



(General Regulatory Chamber)
Information Rights

First-tier Tribunal

Appeal References: EA/2018/0185

Heard in Bury St Edmunds on 11 January 2019

BEFORE

JUDGE DAVID THOMAS

BETWEEN

NICOS MERCOURIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Pages in [square brackets] refer to the bundle

1. This is an appeal by Mr Nicos Mercouris against the rejection on 6 August 2018 by the Information Commissioner (the Commissioner) of his complaint that St Edmundsbury Borough Council (the Council) had wrongly failed to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
2. Mr Mercouris had requested an oral hearing and attended. He was unrepresented. The Commissioner did not attend but had made a written submission. The Council was not a party.

The request

3. In 2003, Mr Mercouris took a lease of some business premises in Bury St Edmund's from the Council. The Council later sold the freehold. Mr Mercouris is unhappy about how the Council has dealt with him and believes he has lost a considerable amount of money as a result. He explained some of the background to me. Whilst it was helpful to understand it, it does not impinge directly on the issue I have to decide.

4. Mr Mercouris has had extensive dealings with the Council and has made a number of requests (whether under FOIA or the Data Protection Act 1998), both before and after the request the subject of this appeal. He has had several meetings with Council officials. He has made an unsuccessful complaint to the Local Government Ombudsman.
5. On 27 November 2017 [38], Mr Mercouris made this request of the Council: ‘My understanding is that the Council holds an email dated 31 July 2003 that was sent to me from Ashton Graham Solicitor. I would be grateful for an unredacted copy of this and any attachments are sent to me under [FOIA] ...’. On 1 December 2017 [39], the Council provided what it described as a letter from the solicitors of this date [40].
6. On 6 December 2017, Mr Mercouris pointed out that he had requested an *email* of 31 July 2003. On 8 December 2017, the Council explained that there was just a single communication of 31 July 2003 and it had supplied that. It suggested that ‘the letter was sent via email’.
7. On 14 December 2017 [45], Mr Mercouris made the request which is the subject of the appeal: ‘... would you please confirm (i) the name of the person who sent you the email dated 31/07/20003 and (ii) when you received it’. This is the information which is at issue in this appeal, and the only information.
8. When it eventually replied on 12 February 2018 [47] (at the instigation of the Commissioner), the Council quoted from its letter sent on 12 January 2014 to Mr Mercouris:

‘... You asked how a letter from your solicitor James Griffiths to you, dated 31st July 2003, came into the possession of the Council. My finding is that on various occasions since 2009 you have attended meetings at these offices, or have come into Reception, bringing with you and leaving for our attention numerous documents, including ... The letter referred to above was one of those copy documents and was not obtained by any other means’.
9. It appears, in fact, that Mr Mercouris has asked for essentially the same information on a number of occasions going back to late 2013, when he first discovered that the Council had Mr Griffiths’ letter. In November 2016, the Council refused to deal with one particular request on the grounds that it was vexatious within section 14(1) FOIA. As far as I am aware, Mr Mercouris did not challenge that refusal. One of the oddities of the case is why the Council did not rely on section 14(1) with the present request which was essentially for the same information.

The Commissioner’s decision

10. In her decision, the Commissioner concluded, on the balance of probabilities, that the Council did not hold the requested information in recorded form.

The Appeal

11. In his letter of 24 August 2018 to the Tribunal [15], Mr Mercouris said he had requested all the information ‘around my entering into a tendering process and construction of two commercial units with four flats above with Saint Edmundsbury Borough Council from the

Council', under FOIA and the Data Protection Act. He set out some of the background. He may indeed have requested all this information at some point but that is not relevant to the request which is the subject of this appeal. In the Notice of Appeal itself [12], Mr Mercouris described the outcome he was seeking in this way: 'to know how the email/letter was received by [the Council]. To do this the Council must supply copies of all the information they hold in relation to my business and development of Tallou Court'. I simply note that the second sentence does not follow from the first: the Council does not need to supply all the information it holds relating to Tallou Court in order to explain how and when his solicitor's letter came into its possession.

Discussion

12. Members of the public have a qualified right to information held by public authorities on request. However, it is self-evident that a public authority can only disclose information which it holds. The fact that an authority might be expected to hold particular information is not determinative but could indicate that it does, in fact, hold it. Equally, if one would not expect an authority to hold the information, that might be a good indication that it does not hold it.

13. Section 3(2) contains a partial definition of whether information is held:

*'For the purposes of this Act, information is held by a public authority if –
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority'*

The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

14. Importantly, for it to be disclosable information must also be held in recorded form. This is because the definition of 'information' in section 84 FOIA is '(subject to sections 51(8) and 75(2) [not relevant]) ... information recorded in any form'. 'Recorded form' implies a degree of permanence. Information which is simply in the mind of an employee is not held in recorded form.

15. It follows that the issue is whether the information Mr Mercouris has asked for in the request I am considering – who sent the Council the communication from his solicitor of 31 July 2003 and when – is held by the Council in recorded form.

16. On the face of it, it is strange that the Council should have a copy of a letter to Mr Mercouris from his solicitor, particularly when the Council was on the other side of the transaction in question and the parties have subsequently been in dispute. Mr Mercouris is adamant that he did not knowingly give it to the Council. He would, he says, have had no reason to do so. He is equally adamant that he did not give it by accident, by, for example, inadvertently including it amongst other documents he accepts he did give the Council. He makes the point, reasonably, that one would

expect the original sent to him to have been on the firm of solicitors' headed notepaper (which the version held by the Council is not). He speculates that his solicitor (who is no longer acting for him and with whom he has fallen out) must have passed the letter on but accepts that this is indeed speculation. That would clearly have been a deeply unprofessional thing for a solicitor to do absent his client's consent, and I would be slow to conclude that that is what happened here without clear evidence.

17. The Council, in its response on 12 February 2018 [47], suggested that the person who gave it the 31 July 2003 letter was Mr Mercouris himself. It thereby answered the first part of the request, repeating what it had already told Mr Mercouris in 2014. It did not answer the second part of the request – when the letter was given to it.
18. The Council did not, in fact, have to answer the first part given, so it says, that it does not have a *record* of the fact (or contention) that Mr Mercouris brought the letter to the Council's offices. The information seems to be in the mind of an official who worked for the Council at the time.
19. As I have said, Mr Mercouris strongly disputes that it was he who gave a copy of the letter to the Council. But the dispute highlights why FOIA only requires a public body to disclose *recorded* information. There can then be no dispute about the content of the information which it holds.
20. Mr Mercouris has become fixated by whether Mr Griffiths' communication was sent via email or letter. The Council at one time said that it was an email but later said it was a letter. It is, in fact, clearly a letter. It is signed and there is nothing to indicate that it was sent by email. Mr Mercouris told me that he did not have email at the time and still does not (see also his letter to the ICO of 6 April 2018 at [67]). Mr Griffiths could not, therefore, have sent him an email.
21. There are, it would appear, three main possibilities of how the letter came into the Council's possession. First, that Mr Griffiths (or someone on his behalf) sent a signed copy, with or without Mr Mercouris's consent (he denies giving consent). Second, that Mr Mercouris gave it (he strenuously denies doing so, even inadvertently). Third, that someone to whom Mr Mercouris had given the letter did so (there is no evidence of this). To the extent that I need to decide the issue, I find that the most likely explanation is that Mr Mercouris gave the letter to the Council by mistake, by including it with other documents. I accept that that would mean that the letter was not on Ashton Graham's headed paper but solicitors do sometimes communicate with clients in this way.
22. Whatever the truth, what ultimately matters is whether the Council holds a *record* of who gave it the letter and when. I accept on the balance of probabilities that it does not. That is what the Council says and there is no reason to disbelieve it. It would only be likely to hold a record if the document at [40] was a copy - despite the fact that it is signed - and that it was emailed to it, without Mr Mercouris's

knowledge or consent and in flagrant breach of Mr Griffiths' professional duties. That is a far-fetched explanation. The explanation given by the Council - that Mr Mercouris himself brought the letter, amongst other documents, on an unknown date - is more plausible.

Conclusion

23. For these reasons, the appeal is dismissed. I find, on the balance of probabilities, that the Council does not hold in recorded form the identity of the person who gave it the letter or when.
24. I appreciate that it is frustrating for Mr Mercouris not to be able to get to the bottom of how the Council came into possession of the letter from his solicitor. As I have explained, however, the Council only has to disclose information which it holds in recorded form.

Signed

Judge of the First-tier Tribunal

Date: 14 January 2019