IN THE FIRST-TIER TRIBUNAL **APPEAL No. EA/2011/0190**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0359218
Dated: 18th July 2011

Appellant: **Councillor Jeremy Clyne**

Respondent: **The Information Commissioner**

2nd Respondent: **The London Borough of Lambeth**

Heard at: **The Tax Tribunal and at Central London County Court**

Dates of Hearing: **2nd February 2012 and 15th March 2012**

Date of Decision: **10th May 2012**

Before

Fiona Henderson
(Judge)

And

Stephen Shaw
and
David Wilkinson

Attendances:

For the Appellant: Mr Clyne represented himself
For the Respondent: The Commissioner chose not to attend the oral hearings
For the 2nd Respondent: Mr Edward Capewell

Subject matter:

EIR – Whether the information is held r 12(4)(a)

What is a public authority -EIR r2.(2)

Cases:

Bromley & others v Information Commissioner EA/2006/0072

Oates v IC EA/2011/0138

Keiller v IC and University of East Anglia EA /2011/0152

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and makes the following amendment to the Decision Notice FER0359218 for the reasons set out in main body of the Decision.

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2011/0190**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: **10th May 2012**

Public authority: **London Borough of Lambeth**

Address of Public authority: **Lambeth Town Hall,**

Brixton Hill,

London SW12 1RW

Name of Complainant: **Councillor Jeremy Clyne**

The Substituted Decision

Lambeth Council have breached regulation 5(1) EIR by failing to disclose all the information held at the relevant time. Lambeth Council have breached regulation 5(2) of EIR in that the information was not disclosed within the time set down

Action Required

Within 35 days of the date of this decision the Council must:

a. restore the expunged email account of Ian Blundell.

b. Search the restored email account of Ian Blundell and the records of Councillor Paul McGlone (from 31st October 2007 to 26th March 2008) using the same key words and search terms as used during the adjournment.

c. Either disclose information within scope to the Appellant or issue him with a refusal notice pursuant to r14 EIRs.

Dated this 10th day of May 2012

Fiona Henderson

Judge

REASONS FOR DECISION

Introduction

1. Southern Rail operate a cleaning depot at Streatham Hill, it is used for light maintenance and the cleaning of trains. In 2005 they constructed 3 parallel canopy structures running for approximately 300 m on the raised sidings. The canopy structures carry lighting as well as pipes used for removal of waste from train toilets, water filling and providing sand for the brakes. The canopies are also said to provide protection from weather for workers.

2. The construction work was undertaken without planning permission, Southern Rail relying on Permitted Development rights under which planning permission is not required. The works were said to affect approximately 100 properties and there was considerable local objection. The matter was brought before the Planning Applications Committee (PAC) in September 2006 which determined that Permitted Development rights did not pertain to the majority of the development. This was contrary to the recommendation of the Council's planning Officers supported by legal advice from a QC. The Committee instructed Officers to submit a report on the expedience of taking enforcement action.

3. On 24th April 2007 an Independent Railway Consultant was appointed[1] to provide a report to include the assessment of "whether the works are necessary in relation to the operation of the railway and ... required for the movement of traffic by rail."

4. The earlier drafts of the report found that the canopies were not required for the normal operation of the railways. However between October 2007 and the February 2008 draft, the report's conclusion on this point had changed stating that:

[1] The original railway consultant appointed in December 2006 withdrew as a result of other professional commitments.

"the canopies provide a safe inspection and maintenance arrangement and are required for the safe and reliable operation of the depot".
This was the conclusion which appeared in the final version of the report dated 26th March 2008.

5. The situation is not yet concluded, on 23rd April 2009 the PAC upheld its original decision. Southern rail appealed resulting in a 12-day planning enquiry. The Inspector's report is currently before the Secretaries of State for Environment and Transport but they have not issued their decision. The Council are on notice that a Judicial Review by one or more residents is in contemplation.

<u>The request for information</u>

6. On 23rd March 2010 Councillor Clyne asked:
"Please supply all reports, emails, letters, records of telephone calls and any other communication, discussion or meeting relating to the different drafts of the report on the Streatham Hill railway depot development by the FN[2] consultancy."

7. The Council purported to answer that request with disclosure of approximately 150 pages of documents largely comprising emails between the Council's enforcement officer and the Independent expert. There was nothing disclosed between the October 2007 version of the report (recommending the removal of the canopies) and the March 2008 report which found that no practical alternative to the present system existed and that the canopies were required for the safe and reliable operation of the depot.

8. Pursuant to Councillor Clyne's request for an internal review based on gaps he believed were evident from the disclosure the Council confirmed:

> *"all correspondence that the Planning division holds, on both the electronic and paper files, and officer e-mail accounts has been checked, and there is no other correspondence other that what has been supplied to you already"*.

[2] Fraser Nash Consultancy

The complaint to the Information Commissioner

9. Councillor Clyne complained to the Commissioner. During the investigation he drew the Commissioner's attention to the fact that after extensive correspondence on record up to and including production of the draft Frazer Nash report in October 2007 there is allegedly absolutely nothing else recorded up to the February 2008 Frazer Nash report, which came to a contradictory conclusion. He argued:

   "*It really is stretching credibility beyond breaking point for the Council to suggest that this final report came into existence spontaneously, and was not even acknowledged".*

10. The Commissioner confirmed that Lambeth:

   "stated unequivocally that no documentation had been deleted or destroyed and that you had been provided with all the information that was held... It is unlikely that we would take this matter further without evidence to suggest that any further information relating to your request had not been provided to you..."

11. The Decision Notice concluded that:

   "The Council's responses were sufficient to satisfy the balance of probabilities test referred to above[3]... the Commissioner is therefore satisfied that it does not hold any further information that has not already been supplied to the complainant."

The appeal to the Tribunal

12. The Appellant appealed on 15th August 2011 on the following grounds:
    i) It is inherently unlikely that Lambeth does not hold the information requested.
    ii) The Commissioner's investigation was not sufficient.
    iii) The Commissioner misunderstood the scope of the Appellant's request.

[3] *Oates v IC EA/2011/0138*

iv) Cross-referencing documents disclosed to the Appellant supports the inference that further relevant documents falling within the scope of the request are held by Lambeth and have not been disclosed.

13. In November 2011 the case was reviewed by the Council's solicitors who had *"re-performed our original searches"*. However, they were unable to locate the paper file and the email account of Ian Blundell, who was the case officer who had conduct of the case at the relevant time and his email account had been expunged by the Council in June 2011 (which was after the complaint to the Commissioner).

14. Enquiries were made of Chris Watters the independent expert from Fraser Nash who authored the report as to whether he had any relevant material within scope. He retrieved an Email which had been sent to him and the Council's Solicitors by Ian Blundell forwarding Southern Rail's points in response to his draft October 2007 report. In their response Southern Rail stated that it would cost £7.3m to take down the canopies and re-route the services. The terms of Ian Blundell's email were:

    "If you could make any initial comments by Monday afternoon so we can start finalising everything, it would be most appreciated".

15. As a consequence of this email the Council then located:

    a) an email also from Ian Blundell in similar terms to John Flynn, Lambeth Council's senior enforcement officer (who had conducted the original searches pursuant to the information request).

    b) an edited version of the report which showed tracked changes in the name of Ian Blundell. These tracked changes were consistent with the conclusions of the final report.

16. The track changes on this version of the report are dated 30th and 31st January 2008 and are prefaced with:

    "FOLLOWING THE RESPONSE BY SOUTHERN THESE ARE MY THOUGHTS Please assess and let me know what you think..."

17. These documents were both retrieved from records that had already been searched by the Council. These documents have now been disclosed, but the Council has not been able to locate any record of the responses to Southern Rail's comments, or any responses to Ian Blundell's proposed amendments to the report.

The questions for the Tribunal

18. The issues before the Tribunal are:

i) Whether on a balance of probabilities additional information falling within the scope of the request was held at the relevant time.

ii) If so what steps should be taken by Lambeth.

Evidence

19. The Tribunal heard oral evidence from Mr Clyne and a fellow Councillor and 2 Council employees. Further written evidence was produced pursuant to the adjournment of the hearing on 2nd February. There was no withheld material as all material that has been retrieved has been disclosed[4]. The Tribunal has also had regard to the agreed bundle of documents. The Tribunal has taken into consideration all the evidence before it, but has only referred to such parts as are material in the analysis of the law and arguments below.

20. The Commissioner confined his participation to written submissions relating to the initial grounds of appeal. He made no submissions in relation to the issues arising out of the adjournment. It was disappointing that the Commissioner chose not to attend the hearing despite it being clear at an early stage in the appeal process that significant additional information had not been disclosed contrary to the Commissioner's finding in his decision notice. Legal submissions and analysis of the Evidence

[4] Although there was reference to "exemptions" under EIR being relied upon during the review stage, the Tribunal accepts that this was due to the use of standard letters and is not material to the information in this case.

21. The Council accept that additional material has been found and discovered since the Commissioner's Decision. They argue that their search is now sufficient and they rely upon the case of *Bromley & others v Information Commissioner EA/2006/0072* that the test for the Tribunal is not one of certainty but whether on a balance of probabilities the public authority held more information at the relevant time.

22. Whilst not bound by the decision of a differently constituted panel of the First Tier Tribunal, this Tribunal agrees with the statement of the law as set out in *Bromley* and notes the factors identified in *Bromley* to determine this issue namely:

    i. The quality of the Public authority's initial analysis of the request.
    ii. The scope of the search that it decided to make on the basis of that analysis.
    iii. The rigour and efficiency with which the search was then conducted.
    iv. Discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which has not been brought to light.

23. The Commissioner argued that he was entitled to accept at face value the responses of the Council where there was no evidence of misleading the Commissioner *Oates v IC* EA/2011/0138 para 11 "*where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession*".

24. In this case before the Commissioner Mr Clyne was able to point out a significant and unexplained imbalance in the material uncovered. Whilst it is acknowledged that it is no part of the Commissioner or the Tribunal's role to determine what should have been held the following was apparent from the material disclosed prior to the involvement of the Commissioner:

a) The abundance of documents before October 2007 and their paucity thereafter,
b) Documents to which there appear to have been no response,

c) References to people in other departments as other sources for these documents, with no explicit assurance by name that they had been approached.

d) All of this coincided with a significant change in a document for which there is no recorded explanation in circumstances where it was to be expected that there would be one.

25. Unlike in the case of *Oates* where the request was limited in its terms, this request was very wide, making the paucity of recorded information and apparent change in process striking. The Commissioner stated that he was *"satisfied that the Council had responded categorically enough to make further investigation unnecessary"*. The Tribunal does not consider that a categorical response addresses the factors identified in *Bromley* which provide the basis for an assessment of whether additional material is held. It is notable that notwithstanding the Commissioner's finding that the search conducted was acceptable, during the appeal hearing the Council conceded that they had used the wrong search term, relevant material was found in areas already searched and between the Decision Notice and the date of the adjourned hearing on 15th March more than 280 additional pages were disclosed by the Council.

26. The Commissioner asked whether the Council held any previous versions of the Fraser Nash report. On the basis of this, the Appellant is of the view that the Commissioner has misunderstood his request. The Commissioner has explained that he had understood Mr Clyne to be asking for earlier drafts because of the terms of his request for a review. However, the Tribunal is satisfied that in any event previous drafts may have fallen within scope since e.g. a track changed document may be the evidence of how the document came to change between October and February. It is clear from the material before us that the Commissioner was addressing his mind to the entirety of the issue.

27. Applying the *Bromley* factors to the evidence, the Tribunal heard from Mr Flynn, Team Leader Planning Enforcement in the Planning Department of Lambeth Council. When the information request was made he conducted the searches relied upon by the Council. His evidence was that he made a manual search of his email and that of the

case officers during the relevant time including Wade Sowman and Ian Blundell. He also searched the paper file. He had interpreted the request narrowly as being for:

> *"Copies of all correspondence between the Planning Division and the Independent Railway Expert"*

He said that he confined himself to draft reports and the end report. He accepted that in hindsight this was wrong because the request was not limited to the Planning Division and was not limited to correspondence. In consequence he had not caused any of the legal department files to be reviewed or considered information in desk diaries. He acknowledged that he had not searched the records of the then head of planning and, despite having searched the drive of Wade Sowman, his original search had not uncovered the January 2008 track changed version of the report stored on that drive.

28. Lambeth argued that in light of the broad scope of the request it had been reasonable to limit its searches to the planning department which was most likely to hold information. The Tribunal disagrees. It is not for the public authority unilaterally to redraw the ambit of the request; if the scope is too wide to enable a proper search to be carried out, efforts should be made to refine the request.

29. From Mr Flynn's evidence it was apparent that Mr Blundell, the case officer between June 2007 and June 2008, was the hub of all communication spending up to 90% of his time on the case, as it was unique and Lambeth had never dealt with one like it before or since. It was very complex. Mr Blundell was meant to copy Mr Flynn in to electronic correspondence and place relevant material in the paper file. Mr Flynn told the Tribunal that he was surprised at the dearth of material in Mr Blundell's email. It was apparent now that the computer document headings he viewed were condensed and therefore keywords were not always apparent when looking at a list.

30. In April 2011 Mr Flynn explained the lack of recorded information between October 2007-March 2008 as being because "*... all communication was by phone, no notes*

were kept as we were too busy (and it didn't seem necessary at the time)". From Mr Flynn's evidence to the Tribunal and from the from the disclosures made in November and during the adjournment it is apparent that in fact there were meetings and some emails.

31. There is reference in the comments from Southern Rail which were incorporated into Ian Blundell's track changes to the report that they disputed Chris Watters assessment of the cost of removing the canopies (£250K) and maintained that it would in fact cost £7.3million. The Tribunal notes that there is no record of how Southern Rail reached that estimate. Whilst Mr Flynn told the Tribunal that they argued the costing very convincingly in a meeting on 31.10.07 there is no record of this in any email or minutes and it does not appear to have been independently questioned or verified.

32. When researching the files in November 2011 as prompted by the email from Mr Watters (paragraph 14 above), Mr Flynn:

    i) Was unable to find the email from Ian Blundell to Chris Watters dated 24th January 2008.

    ii) Found the email to him from Ian Blundell with the original email from Southern Rail dated 24th January 2008 (FNC's email of 24th January 2008) which he now believes he overlooked inadvertently (assuming that the person named in the email was another person called Chris and not Chris Watters).

33. Councillor Ashley Lumsden whose constituency includes the Railway Depot told the Tribunal that in his experience when commissioned reports are presented as being the work of an independent consultant, a committee would expect it to be his work. They would not expect key elements of the final text to have been redrafted by an officer. Ordinarily if an officer disagreed with the conclusions of a report they would do so in a covering letter indicating what could be distinguished e.g. *"we gave greater weight to this"*.

34. Such a fundamental change as happened between the October 2007 and February 2008 versions of the report in his experience could only happen upon instruction and not spontaneously. Consequently there ought therefore to be a paper trail. Planning and legal departments are in different buildings[5] therefore more likely to communicate by email rather than “pop their head around the corner”. The practice of the Council and their preferred method of communication is by email. In his experience the Council keeps copies of legal advice received.

35. It was suggested by Mr Flynn that the reason for the lack of recorded information from October 2007- March 2008 was that amendments were agreed orally and that no written records of the discussions were made. The Tribunal considers that there is a difference between clarifying a point which might be done orally and responding to an email inviting comments on substantive amendments proposed. It is also the experience of the Tribunal that lawyers prefer to give their advice and comments in writing so that they have proof of the advice they have given to ensure that there is no misunderstanding.

Information Disclosed Pursuant to the Adjournment

36. Following the hearing on 2nd February 2012 and in light of the evidence heard, the case was adjourned to enable the Council to make the following searches with a view to establishing whether there remained any additional material within scope held by them:

i) A search using key words of all email accounts already searched (save that of Ian Blundell which has been expunged)

ii) A key word search on the x drive and m drive of all those persons whose email accounts had already been searched.

iii) A key word search on the email accounts and m drive and x drive, the desk/ electronic diary of:

- The former head of planning and his PA,
- The Head of the Legal Department,

[5] In this case an independent firm of Solicitors was used by the Council also in different premises.

- The Monitoring Officer,
- The Legal Officer to the Planning Department.

iv) A search for and if located a search of the paper file.

37. The Council completed the agreed searches doing key word searches on the file names and then manually reviewing those identified. The paper file was located and additional information was found in the accounts for Head of Planning and PA, Head of Legal and John Flynn (the Senior enforcement officer). Approximately 250 additional pages were found including:

    a) From the paper file:

    - minutes of the meeting of 20th August 2007 headed Streatham Hill Depot,
    - Report of 24.12.07 by Southern and network rail addressing the issues raised at the meeting of 31.10.07

    b) From the x drive:

    - using keyword Streatham Hill Depot a timeline created by Ian Blundell setting out a list of documents received or created (not all of which have been traced pursuant to this request e.g. 15/01/08 questions raised by Chris Watters of Fraser Nash Consultants and Sharp Pritchard Solicitors sent to Southern Rail to clarify/answer.)
    - A second copy of the report with track changes made by Ian Blundell indexed as "amended Frazer-Nash report from Chris Watters January 2008".

Does the Council Hold Further Evidence within Scope which has not been disclosed?

38. The Tribunal finds it very surprising that there is so little by way of recorded information relating to the period between October 2007 and March 2008 especially in light of the way that the case was administered prior to that date. The issue for the

Tribunal is not what should have been recorded and retained but what was recorded and retained. The Tribunal has not received an explanation that satisfies it that no recorded information was generated, nor an adequate explanation as to why if generated it has not been retained. Whilst the Tribunal accepts that this information is not in the paper file when it might have been expected it to have been placed there, the Tribunal, rather than concluding that the information has never existed in recorded form, is satisfied that this reflects inconsistent and poor administrative practice.

39. Lambeth argued that the breadth of the request meant that it was too difficult to ensure that every loose end was tied up. They argued that Mr Clyne should resubmit targeted individual requests to follow up these loose ends.

40. The Tribunal disagrees with this approach because:

i) It was accepted by the Council that they would have been included within the terms of the original request.

ii) No advice and assistance was given to refine the request, or objection taken as to its parameters at the time, before the Commissioner or in the pleadings before this Tribunal.

iii) Mr Clyne might be in a worse position were he to agree to this course[6]. The Council dispute that once expunged the account is "held" by them. At present this is material to s 50(4) FOIA, the steps that can be required in any decision notice as it is agreed that Mr Blundell's account and any information within it was "held" by the Council at the date of the original request. Any new request would be made after the account had been expunged, and their argument would be in relation to r3 and 12(4)(a) EIR that the information cannot be disclosed as it is not held at the date of the request.

[6] The Tribunal confines its actual decision to the s50(4) FOIA point based on the facts before it but acknowledges that the arguments would be different for material expunged prior to the receipt of the request.

41. When the case was adjourned the Council did not agree to reconstitute Mr Blundell and Ms Morris'[7] email accounts or to ask Sharpe Pritchard (their legal advisors) what information they hold.

Information held by the Solicitors

42. Mr Clyne argues that since the Council did not have sufficient in-house expertise they instructed Solicitors to act "as the Council's legal department" in this matter. He argues that they are holding information on behalf of the Council and it should be reviewed to decide if any should be disclosed. He argues that it would be wrong if the Council could avoid disclosure by using an outside agency to perform an "in-house" function.

43. The Council are a public authority as defined under s3(1) FOIA. The definition of public authority in Regulation 2(2) EIRs includes:

...(c) any other body or other person, that carries out functions of public administration; or

(d) any other body or other person, that is under the control of a [public authority] and—

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.

44. The Tribunal is satisfied upon the evidence that Sharpe Pritchard are not controlled by the Council, they are an Independent firm of Solicitors instructed on behalf of the Council in the same way as Counsel instructed to provide expert advice. They do not fall within the terms of regulation 2(2) (c) or (d) EIR as their functions and services are not public, they are carried out under a private contract with a public authority.

[7] A planning case officer from June-September 2008 whose email account was searched by Mr Flynn but could not be traced and was not recorded as having been expunged when the additional searches were conducted in November 2011.

Consequently they are not acting “as” the Council’s legal department but are providing outside legal advice to the Council. The evidence was that the Council’s legal department had some overview (e,g the Head of the legal department attended certain meetings) and on the evidence of Councillor Lumsden would have been keeping its own records. We are satisfied that there would be no avoidance of the EIR on this basis. The tribunal is satisfied the Solicitors firm are not a public authority under EIR.

45. Regulation 3(2) EIR provides that information is held by a public authority where:

...(b) it is held by another person on behalf of the authority...

However:

i. There is no evidence before us that the Solicitors had agreed to keep records on behalf of the Council,

ii. The Tribunal is satisfied that as a matter of general practice the Solicitors would send a copy of any relevant correspondence to the Council for their records, any copy they kept would be for the firm’s own records (to protect against a negligence claim, to assist in audit and billing).

iii. There is evidence from the information disclosed that this is what was happening up until October 2007 and this is the experience of Councillor Lumsden.

iv. After that date there is a paucity of recorded information and this does not just apply to correspondence between the Council and their Solicitors.

Consequently we are satisfied that the absence of recorded information held by the Council is not due to a change in responsibility between the Solicitors and the Council but reflects a general issue with regards to the generation of and retention of recorded information. Consequently we are not satisfied that any information held by the Solicitors falls within the scope of the request or is disclosable pursuant to EIR.

Ian Blundell's Expunged Email Account

46. The Tribunal notes that the focal point for all the expected correspondence would be Mr Blundell. At the time that Mr Blundell left in June 2008 the onus was on the leaver to make sure all relevant material was on the hard drive. Mr Flynn was surprised at how little there was in Mr Blundell's email account. The Tribunal has had to consider that it is possible that it had been deleted by Mr Blundell prior to his leaving, as his email has been searched by Mr Flynn, and no relevant material was disclosed. However, the search was manual, did not use key words and was too limited in scope. The discovery of material in November and during the adjournment that ought to have been disclosed originally, in accounts already searched, supports the conclusion that, on a balance of probabilities there is relevant material in the deleted email file of Ian Blundell which has not been disclosed. Additionally the Tribunal relies upon the document list drawn up by Ian Blundell and disclosed after the adjournment which points to the existence of other relevant documents within scope.[8]

The deleted email account

47. Mr Blundell's email account was expunged in July 2011. From the evidence of Ian Goodwin (Lambeth's Information Governance Manager) the current process is that when a member of staff is leaving the line manager reviews the email to decide if it should be retained. If not retained, once it has not been used for a year it is automatically listed for deletion. Prior to deletion it is referred to internal audit, HR and legal services. This system was not in place when Mr Blundell left so it does not appear that Mr Flynn was ever asked about the propriety of deleting the account, however, the evidence was that the other referrals took place prior to deletion.

48. Mr Clyne argues that this deletion is in breach of the Council's own code which requires retention whenever there is the possibility of litigation and the Commissioner's code of practice (pursuant to s46 FOIA) which provides for the retention of records known to be the subject of litigation or a request for information. The Tribunal heard that the Council's legal review concentrates primarily upon

[8] See paragraph 37b above

employment litigation and observes that the process appears flawed in that there is no mechanism to ensure that regard is had to outstanding information requests or appeals to this Tribunal. We note that the deletion took place in the context that this was, in the words of Mr Flynn, a planning case without precedent for this Council, as it was not normal for enforcement to go to committee. It was not resolved when the Council chose to delete Mr Blundell's account.

49. There is an email archive system. This creates daily back ups as well as the specific archiving of email accounts. It was Lambeth's contention that the information would only be held in circumstances where the live data system was destroyed and the public authority would then restore it, in all other circumstances it was not "held". Their view was that having been intentionally deleted (rather than lost by way of a disaster) it was no longer held by them. They argued that to be required to restore the information was disproportionate, they acknowledged that this argument was contrary to the First Tier Tribunal's decision in *Keiller v IC and UEA EA/2011/0152*.

50. The Tribunal is not bound by the case of *Keiller* but reaches a similar conclusion as on the facts we are satisfied that:

i) The back up information is in the possession of the Council,
ii) They are able to reconstitute it.
iii) The need to reconstitute it arises as a consequence of the Council's actions during the currency of a disputed information request. (This Tribunal considers that there is a difference between this case where the information was held in "live" format at the time of the request and a case where the information had been deleted at the date of the request).
iv) They base their argument upon a point of principle and the possible inconvenience in future cases rather than any financial or technical impediment.

51. The Tribunal does not accept that the information is only envisaged to be used in the event of a disaster (e.g. the loss of the entire system) because if this were the case there would only be the need to retain the most recent daily back up and not the

archiving of the whole of an email account. Additionally the Council conceded that there were other circumstances where the information would be restored by the Council e.g. if the High Court ordered disclosure of deliberately deleted information that would have to be complied with.

52. Whilst restoration involves more information than just the email account in question (as the whole system will have to be reconstituted) and it will take several days to complete the process, the involvement once the process has started is by way of a technician monitoring the process from time to time to ensure that the system has not crashed (rather than it taking several days of a technician's time). The Tribunal was not provided with the cost or actual hours involved and arguments akin to the factors material to s12 FOIA and 12 (4)(b) EIR were not raised.

53. The tribunal is therefore satisfied that the backup files should be restored to enable Mr Blundell's account to be searched.

The Email Account of Emma Morris

54. Mr Flynn has told the Tribunal that he searched the email account of Emma Morris originally. She was the planning case officer from June-September 2008. Mr Goodwin's evidence was that her email account has disappeared and could not be traced when additional searches were conducted in November 2011. It is not listed as current neither is there a record of its having been expunged. The Tribunal notes that her involvement came after the final report had been issued and despite the absence of an explanation as to the whereabouts of her email records on a balance of probabilities does not consider that they would contain material within scope. Consequently the Tribunal does not find that there is any basis to require further investigation by Lambeth in this regard.

The Records of Councillor Paul McGlone

55. Councillor McGlone a Cabinet Member present at the meetings of 19.4.07 and more significantly the meeting of 31.10.07 with Southern Rail. This is the meeting at which the draft report was discussed with Southern Rail. No agenda, notes, or minutes have been discovered relating to this meeting although it would appear that

this was when Southern Rail were setting out the costs of removing the canopies which appears to have formed the basis for the change in the report's conclusions.

56. Mr Clyne argues that Councillor McGlone may have made notes, or received correspondence relating to that meeting and that his email and records should be searched. Lambeth argued that every new document provides a new avenue of enquiry and that the search on this basis would have no end. They argue that such a search would be disproportionate.

57. The Tribunal is satisfied that this meeting was high level and material to the change in the conclusion of the report. The presence of Councillor McGlone at this meeting suggests a significant role rather than a fleeting involvement in Lambeth's handling of the situation surrounding the depot and that on a balance of probabilities it is likely that his records will contain material within scope. The Tribunal considers that these records should have been considered by Lambeth at the outset. The Tribunal is satisfied that an electronic keyword search of file names and paper files from 31st October 2007 to 26th March 2008 using the same key words and search terms as used during the adjournment is proportionate and consistent with the level of other searches conducted.

Remedy

58. There was discussion before the Tribunal as to the mechanism available should the Appellant be dissatisfied with the fruits of any search ordered by the Tribunal. The Tribunal considered whether to adjourn again to enable the interrogation of Mr Blundell's back up files and the search of the records of Councillor McGlone. Mr Clyne favoured this option as it would enable him to challenge the adequacy of any search or any disclosure before the Tribunal. The Tribunal is satisfied that this is not necessary or proportionate. The proper place for consideration in the first instance whether a search is adequate or whether an exemption has been properly invoked is before the Commissioner. It is only if the Commissioner's decision is challenged by the parties that the Tribunal's intervention becomes necessary.

59. S58 FOIA (which is applicable to this case pursuant to regulation 18 EIRs) provides that the Tribunal is empowered to:

"substitute such other notice as could have been served by the Commissioner".

The Commissioners powers under s 50 FOIA are:

(4) Where the Commissioner decides that a public authority—

a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by regulation 5(1), or

b) has failed to comply with any of the requirements of regulations 6 or 11 or 14,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken[9]

60. The Tribunal is therefore satisfied that the appropriate remedy is to substitute a Decision Notice requiring the Council to interrogate the back up records of the email account of Mr Blundell and the records of Councillor Paul McGlone and then either to disclose any relevant information under regulation 5 or if no information is found or another exemption is relied upon, to serve a refusal notice under regulation 14.

Conclusion

61. For the reasons set out above, the appeal is allowed. The Tribunal is satisfied that at the date of the request the Council held further information within scope which should have been disclosed.

62. Much of this information has now been disclosed, however, within 35 days of the date of this decision the Council must:

   a. restore the expunged email account of Ian Blundell.

   b. Search the restored email account of Ian Blundell and the records of Councillor McGloan (from 31st October 2007 to 26th March 2008) using the same key words as used during the adjournment.

   c. Either disclose the information to the Appellant or issue him with a refusal notice pursuant to r14 EIRs.

[9] As amended by regulation 18 EIRs

63. Our decision is unanimous

[Signed on the original]

Fiona Henderson

Judge

Dated this 10th day of May 2012