



**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER  
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2011/0295

**BETWEEN:**

**MRS JANET GIGGINS**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**DECISION ON STRIKE-OUT**

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**Subject matter**

**Rule 8(3)(c) The Tribunal Procedure (First-tier) (General Regulatory Chamber) rules  
2009 No. 1976 (L.20)**

**Cases considered**

**Turner v Information Commissioner (EA/2007/0106)**

**Swain V Hillman [2001] 1 ALL ER (CA)**

**Bromley v Information Commissioner & the Environment Agency (EA/2006/0072)**

**Decision**

1. This appeal arises from a letter of request the Appellant wrote to West Berkshire Council on 22 March 2011:-

"I understand that there was a meeting between officers and councillors from around 6 PM to 6:30 PM on 17 November 2010 before the Western Area Planning Committee meeting considering the planning application for Sovereign Housing's proposed redevelopment of the Priory and Platt Court in Hungerford (application number 10/01928/FULEXT). The meeting was held in the council chambers and the press and public were excluded.

Please could you supply:

- (1) the agenda for this meeting
- (2) the minutes of the meeting
- (3) any other associated notes/documents"

2. The Council responded promptly stating that there was no briefing meeting or pre-meeting held on that date at that time. The Appellant asked for an internal review and following to review the Council again confirmed that there were was no such meeting. The following day the council wrote to her to confirm that while no meeting had taken place a training session for the committee had taken place. The Council confirmed that the contents of the training were unrelated to the meeting that took place and that there were no agenda and minutes.
3. The Appellant on 7 April 2011 wrote asking for the following information:-

The agenda for this meeting

The minutes of the meeting

Any other associated notes/documents

In the communication she stated that she would expect to receive training meeting invitations or notification (specifying the date and purpose of the training), acceptances or apologies, notes specifying the matters covered and a list of attendees.

4. The Council conducted a further internal review and replied to the Appellant on 10 May 2011. The response emphasised to the Appellant that the training was not a Council committee meeting and that the Council did not retain notes or other documents relating to it. The Council provided the Appellant with the audit trail for organisation of the meeting, including enclosures demonstrating how the training came to be commissioned by members of the Council and the invitations despatched by the officer delivering the training. The Council's review concluded that all relevant information had been provided to the Appellant and that no further information was held.
5. The Appellant remained dissatisfied. She considered that the Council must hold some information relating to meeting. Her views appeared strongly influenced by

a suspicion arising from the initial response of the Council stating that no meeting had taken place. The essence of the Appellant's complaint was, and remains, the assertion that in her opinion the Council 'must' hold information (whether in the form of an electronic copy of the training presentation or notes of discussions) evidencing the matters discussed by the participants who attended the training. She felt that the contents of the session were likely to have been related to the specific planning application with which she was concerned. She has been supplied with a substantial amount of information concerning how the training session was arranged and informed that the PowerPoint presentation which it had been intended to use at the session had become defective and therefore was not used. The Commissioner has pursued a number of lines of enquiry with the Council and received appropriate assurances from the Council that all relevant information which it holds has been disclosed. The PowerPoint presentation which was the subject of much enquiry was not used at the training session and therefore does not fall within the scope of the request.

6. Following an investigation the Commissioner concluded that all information held by the Council that was within the scope of the Appellant's initial and amended requests had been provided, and on the balance of probabilities, the Council did not hold further additional information relevant to the Appellant's initial and amended requests and a reasonable effort has been undertaken to confirm that this was the case.
7. In her appeal she raised the following key points of argument:
  - the fact that the Council's initial response stated that no pre-meeting of the Planning Committee had taken place at the place and time asserted by the Appellant and that further information was only disclosed in response to further enquires by the Appellant and the Commissioner, should be treated as giving rise to an inference that the Council is seeking to conceal information; and
  - the assertion that it is inherently unlikely that the Council does not hold further information which is relevant to the subject matter of the Appellant's initial and amended request.

## LEGAL FRAMEWORK

8. The Tribunal's powers with respect to this appeal are to be found in section 58 of FOIA. The Tribunal may uphold an appeal if under section 57 the Tribunal considers that the notice against which the appeal is brought is not in accordance with the law. Therefore, the Tribunal is concerned with grounds upon which it might be said that the DN was not in accordance with law. The tribunal does not take the Commissioner's decision again, rather its task is to consider the DN and to consider whether it can be impugned on legal grounds.
9. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provided at 8 (3):-

*"the tribunal may strike out the whole or part of the proceedings if-*

*(c) the tribunal considers there is no reasonable prospect of the Appellant's case, or part of it, succeeding."*

10. The test which the Tribunal applies in cases such as this is whether the appeal has a realistic prospect of success. In the case of *Turner v Information Commissioner 2007/0106* the Tribunal concluded that this 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 the case of *Swain V Hillman [2001] 1 ALL ER (CA)* by Lord Woolf MR who said that the words (no real prospect of succeeding) did not need any amplification as they spoke for themselves. The court (or in this case the Tribunal) must decide whether there is a realistic as opposed to fanciful prospect of success.
11. In response to the invitation to make submissions with respect to the striking out of the claim The Appellant responded by formulating her view of the key issue as:-

"Were sufficient searches made to support the ICO decision?"
12. When deciding whether information is held by a public authority for the purposes of FOIA (or the EIRs), the test to be applied by the Commissioner and the Tribunal is not one of certainty but rather the balance of probabilities: *Bromley v Information Commissioner & the Environment Agency (EA/2006/0072)* at §16. In *Bromley* the Tribunal noted that applying this test required it 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 these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”*

### **Consideration**

13. The first substantive issue raised by the Appellant is whether the Council responds to the appellant initial request can properly be seen as giving rise to concern as to the conduct of the Council. The Council’s Information Management Officer responded to the request by saying that occasionally briefing meetings were held before committee meetings and that she would discuss the request and establish what information was held. That officer then contacted officers who attended the committee meeting on that date and the officer who minuted the meeting and they had confirmed that there was no briefing meeting or pre-meeting held. That initial was response was an entirely reasonable response from the relevant officer who had approached officers who attended the committee to find out about any pre-meeting, the likelihood of a pre-meeting taking place being inferred by the Information Management Officer from the request. However the Information Management Officer subsequently was informed by the Development Control Manager who:-

"has confirmed that he supplied a general training session to the Eastern Area Planning Committee members and the Western Area Planning Committee members in November 2010, and the training for the Western Area Planning Committee members took place before the meeting on 17 November. The training consisted of an update for members, primarily on the changes to PPG3, the changes to garden grabbing guidance, and the changes to Brownfield land definition and residential density. It was unrelated to the business at the meeting which followed, and of course there was no agenda or minutes. This training update was delivered in the

Council chamber, and I think this is what you have mistaken for a pre-meeting of the committee."

14. The response of the Council was informative, and prompt and subsequently information was provided which verified this provision of general training. Further information emerged in response to the enquiries of the Appellant which demonstrated that the Council approached the issue in a proper and reasonable way. No grounds for suspicion of the Council's conduct can arise from the way it responded to the initial enquiry.
15. The second ground is in essence that it was unlikely that training would be carried out without there being the training materials. and that it could be expected that these would be retained by participants over the four month period between the date of the training and the Council's receipt of the Appellant's FOIA request.
16. The Commissioner had the benefit of the evidence of the Council officer who delivered the training that the PowerPoint presentation was corrupted and so was not used to deliver the training. There is no evidence to contradict this, it seems plausible therefore that no printed copies of the slides or other material were produced and given to those attending the training session. It is also clear that this training session was of an ad hoc nature, lasting merely 30 minutes, and arranged to slot in before the two relevant area planning committee meetings. As such it is not surprising that relatively little effort went into the preparation of the briefing material, furthermore it does not seem unlikely that some months afterwards no notes were retained. Such an informal updating of members of a council on national planning policy issues is a very different matter from a decision-making meeting.
17. The Tribunal is therefore satisfied that appropriate enquiries were made by the Commissioner and searches carried out by the Council. The explanations and information provided by the Council and accepted by the Commissioner are cogent and satisfactory. They have the ring of truth about them.
18. The implicit alternative which the Appellant would wish the Tribunal to accept is that despite the Commissioner's thorough investigation of the Council has acted systematically and successfully to obstruct and mislead the Commissioner. The Appellant has been able to produce no evidence in support of this position which the Tribunal considers highly implausible.

**CONCLUSION**

19. In the light of the reasons set out, the Tribunal was satisfied that this Appeal has no realistic prospect of success. The Tribunal therefore strikes this Appeal out under Rule 8(3)(c) of the Tribunal's rules.

Signed C Hughes

Information Judge

14 March 2012