Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0038
FER0120142

Freedom of Information Act 2000 (FOIA)

Determined on papers
Date: 21st December 2006

Decision Promulgated
9th January 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Chris Ryan

And

LAY MEMBERS

Paul Taylor

Jacqueline Blake

Between

JEFFREY PERRINS

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

WOLVERHAMPTON CITY COUNCIL

Additional Party

Decision

The Tribunal Upholds the Decision Notice dated 2 June 2006 and dismisses the appeal.

Reasons for Decision

Background

1. The Appellant is the tenant of a house in the West Midlands which, in order to maintain anonymity, we refer to simply as no. 11. The landlord is Wolverhampton City Council ("the Council"), which originally owned the freehold of the whole area of land on which the estate where the house is situated was erected in the 1970s. At that stage no boundary fences were erected at the front of the properties but at some stage in the mid 1970s the Council did erect such fencing. In the case of the boundary between no. 11 and its neighbouring property (no.15) it was aligned in the form of a "dog leg". It is not clear why this was done, although it was suggested by the Council at one stage that this might have been due to the fact that the properties are located at the end of a cul de sac and that, without a dog leg alignment, some of the properties might have been "land locked" (which we assume means that they would not have had access to the public thoroughfare).

2. The boundary between no.15 and its immediate neighbour, no.17, was also aligned at the time in the form of a dog leg. At that stage therefore the gardens of both no. 11 and no. 15 were identical in shape.

3. In about 1998 the tenant of no. 15 bought the freehold of the property from the Council. At about the same time the boundary fence between that property and its neighbour at no. 17 was re-aligned to form a continuation of the line of the internal dividing wall between the two houses. No equivalent alteration was made to the boundary between no. 11 and no. 15. The garden to no. 15 is therefore now slightly larger than the garden of no. 11.

4. Although the Appellant's property was not reduced, the enlargement of no. 15 at the expense of no. 17 appears to have caused him concern and he has been

in correspondence with the Council on the subject over a number of years. On 15 April 2004 he was given the following explanation of the boundary alignments in a letter from the Council's solicitor and Co-ordinating Director:

> "The position is that when the Council lays out an estate of Council housing it determines where the boundaries are between properties. The law in this regard has not materially changed [since previous correspondence on the point]. Once the boundaries have been allocated by the Council they form part of the tenancy agreement between the Council and individual tenants of properties. When a council tenant exercises their right to buy a property then their entitlement is based upon the boundaries of their previous tenancy. From time to time those boundaries are changed at the point of sale to suit either the Council or the tenant or their neighbours with the agreement of the relevant parties depending on the circumstances. This is what happened in relation to the boundary between number 15 and number 17."

5. That statement has been supplemented by a Witness Statement filed in this Appeal by a Mr Shaun Aldis, the Director of Property Services of Wolverhampton Homes (the body that has taken over from the Council the management of its housing stock), who states that the reason for the alteration to the boundary between no. 15 and no. 17 was simply that the tenants of those properties had agreed to a straight boundary.

The request for information

6. The Appellant was apparently not satisfied with the explanation given in 2004 and it is clear from his correspondence throughout his dealings with the Council that he considered that the former tenant of no. 15 had received favourable treatment. As part of his attempt to have the Council's actions reviewed he wrote to it on 4 January 2005, a few days after the Freedom of Information Act 2000 ("the Act") came into force, setting out the following request for information under the Act:

1. When were the front fences erected?

2 What criteria did the council use, at the time the front fences were erected in 1993, in setting the front boundary lines of 2 and 35 so that their front boundary lines ran in-line with the end walls of the properties?

3. What criteria did [a particular Council employee] use at that time in setting the front boundary line between 15 and 11 as a short dog-leg?

4. What criteria did the Council use in 1998 when setting the current boundary line between 15 and 17 so that it ran in-line with the internal wall of the dividing properties?

5. If the criteria used in 3 above, and the criteria used in 4 above is different, when did it change?

6. What department/departments would have been responsible for making the decision in 4 above?

7. If an open plan estate within the Wolverhampton City limits were to be constructed under the auspices of Wolverhampton Homes, "What would be the criteria/ principle/ standard/ condition/ deciding factor whereby the boundary line is determined between the properties, at the front of the properties, if no boundary line exists on a map or plan?"

7.1 What Act (or Acts) of Parliament (or law) would be utilised?

7. The request was refused and the Information Commissioner was asked to determine whether the Council had handled the Appellant's request properly.

The Decision Notice and Appeal to the Information Tribunal

8. The Information Commissioner issued a Decision Notice on 2 June 2006 in which he concluded that the Council had dealt with the Request properly. The Appellant appealed to this Tribunal and by order dated 22 August 2006 the Council was joined as an Additional Party. The Appellant had originally opted for a determination without a hearing and all parties subsequently agreed that the Appeal should be determined on the basis of written materials and submissions provided by the parties. However, some time after the Pre Hearing Review, which the Appellant attended and at which his earlier preference for a paper determination was reiterated, he submitted an 18 page written submission in which he said "I submit that this appeal should be upheld for the reasons given above but disagree with the Commissioner that the appeal should be dealt with without an oral hearing …". No application was made to reverse the earlier direction that the Appeal should be determined without a hearing, however, and we have therefore proceeded on that basis in the belief that it would be disproportionate, given the subject matter of the dispute, to direct the Appeal to be determined at a hearing.

9. We should add that there has not been complete agreement between the parties as to what documents should be included in the agreed bundle but we have read all the materials that have been sent to us, whether agreed for inclusion or not.

10. It is agreed by the parties that the Appellant's request is covered, not by the Act, but by the Environmental Information Regulations 2004 ("the Regulations"). Regulation 5(1) requires a public authority that holds environmental information to make it available on request. The authority of this Tribunal to hear the Appeal is to be found in s.57 of the Act, as modified by reg.18 of the Regulations.

The Questions arising on the Appeal

11. We have broken the various elements of the Appellant's original request into

three categories, each of which will be dealt with in turn. The categories are:

a. Request 1 – When were the fences erected?
b. Requests 2 to 5 – What criteria were applied in relation to the fences at various points in time?
c. Request 6 – Which Council Department is responsible for boundary alignment?
d. Requests 7 and 7.1 – What criteria and statutory law would be applied at the time of the request.

When were the fences erected?

12. The Council's position has been that it has not been able to find any information on this issue, despite making appropriate enquiries. The Appellant asserts that the Council does retain relevant information. The Information Commissioner originally argued that, in the absence of direct evidence undermining the Council's denial, he was entitled to accept that documentation had not been retained due to the passage of time. However, by the time that he came to lodge his final written submissions on the Appeal, the Appellant had himself located (in archives maintained by Wolverhampton Archives and Local Studies) Housing Management Committee papers from 1974 and 1975 indicating that fencing was being considered for the estate in question at that time. The Commissioner now concedes that these archives are owned by the Council and that the Council did therefore hold information which was (in his view, "arguably") relevant to this question. However, he points out that the records do not record that the proposal to erect fences was agreed or carried into effect at a particular date. He also argues that such information was publicly available and readily accessible to the Appellant for the purposes of Regulation 6(1)(b) of the Regulations, and therefore the Council would not, in any event, have been required to provide it to him by other means. However, he concedes that the Council was in breach of its obligation under Regulation 6(2) to inform the Appellant that it was not providing the information to him because it was already publicly available and that the Decision Notice may have been defective by virtue of failing to identify this breach.

13. We conclude that the Decision Notice was defective in this respect. We do not accept that the terms of Regulation 6 provide the answer which the Information Commissioner suggests as it is only brought into play where the information has been requested in a particular form or format and the Public Authority declines to provide it in the format requested. However, nothing turns on the point, given that the Appellant's own research has brought to light such relevant material as appears to continue in existence and, for the reasons given below, the substantive appeal is rejected.

What criteria were applied in relation to the fences at various points in time?

14. The Council's initial response to the Appellant's request for information was that no specific criteria in relation to individual housing property boundaries had existed at any material time and that individual property demarcations (including subsequent changes) were determined on the merits of local situations, conditions and the collective wishes of relevant tenants. The Witness Statement of Mr Aldis, referred to above, makes reference to the fact that the witness had himself undertaken an internal review into the original request for information and had "…established the Council had no further information to disclose". We note that when Mr Aldis reported to the Information Commissioner on that review, by letter dated 14 December 2005, he used rather more circumspect language in stating that "With…the review of the information available to me at present…I am reasonable (sic) happy given the above circumstances that all the information has been declared to Mr Perrins". We are a little surprised that the Council did not apparently have any written guidance for its officers when determining boundary issues, or that none appear to have survived in its records, but accept that, in the absence of either a challenge to the Witness Statement of Mr Aldis or the presentation of any evidence to cast doubt on its accuracy or completeness, the Appellant has not made out any case to justify his unsubstantiated assertion that other material must exist.

15. The Appellant also asserted that, because the Council must act lawfully, there

must exist a law, rule or other specific criteria governing how the boundaries in question should have been positioned. He does not accept that, while the general powers of the Council to hold and manage property will be regulated by law, it will be left with a broad discretion on detailed arrangements such as boundary lines between parts of its real estate that have been leased to different tenants. His final written response contains the following passage on the point:

> "When the council "*determines where the boundaries are between properties"* there would be criteria establishing the boundaries. How else would the council decide where exactly the boundary should be and what line they take – short dog-leg, long dog-leg or in-line with the internal dividing wall of the property? Evidently this is what occurred in deciding what *line* to take with numbers 2 and 35. Not only criteria determining the boundary line, but a law specifying the criteria"

When the Information Commissioner made the point, in his Reply to the Grounds of Appeal, that it was wrong to suggest that there must be laws specifying to every last detail how the Council should act the Appellant rejected the criticism in a letter dated 31 July 2006, addressed to the solicitor who had filed the Reply. In it he stated that, although he would not suggest that there would be detailed rules governing whether the Council should, for example "use plain or coloured paper clips, or use pencils with plain ends or with erasers on the end", nevertheless the issue of determining a front boundary line was not, in his view, a frivolous issue of that nature. The inference we draw from those remarks, that the Appellant considers that each decision on the detailed boundary arrangements between its properties must be supported by a specific rule, is confirmed by the content of earlier correspondence with the Information Commissioner in which the Appellant had suggested that because the Council, as a public body, had to act within the law, the criteria he was seeking must be based on a "certain section and subsection of an Act of Parliament".

16. We reject the Appellant's arguments on this point. We agree with the Information Commissioner's submission that it is a misconception to suppose that there must be laws specifying to every last detail how an authority is to

act (including, setting boundary lines between particular properties that it owns). This is reinforced by, for example, section 111(1) of the Local Government Act 1972, to which the Information Commissioner drew our attention. It provides that:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

Department responsible for changing the criteria.

17. As the Council asserted that there were no criteria falling within questions 2 – 5 then, self evidently, Question 6 was not applicable. However, it was made clear by the Council that decisions on this type of issues were the responsibility of the Housing Department.

Criteria applicable today.

18. The initial response of the Council to the original request was to provide the names of four statutes which governed the Council's activities. In relation to relevant criteria the Council wrote:

> "It is not possible to offer any meaningful response to item 7 on two counts. Firstly there has been no new development of Wolverhampton City Council housing stock since the late 1970's and there are no plans for new construction for the foreseeable future, and secondly Wolverhampton Homes does not exist at present so a prediction of its policies is totally inappropriate"

The Information Commissioner accepted that position in his Decision Notice and has argued, on the Appeal, (in addition to the points above) that the question was hypothetical and is "unlikely to concern "recorded information" as defined by Regulation 2(1)". We agree that it is not possible to identify in these requests any material falling with the meaning of the expression "environmental information" for the purposes of the Regulation.

Other issues arising on the Appeal.

19. The Information Commissioner identified a number of other questions which he believed he had identified in the Grounds of Appeal and other materials submitted by the Appellant. However, the Appellant has pursued only one of those issues in the course of this Appeal, namely, whether the Council complied with its obligation under Regulation 5(4) to ensure that information it provides is up to date, accurate and comparable. However, having decided, for the reasons set out above, that the Council does not hold the information requested, it follows that there can be no breach of any duty relating to content.

20. We should make it clear that we say nothing in this decision on what information a public authority should or should not hold; only that on the particular facts presented to us we do not accept the Appellant's assertion that the Council has withheld information from him. Nor do we wish to say anything regarding the long running dispute that the Appellant evidently has with the Council, which falls outside the scope of this Appeal, notwithstanding the Appellant's occasional attempts to bring it into the proceedings.

Signed:
Chris Ryan
Deputy Chairman Date: 9th January 2007