



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

Appeal No: EA/2013/0262

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50488647

Dated: 16 July 2013

Appellant: Catherine Whitehead

Respondent: The Information Commissioner

Date of hearing: 25 April 2014

Venue: Employment Tribunal, Ashford

**Representation: Appellant in person
Respondent unrepresented**

Before

HH Judge Shanks

Judge

and

Anne Chafer and Dave Sivers

Tribunal Members

Date of Decision: 29 April 2014

Subject matter:

Freedom of Information Act 2000

s.1 Whether information held

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows Ms Whitehead's appeal and substitutes the following decision notice in place of the Commissioner's decision notice dated 16 July 2013.

SUBSTITUTED DECISION NOTICE

Public Authority: Thanet District Council

Complainant: Catherine Whitehead

The Substituted Decision

For the reasons set out below, the Tribunal finds that the Public Authority did hold the information which was the subject of the Complainant's request for information dated 28 August 2012 and that the request was not therefore dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000.

Action required

The Public Authority must by 16.00 on 30 May 2014 communicate the requested information to the Complainant.

HH Judge Shanks

29 April 2014

REASONS FOR DECISION

Introduction

1. The only issue in this appeal is whether the Information Commissioner was right to conclude as a matter of fact on the balance of probabilities in his decision notice dated 16 July 2013 that Thanet District Council did not hold the information requested by the Appellant. As provided by section 58(2) of the Freedom of Information Act 2000, it is open to the Tribunal to review any finding of fact by the Commissioner; and we are able to look at any such finding in the light of all the evidence which is before us and to reach a different conclusion to that reached by the Commissioner.

Factual background

2. The Appellant, Ms Whitehead, owns a property on Beach Rd in Westgate-on-Sea. There is a large Holm Oak tree on a neighbour's land which substantially overhangs Ms Whitehead's garden. The tree has been the subject of intense dispute between Ms Whitehead and her neighbour and the local authority, Thanet DC, for some years.
3. It appears that in 2010 a Tree Preservation Order (TPO) was made by Thanet DC in respect of the tree. On 28 October 2011 Thanet DC granted consent to Bruks Botha, a tree surgeon, to remove growths from the tree back to the boundary line on behalf of Ms Whitehead. Ms Whitehead told us that he was prevented from completing this work by the neighbour. At some stage Ms Whitehead started legal proceedings against the neighbour in the Thanet County Court in connection with the tree.
4. Ms Whitehead told us that sometime before 28 August 2012 she invited Mr Botha to give a quotation for general landscaping work in her garden but that Mr Botha told her that Nicki Burford, a Planning Compliance Officer with Thanet DC, had told him

not to work for her again or even attend her home and that this instruction had been repeated in “correspondence”. Apparently Mr Botha received a lot of work from Thanet DC and was reluctant to disregard the instruction. When Ms Whitehead asked him for a copy of the correspondence he had referred to he said he could not find it.

5. On 28 August 2012 Ms Whitehead sent an email to Ms Burford at her Thanet DC address in the following terms:

Dear Nicki

Currently the case between [the neighbour] and myself has come before a Judge at the County Court.

Recently I was made aware that you had corresponded with my contractor Bruck Botha regarding the contentious Holm Oak TPO/8(2010).

Please can you forward me a copy of this letter so that I can keep the Judge fully apprised of the situation.

Regards Catherine Whitehead

Within the hour Ms Burford replied as follows:

Dear Ms Whitehead

As this enforcement case is closed I no longer have a copy of this correspondence.

Yours sincerely

Nicki Burford

6. On 3 September 2012, Sir Roger Gale, the local MP, wrote to Ms Burford on behalf of Ms Whitehead requesting her to supply the correspondence and stating:

Given that this is an ongoing case you will appreciate that it would have been wholly improper for the council to have destroyed any such correspondence and failure to provide it will lead to a referral ... to the Information Commissioner ...

On 14 September 2012 Thanet DC’s Planning Manager wrote to Ms Whitehead referring to Sir Roger’s letter and stating that:

... following a search of our records, I have established that the information you requested is not held by Thanet District Council.

7. Following further correspondence, on 29 October 2012 Thanet DC’s Corporate Information Officer wrote to Sir Roger on behalf of the Planning Manager saying:

I can confirm that we have checked our records including our previous email system Groupwise and the email Mrs Whitehead has requested no longer exists in the Council's email system or records.

I trust that this clarifies the position ...

On the same day he wrote to Ms Whitehead as follows:

I can confirm that I have again asked Ms Burford to check her email account and can confirm that the Council does not hold this correspondence within its records.

8. On 5 November 2012 Ms Whitehead wrote to Thanet DC's Freedom of Information Department inviting them to continue the investigation. Her letter expressly referred to her allegation that Ms Burford had forbidden Mr Botha from working for her again or attending her home. She invited Thanet DC to search their archives and, if the letter had been deleted from the computer, to authorise the computer technical team to retrieve a copy from the "hard drive". On 17 January 2013 Thanet DC's Corporate and Regulatory Services Manager, Harvey Patterson, wrote to her saying:

I have now concluded an internal review of your request which included reviewing Ms Burford's deleted items folder and I have also concluded that the information requested is not held by the Council. Although as you suggest it may be technically possible to recover the correspondence in question from the relevant Council server with the aid of a forensic computer analyst, the Information Commissioner has confirmed in guidance that in such circumstances the Council is entitled to consider that it no longer holds the information in question. Finally I can confirm that there is no relevant paper file to which the requested information might have been copied so I have not found it necessary on this occasion to search the Council's paper archive.

On 23 January 2013 Ms Whitehead complained to the Information Commissioner.

The Commissioner's investigation and decision notice

9. In the course of the Commissioner's investigation Mr Patterson informed the Commissioner that Ms Burford's email account had been examined (including her Outlook in-box, sent items folder, and deleted items folder) and that nothing relevant had been found. In the course of a telephone conversation on 7 June 2013 it seems that he also told the Commissioner's case worker that the information had been "double deleted" and the Council was therefore unable to provide it. It is not clear

whether this was speculation on the part of Mr Patterson or he had been expressly told by Ms Burford that she had double deleted the information; unfortunately the Commissioner elected not to attend the hearing of this appeal so we were not able to seek clarification on the point.

10. In the course of the investigation Mr Patterson also informed the Commissioner that the Council's "retention schedules" required that files in relation to protected trees and TPO enforcement action should be kept permanently and that the relevant files had been inspected but did not reveal a copy of the requested letter. His email to the Commissioner continued:

... it was not essential to the proper exercise of the Council's enforcement powers that the requested letter was placed on the enforcement file.

... the Council may well hold a copy of the requested information on a back up tape but ... these are retained by the Council for disaster recovery purposes only, not as an archive.

11. In his decision notice the Commissioner stated that the central argument in the case was whether Thanet DC should have searched its "backup server/tapes for the information in question". He then referred to his relevant published guidance (which states that as a general rule a public authority is not expected to retrieve data from backup tapes), referred to Thanet DC's assertion that its backup tapes are used for disaster recovery only and not as an archive and concluded on this basis that they did not hold the requested information.

The appeal

12. Ms Whitehead appealed against the Commissioner's decision notice on 29 November 2013. Her appeal was allowed to proceed, an extension of time having been granted by the Registrar, who also ordered an oral hearing to take place on 25 April 2014.
13. As we have indicated, unfortunately the Commissioner elected not to attend the hearing and we therefore heard only from Ms Whitehead, who was assisted by a

friend. On the Commissioner's side we were necessarily confined to considering his decision notice itself and his Response dated 25 February 2014.

Our conclusions

14. We have set out Thanet DC's response to Ms Whitehead's questions and the Commissioner's investigation at some length. It is very noteworthy that at no stage has anyone at Thanet DC sought to dispute that Ms Burford did indeed send an email from her Thanet DC email address to Mr Botha in the terms suggested by Ms Whitehead and we can only conclude on the balance of probabilities that that must be the case. It must also follow that if, as Thanet DC maintain, Ms Burford's email account contains no record of such an email, that email must have been deliberately "double deleted" at some stage, as suggested to the Commissioner's case worker by Mr Patterson on the telephone. In those very unsatisfactory circumstances we find it extraordinary that Thanet DC have not taken all steps necessary to retrieve the email for their own purposes, regardless of Ms Whitehead's request to be provided with a copy.
15. Nevertheless it is right to say that Thanet DC were only obliged to provide a copy of the email to Ms Whitehead if they "held" it at the relevant time. They appear to have accepted that the email is likely to be held on a "back-up" tape or that it may be recoverable from its server (if that is different). For his part the Commissioner accepts that if the only purpose for which the back-up tapes are kept is "disaster recovery" and not as an archive then in accordance with his guidance he does not consider that information on such tapes is "held".
16. We are afraid that we strongly disagree with the Commissioner on this point. We do not think the intention of the public authority is of any relevance to the question whether as a matter of fact they "hold" information. If requested information is in (or on) back-up tapes which are themselves held by the public authority or is in some way still stored on the public authority's server, we consider that it is clearly "held" by the public authority. If it is difficult and expensive to retrieve the information then the public authority may be able to rely on section 12 of the Act. However, in this case,

Thanet DC know the writer and addressee of the email in question and presumably have the means of finding out (ie by asking Ms Burford) roughly when it was sent and what its contents were, so it is not surprising that there has been no suggestion that it would be prohibitively expensive to retrieve it.

17. In those circumstances we are quite satisfied that Thanet DC did (and do) hold the requested information and that they should now disclose it to Ms Whitehead.

Disposal

18. We therefore allow the appeal and make the substituted decision notice set out above. We trust that the Commissioner will take steps to enforce the notice should that prove necessary.

19. This decision is unanimous.

HH Judge Shanks
29 April 2014