**

**ON APPEAL FROM:**

**The Information Commissioner's**  
**Decision Notice No: FS50313734**  
**Dated: 13 June 2011**

**Appellant:** David Thompson

**Respondent:** Information Commissioner

**Date of paper hearing:** 12 September 2011

**Before**  
Melanie Carter  
(Judge)

and

Suzanne Cosgrave  
Andrew Whetnall

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal decided to strike out the appeal.

## **REASONS FOR DECISION**

### **Introduction**

1. This appeal arises from a letter of request under the Freedom of Information Act 2000 (“FOIA”) by Mr Thompson to Nether Poppleton Parish Council (“the Council”) and arising from correspondence between the Council and the Chairman of the Poppleton Community Trust (“the PCT”). The letter of request was dated 14 September 2009 and concerned an application by the PCT for a Parish Council grant. In response, the Council provided certain documentation. The Council refused however to provide one letter, dated 25 April 2008, on the basis that as the letter had not been addressed to the Council (it had been addressed to the Chairman of the Council) it had not been recorded as a Parish Council document, rather, the clerk stated, that it was a personal letter and therefore not within the scope of FOIA
2. On 5 February 2010, Mr Thompson requested an internal review of the Council’s decision. No substantive response was received and Mr Thompson complained to the Information Commissioner (“IC”). After making certain enquiries, the IC issued a Decision Notice dated 13 June 2011. The IC upheld the Council’s refusal on the basis that the information sought was not actually held by the Council.
3. The Decision Notice explained that during the investigation, the IC received correspondence from the Council, which had already been provided to Mr Thompson, stating that the PCT Chairman’s letter had been taken away after it had been responded to and that the Council did not have a copy of it. The Decision Notice also stated that the PCT Chairman also did not have a copy of it. The IC noted that the Council had failed to confirm this with Mr Thompson early on and therefore provided guidance to the Council on how better to handle requests. The IC also found that as the Council had not issued a response to the request within the statutory time limit, it was in breach of section 17(1) of FOIA. In addition, as it had failed to confirm that one element of the information sought was not held, within the time period allowed to do so, it had also breached its obligations under section 1(a) and section 10(1).

4. Mr Thompson has appealed the Decision Notice to this Tribunal. The Commissioner considered that there was no realistic prospect of the appeal succeeding and accordingly invited the Tribunal to strike it out under rule 8(3)(c) of the Tribunal Procedure (First-Tier) (General Regulatory Chamber) 2009 Rules. The Tribunal Judge issued directions on the 19<sup>th</sup> August 2011 giving the parties until the 9<sup>th</sup> September 2011 to provide submissions on whether the appeal should be struck out. No further submissions were received from either party.

### **Grounds of appeal and applicable legal test**

5. The Tribunal's powers insofar as relevant to this appeal are to be found in section 58 of FOIA. Thus the Tribunal may uphold an appeal:

*“(1) If.....under section 57 the Tribunal considers-*

*(a) that the notice against which the appeal is brought is not in accordance with the law,”.*

6. Thus, the Tribunal is concerned with grounds upon which it might be said that the Decision Notice was not in accordance with law. The Tribunal does not take the IC's decision again, rather its task is to consider the Decision Notice and to consider whether it can be impugned on legal grounds.
7. As the Tribunal is considering whether or not to strike this appeal out under rule 8(3)(c) of the Rules, it has to ask itself whether the appeal has a realistic prospect of success. The procedure adopted by the Tribunal in such situations is considered in the Tribunal's decision in *Tanner v Information Commissioner 2007/0106*.
8. The Tribunal concluded there that the appropriate test was analogous to the test under Part 24 of the Civil Procedure Rules 1998. This makes provision for a claim which has no real prospect of success to be summarily dismissed. Guidance on the meaning of this test was provided in *Swain v Hillman [2001] 1 All ER (CA)* by Lord Woolf

MR. He said that the words "no real prospect of succeeding" did not need any amplification as they spoke for themselves. The court must decide whether there is a "realistic", as opposed to "fanciful", prospect of success.

9. Mr Thompson's grounds of appeal were brief and essentially amounted to his disbelief, given the way his request had been handled that the letter was not held.

### **Consideration**

10. Whether a public authority holds a document, which is a dispute as to fact, is determined according to the normal civil standard of proof, that is on the balance of probabilities (*Linda Bromley & others v the Environment Agency* EA/2006/0072). In this appeal, the only evidence pointed to by Mr Thompson to countervail the Council's assertion that it does not hold the particular letter, is the inconsistency in responses to his request made by the Council and that the PCT may at one point have held the document.
11. The Tribunal noted the Appellant's belief (reported in the Information Commissioner's response at paragraph 13) that the letter of 25 April 2008 was an application for grant, and it seems to be acknowledged that the letter of 3 May 2008 was a response. If the letter of 25 April did relate to or apply for a grant from the Parish Council, our view is that the letter would have been on parish business, whether sent to the Chairman of the Parish Council's home address or not, and would therefore have fallen within the scope of the Act. The Tribunal and the IC had no way however of checking the content of the letter.
12. The IC was, in the Tribunal's view, entitled to accept the word of the public authority that it did not hold the letter and not to investigate further in circumstances, as here, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or any evidence as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, in every case in which a public authority is simply not believed. Frustrating though this is for Mr

Thompson, the Tribunal accepts in a case such as this, that the IC is entitled to proceed on the word of the Council.

13. The fact that the Council first gave one reason why and subsequently changed this, during the course of the IC's investigation, does not in the Tribunal's view suffice to call into question the assertion that the document is not held. Whether or not the Council *ought* to hold this information is beyond this Tribunal's jurisdiction.
14. Similarly, as the PCT is not a body subject to FOIA and the Tribunal does not understand it to have held the letter on behalf of the Council, whether or not the PCT held or holds the letter is immaterial. No arguments were put to the Tribunal on whether the PCT held information on behalf of the Council and Mr Thompson may have been under the impression that, given the close relationship of the two bodies (the setting for this issue being a parish), FOIA would apply to both. It may have been that Mr Thompson hoped that the Council was able and indeed obliged to require that the PCT hand over any copy it held. That however is not part of the FOIA regime and Mr Thompson must make his own separate request to the PCT.
15. Clearly it was not helpful that the Council failed to consider the position properly at the outset. Had it done so, it would have replied that it did not hold the information. By referring simply to it not being Parish Council business, this led to understandable suspicions on the part of Mr Thompson that the particular letter was in fact available to the Council.
16. It was also not helpful that the Council minutes later referred to an internal review having been carried out, but the result of this, if it ever did take place, was not communicated to Mr Thompson. It might be useful to Mr Thompson to understand that the Council would have been acting properly in carrying out an internal review when requested to do so, whether or not it held the document in question. The purpose of the internal review is to double check whether the right decision has been reached, that the requester has been given the right information or where no disclosure is made adequate reasons have been given. A failure to carry out an internal review or to communicate its results to the requester is properly a subject of criticism but cannot on its own lead to a successful appeal.

**Conclusion**

17. In light of the reasons set out, the Tribunal was of the view that this appeal has no realistic prospect of success. The Tribunal strikes this appeal out.
  
18. Our decision is unanimous.

Signed:

Melanie Carter

Judge

Date 14<sup>th</sup> September 2011