



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

**Case No. EA/2018/0143**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50713121  
Dated: 28 June 2018**

**Appellant: Martyn Lewis**

**Respondent: The Information Commissioner**

**Second Respondent: West Sussex County Council**

**Date & venue of hearing: 4 December 2018  
Fleetbank House, London**

**Date of decision: 14 December 2018**

**Promulgation Date 28<sup>th</sup> December 2018**

**Before**

**Anisa Dhanji  
Judge**

**And**

**Marion Saunders  
Paul Taylor**

**Panel Members**

**Representation**

For the Appellant: in person  
For the First Respondent: no attendance  
For the Second Respondent: no attendance

**SUBSTITUTED DECISION NOTICE**

**Dated:** 14 December 2018  
**Name of Complainant:** Martyn Lewis  
**Public Authority:** West Sussex County Council  
**Address of Public Authority:** 27 Goodhart Way  
West Wickham  
Kent BR4 OER

*The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 28 June 2018.*

Mr Lewis' request for information made on 3 June 2017, under the Freedom of Information Act 2000 ("FOIA"), was not vexatious, and therefore, section 14 of FOIA, was not engaged.

We also set aside the Commissioner's finding under section 3(2) of FOIA. However, since the Public Authority has now provided the information requested to Mr Lewis, we make no finding as to whether the information requested was held by the Public Authority under section 3(2).

**Signed**

**Anisa Dhanji  
Judge**

## **REASONS FOR DECISION**

### **Introduction**

1. This is an appeal by Mr Martyn Lewis (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 28 June 2018.
2. It concerns a request for information made by the Appellant on ~~12~~3 June 2017, under the Freedom of Information Act 2000 (“FOIA”), to West Sussex County Council (the “Council”),
3. The request was for minutes of a meeting (“the Minutes”) of the West Sussex Safeguarding Adults Board (“SAB”), which was conducting a Safeguarding Adults Review (“SAR”), into injuries sustained by Mr Lewis’ brother, and another individual, while in a care home in the Council’s area.
4. The SAR was later published on 17 April 2018. At the request of the injured parties’ families, both individuals were publicly identified in the SAR.

### **The Council’s Response to the Request**

5. Initially, the Council refused the request citing the exemption in section 31 of FOIA (law enforcement), on the basis that the Minutes formed part of a multi-agency review which included the police, and was looking into matters that might constitute criminal offences.
6. The Appellant complained to the Commissioner about the Council’s refusal. During the course of the Commissioner’s investigation, the Council maintained its reliance on section 31. It also stated that in any event, it did not hold the Minutes under section 3(2), for the purposes of FOIA; it only held them on behalf of SAB, and so was not required to provide them.
7. In addition, the Council relied on the exemption in section 14 of FOIA on the basis that it regarded the request to be vexatious. It asserted that the Appellant had developed a campaign of repeated information requests, subject access requests, and complaints to and about the Council that imposed a considerable and unjustifiable burden on the Council.

### **The Commissioner’s Decision**

8. For the reasons set out in her Decision Notice, the Commissioner rejected the Council’s contention that it held the information solely on behalf of SAB.
9. However, the Commissioner considered that the request was vexatious and therefore upheld the Council’s refusal under section 14 of FOIA.
10. The Council withdrew its reliance on section 31, and accordingly, the Commissioner made no decision on that issue.

### **Appeal to the Tribunal**

11. The Appellant has appealed against the Commissioner's Decision Notice under section 50 of FOIA.
12. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she 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.
13. The parties have lodged an open bundle. We have also been provided with the Minutes, by way of closed material.

### **Developments before the Appeal Hearing**

14. In a brief Response dated 7 September 2018, the Commissioner departed from her findings as set out in the Decision Notice.
15. She stated that she had erred in finding the Appellant's request to be vexatious, because in doing so, she had relied substantially on facts arising after the request. At the date the request was made, it was not vexatious. On that basis, she does not now oppose the appeal in respect of section 14(1).
16. In addition, the Commissioner said that upon further review, she does not consider that there was sufficient evidence before her to reach the conclusion that she did concerning the application of section 3(2). She submitted that the Tribunal should form its own view about this matter, having regard to such evidence as may be placed before it.
17. The Council, in its Response dated 12 October 2018, said it was now willing to disclose the Minutes. Indeed, it has now done so.
18. The Council considered that the Commissioner had been wrong about her finding in relation to section 3(2). However, it considered that this issue was now academic because it had obtained agreement of SAB's lead author Brian Boxall (who it regards as the true 'holder' of the information), that the Minutes could be disclosed. On that basis, the Council said it was not cross-appealing on the section 3(2) issue, and was not seeking a ruling on the issue from the Tribunal.
19. The Council agreed with the Commissioner's revised position that whether a request is vexatious falls to be judged at the date of the request (or, at the latest, by the last date for responding to the request). The Council accepted that at that date, the request was not vexatious because other matters relied upon had yet to develop.
20. The Council maintained that as at the date of the request, it had been correct to rely on the section 31 exemption. However, given the publication of SAR, matters had moved on, and the Minutes were far less sensitive. It considered that Mr Boxall was best placed to judge the current sensitivity (or otherwise), of the Minutes, and since he had agreed to its disclosure, the Council was content that there would be no prejudice to law enforcement from their disclosure.
21. The Council had not, in its refusal, addressed whether the Minutes contained personal data, nor was any such issue raised by the Commissioner. It was, however, raised by the Registrar in her Case Management Directions dated 18

September 2018. The Council considered that they did not contain any personal data, including any sensitive personal data, that should not be released. In particular, the names of the vulnerable adults were already public, at the request of their families, and the Minutes did not contain any of their personal data that has not already been published in SAR.

22. Additionally, the care assistants implicated in the incidents were not identified in the Minutes, nor was there any identifying information relating to them that goes beyond what was published in SAR. As well, the Council considered that disclosing the names of those who attended in their professional capacities, would not be unfair to them or otherwise be in breach of data protection legislation. The Commissioner has made no submissions on the issue of personal data.
23. The Council has invited the Tribunal to allow the appeal on the basis that the Decision Notice involved an error of law in relation to section 14, and to substitute a Decision Notice stating that no further action is required, as the information requested has now been disclosed.

### **The Appeal Hearing**

24. On the basis that neither the Commissioner, nor the Council, was now opposing the appeal, the Registrar made case management directions dated 23<sup>rd</sup> October 2018, setting out the different ways in which an appeal to the Tribunal can end (ie, by a strike out, by the Appellant withdrawing his appeal, by a consent order, or by the Tribunal making a decision).
25. The Council's request for the hearing to be vacated was refused, because it is not one of the permitted ways that an appeal can end. The Registrar invited the parties to provide either a set of agreed terms on which the appeal could end by consent, or to explain to the Tribunal why they were unable to agree such terms, if that was the case.
26. In response, by an email dated 27<sup>th</sup> October 2018, the Appellant informed the Registrar that he felt unable to agree to end the appeal by consent. He was also not willing to withdraw the appeal. By way of explanation, he said that:
  - without his appeal to the Tribunal, he would not have received the information he had requested, relating to his brother. His other attempts to obtain the information had been unsuccessful;
  - there is a considerable public interest in the appeal being heard, for the various witness statements and their content to be fully considered by the Tribunal, and for a decision to be reached and made public. As such, he does not consider that the continuance of the hearing would be a waste of public resource. It would be an investment to assist those who may experience similar barriers and poor practice in the future; and
  - legislation should not be used by public authorities to hide things that expose their failures in order to protect themselves from criticism or potential for prosecution, nor should such action be supported by the Commissioner.
27. Since the Appellant was unwilling to withdraw his appeal or to agree terms of a consent order, case management directions were made for the appeal hearing to proceed. The Council informed the Tribunal that since it had nothing further to add that could assist the Tribunal, it would not be attending the hearing. The

Commissioner also notified the Tribunal that she would not be attending. Thus, the hearing proceeded with the Appellant, alone, acting in person.

28. At the start of the hearing, we asked the Appellant what he was seeking from the Tribunal. He said he wanted a formal decision overturning the Commissioner's decision in relation to her finding that his request was vexatious. He also wanted the Tribunal to direct that cases in which other families had had similar requests refused, should be reviewed.
29. We acknowledged the Appellant's tenacity in bringing and pursuing this appeal in order to safeguard his brother's interests and wellbeing, and his frustration at the changing positions of the Council and the Commissioner. We explained to him that while we could issue a substituted Decision Notice in relation to section 14, we had no power to make any directions in relation to other cases not before us. It is also worth noting that decisions of the First-tier Tribunal are fact specific. Any decision we make would not bind any future decision makers.
30. We are grateful to the Appellant for accepting with good grace what must have been disappointing for him to hear. He said that he had intended for the Tribunal to hear evidence from one witness. That witness had not yet arrived and in light of what we had said, he did not request that we wait until the witness arrived to hear his evidence. The father of the other individual referred to in paragraph 3 above, had attended the hearing with the Appellant. We asked him if he wished to say anything, but he said he did not wish to do so.

### **Decision**

31. For the reasons set out above, we allow the appeal against the Commissioner's finding that the Appellant's request was vexatious under section 12.
32. We also set aside the Commissioner's finding that the Council did not hold the requested information under section 3(2). However, since that information has now been provided to the Appellant, we make no finding as to whether the Council held that information under section 3(2). Any such finding would be fact specific, and would not bind any future decision maker.

**Signed**  
**Anisa Dhanji**  
**Judge**

**Date: 14 December 2018**