



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

Appeal No: EA/2014/0319

BETWEEN

ERNEST JOHN DEMPSEY

Appellant

and

INFORMATION COMMISSIONER

Respondent

Tribunal

Brian Kennedy QC

Alison Lowton

Narendra Makanji

Hearing: 5 May 2015

Location: Fox Court London

Decision: Appeals refused.

Subject Matter: The Environmental Information Regulations 2004 (“EIR”) and reliance by the Appellant on Regulation 12(4)(a) EIR’s to withhold disclosure of the requested information.

Regulation 12(4)(a) EIR’s provides an exception to the general rule of disclosure under Regulation 5 of the EIR’s where a public authority does not hold the information requested.

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) as modified by Regulation 18 EIR. The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 11 December 2014 (reference FER0555095), which is a matter of public record.
2. A paper hearing took place on 5 May 2015. The Tribunal and parties have been provided with a paginated (1-98) and indexed Open Bundle (“OB”). We also have the usual pleadings including the DN, the grounds of appeal and the response on behalf of the Commissioner. We find the Commissioners Response (30 January 2015 pages 15 - 25 OB) to the Grounds of Appeal particularly helpful in setting out the issues for the Tribunal and for the sake of completeness we will outline a brief account of the Background and the issues before us as summarised in the formal Response.:

Background:

3. On 19 May 2014 the Appellant made a number of requests for information to the council. By the instant appeal the Appellant disputes the council's response to the following request:

' ---- as the ratepayer would you give me the cost of your abortive efforts to relay the Tarmac in Rosemary Crescent and adjacent roads.

“ I refer in particular to the appearance of red spray paint marking the obvious deficiencies of the tarmac some months ago and in the following weeks the mauve spray paint that appear in a bomb across the road.’

4. The Council replied to the Appellant on 20 May 2014, stating that the request was covered by FOIA and that the Council would respond within 20 working days.
5. The Council responded on 4 June 201, providing the Appellant with a link to the Council website which it stated *“explains how we prior prioritise and programme repairs’*.
6. The Appellant wrote to the Council on 8 June 2014, stating that the website did not answer his questions and did not contain the relevant information. He wrote again on 5 July 2014, repeating his request for information about the cost of the spray paint markings.

7. The Council conducted and in an internal review, following which it wrote to the Appellant on 12 August 2014 stating that it maintained its response to the request, but provided further explanation by way of clarification. It explained that orange or mauve markings on roads were not necessarily indicative of repairs to be undertaken, but rather *'are simply an indication by inspectors monitor the area for deterioration'*. As to the cost of these markings, it stated that, *"we are unable to give you any specific costing for these tasks as they are done as part of the inspection process and cared for via our partnership agreement"*.
8. On 23 August 2014 the Appellant wrote to the Council, expressing dissatisfaction with this response and stating his view that the council must be able to provide information as to the cost of conducting spray-painting at Rosemary Crescent. He wrote as follows:

"It is a nonsense to tell me that you cannot arrive at a cost for these abortive actions".

"A workman is given a job (does not does he not get costing job sheet or reference number) to which to allocate his time whilst marking Rosemary Crescent. The worker is on a wage and he is allocated transport at a known cost so it is a simple mathematical calculation to arrive at the total cost even if the best you can do is an estimate."
9. The Council replied and 26 August 2014, confirming that it was unable to give costings. It explained that:

"These markings are sometimes done as an inspector passes, sometimes they are marked by other utility companies, and even members of the public sometimes go out and mark the potholes. If you wished to know how much an inspector is paid per hour then that is the type of information we do hold and could be requested....."
10. The Appellant complained to the Commissioner on 11 September 2014, expressing his dissatisfaction with the handling by the council and another public authority of a number of information requests. The Commissioner wrote to the appellant on 26 September 2014, explaining that case reference FER0555095 would address his complaint against the council respect of request made on 19 May 2004.
11. The Commissioner investigated the Appellant's contentions. The Commissioner explained to the Council that the request would be considered under the EIR, rather than FOIA, because the information requested related to activities affecting are likely to affect the land.

12. On 24 October 2014 the Commissioner asked the Council whether it maintained that the information was not held, what searches had been conducted, and whether any information had been deleted, destroyed or misled. The Council was also specifically asked whether the website link it had originally provided to the Appellant contained the requested information, and to explain the relevance of that statement to the Appellant regarding a partnership agreement. The council explained that:
- a. It accepted that the EIR applied, and relied on the exception provided for in regulation 12(4), maintaining that it did not hold the information.
 - b. It accepted that its initial response to the Appellant, referring to a partnership agreement, may have been confusing; but that by its further response on 28 August 2014 it had clarified to the Appellant that it did not hold cost breakdowns first sprayed markings.
 - c. Road marking is undertaken by Essex highways, under a partnership with the council.
 - d. The Council is not billed by Essex highways for each instance of the defect been inspected from marked, and there is therefore not a cost associated with each such operation. In response to the request the Council had investigated the systems it uses to record inspection activity, and had determined that the records did not enable it to derive a total cost for the specific activity identified in the request.
 - e. It had conducted 'site history' search of the location the Appellant specified, and had not found any indication of defects raised by inspectors between October 2013 and the date of the request. The Council explained that this period had been chosen as the time it felt likely to be relevant to the request.
 - f. No records of site inspections are deleted from its system.
 - g. It was not possible to say if highways inspectors made markings, as utility companies also use spray paint to indicate potential areas of work.
 - h. It was not it was not possible to determine how long it had taken to mark a particular road, as markings could have been made as part of an annual inspection or as an "ad hoc" visit.
 - i. It had provided the website link to the Appellant in response to the Appellant's reference to "*abortive efforts to relay the tarmac*" at Rosemary Crescent and adjacent roads. There had been no such efforts, but the website explained how the Council prioritises repairs. The website also

explained that the Council does not use red markings. The Council considered the additional information on the website would provide the Appellant with useful context to its response.

13. Following a request from the Commissioner for further information, the Council also provided the Commissioner with the site history report stored on its system for Rosemary Crescent, specified in the Appellant's request. That report showed no recent or scheduled work activity. In addition, there was no provision on the report for the recording of the time taken to complete work activities. The Council explained that even if there had been instances of activity, it would therefore not have been able to estimate the cost of specific activities.
14. The Commissioner further asked the council as to the process for allocating work to inspectors, in light of the Appellant's contentions that specific jobs would be allocated and job sheets records generated. The Council explained that spray markings of the type the Appellant had enquired about could be made as a result of allocated inspection tasks, or could be made in passing by an inspector en route to other scheduled tasks. The Council explained that when an inspector investigates a defect, a record is created and uploaded to its system. It confirmed that the site report it had provided was from this system, and that that held no information instructing an inspector to undertake work at the location the Appellant had identified.

The Decision Notice:

15. The Commissioner decided, his decision notice of 11 December 2014, the Council did not, on the balance of probabilities, hold the information requested by the Appellant.
16. The Commissioner concluded the information requested is information that relates to activities affecting likely to affect land, and is therefore within the scope of the capital EIR. That conclusion is not an issue in this appeal.
17. The reasons for the Commissioner's decision that the Council did not hold the information are set out in the DN, but were, as summarized thus in his formal Response to this Appeal;
 - i. That the records were kept by the Council of defects identified by inspectors and of scheduled work, but that none had been found in relation to the area specified by the Appellant. The Council had checked the relevant records and confirmed that no information falling within the scope of the request had been deleted, destroyed or misled.

ii. That even if records had been found, the Council did not hold the further Information that would be necessary to respond to the Appellant's request as to the specific cost of the spray-painting in the area the identified.

iii. That, contrary to the Appellant's contention, the keeping of records showing the specific cost related to such activities was not a fundamental requirement for the Council nor was it indicative of poor record-keeping by the council. It appeared the appellant had assumed this information would be held, but the council had explained why it was not.

iv. The Council was not able, and was not required, to estimate what the cost of any individual work activities may have been.

The Legal Framework:

18.

a) Public Authorities ("PA") are under a general duty under the EIR to disclose information where it is requested: Regulation 5 provides a duty to make available environmental information on request.

b) If the PA does not hold the information requested, Regulation 12(4)(a) provides a qualified exception to that duty, qualified with a public interest test at 12(1)(b);

19. Particularly pertinent to this appeal is Regulation 12(4); *"For the purposes of paragraph 12 (1)(a), a public authority may refuse to disclose information to the extent that- (a) it does not hold that information when an applicant's request is received;"* The Commissioner reminds us, and we accept, that the in determining a dispute as to whether information is "held", the relevant test is whether the information is held on the balance of probabilities.

The Notice of Appeal, and the Commissioner's Response:

20. The notice of Appeal states: *"Essex County Council is a statutory body and is by statute bound to keep records of all expenditure and income"*. In his document entitled *"comments on ICO's decision notice"* the Appellant further states that he *"cannot accept that the cost involved by the road marking is so insignificant as to not require a job record or similar document to record the spending of taxpayers money"*, and advances a number of contentions as to the need for such information to be kept by the Council and the inadequacy of the information it had provided.

21. The Appellant's appeal is thus based on this conjecture, as the Commissioner puts it, that a) the costing information he requested is held by the Council, and/or that b) such information should be held.
22. As to a) notwithstanding the Appellant's view, if reasonable searches by the council find no information, the Commissioner was right to conclude that on the balance of probabilities the information is not held. The Council explained the searches conducted which included:
 - a) A "*site history search*" of its system in respect of the location specified by the Appellant; and
 - b) Examination of a site history report.
23. The Council confirmed that it had found no relevant information on its system. Further, its examination of a site history report showed that even if a site history report with a record of the spray markings had been found, it would not have included the specific costing information the Appellant requested, or information as to the time taken by an Inspector to carry out these works. The Commissioner was, he argues, therefore right to conclude that, on the balance of probabilities, the requested information was not held.

REASONS

24. The Tribunal accepts and adopts the Commissioner's reasoning throughout the DN. In fact the Appellant does not argue to any significant degree that the Commissioner is flawed in his reasoning. Rather he seems to argue that the Commissioner has been misled. The Appellant argues not against the reasoning per se except to say that it cannot be right because the Council must have information in the form sought within the scope of the request. As is often the case in this type of appeal, the grounds are based not so much by a demonstration that that the Commissioner's reasoning is wrong, in fact or in law, but that the facts, as the Appellant sees it suggest to them that, in this case, the Council must be withholding information and facts from the Commissioner in the course of his investigation.
25. Essentially the Appellant is arguing that the requested information "should" or "must" exist. They argue in the Grounds of Appeal that the Council is bound to keep records of all Expenditure and Income. However, with respect to the Appellant, this is not what he sought either in specific or general terms. In essence the Council no doubt hold details of expenditure and Income but not in the specific way or relating to the specific tasks identified, as they were by the Appellant.

26. Analysis of the DN illustrates the careful manner in which the Commissioner investigated the complaint by the Appellant (see paragraphs 12 – 21 of the DN). We do not find the Commissioner erred on the facts, in his application of the scope of the request, or in the access regime (EIR rather than FOIA).
27. For the reasons above we find that on the balance of probabilities the Council do not hold the requested information in the specific format requested. The Commissioner, in our view was correct and the DN should stand. Accordingly we refuse the appeal.

Brian Kennedy QC
Tribunal Judge

5th June 2015.