



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2020/0341**

**Decided without a hearing  
On 22 December 2021**

**Before**

**JUDGE ANTHONY SNELSON  
DR AIMEE GASSTON  
MR PAUL TAYLOR**

**Between**

**MR MICHAEL FAGAN**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**DECISION**

The decision of the Tribunal is that the appeal is dismissed.

**REASONS**

*Introduction*

1. On 1 January 2016 the Appellant, Mr Michael Fagan, wrote to numerous members and employees of Worcester City Council ('the Council'), making allegations of serious wrongdoing on the part of the newly-appointed Managing Director of the Council during her time as Chief Executive of

Knowsley Council. The Council advised the recipients not to respond and informed Mr Fagan that the allegations were historical and not matters which it had any power to investigate.

2. On 15 January 2016 Mr Fagan wrote to the Council requesting information under the Freedom of Information Act 2000 ('FOIA') as follows:

**I am aware that all Councillors, senior staff and local MPs have received an email setting out serious allegations against the Managing Director of the City Council.**

**These allegations, if correct, would clearly make her entirely unsuitable for her role in heading up the Council. Presumably, she will have been very anxious to rebut the allegations. Similarly, I presume that the Council will have been equally anxious to be seen to have taken all reasonable steps to investigate the matter so that it would be able to satisfy the people of Worcester that there is no truth in the allegations.**

1. **What statements has the Managing Director made to refute these allegations?**
2. **What steps has the Council taken to investigate the matter?**
3. **In what manner has the Council informed Councillors and staff of the Managing Director's response to the allegations?**

3. The Council initially declined to answer the request, judging it vexatious and relying on FOIA, s14, but later revised its position and, on 16 September 2016, stated that it did not hold the information requested.
4. Mr Fagan complained to the Respondent ('the Commissioner') about the way in which the Council had dealt with his request but, following an investigation, she accepted that the Council did not hold the relevant information.
5. Mr Fagan then appealed to the First-tier Tribunal ('FTT') which, by a decision promulgated on 21 June 2017, allowed the appeal. The judgment of Judge Annabel Pilling included the following passages:

**23. This does not appear to me to be a credible explanation of how events unfolded in response to the email of 1 January 2016. It is clear that within 24 hours the Council took the step of issuing instructions for staff not to respond to the Appellant, yet appears to submit that there is no recorded information of any conversation or email correspondence as to how to respond, nobody made any recorded note of the decision to do so, or of any enquiries of the Managing Director to establish whether she was aware of the allegations or the individual concerned. In the Decision Notice the Commissioner points out that the Council does not appear to have conducted any searches and the only search conducted subsequently relates to the conversation with the Monitoring Officer of Knowsley Council. I find that the Council has been far from thorough in its dealings with this matter and I am not satisfied that an adequate search has been conducted.**

**24. On the balance of probabilities I am satisfied that the Council must hold further information within the scope of the request ...**

6. Following the judgment of the FTT, Mr Fagan, on 24 June and 10 July 2017 directed further requests to the Council for the information sought by his

January 2016 request and for all recorded information held relating to allegedly false statements made by Mr Tim O’Gara, then employed by the Council as Deputy Director - Governance, in response to that request.

7. Pursuant to the judgment of the FTT, the Council conducted further searches and, on 19 July 2017, disclosed a schedule of information said to be within the scope of the January 2016 request. The Commissioner then enquired into whether the Council had complied with the judgment. In the course of the enquiry the Council disclosed a further document on 30 October 2017. Thereafter, the Commissioner determined that the Council had complied.
8. Also on 19 July 2017, Mr Fagan presented a further request to the Council in these terms:

**Following Judge Pilling’s ruling that the Council had misled the Information Commissioner and deliberately withheld information a copy of the judgment was sent to the Council.**

**Obviously, the Council will have considered this judgment in detail, I presume at least one report will have been prepared and there will, no doubt, have been exchanges of emails and/or memos.**

**Please provide copies of all recorded information relating to this matter dating from the date of the judgment 18 May 2017.**

9. The Council initially declined to respond to the request, relying on FOIA, s14, but, in the course of the Commissioner’s investigation which followed, revised its position and, on 13 March 2018, provided a response in these terms:

**Clarification has been sought from the ICO, who have confirmed that the timeframe that this request relates to is from 21 June 2017, when a copy of the Tribunal decision was received ... The Council has carried out searches of its paper-based and electronic records for that period. The information that the Council holds is attached at Appendix A and comprises a number of email exchanges ...**

**From the email records, there is reference to two meetings that took place on 26 June 2017. The first was a meeting between David Blake, Managing Director and Tim O’Gara, Deputy Director - Governance, and the second was a meeting between David Blake and Councillors Gregson, Bayliss and Stephen. Mr Blake and Mr O’Gara have reviewed their electronic and paper-based records and hold no records relating to either of those meetings. In addition, Councillors Gregson, Bayliss and Stephen have been asked to confirm whether they hold any records from [those] meetings. They have confirmed that they do not. Email correspondence with the relevant Councillors is included within Appendix A.**

**The request specifically asks for any report relating to this matter. The Council confirms that no such report was prepared and therefore it does not hold this particular category of information.**

**When this request was received, the Council was in the process of responding to the Tribunal ruling. When conducting the electronic searches to respond to this request, a number of administrative emails were returned in addition to those disclosed at Appendix A. Please note these emails have been discounted as they relate to the**

administration of the Council's response to the Tribunal decision, for example there are a number of emails relating to the confirmation of the required search terms as well as the Head of IT seeking authority to conduct the network wide searches from the appropriate officer.

10. The Commissioner then closed her enquiry, Mr Fagan's complaint (which related to the Council's initial application of FOIA, s14) having been resolved.
11. On 21 July 2019, Mr Fagan then made the request with which these proceedings are concerned. It was in the following terms:

Recent events have led me to review the information provided in the comprehensive schedule you sent me.

You state that the period covered by the request is 21 June to 16 July 2017.

I note that in some of the emails sent to Mr Blake a briefing note is requested and Mr Clegg promises one for the week beginning 3 July.

However, in the information you provided me there is no copy of a briefing note. Nor are there any minutes of the meeting. Even if both were delayed by a week they would fall into the time period of my request.

Can I ask you to investigate this matter and get back to me as soon as possible? You will, of course, be aware that withholding information is a criminal offence under the legislation.

Can I also make a new request for all recorded information distributed to Councillors and Council Officers about the outcome of my appeal to the ICO and the Tribunal Hearing to be unlimited by any date? This covers emails, notes, briefing notes and reports. There is no need to duplicate what you have already provided to me. ...

As can be seen, the request divided into two parts, the first in effect repeating the request of 19 July 2017 and the second, contained in the final paragraph, making an avowedly new request. We will refer to them jointly as 'the request' and individually as 'the renewed request' and 'the new request' respectively.

12. The Council responded on 28 October 2019, declining to provide any information and citing FOIA, s14. There was no internal review.
13. Mr Fagan complained to the Commissioner. In the course of her investigation, the Council again revised its position and purported to address the substance of the request. Its response, dated 18 September 2020, addressed the renewed request and the new request in turn. As to the former, it included the following:

The Council undertook a reasonable search of its mail servers and document folders. No minutes or briefing note were identified. All written records identified in the search were already disclosed to you.

The conversation between David Blake, Chris Mitchell, Marc Bayliss and Tim O’Gara (... pages 46 to 67 of the disclosure) took place on the afternoon of Sunday, 25 June 2017. A meeting was held the next day and is recorded in David Blake’s calendar ... where this matter would have been discussed. This would give no time for a report to be prepared by Tim O’Gara and this is not the way in which these meetings work, as it is our understanding that these were fairly informal meetings and used as a regular means of communication (verbal) rather than a means to consider any ‘formal’ reports as you perhaps have assumed. You are incorrect in asserting that David Blake promised a briefing note for the week beginning 3 July as there is no record of this. Perhaps you may have confused the dates as this matter would have been dealt with the following day as outlined above.

Ultimately, the Council does not hold the information that you are referring to ...

Turning to the new request, the Council’s response included the following:

The Council initially refused this request on the grounds that it is vexatious ... The ICO has asked us to reconsider, on the basis that it is linked to your original request. Therefore we have now conducted a reasonable search of mail servers and document folders. The searches identified the information attached here as meeting the description of your request.

Certain documents were attached.

14. Dissatisfied, Mr Fagan complained to the Commissioner, who proceeded to carry out an investigation. This took the form of considering the information supplied by Mr Fagan in support of his case and the Council’s responses to a number of questions posed by the Commissioner.
15. By a decision notice dated 6 November 2020 (‘the DN’) the Commissioner determined, on a balance of probabilities, that the Council did not hold information in addition to that already disclosed.
16. By a notice of appeal dated 29 November 2020, together with a 37-page attachment, Mr Fagan challenged the DN on a number of grounds.
17. In her response to the appeal dated 25 January 2021, prepared by Nicholas Martin, solicitor, the Commissioner joined issue with the appeal and defended the DN.
18. In a four-page document of 14 February 2021 Mr Fagan set out a number of comments on the Commissioner’s response.
19. The matter came before us on 11 May 2021 for consideration on paper, the parties having agreed that it should be decided without a hearing. We had before us the open bundle of documents running to some 673 pages. Following a detailed discussion we were able to agree on most matters in issue but felt the need to revert to the parties to invite written representations on one aspect. That was a concern raised by Mr Fagan in his ‘report’ dated 29 November 2020 (part of the attachment to the notice of appeal), paras 35-37 that the Council

had disclosed an email of 20 September 2017 but not the four attachments to it. The Commissioner did not consider that the attachments were within the scope of the request but suggested that the Council be approached.

20. We had the opportunity to confer on 23 July 2021 and took the decision to invite the Council's representations.<sup>1</sup> The Council responded on 23 August, enclosing copies of the attachments to the email of 20 September 2017.
21. The next opportunity for us to meet (remotely) was 22 December 2021, when we completed our deliberations and reached our decision above.

*The applicable law*

22. The Freedom of Information Act 2000, s1(1) enacts a general right in favour of a person making a request for information held by public authorities to be informed whether the authority holds the information and, if it does, to have the information communicated to him or her. The request must be construed by giving the words used, in their context, their natural meaning. 'Information' means information recorded in any form (s84).
23. In *Bromley and Information Commissioner v Environment Agency* EA/2006/0072, the Information Tribunal held that any question under reg 12(1) and (4)(a) is to be decided on a balance of probabilities, adding:

**Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.**

24. The appeal is brought pursuant to the Freedom of Information Act 2000, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

**(1) If on an appeal under section 57 the Tribunal considers -**

- (a) that the notice against which the appeal is brought is not in accordance with the law; or**
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that [she] ought to have exercised [her] discretion differently,**

**the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.**

**(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

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<sup>1</sup> Pursuant to the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (as amended), r5(3)(d)

*Analysis and conclusions*

25. It is convenient to arrange our reasons largely by reference to Mr Fagan's arguments.
26. First, Mr Fagan argues that we should reject the Council's case, or at the very least treat it with considerable scepticism, because, in its dealings with him, the Commissioner and the Tribunal, it has conducted itself in a misleading, and indeed dishonest, fashion. The individual at whom this charge is directed is Mr O'Gara. Mr Fagan complains that he lied to the Commissioner in a letter of 17 August 2016, in which he stated:

**The Council is aware that Mr Fagan carried out a prolonged campaign against the Managing Director during her tenure at Knowsley Council and that the allegations that he made were fully investigated and that there were no findings of fault on the part of the Managing Director. The Council is also aware that due to his persistent campaign against the Managing Director that Knowsley Council classified him as vexatious.**

Mr Fagan further alleges that Mr O'Gara lied to the Commissioner in responding to a subsequent query as to the source of his information about the alleged 'campaign' against the Managing Director, namely that he had been told about it in a telephone conversation with an officer of Knowsley Council. Mr Fagan further alleges that 'the Council' (no individual culprit is identified) lied in saying in response to the January 2016 request that no information was held.

27. As to the first alleged lie, we find that the material relied on by Mr Fagan falls well short of substantiating the serious charge which he makes. On the face of it, Mr O'Gara was simply passing on to the Commissioner information communicated to him, of which, self-evidently, he had no personal knowledge. Whether the word 'campaign' could or could not fairly be applied to Mr Fagan's activities in seeking to expose alleged wrongdoing at Knowsley Council is not for us to judge but we have no possible reason to doubt that it fairly conveyed what was communicated to Mr O'Gara. As to the second alleged lie, we are not at all persuaded by Mr Fagan's surprising theory that the telephone conversation with the officer of Knowsley Council was simply an invention of Mr O'Gara. We do not think it necessary to explore the exiguous grounds on which he sought to persuade us that Mr O'Gara, a solicitor and a senior officer of the Council, fell prey to the temptation to manufacture evidence. The fact that the officer of Knowsley Council later said that he had no record of the conversation does not, to our minds, cast any doubt on Mr O'Gara's statement that the conversation took place. As to the third alleged lie, Judge Pilling was certainly satisfied that the Council had taken a cavalier approach to its duties under FOIA, but she did not say or suggest that its response had entailed any dishonesty or deception. She explicitly declined to order any specific disclosure, on the basis that the Council must first carry out a proper search to ascertain whether any relevant

information was held and then determine whether any exemption applied to it. Moreover, the documents ultimately disclosed included no 'smoking gun', and lent no support to Mr Fagan's suspicion that the Council was somehow seeking to suppress potentially damaging material.

28. Secondly, Mr Fagan complained that the Council should be treated as lacking credibility because it had abused the FOIA process in two respects: first, in seeking to place reliance on s14, and secondly, by delay. We are not persuaded that there is anything in either point. In our judgment, it is not hard to understand why, in light of the history which we have sketched, the Council was initially disposed to reject Mr Fagan's latest request for information as vexatious. Since that has not been the battleground of this litigation, we need say no more on the subject. As to delay, the Council certainly did not deal with the request within the stipulated timeframe but its initial response was delivered within about three months and the request was made at the start of the summer holiday period. There was then a substantial delay before correspondence between the Commissioner and the Council in the spring of 2020 resulted in the Council being persuaded to withdraw its reliance on s14. The Commissioner's investigation followed. There is no evidence of significant delay on the part of the Council in that process. In any event, we are satisfied that the Council engaged fully with the Commissioner in her investigation and we find nothing in the Council's conduct suggestive of a desire to stonewall or obstruct.
29. The third plank of Mr Fagan's case consisted of the simple contention that it was 'likely' that certain undisclosed documents had been generated and were held by the Council. The renewed request refers in particular to a briefing note and to minutes of a meeting of 26 June 2017. Mr Fagan later conceded that the request for the briefing note was based on a misreading of an email, although he seems more recently to have resiled from that concession. We are satisfied in any event that no briefing note was generated within the period to which the request relates. Mr O'Gara and the new Managing Director (the former leader of Knowsley Council having already moved on to a fresh appointment elsewhere) met informally on 26 June 2017 to discuss "next steps" following the handing down of Judge Pilling's judgment. We disagree with Mr Fagan that it is probable that minutes were taken at that meeting. On the contrary, in our (considerable) collective experience, it would have been most unusual for such a meeting to be minuted.
30. Mr Fagan also points out that, among the disclosed documents, there is an email sent by the Managing Director dated 24 June 2017 addressed to four elected members of the Council, asking them not to reply directly to an email which Mr Fagan had sent to them concerning Judge Pilling's judgment, stating that "we" (which seems to mean he and Mr O'Gara) intended to be in touch with all the Council members. From this, Mr Fagan infers that it is more likely than not that a report was produced for circulation to those members,



addressing matters arising out of Judge Pilling's judgment. Again, we think it singularly unlikely that such a report was produced. Contrary to Mr Fagan's imaginative reading of the judgment, it did not call into question the integrity of the Council or any officer or member of the Council. It did amount to a rebuke to the Council for failing to live up to its obligations under FOIA, but that did not call for a major PR offensive. And we have little doubt that if anyone in authority had proposed preparing a report he or she would have been met with the advice that doing so would only generate another document which would need to be disclosed pursuant to any subsequent request for information which Mr Fagan might present, thereby perpetuating the cycle of hostile correspondence and increasing the risk of yet more litigation.

31. Fourthly, Mr Fagan argues that it is "clear" that other documents have been wrongfully withheld. As a general assertion, the argument carries no weight whatsoever. Specifically, Mr Fagan draws attention to an email of 25 June 2017 from the Managing Director to Mr O'Gara proposing an informal meeting for the following day. In it, the Managing Director states that he has read through the "two attached documents for background". For some reason, Mr Fagan believes that the email was responding to one from Mr O'Gara, which has not been disclosed. We do not understand this. If it was, it would surely acknowledge the message to which it was responding. In any event, the notion that Mr O'Gara, an experienced local authority solicitor, may have said something damaging in an email attaching Judge Pilling's judgment, seems to us highly improbable.
32. Finally, we turn to the matter of the missing attachments to the email of 20 September 2017 (see para 19 above). As we have mentioned, those attachments have been sent to the Tribunal. Although we are prepared to assume for present purposes that they were 'held' by the Council at the time of the request, we are satisfied that Mr Fagan's complaint on this aspect is unfounded because the relevant material is not within the scope of the request. The documents were generated in September 2017 and so are inevitably outside the renewed request, which is concerned with the period from 21 June to 16 July 2017. And they are also outside the new request, which is directed to "information distributed to Councillors and Council Officers about the outcome of [Mr Fagan's complaint to the Commissioner] and the [Pilling] Tribunal hearing." The attachments were prepared and collated *as a consequence* of the decision of Judge Pilling, but they were certainly not *about* that decision or the prior decision of the Commissioner. They were *about* Mr Fagan's requests for information and the Council's responses thereto.
33. On the last point, we should add two further comments. First, it is perhaps unfortunate that the proposed enclosures were not attached but we are satisfied that this was not deliberate and the Council was not seeking to suppress their disclosure. They are not documents which could have been used against it and had they had such an intention, they would surely have

withheld the covering email. Secondly, it is now clear that the appeal, in so far as it rests on the missing attachments point, became very largely academic a long time ago because the Council disclosed the four documents to the Commissioner during her investigation and she incorporated them into the bundle (pp 223-226 and 227-229).

34. By contrast with Mr Fagan's case, we find obvious merit in the Commissioner's. It is sufficient to make four points. First, we are satisfied on the copious material presented that the Council did in fact carry out the searches described in its answers to the Commissioner's investigations.
35. Secondly, the evidence vindicates the Commissioner's view that the searches carried out (summarised in the DN, paras 17-24) were reasonable and proportionate. The law does not set a higher standard of diligence than that. In particular, we agree with the Commissioner that, for the reasons given in detail in the DN, paras 21-24, it would not have been proportionate to search the mailboxes of individual councillors or personal staff hardware drives and that, had the Council done so, it is highly unlikely that any relevant information would have been found over and above the material disclosed by the searches which were carried out.
36. Thirdly, the information supplied by the Council (in documents disclosed and/or in responses to the Commissioner's inquiries) does nothing to undermine the Council's denial of any material non-disclosure. In particular, nothing in the voluminous evidence put before us suggests the existence of relevant undisclosed documents.
37. Fourthly, Mr Fagan's theory of deliberate suppression is improbable and owes much to two particular factors which often feature in cases involving what may be seen as abuse of the freedom of information legislation: his misguided perception of the importance which the Council attaches to his concerns, and his failure to appreciate that his arguably vexatious activities are likely to have caused the Council to keep generation of new recorded information in areas of interest to him to a minimum.
38. For all of these reasons, we conclude that the Commissioner's finding that the Council did not hold the further information sought was in accordance with the law. Accordingly, there was no breach of the duty to disclose.

#### *Outcome and postscript*

39. The appeal is dismissed.
40. Had we seen the matter of the missing attachments differently, we would have allowed the appeal on that narrow ground. In that event, we would not have

directed that any steps be taken. The information in question is in any event in Mr Fagan's hands and has been for a considerable period.

41. We have already remarked that we can well understand why the Council was initially disposed (more than once) to cite s14. In our judgment, Mr Fagan would do well to think carefully before issuing fresh FOIA requests directed to any of the matters examined by this Tribunal and/or Judge Pilling.

(Signed) Anthony Snelson  
Judge of the First-tier Tribunal

4 January 2022

Promulgation Date: 5 January 2022