



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

Appeal No: EA/2017/0064

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50612839
Dated: 28 February 2017**

Appellant: Susan White

Respondent: The Information Commissioner

Heard at: Fleetbank House

Date of Hearing: 27 July 2017

Representation:

Appellant: in person

The Commissioner: Robin Hopkins

**Before
HH Judge Shanks
and
Steve Shaw and Nigel Watson**

Date of decision: 6 September 2017

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 1 (whether information held)

Section 30 (investigations and proceedings conducted by public authorities)

Section 31 (law enforcement)

Section 40(2) (personal information)

Environmental Information Regulations 2004 (EIR)

Regulation 12(5)(b) (justice)

Regulation 13 (personal data).

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: **Maldon District Council**

Complainant: **Susan White**

The Substitute Decision

For the reasons set out below the Public Authority did not deal with the Complainant's request for information dated 2 December 2015 in accordance with the FOIA or EIR in that:

- (a) they were not entitled to rely on section 30 or 31 of FOIA (or regulation 12(5)(b) of EIR) to withhold any of the emails in the email chain between 15 May and 25 July 2014 (which were numbers 117, 118, 119, 122, 123, 124, 128, 131, 143, 148, 149, 150, 151, 159, 160 and 161 in the schedule of documents supplied by the Public Authority to the Information Commissioner in the course of her investigation);
- (b) they failed properly to consider whether they held information within request no 3 and what (if any) exceptions they might be entitled to rely on to withhold them.

Action Required

The Public Authority must by 16.00 on 6 October 2017:

- (1) make available to the Complainant any email referred to at (a) above which mentions her name and has not already been disclosed to her;
- (2) identify all information (including documents) held by them which falls within request no 3 and either make it available to the Complainant or (in so far as they seek to withhold it) serve a proper notice identifying the information and documents in question and explaining why it has been withheld in compliance with regulation 14 of EIR.

HH Judge Shanks

6 September 2017

REASONS FOR DECISION

Factual background

1. The Appellant, Susan White, is a councillor on the Maldon District Council for the Purleigh ward.

2. On 15 May 2014 Cllr White received an email from a landowner at Nipsells Chase in Mayland, another ward in Maldon DC, complaining about the behaviour of Council officers who had accused him of breaching a tree preservation order (TPO) which had been made in relation to his land in 1991. She raised the matter with officers and other councillors and this gave rise to an “email chain” which we have seen between 15 May and 25 July 2014. On 25 July 2014 Cllr White was informed by the Council’s Development and Projects Manager that no further action was to be taken against the landowner.
3. Cllr White tells us that in September 2014 vegetation was cleared on the land underneath various power cables by a company called BTS. At the hearing she produced a “Tree and Vegetation Clearance Consent Form” dated 20 June 2014 which she says relates to this work. It appears to be a pro forma issued by BTS and to be signed by Jackie Gilbert, the Council officer who was responsible for tree preservation.
4. She also tells us that following an offer from the landowner made in March 2015, she and her partner purchased the land at Nipsells Chase in June 2015 to keep horses on. Permission was obtained from the Council to carry out further clearance work on the land although it seems Cllr White did not inform the Council of her personal interest at this stage. When the clearance work was carried out there were complaints to the Council by local residents. The Council responded to these complaints in emails from Planning Services to local residents dated 21 August 2015 (which Cllr White produced for the Tribunal attached to her email of 10 July 2017); the emails make clear that the Council had been told what was proposed in advance and that they had no problem with the works that had been carried out and they make the point that the TPO was of very limited effect and that the majority of the vegetation on the land did not require permission to be removed.
5. Cllr White tells us that in response to the local residents’ complaints she attempted to organise a meeting between residents and her fellow councillors. At that stage, she says, having discovered that she was a co-owner of the land, the Council responded by initiating proceedings against her and her partner alleging breach of the TPO. They were interviewed under caution in October 2015 and then charged. The first

hearing in the Magistrates' Court was in February 2016. Following numerous hearings and delays there was a four day trial at which they were found not guilty in March 2017. She tells us they incurred legal costs of £120,000 in their defence.

Request for information and complaint to Commissioner

6. On 2 December 2015, at a stage between her interview and first appearance before the Magistrates, Cllr White made a request for information under FOIA. The request is not the clearest but in summary she was asking for three categories of information and documents held by the Council relating to the period before June 2015:
 - (1) any email mentioning her name in relation to planning matters in Mayland “for the last 18 months”, whether involving councillors or officers;
 - (2) any email mentioning her name written to or from six named councillors “for the last 18 months”;
 - (3) a series of documents and information relating to the clearance of the trees under the power cables on the land; this request appears to relate to the document she showed us dated 20 June 2014, although not expressly so.
7. The Council responded in a letter dated 16 December 2015. They stated that the matters raised related to a current investigation into a TPO enforcement matter against her and her partner and that the requests went “... to the heart of the enforcement investigation”. The letter referred to section 31 of FOIA and stated that it applied so that the duty to confirm or deny whether the Council held the information did not arise. Following a review the Council confirmed their stance in a letter dated 17 February 2016; the review letter referred to both sections 30 and 31 of FOIA and there was a passing reference to the “public interest” in disclosure of the requested information and the public interest in preventing crime and it was stated that these had been considered “very carefully”.
8. Cllr White complained to the Information Commissioner about the way her request had been dealt with. As recorded in the decision notice, in the course of the Commissioner’s investigation the Council confirmed that in response to the request

they had identified documents containing Cllr White's personal data and had dealt with them as being the subject of a "subject access request" under the Data Protection Act 1998; the Commissioner did not therefore consider such documents further in the course of her investigation. In the course of the investigation the Council also sent the Commissioner a schedule of documents, which were presumably those which the Council considered to come within the terms of the request but sought to withhold, identifying the FOIA and EIR exemptions they relied on in relation to each of the documents; these exemptions included sections 30, 36, 40(2), 42 and 43 of FOIA and regulations 12(4)(e), 12(5)(e) and 13(1) of the EIR, though not, it seems, section 31 of FOIA, although they had relied on this exemption in their response to the request.

9. In her decision notice the Commissioner:

- (1) identified a large number of those documents where Cllr White was herself a party to the document (as sender or recipient) or which were outside the terms of the request and did not consider them further;
- (2) rejected the Council's case that they were entitled to rely on section 36, 42 and 43 of FOIA and regulations 12(4)(e) and 12(5)(e) of the EIR in relation to various documents and directed the Council to disclose those documents to Cllr White; we assume that that part of the decision notice has been complied with;
- (3) upheld the Council's position on section 40(2) of FOIA and regulation 13(1) of EIR (third party personal data) in relation to limited parts of various listed documents; it became clear during the appeal that Cllr White does not complain about this part of the decision notice and we need consider it no further;
- (4) decided that the documents where the Council was claiming reliance on section 30 FOIA from the email chain from 15 May to 25 July 2014 to which we refer above in fact contained "environmental information" and were therefore covered by EIR; as we understand it this conclusion is not challenged;
- (5) decided that the Council were entitled to withhold the parts of the email chain to which Cllr White was not a party in reliance on regulation

12(5)(b) of EIR (which covers information whose disclosure “would adversely affect ... the course of justice ... or the ability of a public authority to conduct an inquiry of a criminal ... nature”).

The appeal

10. Cllr White appealed against the decision notice on 5 April 2016 and sent in more detailed grounds of appeal on 2 May 2017. She stated in the box headed “Outcome of appeal” that “Everything I actually wanted was refused and ... pointless things were allowed”. Her grounds of appeal are not the clearest but it is fair to note that she was acting in person and that she did make a number of relevant points, in particular:
- (1) that she did not know what the documents the Commissioner was referring to were; apart from the fact she had obviously not seen the documents in the schedule other than those to which she was a party, it is right to say there was very little by way of description of them in the decision notice and nothing at all in the refusal and review letters;
 - (2) that she understood that the emails about her were “nasty and unpleasant” since she had been informed of some of the contents;
 - (3) that the information withheld relating to the TPO and work carried out on the land pre-dated her acquisition of the land in June 2015 and could have had nothing directly to do with her prosecution;
 - (4) that there were questions about how her prosecution had come about and that there may have been “poor practice” on the part of the Council which ought to be exposed.
11. The Council were sent a copy of the grounds of appeal by the Tribunal on 5 May 2017 and invited to indicate whether they wished to be joined as a party to the appeal but they took no steps to do so. A hearing therefore took place in their absence on 27 July 2017 at which Cllr White represented herself and the Commissioner was represented (ably as normal) by Mr Hopkins. Part of the hearing was necessarily held in “closed session” while we considered withheld material.

12. It is right to record that we received quite a lot of oral clarification and information from Cllr White during the hearing (largely reflected in paragraphs 3, 4 and 5 above) and that Mr Hopkins on behalf of the Commissioner was frankly unable to respond to various points made against the Council partly, he told us, because they had not even responded to recent written enquiries made of them by the Commissioner. Although we consider it would have been much more satisfactory if the Council had participated in the appeal, in the circumstances we do not think they can complain of any unfairness in the process and we have gone ahead and decided matters as best we can on the basis of the material presented to us at the hearing.

The email chain 15 May to 25 July 2014

13. The appeal has focussed on this email chain, which was provided to us in a closed bundle. Most of it comprises emails to which Cllr White was herself a party and which therefore do not concern us directly but most of the other emails in the chain mention her by name and relate to planning matters in Mayland and therefore clearly come within her request no 1. The Council sought to withhold these emails on the basis they came within section 30 of FOIA and the Commissioner decided that they were entitled to rely on reg 12(5)(b) of EIR, which provides an analogous exemption.
14. We have considered this withheld material in the light of the facts in so far as we have been able to ascertain them. In the absence of any evidence or detailed explanation from the Council, we are unable to see how disclosure of the material in (say) January 2016 would in fact have adversely affected the course of justice or the Council's ability to investigate the allegations against Cllr White. In the circumstances, we are not satisfied that regulation 12(5)(b) was engaged.
15. Further, we note that, even if regulation 12(5)(b) had been engaged, it would only have allowed the material to be withheld if the public interest in maintaining the exception outweighed that in disclosure and, further, that the Council were under an obligation to apply a presumption in favour of disclosure (see regulations 12(1)(b) and 12(2)). Even assuming that there would have been some adverse effect on the investigation and prosecution of Cllr White resulting from disclosure of the withheld material in January 2016, Cllr White would say that there was a greater than normal

and weightier public interest in disclosure of the withheld material at that stage in order to allow the public to see the whole background to the investigation and impending prosecution. From what we have seen, we are inclined to agree with her: a prosecution of a serving councillor by her own Council is unusual at any time; against the background of her earlier involvement in 2014 and the email chain resulting from it and the emails of 21 August 2015 to which we have referred, questions were raised which we think dictate that the public was given as full a picture as possible. Without making any finding of wrongdoing on the part of the Council we nevertheless agree in those circumstances that the public interest balance favoured disclosure of all this material.

16. We therefore disagree with the Commissioner's conclusions in relation to the email chain and allow the appeal and issue a substitute decision notice requiring the Council to disclose the withheld material. We note that most or all of the withheld material is about Cllr White herself and therefore probably constitutes her personal data and that some of it may also be the personal data of others within the Council (who were acting, we note, in their official capacity) so that it may have been arguable that regs 5(3), 12(3) and 13 EIR (and possibly section 40 FOIA) needed to be considered. But this point was not taken either by the Commissioner before us or, it seems, by the Council before her, and, as we have said, the Council has chosen not to participate in this appeal. In the circumstances, we are not inclined to take the point of our own motion, potentially causing further delay and inconvenience for Cllr White in particular.

Request no 3 relating to the clearance of trees under the power cables

17. Cllr White sought to explain the significance of her request no 3 to us. She suggested that there is something odd about the consent form dated 20 June 2014 and she told us that part of the Council's case against her in the TPO prosecution was for cutting down branches which had actually been cut down in 2014 as part of the clearance of trees under cables done with the consent of the Council by others long before she acquired the land.

18. We are not in a position to give any opinion about any of that but, given the existence of the consent form, we feel there must be some information or documents held by the Council which comes within request no 3 and we cannot help noting that we have not seen any such information or document (other than the consent form itself) and that, when we asked, the Commissioner was not able to say that any such document was contained in the schedule produced by the Council to her. Since the initial answer from the Council was that they “neither confirmed nor denied” holding the requested information and in the absence of any further input from them, we think they may well have overlooked this part of the request or not given it the consideration it deserved.

19. In the circumstances, although the point was not “four square” before us, we have decided to issue a substitute decision notice requiring the Council to identify any information or documents answering request no 3 and to consider whether, in the light of this decision, there was any basis for withholding it, and to disclose it or serve a suitable notice under regulation 14, which can then, if Cllr White remains dissatisfied, form the basis for a further complaint to the Commissioner.

Data Protection Act “subject access request”

20. As we record above the Council assured the Commissioner in the course of her investigation that they had dealt with Cllr White’s request, in so far as it was a request for her personal data, as a subject access request under the Data Protection Act 1998. Cllr White tells us that she has not received the emails about her that she expected to and, as we have already noted above at paragraph 16, we did see emails about her which had not been dealt with under the DPA. Although we have no jurisdiction to deal with matters arising under the DPA we would remind the Council of their obligations in this regard and invite them to consider again whether they have in fact properly dealt with Cllr White’s request under the DPA in so far as it is a request for her own personal data.

Outcome

21. For all those reasons, we allow the appeal and issue the substitute decision notice set out above.

22. This is a unanimous decision.

HH Judge Shanks

Date of Decision: 6 September 2017

Date Promulgated: 7 September 2017

