



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0012
Information Commissioners Ref: FS50129838

The Environmental Information Regulations 2004

Heard on the papers on
17 September 2007

Decision Promulgated
9 October 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

ANISA DHANJI

and

LAY MEMBERS

MARION SAUNDERS AND PAUL TAYLOR

BETWEEN:

PETER GRAHAM ROBINSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

EAST RIDINGS OF YORKSHIRE COUNCIL

Additional Party

The parties are referred to in this determination as the Appellant, the Commissioner, and the Council, respectively.

DECISION

The Tribunal upholds the Commissioner's Decision Notice and dismisses the appeal.

The Commissioner should have made his decision by reference to the Environmental Information Regulations 2004 ("EIR"), rather than the Freedom of Information Act 2005 ("FOIA"). However, in this case, that makes no substantive difference, and therefore, the Tribunal does not issue a substituted decision notice.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Appellant against a Decision Notice issued by the Commissioner, dated 3rd January 2007. It relates to a request for information made by the Appellant in connection with the Council's handling of a certain Tesco development, and in particular, relating to the redesign of the development scheme in about 1998 – 1999.

The Request for Information

2. The Appellant's request for information has a history which goes back some years, before the FOIA and EIR came into force.
3. The request which precipitated the appeal, however, was made by the Appellant in a letter dated 27 February 2005. In it, the Appellant requested the Council to provide him with the following information:

“(a) the Director of Law, Planning, etc, Nigel Pearson's report to the three Members of the Urgency Committee Meeting held May 18th 1999;

(b) the letter referred to in the minutes at 269 Reason for Urgency...

(c) the drawings and costing for the Manor Road Traffic lane, including any associated papers that would identify the officer responsible for the over evaluation, revealing exactly when the scheme was dropped;

(d) the documentation, plans, estimates that constitute the redesign...I would like to see the breakdown of the accounts and how the reduction affected the various elements of the road widening scheme. That is the records of how the original estimate of £500,000 plus is reduced down to £200,000, which Officer or Officers conducted the remodel and what date did it [take] place

(e) the accounts, files or whatever documents that define how the Head of Highways, Dave Rennie, calculated the Tesco

contribution by revising the five transport systems listed for the second application

(f) the letter from Tesco's Consultants detailing the works and costs, that were assessed and checked by the Council, and in consequence reduced their payment by £15,000 down to the final £185,000"

4. The Appellant did not receive a response. On 12 September 2005, he wrote again to the Council. On 27 September 2005, the Council wrote to the Appellant stating that it had not responded to his letter of 27 February 2005 because the Appellant had asked his Councillor to raise a query and the Council had responded to the Councillor instead.
5. The Appellant reiterated his request in a letter dated 2 November 2005. On 25 January 2006, the Council replied, stating that it did not hold the information.

The Complaint to the Information Commissioner

6. On 20 April 2006, the Appellant made a complaint to the Commissioner. His letter comprises some five pages. It is not entirely clear from this letter what information the Appellant was seeking.
7. The Commissioner wrote to the Appellant on 17 August 2006 to ask him to provide a copy of his original request for information. The Commissioner did not receive a response and so wrote to the Appellant again on 26 September 2006. On 5 October 2006, the Commissioner received a copy of the Appellant's letter dated 27 February 2005, referred to in paragraph 3, above.
8. The Commissioner then made enquiries. He wrote to the Council asking a number of specific questions, including the following:
 - Was the requested information ever held?
 - If so, when was the information deleted or destroyed?
 - Does the Council have a formal records management policy, and if so, what does it specify about records of this sort?
 - What steps were taken to locate the requested information?
 - For what purpose would the Council have held the requested information?
 - Are there any statutory requirements to keep the information requested?
 - Whether any third party (including in particular, Tesco's Consultant) hold the information on the Council's behalf.
9. On 9 November 2006, the Council replied to the Commissioner, advising that:
 - It did not hold any of the information described in the Appellant's requests.

- The Council will have held some of the information requested, but this appears to have been destroyed prior to 2002/2003.
 - The Council has a formal records management policy, but it was not in effect at the time the records were destroyed.
 - Following the Appellant's request for information in 2002/2003, searches were carried out. A further search was carried out in 2005, following the Appellant's request of 27 February 2005.
 - There would have been no purpose for the Council to hold on to the requested information because it related to two highway schemes that were not carried out.
 - There is no statutory requirement for the Council to keep the information.
 - None of the information is held on behalf of the Council by Tesco's Consultant, nor by any other third party.
10. The Commissioner was satisfied that the Council did not hold the information requested by the Appellant and issued a Decision Notice to this effect. However, he found that the Council had breached the requirements of section 10(1) of FOIA by failing to respond to the Appellant's request within the 20 days specified in that section.

The Appeal to the Tribunal

11. By a Notice of Appeal dated 22 January 2007, the Appellant appealed to the Tribunal against the Decision Notice. The Grounds of Appeal are not set out in the clearest of terms, but we consider that the summary (reproduced below) provided by the Commissioner in his Reply, correctly represents the issues raised by the Appellant in his Notice of Appeal:

the Commissioner has wrongfully ignored that the Council acted illegally in disposing of the records, since they were required to keep the documents for the purposes of a district audit;

the Commissioner has wrongfully failed to take into account that the redesign of the Tesco development was intended to save Tesco money but did not proceed with Mr Robinson's agreement; and

the Commissioner has failed to resolve a conflict in the evidence, namely that the Council has given competing accounts of the reasons why the original development scheme was abandoned.

12. We have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including in particular, the documents contained in the agreed bundle of documents.
13. At the request of the parties, this appeal has been determined without an oral hearing, pursuant to rule 16 of the Information Tribunal (Enforcement Appeals) Rules

2005. Having regard to the nature of the issues raised, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

EIR or FOIA?

14. The Council and the Commissioner have both treated the Appellant's request as having been made under FOIA. No mention has been made of the EIR.
15. If the information comes within the scope of the EIR, then, as the Tribunal pointed out in **Kircaldie v Information Commissioner**, it is exempt information under FOIA (pursuant to section 39), and the public authority is obliged to deal with the request under the EIR.
16. The EIR implements Council Directive 2003/4/EC on public access to environmental information. It creates a duty on public authorities to make environmental information available on request (regulation 5(1)). "Environmental information" is defined in regulation 2(1) in the following terms:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

17. We consider that the information in question clearly comes within the scope of regulation 2(1)(c), and therefore, the request should have been dealt with under the EIR. However, the provisions of FOIA and the EIR relevant to the issues in this case are, in substance, the same under both legislation. The fact the Commissioner considered the Appellant's application under FOIA rather than the EIR makes no difference to the substantive outcome of his decision, nor of this appeal.

The Tribunal's Jurisdiction

18. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA shall apply for the purposes of the EIR (save for the modifications set out in the EIR). Under 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 the Decision Notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he 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.
19. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based.

Findings

20. Under the EIR, a public authority which holds environmental information must make it available on request (regulation 5(1)). It must make the information available as soon as possible, and no later than 20 days after receiving the request. If it refuses to do so, it must make its refusal within the same time limit.
21. The right of access under the EIR, like under FOIA, applies only to information that a public authority holds. The Appellant appears to have accepted, on a number of occasions, that the Council does not hold at least some of the information he has requested. For example:
 - In his letter dated 7 February 2006 to the Council's Chief Executive, he says *"The confirmation that this vital accountancy data was disposed of alters my complaint to an appeal that ERY Council cannot justify this action"*.
 - In his letter to the Commissioner dated 20 April 2006, he acknowledges that the Council has *"disposed of all the redesign documents"*.
 - In his letter dated 27 February 2007 to the Audit Commission, he states: *"Firstly there is clear evidence from the Council officers that documents essential for a proper audit have been disposed of. This particularly applies to the hypothetical Redesign file which was purportedly disposed of after October 2002 when Nigel Pearson [Director of Law, Planning and Property] told me that I was not entitled to see it..."*
22. Clearly, to the extent that the Council do not hold the information, then the Commissioner's decision must be right. The Appellant has not said, or at least has not said with any clarity, what information he considers that the Council still holds, if any, nor has he explained why he thinks they hold it, despite their assertions to the contrary. The Tribunal sought to clarify this with the Appellant at the directions hearing, but without much success.
23. The Grounds of Appeal, and indeed many of the other documents and submissions from the Appellant before the Tribunal are concerned primarily with whether the

Council made its decision as regards the redesign of the Tesco development on a proper basis and whether it has given conflicting explanations to the Appellant. Those are not issues within the scope of the Tribunal's jurisdiction. The Appellant has also alleged a conflict of interest between the Council's role as landowner and as planner. Again, that is not a matter that this Tribunal has any jurisdiction to consider.

24. Although it remains unclear what information the Appellant says the Council holds or may hold, bearing in mind that the Appellant is unrepresented, we have considered the likely possibilities:

Information seen by Mike Newbury, District Auditor:

25. In the Appellant's letter dated 20 April 2006 to the Commissioner, he states "*I wish to make a formal request that you review the decision of the East Riding of Yorkshire Council to refuse to provide me with the material as seen by the District Auditor, Mike Newbury, that convinced him that my complaints regarding the reduction of the mitigating highway contribution for Tesco's Beverley store were unfounded and required no further action.*"
26. The Council's evidence is that they do not know what information Mr Newbury relied on in 2004. The Appellant has not put forward any evidence or submissions which could support a finding that the Council could in fact identify exactly which documents were seen by Mr Newbury. We also note that the Council's evidence, which does not appear to be disputed, is that the documents that have been found which may have been relied on, have already been provided to the Appellant. They have also provided the Appellant with a letter from Mr Newbury relating to the Appellant's complaints.

The Documents, Plans and Estimates that Constitute the Redesign:

27. In his letter dated 3 April 2007 to the Tribunal, the Appellant says that "*The information that I have repeatedly requested to see is the hypothetical redesign of the rejected road scheme*".... The Council has said that a search was carried out in 2002/2003 when the Appellant first requested these documents, but that no such documents were found. The redesign scheme in question was not carried out, and the documents were destroyed. We note that elsewhere, the Appellant appears to accept that the Council does not hold this information (see paragraph 21 above).
28. The Appellant says, however, that the Council acted illegally in disposing of the information, since they were required to keep the documents for the purposes of a district audit. The Council has said that there is no statutory requirement for them to keep such information. It is also their evidence that any such documents were destroyed prior to 2002/2003. There is no basis, on the evidence, on which the Commissioner or the Tribunal could find that any such documents were not destroyed, or that they were destroyed in bad faith. There is also no evidence that the Council destroyed any information with the intention of preventing disclosure under the FOIA or EIR, both of which came into force in January 2005, some time after the documents are said to have been destroyed.

Urgency Facility Regulations:

29. The Council's evidence is that an Urgency Committee existed in 1998. It has provided the Appellant with its terms of reference and the legislation that deals with committees of the Council. They say that there is no legislation relating to Urgency Committees specifically.
30. It appears that the Appellant accepts that there are no Urgency Facility Regulations. We note that in his letter dated 22 November 2006 to the Commissioner, the Appellant states "*like yourself I am satisfied that the Urgency Facility Regulations do not exist*". I also believe the Council, as landowners, can use whatever urgency provision they feel is necessary to conduct their lawful business". In light of this, it is difficult to see the challenge to the Commissioner's findings.

Recent Requests

31. During the course of recent communications between the parties, the Appellant appears to have made a new request. In particular, in his letter dated 26 April 2007 to the Commissioner, he has asked for "*the status of the meeting that required Tesco to build their new store at the rear of the site*". This was not a request that appears to have been made previously. The Commissioner and Council say, and we agree, that it cannot therefore come within the scope of this appeal. It is a fresh request, not covered by the Decision Notice against which this appeal has been brought. The Appellant is entitled to a response from the Council to that request, but that is not a matter for this appeal.
32. The Appellant has also said that he wants certain information held by the District Auditor or that he wants that information passed to the Council so that it can then be subject to an information request. The District Auditor and the Council are separate bodies. It has not been suggested that any such information is held by the District Auditor on behalf of the Council. Such information is therefore also outside the scope of this appeal.
33. In all the circumstances, the Tribunal considers that there is no basis to find that the Commissioner was wrong to accept that the Council did not hold the information. There was and is no evidence that it does.
34. It is unfortunate that the Appellant, perhaps like many other applicants, may not have fully understood the scope of the freedom of information legislation. As the Tribunal endeavoured to explain to the Appellant at the directions hearing, the legislation is intended to provide access to information that is held by public authorities. It is not intended to provide remedies for other disputes that members of the public may have with public authorities, nor is it a safeguard against improper decision making, improper use of public funds, or other wrongdoings by public authorities. We do not suggest that the Council in this case was involved in any wrongdoings. That is not a matter which we have jurisdiction to consider. We simply make the point that to the extent that the Appellant's complaints against the Council relate to matters other than obtaining access to information which it holds, the Tribunal is not the body which can offer the Appellant any redress.

Decision

35. For all the reasons set out above, we uphold the Decision Notice and dismiss the appeal. We agree with the Commissioner's findings that the Council does not hold the information. Although the Commissioner's decision is based on FOIA, the outcome under the EIR is the same because under both legislation, the right to access only arises if the public authority holds the information.
36. We also agree with the Commissioner's finding that the Council failed to respond to the Appellant within the required 20 day period. The Council was therefore in breach of regulation 5(2) of the EIR (rather than section 10(1) of FOIA).

Signed:

Date: 9th October 2007

Anisa Dhanji
Deputy Chairman