



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0028

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50419393
Dated: 9 January 2012

Appellant: Trago Mills (South Devon) Limited

First Respondent: The Information Commissioner

Second Respondent: Teignbridge District Council

Heard at: Bristol

Date of hearing: 25 July 2012

Date of decision: 22 August 2012

Before

Chris Ryan
(Judge)

and

Jean Nelson
John Randall

Attendances:

For Trago Mills: Juan Lopez (counsel instructed by Stephens Scown)
For the First Respondent: Christopher Knight (counsel)
For the Second Respondent: Robin Hopkins (counsel)

Subject matter: Request for information, Reg 5 of EIR
Personal data s.40

Cases: Corporate Officer of the House of Commons v
Information Commissioner and others [2008] EWHC 1084
(Admin).
Bromley v Information Commissioner and Environment
Agency (EA/2006/0072).

**IN THE FIRST-TIER TRIBUNAL
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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. We have decided that the Second Respondent was entitled to refuse part of a request for information that was concerned with the severance arrangements it entered into with a senior employee. This was on the basis that the information was the personal data of that individual and disclosure would have been contrary to the data protection principles. It was therefore exempt information under section 40(2) of the Freedom of Information Act 2000. We have also decided that the Second Respondent did not hold information falling within the scope of a second part of the request, about the procedures followed when dealing with a particular planning application, beyond that which had already been disclosed to the Appellant.

Background

2. In recent years the Appellant Trago Mills (South Devon) Limited (“Trago Mills”) has from time to time found itself in disagreement with the Second Respondent (“the Council”) over planning issues affecting Trago Mills’ out-of-town shopping centre complex at Newton Abbot. Particular difficulty arose in relation to an application for a development that incorporated certain towers (“the Towers Application”). This was recommended for refusal by the Council’s Planning Officers, but was subsequently approved by its Development Control Committee. An individual who held the position of Service Lead for Planning at the time, (and who we will refer to simply as “X”), played the lead role in the initial recommendation for refusal. Trago Mills’ Chairman, Mr Robertson, told us that the disagreements arising from this and other planning matters related, not only to X, who he regarded as an “unmanaged maverick”, but also to others in the Council. He believed that there was a “cabal of officers who will not take criticism”. Mr Robertson told us that the relationship between his company and the Council made him frustrated and sometimes irritable.
3. In 2007 Trago Mills lodged a further planning application in respect of a shop and petrol filling station at the Newton Abbott premises (“the Filling Station

Application”). The application was initially considered by a more junior colleague of X, who was minded to approve the application. However, X then became involved and took a different view, resulting in the submission of a modified scheme. Trago Mills was dissatisfied with this intervention. It had not appealed the refusal of permission but Mr Robertson complained to the Council about X’s conduct. His letter of complaint alleged that X had *“displayed prejudice and a distinct bias against Trago from the very first time I met him...”* This led the Council to commission an independent investigation by a firm of solicitors in order to see if X had displayed prejudice or bias. The solicitors subsequently submitted a report (“The Independent Solicitor’s Report”) in December 2009, in which they found that there was insufficient evidence to substantiate the allegations.

4. When, in early 2010, Mr Robertson learned that X was to take early retirement as part of a Council scheme for reducing its staffing levels, he was suspicious. He thought that the manner of X’s departure was not as the Council would have it. He thought that the Council was well aware of what he described as X’s “misconduct” and that it had, in effect, dismissed him and was using the early retirement scheme, and the confidentiality claimed in respect of the severance agreement reached with X, as a “shield” to suppress the truth. At the time the Council had published a statement by its Chief Executive explaining that, as part of a scheme to secure £3.3M of savings over three years, six members of its senior management, including X, would be taking voluntary early retirement or voluntary redundancy. The bulletin added:

“All of the departures are voluntary, are not subject to any ‘golden goodbye’ style arrangements, and will be taking place in March and April”

5. Mr Robertson’s suspicions, therefore, were that the Council’s Chief Executive had put her name to an untruthful public statement. He confirmed that this was his suspicion during cross examination in the hearing before us.
6. Mr Robertson also told us that he then instructed his solicitors, Stephens Scown, to request information about X from the Council under the Freedom of Information Act 2000 (“FOIA”) because he thought that this would be the best way of getting at the truth about X’s departure from the Council’s employment and of demonstrating that his allegations that X was an “incompetent officer”, who had been guilty of “wrongdoing” had been justified. He told us that he hoped that this would lead, ultimately, to an apology from the Council.

The request for information

7. The information request that Stephens Scown lodged with the Council, on 15 February 2010, was in these terms:

“We understand that arrangements are in place for [X] employment with the Council to end.

Can you please confirm this and, if it is correct, please provide full details of the remuneration he will receive in connection with the termination of his employment.

Please also provide us with a copy of his contract of employment and details of his remuneration package whilst in the Council's employment."

8. The request was made under section 1 of the FOIA, which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions set out in FOIA.
9. Although the Council provided a redacted copy of X's employment contract in response to the information request it refused to disclose other information about X's employment on the ground that it was exempt information under FOIA section 40(2) (third party personal data). It did, however give Trago Mills an indication of the salary range applicable to X's employment.
10. Some five months later Stephens Scown resurrected its client's pursuit of information in a letter to the Council dated 2 August 2010. The relevant part read:

"We understand that X's employment with the Council has now been terminated. Please provide us with details of [X's] severance package.

From previous correspondence you will be aware that our client lodged a planning application for a petrol station which was considered by [X]. Please can you review and confirm the procedures followed by [X] in determining the application.

Finally, please also provide us with the name of the solicitors undertaking the Independent Solicitor's Report and the details of the Report itself"

The planning application referred to was, of course, the Filling Station Application.

11. As to the first request ("the Severance Package Request") the Council maintained its position that the information was exempt under FOIA section 40(2) and argued that the information would also fall within the exemption provided by FOIA section 41 (confidential information obtained from a third party). As to the second request ("the Planning Procedures Request") it is evident that the Council initially treated the words "*procedures followed by [X] in determining the application*" as referring to any procedural guide which planning officers were expected to follow, rather than to the procedures that X actually followed. It therefore responded that it did not hold information falling within the request other than what was contained in the Independent Solicitor's Report, which it also refused to disclose at that time. The Council's decision on these issues was set out in a letter dated 2 September 2010, which also suggested that the parties could discuss the response to the information requests at a meeting that had already been arranged with Trago Mills for November of that year in order to discuss its complaints about the Council's planning department.
12. The meeting, when it took place, was attended by Mr Robertson and the Chief Executive of the Council, among other people, and appears to have covered

both the complaints about X's performance of his duties and the disclosure of the requested information, in particular the Independent Solicitor's Report. Mr Barnes, a Director of the Council, gave evidence, which was not challenged, about the meeting. He recalled, with the aid of a contemporaneous note, that those representing Trago Mills accused X of having allowed his personal opinions to interfere with his work and of having attacked its business by opposing the proposal for towers in the earlier planning application. They suggested that X had been "*golden parachuted out of the organisation*" and sought an apology from the Council and compensation arising from the refusal of the Filling Station Application. The earlier request for a copy of the Independent solicitor's Report was also repeated and an indication was given that Trago Mills intended to bring legal proceedings against both X and the Council.

13. No more was heard until 20 April 2011 when Stephens Scown wrote to the Council again asking it, in effect, to carry out an internal review of the refusal communicated to it in its letter of 2 September 2010, seven months previously. The outcome of the review was set out in a letter from the Council dated 24 May 2011. At this stage the Council changed its mind on the Independent Solicitor's Report and disclosed a copy. It therefore formed no part of this Appeal. Nevertheless Trago Mill's counsel, Mr Lopez, spent considerable time during the hearing before us in cross examination and submission about the terms of reference for the report, the qualifications of the independent solicitor to adjudge the planning issues that were said to form a crucial element of it, and the Council's delay in releasing it.
14. No such change of mind took place in respect of the other two elements of the information request. The Council continued to reject the Severance Package Request on the basis of FOIA section 40(2) and the Planning Procedures Request on the basis that it did not hold the requested information. However, in relation to that request, the Council provided a note of a conversation which had taken place after the November 2010 meeting. The note recorded that Mr Robertson had suggested that X had taken the file from the more junior officer once she had recommended approval and that this was improper conduct because X was prejudiced against any Trago Mills development. The note then read:

"I have spoken to [redacted by Tribunal] about her recollection of how the matter was dealt with. Her recommendation was that the application should be approved but [a more senior colleague] thought it wise first to check with [X] to see that he was happy with the decision."

Having recorded that X thought that the application should be refused on certain policy grounds (which were subsequently realised to be inapplicable) and that a second application was submitted and approved, the note concluded:

"At no stage did [redacted by Tribunal] feel that the file had been "taken off her" by [X], so far as she was concerned it was just part of the normal process of a senior officer reviewing a decision by the case officer something which is not at all unusual."

15. The Council's letter of 24 May 2011, which was signed by its Chief Executive, contained an assurance that X's departure was wholly unrelated to the matters set out in the Independent Solicitor's Report.

The Complaint to the Information Commissioner and his Decision Notice

16. On 26 September 2011, some four months later, Trago Mills filed a complaint with the Information Commissioner. During the course of the investigation into that complaint the Council accepted that its initial interpretation of the Planning Procedures Request had been wrong and searched for, and released to Trago Mills, documents recording how the Filling Station Application had been dealt with.
17. At the conclusion of his investigation the Information Commissioner issued a Decision Notice on 9 January 2012. It covered a number of issues, but the ones that have relevance to this Appeal are the conclusions reached on the following issues:
 - a. Whether the Planning Procedures Request fell to be determined under the Environmental Information Regulations 2004 ("EIR"), rather than FOIA. However, as the obligation imposed on a public authority to disclose requested information is effectively the same under EIR regulation 5(1) as that imposed under FOIA section 1, (see paragraph 8 above), the ruling did not affect the rights and obligations of the parties involved.
 - b. Whether the Council had failed to provide all the information falling within the scope of the Planning Procedures Request. The Information Commissioner considered the searches that the Council had carried out and the documents that had been released since the original request. He concluded that, on the balance of probabilities, no information was held beyond that which had already been disclosed.
 - c. Whether information falling within the Severance Package Request fell within the exemption provided by FOIA section 40(2). He concluded that, although X held a senior role in the public sector, such that his reasonable expectations of privacy might be less than would otherwise be the case, they nevertheless outweighed the arguments for disclosure. The exemption therefore applied and the Council had been entitled to reject the information request.

The appeal to this Tribunal

18. On 6 February 2012 Trago Mills filed an appeal with this Tribunal against the Decision Notice. Directions were given for joining the Council to the Appeal as Second Respondent and for a pre-hearing timetable. The Directions included a provision that the requested information should be provided to the Tribunal on terms of confidence. In the event the Council was granted permission to include in this closed bundle certain other documents that recorded the negotiations that led to X's early retirement agreement and the advice that the Council received in respect of it, as well as a closed witness statement by Mr Barnes explaining the particular circumstances of X's departure.

19. The Directions were complied with, save that in the last ten days before the hearing Trago Mills indicated that it wished to put in new evidence and sought to delay the filing of its skeleton argument until after this had been completed. Both the new evidence and the skeleton reached the members of the Tribunal on the morning of the hearing, although the other parties were able to access them a little earlier. After hearing an application by Trago Mills for permission to adduce the additional evidence we rejected it on the basis of relevance and delay. We expand on those reasons in paragraphs [60-62] below. The other parties did not press their objection to the late service of the skeleton and we therefore accepted it.
20. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.

Evidence

21. Both Trago Mills and the Council filed evidence in the form of witness statements. The witnesses were Mr Robertson for Trago Mills and Mr Davies and Mr Barnes for the Council. All the witnesses attended the hearing and were cross examined on their evidence.

Mr Robertson

22. Trago Mills filed a witness statement by Mr Robertson. It dealt with the following three main issues:
- a. Mr Robertson's expectation, based on previous experience, of what records would have been created and retained by the Council in respect of the Filling Station Application. This led him to express surprise at the Council's suggestion that the only information held would be that stored, in electronic form, on a system called "Comino" and that no email traffic to and from X had been found. To some extent this was expert evidence without any explanation of the witness's claim to expertise in the field, beyond his experience as a businessman who had from time to time instructed architects to file applications for his company.
 - b. A history of the Towers Application involving towers on which he and X had disagreed some years previously. This section of the witness statement concluded with the following passage:
"By reference to the above and other matters, which involved [X], I have made previously made (sic) to the Council what I believe amounts to a clear and categoric case of repeated planning officer wrongdoing by the Council"

The “other matters” were not dealt with further in the witness statement.

- c. Mr Robertson went on to say that he assumed that the Council had instructed the preparation of the Independent Solicitors Report in response to his complaints about X. But he criticised the Council for having, in his view, characterised his complaint as one of bias, when it was more extensive, for having instructed a solicitor who did not have the necessary specialist skills to perform the task and for not having involved Mr Robertson himself in the process.

23. Mr Robertson was cross examined briefly on his witness statement. He was asked to explain the basis for his perception that the Council had covered up the real reason for X leaving its employment. In response he reiterated his suspicions, in the face of statements by the Council to the contrary, but did not provide any additional evidence to support the suspicions. He was also asked for his rationale, in public interest terms, for requesting details of X’s severance package. He acknowledged that he had a personal grievance, as a disappointed applicant for planning permission, but stressed the public interest in local authorities acting fairly and properly and stated that he believed that his request served the interests of the public. When pressed as to why the details of an individual’s severance package would serve that public interest he said that the information request had been formulated by lawyers, not a layman such as himself. He maintained the view that the request was justified.

Mr Davies

24. Mr Davies manages the Development Management function of the Council’s planning service and said that he was, as a result, very familiar with how information about planning applications is held. He provided background about the history of the planning applications related to the Trago Mills business and exhibited newspaper articles dealing with the decision of the Council’s Development Control Committee in 2009 to approve the Towers Application. The “Newton Today” dated 8 May 2009, reporting on the opening of the new garden centre at Trago Mills, referred to Mr Robertson’s speech at the launch party. This included an expression of thanks to local councillors for their support in overcoming resistance from the Council’s planning officers and a statement that five new towers on the site had been given a name incorporating X’s first name and the word “spires”. The article said that this reflected the problems Mr Robertson had in convincing X that they were in keeping with the 27 others on the site. The Mid-Devon Advertiser recorded the same story including the statement that X had “*tried to stop the new trademark Trago Towers going up only for members [of the Council] to pass them overwhelmingly. They are now referred to as [X’s first name] Spires*”

25. With particular reference to the Filling Station Application Mr Davies effectively confirmed the summary set out at paragraph 14 above. He said:
“*This was initially considered by [case officer’s name redacted by Tribunal], whose initial view was to recommend that the Council grant the permission. However, when [name redacted by Tribunal] Head of Development Control, considered her recommendation he decided to*

seek the opinion of his Line Manger, [X], as he was concerned that the recommendation to approve the application was not in accordance with adopted Development Plan policies. It is perfectly normal practice for Officers to seek the advice of more senior Officers when preparing recommendations, or when considering the recommendations of other, to seek guidance or a second opinion on interpretation of policy. X decided, on a number of adopted and emerging planning policy grounds, that permission should not be granted.”

He went on to relate that, although Trago Mills did not appeal the decision it made the complaint to the Council referred to above, leading to the preparation of the Independent Solicitor’s Report.

26. Mr Davies explained the approach adopted in respect of the Planning Procedures Request, including the release of information during the course of the Information Commissioner’s investigation. He then described how planning information is held by the Council. It is saved into an electronic document management system, called Comino, which has replaced the need for a paper file. Incoming and outgoing correspondence, documents, emails and notes may all be saved into the system in electronic form, although planning officers may create hard copy duplicates for their own convenience. He confirmed that a search had been made to see if X had left any relevant hard copy materials, but said that this had produced nothing.
27. According to Mr Davies’ evidence most documents created by planning officers would be automatically saved into the system on creation. However, in the case of emails, the officers would have to make a decision as to whether it warranted retention as part of the permanent file on the matter. If it did then a duplicate of what is automatically saved into the email system would have to be created and, with appropriate editing to protect personal data, saved into the Comino system. If permanent retention was not thought to be justified then the email will in due course be purged from the email system in order to free up space.
28. The file structure of, and the search facility incorporated in, the Comino system was explained by Mr Davies in some detail. The record of the Filling Station Application, which was disclosed to Trago Mills during the course of the Information Commissioner’s investigation, had been obtained by searching in the file created in Comino for that application. The adequacy of the search had been checked by reviewing the audit trail of all processes that took place in respect of the application and a separate audit trail incorporated into the Council’s document creation system. Relevant print outs in respect of the audit trail investigations were exhibited to the witness statement.
29. Mr Davies also considered any other locations where relevant material might be found. One was the Council’s computer hard drives. The folder where X saved his files had been searched using the search terms ***03512*** (the planning application number) and ***rago*** (a term that was thought to be wide enough to capture anything related to Trago Mills, omitting the first letter so as to avoid missing any case-sensitive records). A search in this part of the Council’s records would be effective across all planning applications, not just the file on the Filling Station Application, as in the case of the Comino system search.

30. Another possible location mentioned by Mr Davies was the Council's email system, which was dealt with in the witness statement of his colleague, Mr Barnes (see below).
31. Consideration had also been given as to whether other departments might hold relevant information, but Mr Davies had concluded that anything generated in the course of consulting other departments would have been saved in Comino and not in the records of those departments.
32. Mr Davies explained that, in preparing for this appeal, and with a view to avoiding a hearing if further efforts produced anything to satisfy Trago Mills, the Council had extended its searches of its hard drive, as described in paragraph 29 above. It extended the search beyond anything to do with the Filling Station Application, regardless of whether X had been involved. This produced one further document, the draft decision notice prepared by the case officer who carried out the initial assessment of the application, before X reviewed it and took a different view.
33. The witness statement concluded by relating how X had been contacted in retirement to see if he could think of anywhere else the Council might search (he could not) and expressing Mr Davies' personal view that there was "*simply no other reasonable place the Council could have looked for this information*". He also said, in this context:

"It appears to me that Trago Mills think there should be some documentary record of the internal discussions that took place between Officers between the time that the Case Officer made her initial recommendation and the time that the refusal notice was sent out. I can say from personal experience that this type of internal discussion is very rarely recorded. I have regularly been involved in similar discussions, under X's management and more recently in my role as Service Manager, and I am not surprised that the Council had not found any information in this regard."

34. During cross examination various suggestions were made to Mr Davies as to how other material might exist, in hard copy or electronic format, which had not been brought to light as a result of the various searches described in the Council's evidence. It was even suggested (without any basis that we could see) that Mr Davies might have been "fearful" of hard copy documents coming to light. However, his answers were clear and wholly credible in explaining the thoroughness of the exercise the Council had undertaken. Other questions put to Mr Davies, about the apparent absence in 2007 of guidelines on how applications should be processed and the correctness of X's approach in respect of the Towers and Filling Station Applications generated nothing that is relevant to the issues we have to decide, given our assessment of the content of the Closed Bundle. We found Mr Davies to be a convincing and helpful witness who gave straightforward answers to all the questions put to him.

Mr Barnes

35. Mr Barnes is a Director at the Council responsible for five of the Council's services, namely Legal and Democratic Services, Finance, Information and Communications Technology, Human Resources and Communications. Because of his responsibility for the Council's IT issues he supported the evidence of Mr Davies on the Planning Procedures Request with some background about the Council's retention of emails. He believed that X tended to discuss issues in person rather than by email and explained the process by which planning officers were expected to save any emails that were relevant to an application into the Comino system, so as to form part of the permanent record of the application. There was no obligation on X to save emails by any other means and officers were encouraged to delete emails, which did not merit being stored in Comino, once they were no longer needed. Mr Barnes also explained the Council's general practice for permanently excluding from back-ups of its system any items selected by individuals for deletion and for deleting an email account once an employee left and his or her colleagues no longer needed to access it.
36. The back-up tapes had not previously been searched for emails relevant to the Planning Process Request, but Mr Barnes explained that, in an attempt to avoid an appeal hearing, it had carried out certain searches on historic back-up tapes. It did this despite a doubt as to whether such information was truly "held" by the Council and in the realisation that, if it was, the cost of searching would exceed by some margin the 'appropriate limit' on such costs set under s.12 of the Freedom of Information Act. Mr Barnes recorded that the Council's experts rebuilt a copy of the system as it was then to enable them to search for data no longer held. It searched for emails or other documents against a number of search terms related to the planning application in question and X's surname. This revealed over 300 files all of which Mr Barnes stated he had read. He confirmed that none of them contained information which was relevant to the information request and had not already been revealed.
37. The greater part of Mr Barnes's witness statement concerned the Severance Package Request. He summarised the complaints made by Trago Mills about X, the requests for information lodged by Stephens Scown on its behalf and the manner in which the Council had dealt with them. This included the meeting in November 2010, which has been summarised at paragraph 12 above. Mr Barnes explained that, following that meeting he made further enquiries about the outcome of the Filling Station Application and set out his findings in the note that was subsequently passed to Stephens Scown in May 2011 (see paragraph 14 above).
38. Mr Barnes stated that he had been involved in some of the negotiations that preceded X's departure and he confirmed, in the plainest terms, that X's departure had nothing to do with Trago Mills' complaint or any other complaint. He then described the procedure that was followed in the early retirement/voluntary redundancy scheme that the Council introduced in 2009 and the confidentiality controls that were imposed in relation to it. In the case of X Mr Barnes explained that he was one of those who applied for early retirement/redundancy and that, following consideration of it and discussions

with X, a compromise agreement was signed bringing the employment to an end with effect from 30 April 2010. Mr Barnes said no more about the details of the Council's internal deliberations and discussions with X because, like the contents of the compromise agreement itself, it was regarded as confidential by X and included a specific obligation of confidentiality. He did disclose this much however:

“Following discussions between the Council and [X], it was agreed that a compromise agreement was appropriate. This had nothing whatsoever to do with Trago Mills’ complaint about [X], nor about any complaint by anyone else. It had nothing to do with any dissatisfaction with [X’s] performance or conduct. I worked with him for many years and I know that there were no issues about performance or conduct. A compromise agreement was concluded simply because there was some uncertainty over exactly how the early retirement/redundancy scheme applied in [X’s] circumstances. The Council took specialist legal advice and as a result of this I considered that it would be prudent to protect the Council’s position by the conclusion of a compromise agreement which would ensure that we were not at risk from any subsequent claims for redundancy.

“In my experience, this is a very common way for employment relationships to end. It did not involve paying [X] inappropriate sums, and it did not involve anything remotely unusual or untoward. I can say no more in open about this, but have explained further details in my closed statement, supported by contemporaneous evidence. My hope is that, having inspected the closed material in light of my closed statement, the Tribunal will agree with me that there was nothing untoward or unusual about this compromise agreement – and I hope that Trago Mills will take some comfort from the fact that an independent Tribunal is able to scrutinise the disputed information and the other closed material.”

We will return to both of those passages in due course.

39. Mr Barnes disclosed that, in preparing for this Appeal the Council had sought X's views and had been told that he expected the terms of his severance arrangement to be kept secret and that he would be distressed if it were not. The Council itself had concluded that there was nothing in the circumstances of the case to outweigh X's right to privacy, despite his seniority, and that complying with the Severance Package Request would have been unfair and in breach of X's rights in respect of his personal data.
40. Mr Barnes also filed the closed witness statement mentioned above. It provided us with further details of the Council's internal deliberations and discussions with X and was entirely consistent with the summary in the passages from the open statement quoted in paragraph 38 above.
41. At the hearing before us Mr Barnes was subjected to sustained cross examination on his witness statement. This focussed, in particular, on the passage quoted in paragraph 38 above in which Mr Barnes explained that, on the basis of working with X for a number of years *“there were no issues about performance or conduct.”* Mr Lopez put to him that this was an untruthful

statement. Later, in his closing submissions, Mr Lopez made clear the purpose of this line of questioning. The manner and content of the answers he extracted meant, he said, that we should not believe Mr Barnes when he told us, elsewhere in the same paragraph of his witness statement, that conduct issues had nothing to do with X's departure. Quite why it should be thought that Mr Barnes would have chosen to lie on the point, when he would know that the Tribunal members had before them the Closed Bundle, which included the severance agreement and documents relating to the negotiations of its terms, is unclear. Nevertheless, Mr Lopez persisted in lengthy cross examination seeking to establish that X's record disclosed mistakes, improper conduct and a complaint to his professional body, which were so serious that Mr Barnes must have known of them and should have drawn them to our attention. More importantly, it was suggested, he could not possibly have believed, in the face of that knowledge, that there were "*no issues about performance and conduct*".

42. Mr Barnes remained steady under fire. He thought that the allegations of wrongdoing behind Mr Lopez's questions arose from a misreading of the material relied on. He reiterated that, at the time when the severance agreement was negotiated, there were no complaints against X which had either been sustained or were justified in his view. He said that occasional technical mistakes or disagreements with applicants on planning issues did not justify the criticism that Mr Lopez voiced on his client's behalf. He accordingly maintained that the judgment that lay behind the passage of his evidence under attack had been justified.
43. In his closing submissions Mr Lopez accused Mr Barnes of being an unreliable witness. We did not find him so. In our view he was a truthful witness who gave his evidence in a fair and measured manner with the intention of assisting the Tribunal even if his answers might be unhelpful to his employer's case. He was criticised for being slow in his responses. We did not see that as a sign of unreliability. It seemed to us that he was punctilious in making sure that, before he gave an answer, there was nothing in his memory that might inform or qualify his evidence on the point. We regard Mr Lopez's criticism of Mr Barnes as being wholly unjustified.
44. Nor was it necessary or relevant. Even if the passage on which Mr Lopez based his credibility attack had been inaccurate, it would have had no effect on our decision because, as we have said, we listened to Mr Barnes' evidence in the knowledge that the contemporaneous material in the Closed Bundle was totally consistent with the crucial statement in his witness statement, to the effect that conduct questions had not come into the negotiations of X's departure or severance package.
45. Mr Barnes was also subjected to sustained cross examination on the qualifications of the author of the Independent Solicitor's Report to make the judgments he did (although Trago Mills offered no evidence on what his qualifications in fact were). The questioning developed into something of a debate on the task of any adjudicator who has to absorb detail on an area of expertise outside his or her own field. It did not generate any information that assisted us with our decision, for reasons that will become apparent. The Independent Solicitor's Report was, of course, released to Trago Mills as a

result of the internal review the Council was asked to undertake, so that the further questioning which then took place as to the reasons for the delay was irrelevant to any issue we have to consider.

46. Mr Lopez probed in cross examination for what lay behind a reference in Mr Barnes' witness statement to unspecified "*personal reasons*" said to have influenced X's wish for privacy as to the reasons for his departure. Mr Barnes tried hard to give as full an answer as he could, without breaching confidence. It is, of course, frustrating for the party seeking information to have to trust the Tribunal to form its views on the basis of closed material that is not made available to that party. However, we are satisfied, from our examination of the Closed Bundle that this part of Mr Barnes' evidence was as full as it could be and provided an accurate summary of the issues that led X to seek early retirement and for the Council to agree to it on the terms of the severance package that was negotiated.
47. Finally, Mr Barnes was asked about a section of his witness statement in which he said that X's reluctance to consent to disclosure was influenced by an apparent fear that the information might be "*used in the media for damaging and malicious purposes*". Mr Barnes could not recall whether he or X had raised this possibility when he, Mr Barnes, had phoned to ask if X would be willing to consent to disclosure in order to avoid an appeal hearing. However, he accepted that they were both probably aware that there was a possibility of publicity being generated given that a photograph of X was known to have been exhibited at Trago Mills' premises in the past and there had been public statements made about disagreement between Mr Robertson and X, as mentioned in paragraph 24 above. Mr Barnes was asked if he was suggesting that Mr Robertson was malicious. He replied that he did not think he was, but that he was of "combative stock" and was "not a fan of public servants", whom he sometimes pilloried. He added that he could himself live with that sort of criticism but he suspected that it affected other people differently.
48. Against the background of that evidence we turn now to consider the issues we have to determine.

The Planning Procedures Request – did the Council hold more information than it has disclosed?

49. We have mentioned, in paragraph 8 above the broad obligation for public authorities to disclose requested information. On the question of whether requested information is held by a public authority all parties referred us to the Tribunal decision in *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072). The Council and Information Commissioner relied on a passage of the decision which, while not binding us, does set out a test in terms with which we agree. It reads:

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere with a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different

locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. 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 those factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

50. On behalf of Trago Mills Mr Lopez argued that the Information Commissioner's conclusion that it was improbable that further information was held by the Council was perverse and was based on an incomplete and fundamentally flawed investigation. The basis for those contentions was that the Council had failed properly to scope the search it conducted because it had construed the word "procedures" in the information request too narrowly. We were also taken back to the alleged misstatement by Mr Barnes about there being no performance or conduct issues in respect of X, in an attempt to undermine the credibility of the Council's response to the information request and the evidence it adduced in this Appeal. Even if the allegation had been substantiated (and we have already made clear that it has not) it is frankly absurd to seek to use it to taint the credibility of Mr Davies, who provided most of the information on the Council's searches for information. That evidence showed that, even though the Council initially placed an interpretation on the language of the information request that was too narrow, it had corrected its approach by the time the Information Commissioner had concluded his investigation. It also provided further information, which had not been made available to the Information Commissioner, which satisfies us that the scope of the searches made, and the areas of the Council's records to which they were directed, were more than adequate to justify the conclusion that no information is held beyond that which has already been disclosed. We would go further and say that Mr Davies's evidence, supplemented by Mr Barnes in respect of email storage, convinced us that the Council had gone to quite extraordinary lengths (and expense) to be as certain as it could be that, if it had retained any further information falling within the scope of the information request, (adopting the widest interpretation of scope contended for by Mr Lopez), it would have come to light.

51. Mr Lopez made further criticisms about the Council's explanation of its records deletion practices and of the Information Commissioner's investigation of them. However, the Information Commissioner is not required to consider whether documents have been deleted prior to the date of the information request, only the recorded information that the public authority

holds at that time. Given what we have said about the broad reach of the searches that have now been undertaken, we believe that this element of criticism is not relevant to our task in the Appeal.

52. Finally, Mr Lopez suggested that the Council's evidence to the effect that X did not habitually generate a great deal of email traffic and that most of it was likely to have been deleted was no more than conjecture. We think it was much more than that. We are satisfied, on the basis of the evidence adduced, including Mr Davies' report on the enquiries recently directed to X to see if he knew of any other locations where relevant information might be stored (see paragraph 33 above), that it is not likely, on a balance of probabilities, that further relevant emails were held by the Council at the time of the information request.

The Severance Package Request

The Relevant Law

53. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

54. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

"personal data' means data which relate to a living individual who can be identified-
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"

Trago Mills does not challenge the Information Commissioner's conclusion that the requested information in this case did constitute the personal data of the two individuals concerned.

55. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

"Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-
(a) at least one of the conditions in Schedule 2 is met ..."

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

56. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

The issues we have to consider

57. In determining whether or not disclosure would be contrary to the data protection principles we have to consider:
- i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
 - ii. an unwarranted interference with the rights and freedoms or legitimate interests of the individual concerned.

And if we are satisfied on those points we have also to consider:

- iii. whether disclosure would have been unfair or unlawful for any other reason.
58. In considering fairness and lawfulness we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

“In determining for the purposes of the [first data protection principle] whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.”

Our consideration of the evidence

59. The difficulty Trago Mills faces is that the material in the Closed Bundle makes it very clear, as the Council has stated in correspondence with Trago Mills, and in the evidence it presented in this appeal, that X’s departure and the terms of his severance package were not influenced in any way by conduct or performance issues. The contemporaneous documentation which we have considered confirms that this is so. Therefore, even if Trago Mills had established the allegation in Mr Lopez’s skeleton argument to the effect that X had been guilty of “*wrongdoing in public office*” (which it did not), this would only support a legitimate public interest if the wrongdoing had been so serious that the Council could be criticised for not having taken it into account when considering X’s application for early retirement. Mr Lopez did not put his client’s case that high in this Appeal. He was right not to do so. The allegations made against X fell a long way short of the sort of activity that would have brought that type of consideration into play.

60. It is appropriate, at this stage, to deal with the application, made at the start of the hearing, to introduce new evidence in support of Trago Mills' case. The evidence took the form of a second witness statement by Mr Robertson. Much of it consisted of pure argument, although expressed to be a response to the witness statements of Mr Barnes and Mr Davies. The most significant section (and the only one on which Mr Lopez concentrated when making the application) constituted a challenge to Mr Barnes' statement (see paragraph 38 above) that there were no issues about performance and conduct considered in relation to X's severance arrangements. As mentioned in paragraph 22(b) above Mr Robertson had stated in his first witness statement that there were "*other matters*" which supported his allegation of planning officer wrongdoing. He gave no further explanation at that stage as to what those matters might be or why it was not possible to include them in his evidence at that stage.
61. The new material in Mr Robertson's second witness statement concerned problems that a Mr Bob Wakeling felt that he had with X and the Council in 2006 and 2007. It was said by Mr Robertson that Mr Wakeling's experience "*mirrors the very substance of my complaint against [X], and in respect of which information on "procedures" was sought*". The issues that concerned Mr Wakeling, even if characterised as being as serious as Mr Lopez claimed, would not take the case into the area where failure to have taken them into account during the negotiations with X would have raised a legitimate public interest in disclosure. Accordingly, given that it was evident to the Tribunal from the pre-reading of the Closed Bundle that the issue of conduct had no impact on the negotiations of X's severance package, it was not appropriate for time to be spent during the hearing in considering more material that was said to support Trago Mills criticism of X's conduct. We also felt that other criticisms by Mr Wakeling about the manner in which information on his planning application had been filed by the Council had too remote a connection with the adequacy of the Council's searches in respect of the Planning Procedures Request to justify being introduced into the evidence before us. We therefore refused permission to Trago Mills to introduce the new evidence on the basis that it had not relevance to the issues we had to decide.
62. A second reason for refusing permission was the late presentation of the evidence. Evidence was exchanged in mid-June. Mr Robertson should therefore have been aware of what Mr Barnes said some 5 weeks before the hearing was due to take place. Although we asked Mr Lopez to explain how soon after that Trago Mills had started to consider seeking further evidence and filing evidence in reply he was not able to tell us any more than that the material relating to Mr Wakeling's dealings with the Council had not come into Trago Mills' possession until Friday 20 July, that its discovery had been "*pure chance*" and that Trago Mills "*had not been sitting on its hands*". For his part Mr Robertson said in his second witness statement that he had no business relationship with Mr Wakeling but did not volunteer any information as to what the "*pure chance*" was, to which Mr Lopez referred, or the steps that his company and its advisers had been taking since mid-June to prepare further evidence or to expand on the "*other matters*" of which he said he was aware when he signed his first witness statement. The unexplained delay would have justified the refusal of permission in any event. In this case we took into

account the additional fact that the Council and its advisers had a very short time indeed to consider the new allegations made against it and the substantial clip of correspondence that was said to support them. The late submission of the evidence was therefore likely to compromise other parties. We felt that there was also a danger that, given that a single day had been allocated to the hearing and it would be necessary to accommodate the cross examination of three witnesses and to hear the submissions of all the parties, the introduction of new evidence increased the risk of the hearing not being completed. The significance of the evidence to the issues under consideration did not justify that risk, in our view.

Our conclusions in respect of the Severance Package Request

63. For the reasons given above the issue of X's conduct did not arise in the discussions between the Council and himself about his departure. It therefore carries no weight to support Trago Mills' argument that there is a strong and legitimate interest in disclosing the requested information. As to other factors supporting a legitimate interest, the parties were in general agreement that:
- a. X was a senior officer, responsible for significant decisions having potentially serious consequences for those making planning applications or affected by their outcome;
 - b. his role was, to a considerable degree, a public facing one;
 - c. there is a need for transparency in respect of a public authority's expenditure of public funds, both generally and, more particularly, where the expenditure relates to severance packages for senior officers.
64. Trago Mills also argued that the disclosure sought would relate only to X's public functions. This was not accepted by the other parties and we think the argument is unsustainable, certainly in the absence of either proof or strong indications that issues about the employee's wrongdoing had influenced either the decision to enter into a severance agreement or the terms of that agreement. Nor were we attracted by Mr Lopez's argument, to the effect that the Independent Solicitor's Report was so flawed in its terms of reference and its judgments that it should not be regarded as serving the legitimate interest in disclosure. We do not think that the point is of any relevance given our view that, in light of our inspection of the Closed Bundle, issues of conduct are not relevant.
65. In respect of the degree of interference with X's privacy, which must be set against any legitimate interest in disclosure, there was again a level of agreement between the parties that the mere fact that the employer and employee had agreed specific terms of confidentiality would not be determinative. However, even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction, (it clearly was), but whether the factors in favour of disclosure should lead us to conclude that, on balance, disclosure would not have represented an unwarranted interference with that right. We do not believe that the evidence of X having recently expressed a strong wish for privacy to be preserved adds material weight to the argument. We make our decision

on the expectations of privacy held by the reasonably balanced and resilient individual holding the position that X held with the Council. Nor did we attribute any weight, in the other direction, to Mr Lopez's arguments that the commissioning and ultimate release of the Independent Solicitor's Report constituted a waiver of confidentiality.

66. Mr Lopez rightly pointed out that X was no longer employed by the Council, so that no working relationship would be jeopardised by disclosure, and that there were no charges or disciplinary proceedings known to be faced by him. However, even taking those factors into account, in addition to those identified above, we do not find that the Council's duty to be transparent and accountable about the expenditure of public money outweighs the requirement to respect the former employee's reasonable expectation of privacy. Accordingly we conclude that disclosure would have breached the data protection principles.
67. We have not identified any issues, beyond those considered above, that would have rendered disclosure unfair or unlawful. However, it is enough that the data protection principles would have been breached for us to conclude that the information requested was exempt information under FOIA section 40(2) and that the Information Commissioner was therefore correct to find that the Council had been entitled to refuse this part of Trago Mills' information request.

Conclusion

68. In the light of our findings above we have concluded that the appeal should be dismissed.
69. Our decision is unanimous.
70. In his closing submission Mr Hopkins for the Council invited us to express criticism of the way in which Trago Mills had handled the appeal. We think that it would be unwise for us to express any view on that subject as it is possible that a claim for costs may be made by one or both of the Respondents. We would not want to be seen to have pre-judged, one way or the other, any of the issues that would come into consideration at that stage.

[Signed on original]

Chris Ryan

Judge
22 August 2012