

Information Tribunal

Appeal Number: EA/2005/0031
FS50084406

FREEDOM OF INFORMATION ACT 2000

Determined without a hearing

Decision Promulgated

31st August 2006

Before

**Christopher Ryan – Deputy Chairman
Jenni Thomson – Lay Member
Ivan Wilson – Lay Member**

Between

GLEN MARLOW

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

We have decided to substitute, for the Decision Notice issued by the Information Commissioner on 5 December 2005, a Decision Notice in the following terms:

FREEDOM OF INFORMATION ACT 2000 (SECTION 50 and 58(1))

SUBSTITUTED DECISION NOTICE

Dated 1st August 2006

Name of Public Authority: Melton Borough Council
Address of Public Authority: Council Offices
Nottingham Rd
Melton Mowbray
Leicestershire
LE13 0UL

Name of Complainant: Mr G Marlow

The Decision Notice of the Information Commissioner dated 5 December 2005 shall stand and there shall be added to it the following:

Nature of Complaint

The Information Commissioner (the "Commissioner") received a complaint from the above person (the "complainant") which stated that on 17th April 2005 Melton Borough Council had been requested to disclose to the complainant material which it had described in correspondence as a "formal advisory system for lawyers".

It was alleged that:

the Council had failed to comply with that request.

The Information Tribunal, having concluded that the Information Commissioner had wrongly declined to issue a Decision Notice in respect of that complaint, issues this Decision Notice as follows:

The Council complied with section 1(1) of the Act in that it communicated to the complainant the information which, at the relevant time, it held in respect of a database of statutory material (the "formal advisory system" referred to above), over which it had limited rights of access as a licensee.

Section 1(1) of the Act states:

"Any person making a request for information to a public authority is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicate to him.”

Action Required

No action is required in light of the decision that has been reached.

Dated the 31st day of August 2006

Signed: ...
Deputy Chairman

A handwritten signature in black ink, appearing to be 'A. H.', written over the text 'Signed: ...'.

Reasons for Decision

- 1 In our decision dated 1 June 2006 we decided that the Information Commissioner's Decision Notice dated 5 December 2005, which formed the subject matter of this appeal, should not stand in the form in which it had been issued. We adopt the same definitions in this decision as we set out in our original decision.

- 2 In our original decision we concluded that the Decision Notice did not deal with one of the issues raised in the appellant's original complaint, namely, whether the Council should have disclosed to the Appellant material which it had described in correspondence as a "formal advisory system for lawyers". We therefore decided that we should issue a substituted Decision Notice, using the powers given to us for that purpose under FOIA section 58. We directed the Commissioner to carry out certain additional investigations in order to provide us with the information that we felt we needed in order to do so. We now have the results of those investigations and are in a position to make our decision, which, as in the case of our original decision, we have done without a hearing.

- 3 It is clear from the evidence presented to us that what the Council meant by the expression "formal advisory system for lawyers" was the online database of statutory material maintained at the time by the "Butterworths Direct" publishing business. In our original decision we expressed the preliminary view that such a database did constitute "information" for the purposes of the FOIA. We then said the following in paragraphs 20 to 22:

"20 The obligation of a public authority under Section 1 of the FOIA is to state whether or not it "holds" information requested and, if so, to disclose that information, unless it is covered by one of the exemptions set out in the Act. To what extent, therefore, can it be said that the Council "held" information contained in the Butterworths database at

the time when Mr Marlow made his request? Once particular information on that database has been identified, selected, downloaded and saved on the subscriber's computer system then it is in our view clearly information that is "held" by the subscriber. Information printed direct from screen is also "held" by the subscriber who has possession of the printed version. Some information that fell within either of those categories has, of course, already been provided to Mr Marlow, under cover of the Council's letter of 1 March 2005.

"21 The question of what other information on the database may properly be regarded as "held" by a subscriber will depend on two factors. The first is the terms of the contract between the subscriber and the owner of the database and the second is the technical means by which the subscriber may access the database. The two are, of course, connected in that the contract between the parties is likely to place limitations on the right to access/download material, and technical features will go some way to enforce those restrictions. The contract may, for example, limit the number of individuals, or individual computers, which may access the database. Or it may provide that only a limited number of searches may be conducted simultaneously. In both cases the communication system between the subscriber and the database may monitor and block excessive usage. In other respects the control imposed by the subscriber will be purely contractual. It may provide that information obtained from the database must be used only for the subscriber's own purpose and must not be distributed as part of a separate commercial service to third parties. Alternatively, it may allow for reproduction and use, provided that there is adequate acknowledgement of source and copyright.

"22 We have no doubt that in the great majority of cases the total body of information, held on a third party's database and capable of being accessed by a public authority under subscriber rights of the type that we have described in the preceding paragraph, should not be characterised as having been "held" by the public authority. It is not so

easy to discern the stage between that situation, at one extreme, and the downloading and/or printing of a specific item, at the other, at which it may be said that the information is “held” by the subscriber. It is conceivable that cases will exist where the subscriber has such unrestricted rights to access, use and exploit a third party’s database (perhaps subject to appropriate attribution) that it may be said that information on it is “held” by the subscriber, even before an online search facility is operated in order to identify a particular item or items.”

- 4 On the basis of those considerations we directed the Commissioner to make enquiries about the nature of the relationship between the subscriber and the publisher to enable us to decide what part of the information in the Butterworths Direct database, if any, was “held” by the Council at the relevant time. We also asked to see a copy of the extract from the database that was actually provided to the Appellant.
- 5 In response to that direction the Commissioner has provided us with a copy of a letter to him from a Mrs D S Hudson, the “Head of Legal” at the Council, dated 19 June 2006. In it Mrs Hudson explained that the Council holds just one “single use licence” of the Butterworths Direct system (now re-branded as a LexisNexis product) and enclosed a copy of the relevant licence agreement.
- 6 It is apparent from that copy that the Council’s rights in relation to the whole body of material are very restricted. The following extracts from section 1 of the contract, headed “Licence; Restrictions on Rights”, form a non-exhaustive illustration of the Council’s limited rights.

Sub-clause1.1. “You are granted a non-exclusive, non-transferable, limited licence to access and use for research purposes the Online Services and Materials from time to time made available to you. This licence includes:

- (a) The right to electronically display Materials retrieved from the Online Services to no more than one person at a time, subject to the Supplemental Terms for Specific Materials:
- (b) The right to obtain a printout of Materials via printing commands of the web browser and to create a single printout of Materials downloaded via downloading commands of the web browser (collectively, “Authorised Printouts”);
- (e) ...the right to retrieve via downloading commands of the web browser and store in machine-readable form for no more that ninety (90) days, primarily for one person’s exclusive use, a single copy of insubstantial portions of those Materials ...”

Sub-clause 1.2. “To the extent permitted by applicable copyright law and not further limited or prohibited by the Supplemental Terms for Specific Materials, you may make copies of Authorised Printouts and distribute Authorised Printouts and copies.”

Sub-clause 1.3. “Except as specifically provided in Sections 1.1 and 1.2, you are prohibited from downloading, storing, reproducing, transmitting, displaying, copying, distributing or using Materials retrieved from the Online Services. You may not print or download Materials without using the printing or downloading commands of the web browser.”

Sub-clause 1.6. “You may not remove or obscure the copyright notice or other notices contained in Materials retrieved from the Online services.”

7 In the light of those provisions we have concluded that the Council did not “hold” material contained in the database, which was relevant to the Appellant’s request, other than that which it had already provided to him, as referred to in paragraph 3 of our original Decision.

8 In a written submission to us on the subject Mr Marlow has suggested that the Council's obligations may have been wider and to have encompassed other material, beyond that originally sent to him. We are satisfied that this is not the case. In an effort to explain its legal position on a point, the Council accessed a body of information which it did not "hold", but in respect of which it had the limited access rights mentioned above. It then extracted a small portion of the total database to be passed on to Mr Marlow. Although it did this of its own volition, and could not have been forced to interrogate the database under any rights created by FOIA, its actions resulted in the creation of a body of information, (the amended text of the Statute in question), which at the moment of being downloaded or printed from screen, became information that Mr Marlow was entitled to request. However, by the time Mr Marlow first made his complaint he had already been supplied with a copy, again voluntarily, and it is not therefore necessary for us to include in the substitute Decision Notice any direction to that effect.

9 As we have mentioned, the Commissioner has, under our direction, obtained from the Council a copy of the material actually sent to Mr Marlow. We have noticed that it does not display any mention of Butterworths, or the fact that it had been extracted from its database. We indicated in paragraph 6 of our original Decision that, had the Council made clear the source of the information, the effort and expenditure that has been involved in this appeal might have been avoided. We note now that paragraph 1.6 of the contract with Butterworths, quoted above, obliged the Council not to remove or obscure the copyright notice or other notices from Butterworths Materials. We do not know how it came about that no such notices were visible on the information supplied to the Appellant, but their absence may have exacerbated his understandable confusion as to the nature of the "formal advisory system".

Dated the 31st day of August 2006

Signed: Chris Ryan
Deputy Chairman