



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

**EA/2014/0139**

**ON APPEAL FROM  
The Information Commissioner's Decision  
No FS50525876 dated 7 May 2014**

**Appellant: Pip Martyn**  
**Respondent: The Information Commissioner**  
**Second Respondent: Harpenden Town Council**  
**Date and place of hearing: on the papers**  
**Date of decision: 27 February 2015**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Andrew Whetnall and Narendra Makanji  
Panel Members**

**Subject matter**

FOIA section 1(1) - whether information was held.

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

**Case No EA/2014/0139**

**SUBSTITUTED DECISION NOTICE**

**Dated:** 27 February 2015

**Public Authority:** Harpenden Town Council

**Address of Public Authority:** Town Hall, Leyton Road, Harpenden, Herts  
AL5 2LX

**Name of complainant:** Ms Pip Martyn

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 7 May 2014.

The Public Authority failed to comply with sections 1(1)(a) and 1(1)(b) of the Freedom of Information Act 2000 in respect of the information referred to at paragraph 33 of our decision.

However, since the Complainant now has this information, the Public Authority is not required to take any further steps.

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

**Signed**

**Anisa Dhanji  
Judge**

**IN THE FIRST-TIER TRIBUNAL  
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**REASONS FOR DECISION**

**Introduction**

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 7 May 2014.
2. It arises from a request for information made under the Freedom of Information Act 2000 ("FOIA"), by the Appellant, Ms Pip Martyn, to the Second Respondent, Harpenden Town Council (the "Council").
3. The Appellant lives on Marquis Lane in Harpenden, adjacent to a play area for children and an open space (the "Open Space"), as well as Batford Springs Local Nature Reserve ("Batford Springs"). In 2009/2010, concerns were expressed about damage to the grass verge boundary of the Open Space resulting from parking by visitors to these amenities, as well as more general concerns about congestion and the lack of parking for residents of Marquis Lane. In response, St Albans City & District Council ("St Albans") which then owned the Open Space and Batford Springs, carried out a consultation exercise with local residents to consider options for resolving these issues.
4. In May 2012, ownership of the Open Space and Batford Springs transferred from St Albans to the Council. In or around April 2013, the Council erected a knee-high fence on the boundary of the Open Space.

**The Request**

5. The Appellant's request, made on 28 August 2013 was on the following terms (the requests have been numbered for ease of reference):

"(1) Who was present at each of the closed 'secret' meetings attended by councillors and/or officers of Harpenden Town Council relating to any matters concerning Marquis Lane since 2009 and/or its adjoining roads, open spaces and allotments since 2009 (Please include all attendees).

(2) Please also provide all notes, minutes and any recordings taken at all of these meetings plus any 'input' included from other persons not present and unable to attend given to Harpenden Town Council to include in these meetings.

(3) Please provide all documentation relating to the tendering process and awarding of the contract to erect the fence and gate along the verge of Marquis Lane Open Space as erected in March/April 2013.

(4) Please include the initial invitation to tender.

(5) Please advise when the contractor(s) were selected to tender and by whom and also on what date was the final contractor chosen and on what merits and by whom.

(6) Who determined the specifications of both the fence and gate and on what date(s)?

(7) Please forward the contractor's quotation(s), invoice(s) and receipt(s) and any other related correspondence..."

6. On 23 September 2013, the Council informed the Appellant, as regards requests (1) and (2), that:

"...there are no records of informal meetings attended by councillors and/or officers held preceding or post public meetings relating to matters concerning Marquis Lane, its adjoining roads, open spaces and allotments since 2009..."

7. As regards requests (3) to (7), the Council provided the tenders received which it said "...detail the specification for the work..." as well as the official order for the works and the invoice. The Council further said that the "...tender was awarded in accordance with Standing Orders (84(a)) by the Town Clerk based on quality of work, ability to complete the task and value for money. The specifications were determined by officers of the Council...."

8. The Appellant sought an internal review, stating as follows:

"Perhaps to assist in this matter you could refer back to the bookings for the council chamber and perhaps refer to your own correspondence for all meetings (closed to the public) which have any relation to the information we have requested.

To further assist, these should include meetings regarding the transfer/devolution of Marquis Lane Open Space, CPZ's, additional parking provision, the meetings of councillors and/or officers regarding how to proceed with Marquis Lane (2010 and 2012 in particular) including draft consultation documents that were never circulated to the public. Meetings between

yourself and representatives of East Harpenden Gardening Club.

Also documents relating to meetings with Batford Springs volunteers, Herts and Middlesex Wildlife Trust and other advisers that are not available on your website. Please send copies of all emails and documents (this can include hand written notes) held by Harpenden Town Council.

Please also advise the dates regarding the tendering process as requested above and provide the initial estimates/quotations as requested which were received prior to Oct 24th 2012 before the fence specification was changed.

Please clarify which officers determined the specifications..."

9. On 15 November 2013, the Council upheld its previous refusal and reiterated that it did not hold the information requested.

#### **The Commissioner's Decision**

10. On 2 January 2014, the Appellant complained to the Commissioner. The e mail setting out her grounds is lengthy. In brief she complained that:
  - (1) The Council held more information than it had disclosed (the Appellant said she knew this because of certain correspondence she had, and she also referred to other reasons why she maintained that the Council held further information).
  - (2) The individuals who carried out the internal review were connected with the matters she was seeking information about, and so their impartiality could not be guaranteed.
  - (3) The Council should not have communicated the outcome of its internal review using the "What do they know?" website, rather than to her personally, and also the response to the internal review came from the Clerk.
  - (4) The Council had made no further comment relating to her request for the further missing detail in relation to the tendering process for the fence and gate works, and about which particular officers were involved.
11. On 13 March 2014, the Commissioner informed the Appellant that (3) and (4) were not matters within his jurisdiction.

12. For the reasons set out in his Decision Notice, the Commissioner found, on a balance of probabilities, that the Council did not hold any further information.

### **The Appeal to the Tribunal**

13. The Appellant has appealed to the Tribunal against the Decision Notice. The Appellant also made a request to St Albans, which is the subject of a separate appeal (EA/2014/0168).
14. The Tribunal joined the Council as a Second Respondent, pursuant to Rule 9 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
15. All parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.
16. We have considered all the documents received even if not specifically referred to in this determination, including, in particular, the documents in the agreed bundle, and such additional written submissions as have been received from the parties. None of the parties relies on any witness evidence.
17. After the Commissioner issued his Decision Notice, the Appellant said that she had been verbally informed by the Commissioner's Office that she would have the opportunity to submit any further evidence after the Commissioner had received a response from the Council, but that this opportunity had not in fact been afforded to her. The Commissioner acknowledged that there appeared to have been a misunderstanding as to the point at which the Appellant was advised to submit any further evidence. The Commissioner considered her additional evidence during the course of this appeal, and sought further clarification from the Council on a number of specific questions. The Commissioner has set out his position following the Council's response in his submissions to the Tribunal dated 24 September 2014.

### **The Tribunal's Jurisdiction**

18. The scope of the Tribunal's jurisdiction in dealing with an appeal against the Commissioner's Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's Decision Notice is not in accordance with the law or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

19. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

### **Legislative Framework**

20. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(b), he is entitled to have that information communicated to him.
21. The duty under section 1 does not arise if any of the exemptions set out in FOIA apply. No such exemptions are being relied on in the present case. The Council simply says that as at the date of the request, it did not hold any further information.

### **Issue**

22. The only issue in this appeal is whether, as at the date of the request, the Council held any further information within the scope of the request.

### **Evidence and Findings**

#### **Requests 1 & 2**

23. In Request 1, the Appellant asked for the names of those present at each of the closed 'secret' meetings attended by Councillors and/or officers of the Council relating to any matters concerning Marquis Lane and/or its adjoining roads, open spaces and allotments since 2009.
24. Request 2 seeks all notes, minutes and any recordings taken at such meetings and any 'input' from anyone not present.
25. The Appellant says that she is aware that the Council's clerk and a Councillor had met with representatives of St Albans to discuss details of the transfer of ownership of Batford Springs and land in or around Marquis Lane. She has provided extracts of Council minutes, which refer to meetings taking place. Details of these meetings had not been made publicly available, so the Appellant describes these meetings as closed or secret.
26. The issue before us is not whether any such meetings took place, but rather, whether as at the date of the request, the Council held any relevant recorded information about such meetings, coming within the scope of these two requests.
27. The Council says that it did not. The Council also says that it does not hold secret meetings. It has explained that in less formal "preparatory

meetings to assist in compilation of a report”, a note may or may not be taken, but even if a note is taken, it may be disposed of when the report is produced “as the report is the primary record of policy and proceedings.”

28. We see no reason, in principle, why the Council's explanation as to why there are no minutes or records kept of such meetings is not reasonable or credible. There is a risk of overestimating the extent to which the less formal end of business in small councils is in fact recorded and retained.
29. We note that the minutes of the Council's Environment Committee EGM on 28 February 2011 refers to an authorisation to the Council's clerk to continue with his negotiations “either around the table or by phone” to assist in the compilation of a report. This supports a finding that the discussions in this case may well have taken place informally.
30. However, the same minutes refer to 4 specific documents. The Commissioner considered whether these fall within the scope of the request, and sought clarification from the Council. He concluded, as set out in his submissions dated 24 September 2014, that if held, the second and third documents (being a note attached to the Councillors' Bulletin and a note of a meeting which appears to have taken place between 28 February and 16 March 2011), would fall within the scope of Request 2, but that the other documents would not fall within scope. We see no reason to disturb the Commissioner findings on this.
31. As to whether those two documents were held at the date of the request, the Council has said that the information was not held. Given that nearly 2 1/2 years had passed between the meeting in March 2011, and the date of the request in August 2013, it is not implausible for the Council to have deleted or discarded the information or to be unable to trace it. There is nothing in the evidence before us to cast doubt on the Council's response. On a balance of probabilities, we accept that the Council did not hold these two documents at the time of the request.
32. The Appellant also says that a meeting took place between the Council's Clerk and a representative of a gardening club to discuss the future of Marquis Lane and nearby allotments. We accept that information held about such a meeting would come within the scope of Request 2. The Council confirms that a meeting did take place, but says that there was no agenda and no note taken by either party. In response to the handwritten note supplied by the Appellant, the Council accepts that it appears to be a note made by the gardening club chairman after the meeting, but says that this would not be a record created by officers of the Council and held by it. Again there is no basis for us to find otherwise.
33. In response to highlighted sections from various e mails supplied by the Appellant, the Council has acknowledged that a letter was sent by the Council to the Chairman of the Gardening Club, and it has now supplied a copy of that letter. Although the Council says that the Appellant would



have been aware of this letter from other sources, the Council was not of course entitled to rely on that. The letter comes within the scope of Request 1, it should have been provided to the Appellant, and we find that the Council was in breach of its obligations under section 1 of FOIA for failing to do so.

34. The appellant has referred to a number of e mails, which she says indicate that other meetings also took place. While we accept that these e mails indicate that such meetings may have taken place, there is no evidence to support a finding that any recorded information would have been produced in connection with any such meetings, nor is there any evidence to put into question the Council's repeated assertions that it held no recorded information about such meetings as at the date of the request.

### Requests 3 to 7

35. The Appellant says that she finds it improbable that there is no documentation other than that provided. She believes it is unlikely the Council would hold no recorded information on a procurement process beyond that disclosed, or that such information would be deleted once the process was complete. However, here too there have been repeated assertions from the Council that it holds no relevant information beyond that already disclosed. There is no basis, on the evidence, for us to find that it does.
36. It follows that except as referred to in paragraph 33 above, we must dismiss this appeal. We recognise, however, that those requesting information are often at a disadvantage when challenging a public authority, which says it, does not hold certain information, because they are not able to inspect for themselves the public authority's files whether in paper or electronic form. There may also be difficulties arising from a mismatch between a requester's expectations as to what should be held, and the reality of what is actually held. The issue for the Tribunal is not about what ought to be held, but what is actually held. In reaching its findings, the Tribunal will consider all the evidence before it, including what the public authority says about why it does not hold the information, the credibility of what the public authority says, and any evidence that may point to the existence of information, which has not been brought to light. The test to be applied is not certainty, but the normal civil standard of proof, i.e., a balance of probabilities.
37. Applying that standard in the present case, we find that except as set out at paragraph 33 above, the evidence does not support the Appellant's belief that additional information is held. As already indicated, the Commissioner has been through a further process since the conclusion of his Decision Notice by putting questions arising from the Appellant's further material to the Council. We have had the benefit of being able to consider those questions and explanations. We have also, during the course of our deliberations, invited and received further responses from the Council. There are always further questions that can still be asked,

and further areas on which clarification can be sought, but it is also necessary to be mindful of the proportionality of doing so. We consider that such clarification as could reasonably be sought has been sought, and we are satisfied, on a balance of probabilities, that as at the date of the request, no further information was held.

#### Other points

38. In response to the Council's claim that there was public access to various minutes via the Council's website, the Appellant says that in her experience the links cited do not work or are misleadingly titled and would hinder any searches for the information requested, with the result that the Council may be in breach of its obligations under section 21 of FOIA. We have not tested such links and on the basis that the Council has not relied on the exemption in section 21, we make no findings on this issue.

#### Decision

39. Except as set out at paragraph 33 above, the Appellant's appeal is dismissed.
40. Our decision is unanimous.

Signed  
Anisa Dhanji  
Judge

Date: 27 February 2015