



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0313**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50553307

Dated 26th November 2014

BETWEEN

Mr David Weale

Appellant

And

The Information Commissioner

Respondent

Determined at a hearing on the papers at Field House 30th April 2015

Date of Decision 21st July 2015

BEFORE

Fiona Henderson (Judge)

Suzanne Cosgrave

and

Rosalind Tatam

Subject matter: EIRs reg 5(1)– whether information held

Case Law: Bromley v Information Commissioner and the Environment Agency (EA/2006/0072)

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50553307 dated 26th November 2014 which held that West Sussex County Council (the Council) did not hold any further information under s1(1)(a) of the Freedom of Information Act.

Information Request

2. The Residents' Committee of which the Appellant is a member wished to embed pieces of rock in the grass verge of their cul-de-sac in order to prevent vehicles from using the verge and damaging the grass. The Appellant asked the Council's Highways' Department whether this action would constitute a potential obstruction to emergency services. The Council have refused permission for this action and the Appellant has been asking the Council to explain the basis of their decision with reference to legislation or regulations with a view to challenging that decision which he believes is inconsistent with the applicable guidance.
3. The Appellant had been in correspondence with the Highways Department and had received advice and information relating to the applicable law behind their decision, and the status of the verges in his cul de sac, but he was not satisfied with these responses. He had also written to the planning department (although they had not provided the original decision), without success. He then approached the Council's FOIA department and following advice from them, he wrote to them on 23rd June 2014 asking:

"I've been told by the Highways department that it is permissible to place only "passively resistant plastic bollards" not pieces of rock, in the grass verge of an adopted road in order to deter unwanted encroachment by vehicles.

*As far as I can make it out, this subject should be covered by national and local regulations, the **Highways Act** and the Department for Transport's **Manual for Streets** being two of which I am aware, supplemented by other recognised guidance*

such as the SWCC's Local Design Guide and the West Sussex Design Commission's Design Principles 2007.

I wish to know which of the Council's policies, procedures, guidance documents, etc as well as which part of any regulation, including those I have mentioned, enable them to disallow something that does not appear to be prohibited under the regulations I have mentioned and which in fact appears to represent something that is positively encouraged by the recognised supplemental guidance I have mentioned".

He attached a copy of a previous email in which he attempted to explain his understanding of the matter.

4. The Council responded on 25th June 2014 stating:

"I am afraid that I do not think this is going to be susceptible of an approach under the terms of the Freedom of Information Act, since effectively you are challenging the Council's interpretation of the Highways Act [quoting from the Appellant's email to planning applications of 25th May].

...Should you wish to challenge the Council's interpretation then I would have to suggest that you take your own legal advice on the matter".

5. Following further correspondence, on the 9th July the Council said that there were 2 sources of guidance for Officers relating to objects placed on the verge which were:

- The Council's 'safety plus inspection manual' (in particular the section relating to illegal activities on the highway and which mentioned verge markers with the example given of large rocks.)
- The Council's 'Superintendents' manual' which also refers to stones as illegal verge markers.

6. The Appellant challenged the relevance and status of these documents and their applicability to his case in his letter of 9th July 2014. The Council provided a formal response dated 15th July 2014 in which they provided a summary of all their previous correspondence with the Appellant on this topic and restated their position as being:

- S137 Highways Act 1980 introduced a penalty for wilful obstruction of the Highway,

- S130 places a duty on the Highways Authority to assert and protect the rights of the public to use the highway and prevent the obstruction of the highway,
 - A map had been supplied showing in relation to the Appellant's cul de sac, that although the grass verge is not part of the carriageway, it is part of the highway.
 - The Council interprets installation of markers designed so that they are not potentially hazardous to people or vehicles as compatible with its responsibilities under s130 and thus not in contravention of s137 Highways Act 1980.
 - The Design Commission Design Principles, the Manual for Streets and the WSCC local design guide relate to new development and not to an existing highway. They therefore do not apply to the Appellant's situation.
7. They said that under FOIA there is no requirement to justify how information in scope relates to a decision or to show how it is derived from legislation or other documents. The Appellant was informed of the Council's corporate complaints procedure whereby he could make a formal complaint about the decision to refuse permission for the rocks, which could lead if necessary to a referral to the Local Government Ombudsman. (He duly wrote to the corporate complaints section and received a response from the Council's Chief Operating Officer dated 8th August 2014.)
8. This decision not to provide any further information in relation to this request was upheld upon internal review (5th August 2014). The Appellant complained to the Commissioner. He prefaced his complaint with:
*"My complaint is about my unsuccessful efforts to get my local Council to explain the basis of a decision of theirs; ie, to let me know the related legislation or regulations."*¹ The Commissioner's Decision Notice upheld the refusal on the grounds that no further information was held.

The Appeal

9. The Appellant appealed on 18th December 2014 on the grounds that:
- i. The decision was wrong because the Commissioner failed to investigate properly,

¹ Complaint to Commissioner p 65 bundle

ii. The wrong legal test was applied by the Commissioner because the case was a matter of fact not opinion,

iii. Further information in scope is held²,

iv. The Council are wrong to assert that the aforementioned documents are not applicable to the decision and the information provided thus far does not justify the Council's decision.

v. The Council are wrong to rely upon the Highways Act 1980 and the 2 disclosed manuals to justify their decision.

vi. The Council were deliberately evasive in the way they dealt with the Appellant's request and their statement that it holds no further information within scope should not be accepted on a balance of probabilities.

10. The Commissioner resists this appeal and relies upon the decision notice. The Council have not applied to be joined. Both parties indicated that they were content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (the GRC rules) that it can properly determine the issues without a hearing. The Commissioner provided a bundle of some 224 pages and the Appellant provided his own amended and annotated colour version of parts of the bundle in which he had presented a synopsis and chronology of the correspondence. Although the Appellant's bundle does not include all the material of the Commissioner's bundle and appear in a different order, the page numbers have remained the same. All parties have had the opportunity to make submissions in writing relating to the issues in dispute; the Tribunal has considered carefully all the material presented, although it does not refer to all correspondence and other papers in this determination.

² The Council's Safety Audit Adopted Policy, The Council's Local Design Guide, The Department for Transport's Manual for Streets, The Department of Transport. 's Traffic Advisory Leaflet 04/93, The West Sussex Design Commission's Design Principles March 2007

The Applicable Regime

11. This case has been processed under FOIA. The Tribunal is of the view that the request was for environmental information and it ought to have been considered under *Environmental Information Regulations* (EIRs). The Tribunal relies upon regulation 2(1) which defines environmental information as information on:

(a) the state of the elements of the environment, such as land, landscape
(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;

12. We are satisfied that the subject matter of the requested information relates to the state of the land and landscape, being about the use of land (i.e whether a verge is driven upon) and its look (i.e. whether it has rock, plastic bollards or neither embedded in it) . The information that is sought is the measures which affect or are designed to protect the land and landscape, namely policies, procedures, guidance and regulations, which would enable the Council to dictate the measures used by members of the public to prevent the encroachment of vehicles.

13. The Tribunal has considered whether to adjourn the case for the parties to make submissions under EIRs but is satisfied that it is neither proportionate nor necessary. In so concluding we have had regard to the overriding objective as set out in rule 2 GRC Rules. Under either regime, the issue between the parties is the scope of the request, the analysis of this issue would be the same in either event. Although the EIRs include a presumption in favour of disclosure (reg 12(2) EIRs) and a public interest test (reg 12(1)(b), in light of our finding of fact (as set out below) that the request has been answered in full and therefore no further information is held or

exists, we are satisfied that it can never be in the public interest to require the public to disclose information which is not held and does not exist.

Remedy sought

14. The Appellant sought the following remedy:

“I am seeking a reversal of the Commissioner’s decision; from a finding in the Council’s favour to one in mine; ie, that the Council failed to correctly identify and therefore disclose all relevant information held by it, whether in fully documented form or simply by way of an express reference to an accepted/acknowledged regulation.

In other words, to oblige the Council to accept that all work is new work and therefore subject to the requirements of both the Council’s sources and my sources [as set out above].

15. Additionally in his response to the Commissioner’s response the Appellant states that one of the purposes of this appeal is:

“The Council’s rejection of the embedded rock proposal is demonstrably indefensible. I therefore appeal to the Tribunal to confirm this unequivocally”.

16. It is not within the jurisdiction of this Tribunal to judge whether the Council have applied the planning and highways laws appropriately, neither is it the forum for litigating the reasonableness or accuracy of the Council’s decision. The remit of this appeal is whether at the relevant date the Council held any further information within the scope of the information request and if so whether it should have been disclosed to the Appellant.

Failure to investigate properly and application of the wrong legal test

17. The Appellant argues that the decision was wrong because the Commissioner failed to investigate properly. The Appellant argues that the Commissioner has focused too narrowly on the information request and was wrong to accept the Council's assertion that there is no further information when they have not shown good faith. The Appeal constitutes a complete rehearing, the Tribunal is not bound by the Commissioner's findings of fact or law. The Tribunal has considered all the material before it, including the Appellant's chronology of correspondence and as set out below we are satisfied that the information request has been appropriately defined and that the Commissioner had sufficient information to reach the conclusion that he did.
18. The Appellant's case is that the wrong test was used because the case was a matter of fact not opinion. The information request is asking for the justification of an opinion. It was for the Council to decide which regulations were applicable to the decision it took and a matter of fact which regulations were taken into consideration. This ground is therefore not made out. The Tribunal notes that the issue between the parties in this case does not relate to the thoroughness of the search but the interpretation of the same regulations and policies. It is implicit in the Appellant's arguments that he does not accept the bona fides of the Council when they state what they relied upon. We are satisfied that the applicable standard to apply to their evidence is "on a balance of probabilities" (as exemplified in *Bromley v Information Commissioner and the Environment Agency (EA/2006/0072)*) and we have set out our analysis of the credibility of the Council's evidence below.

The scope of the request

19. The Appellant's request "*I wish to know which ...*" is arguably a request for advice not for information. The Commissioner argues that the Appellant is seeking to prove a negative if the request is construed as asking what legislation allows them to prohibit something which is not prohibited. He contends that regardless of whether any of the documents relied upon by the Appellant do or do not prohibit the use of rock or require the use of plastic bollards, this would not

answer the request as asked. The Council have treated the request as being confined to the circumstances of the Appellant's application in relation to his *cul de sac* and maintain that the documents drawn to their attention by the Appellant were not applicable³ and they have disclosed the legislation they rely upon in support of their decision.

20. The earlier paragraphs of the letter of 23rd June are intended to and do limit the request to the Council's decision in relation to the Appellant's application. In these paragraphs the Appellant argues that the Council rejects the relevance of his sources which he says invalidate the basis for their rejection of his application to them for approval of certain work, he argues that the sources relied upon by them do not provide sustainable justification to the basis of that rejection. We are satisfied that the objective reading of the request is asking what is the Council's justification for prohibiting the use of pieces of rock (with the commentary that in the Appellant's view this does not appear to be prohibited under the regulations). It links the request to the particular facts of his case and not the Council's more general highway works.
21. The Appellant wrote to the Commissioner on 25th August 2014 setting out the detail of his *"unsuccessful attempts to get my local Council to explain the basis of a decision of theirs"*. He criticizes the Commissioner for having focussed on the request as set out in his letter of 23rd June and as reiterated in the letter of 1st July. He argues that the Commissioner focused on the 30th of 47 pieces of correspondence over an 8 month period during which he believes there were 7 prior information requests and one afterwards all asking for information on the subject in question.
22. Upon receipt of the Appellant's complaint, the Commissioner wrote to the Appellant setting out the scope of his investigation in the following terms:

"From 15 March to 1 July 2014 you made a number of requests to the Council. Relevant to this investigation are the requests made on 23rd June and 1 July 2014 as follows "[quotes 23 June letter and 1 July letter]..."

³ Email of 15th July

It upheld its original position that you had been provided with all information relevant to your request of 23 June/1 July 2014 and that no further information was held.

My investigation will look at whether Council is correct when it says that it does not hold any further information, other than that which has already been provided to you”⁴.

23. From this we are satisfied that the Commissioner was defining the scope of the request and investigation appropriately, and that by his email response of 19th September in which he states: “*your review of things seems fine*” the Appellant has accepted the scope as set out by the Commissioner.
24. Nevertheless the Tribunal has considered the prior correspondence to assess whether in fact the scope of the request was wider than as set out in the letters of 23rd June/1st July. We have reviewed the correspondence between the Council and the Appellant. We are satisfied that the Appellant sought to enter into debate with the Council to understand the reasoning behind their position and to persuade them to change their approach and distinguish his case. In the correspondence the Appellant sought clarification as to who had responsibility for the verges, how the “highway” was defined, why rocks were permitted in other areas and drawing the Council’s attention to guidance which the Appellant felt supported his application and contradicted the Council’s position. At times this amounted to asking them for their legal opinion as to the construction of legislation.
25. The Council provided detailed recorded information and attachments, such as sections of the Highways Act and a map of the cul de sac in question, in the context of providing an explanation of their reasoning and advice to the Appellant. The reasoning why the pieces of rock were not permitted in his situation was not recorded

⁴ P98-100 bundle

information. The Appellant corresponded further, challenging the Council's reasoning and asking for elaboration and the Council's view on documents provided.

26. From studying the correspondence we are satisfied that the Appellant was not at this point seeking recorded information but the reasoned explanation for the Council's decision and the opportunity to debate this/enter into negotiations.

Assessing the Council's credibility

27. The Appellant relies upon the fact that there is no requirement for FOIA (or EIR) to be specifically referred to for a request to be considered as a FOIA request. He relies upon the Code of Practice 2004 (pursuant to FOIA s45 and EIRs reg16) which assures the public's right of access to information by requiring an authority to respond, proactively, to any request for information, there being no requirement to specify that this is under FOIA or EIR.
28. With regard to the context of the correspondence, its purpose and the nature of the information being asked for, we confirm that the Appellant was seeking the advice and guidance of the Council as to the applicable regime and mounting arguments to challenge the Council's decision. The Council were dealing with this as a dispute over their decision rather than under FOIA or EIR. He was provided with more information than he would have been entitled to under FOIA or EIR, as he was given assistance with interpretation, and explanation rather than just information that was recorded.
29. Although we have found that in fact the request should have been dealt with under EIRs we address the FOIA provisions here because the Appellant argues that the Council's request that he frame his request for information under FOIA amounts to an abuse of process, and he relies upon their conduct as evidence that their assertion that the information has been provided cannot be relied upon. He maintains that they have misrepresented and evaded his request, and mishandled their complaint procedures by requiring him to make a specific FOIA request which has restricted the request unnecessarily. The Tribunal has given the equivalent provisions relating to

EIRs in the footnotes as it is our determination that the position would have been the same had the request been correctly identified as an EIR request by the Council.

30. The Appellant wrote to the Council's Freedom of Information Department on 19th June stating:

*"I've encountered what appears to me to be a contradiction in some advice from the Highways department and the principles that are said to underly its approach to such things. However, none of my **requests for clarification**⁵... have been answered or even acknowledged...*

Is this something you could assist with?"

We are satisfied that this was not a FOIA compliant request, in that it did not specify the type of recorded information that was sought and was identified as a request for clarification (i.e. explanation).

31. Under FOIA⁶ there is a duty to provide advice and assistance:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

32. In providing the Advice and assistance the Council are directed to the Code of Practice as provided for under reg 45⁷. We are satisfied that the initial approach to the FOIA department was a request for advice and assistance as to how to proceed with a FOIA request. We are satisfied that the Council's advice as set out below was correct and compliant with the Code of Practice which states that:

⁵ Emphasis added

⁶ And also EIR Regs 9(1) and 9(2)

⁷ Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000 Issued under section 45 of the Act. November 2004

*8 A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.*⁸

33. We are satisfied that it was not appropriate to expect the Council to review 30 prior pieces of correspondence to try to ascertain what it was that in his view remained outstanding, and what information at the date of this request the Appellant wished to have provided. We are satisfied that the Council's email of 20th June was in accordance with paragraph 8 of the Code:

"In order for FOI or EIRs to apply " a request must be for specific information held by the Council". Your request appears to be for an explanation of/or an interpretation of policy in which case you should contact feedback@westsussex.gov.uk"

34. The Appellant then emailed the Council again on 20th June 2014, including the query:

"Am I now outlining a legitimate request for information?"

35. The FOIA Code paragraph 10 provides:

Appropriate assistance in this instance might include:

⁸ Under EIRs this is reflected in Regulation 9.

—(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—

(a)ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b)assist the applicant in providing those particulars.

- *providing an outline of the different kinds of information which might meet the terms of the request;*
- *providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;*
- *providing a general response to the request setting out options for further information which could be provided on request.*

*This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.*⁹

36. We are satisfied that the Council's response on 23rd June 2014 has had regard to paragraph 10 as set out above:

"you need to frame your request as being for the Council's policies procedures and guidance documents relating to the area in which the advice was given to you which were current at the time the advice was given".

37. The Tribunal accepts that it is permissible to ask for recorded information in the form of a question rather than by reference to specific documents. The Appellant argues that he should not be required to identify the information requested as that is what advice and assistance is for. The Appellant relies upon paragraph 11 of the FOIA Code and argues that the Council have been too prescriptive in defining his request:

*11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants*¹⁰.

38. The Tribunal observes, it is not a requirement to list the documents and therefore know what documents are held, but it is necessary to define the terms of the request to identify what it is that the applicant wishes to know. We are satisfied that the

⁹Under the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391) Issued under Regulation 16 of the Regulations, February 2005 this is reflected in paragraph 10

¹⁰ Reflected in EIR Code paragraph 17

Council have asked the Appellant only to identify the type of information he seeks (e.g. policies) not name the policies he is seeking. Indeed the Appellant's appeal rests on the fact he has identified specific policies that he believes should have been taken into consideration. From this we are satisfied that it was reasonable for the Council to ask the Appellant to clarify his request and we do not accept that this is evidence of bad faith or misrepresentation on behalf of the Council.

39. The Appellant maintains that the Council were deliberately evasive in the way they dealt with his request and their statement that it holds no further information within scope should not be accepted on a balance of probabilities. The Appellant relies upon the failure of the Council's Planning Applications Department to respond to his letter of 25th May substantively, we note that the Appellant suggested it be redirected if necessary, they had no other involvement in the case and, in light of the full responses that the majority of the Appellant's correspondence had generated, we are not satisfied that this is evidence of evasion or bad faith.

40. The Tribunal has reviewed the correspondence before it and has not seen any evidence of evasiveness and does not accept that the Council have been deliberately evasive. The Council have provided detailed answers providing further explanation of their decision. The issue between them is not one which lends itself to resolution in the Information Tribunal, the Appellant is challenging the Council's specific decision and this is not the correct forum for doing so. We are satisfied that the Council have searched for the information in the scope of the request and that there are no grounds for concluding that they have been deliberately withholding information.

Is further information in scope held?

41. The Appellant argues that further information in scope is held¹¹; the Council are wrong to assert that the aforementioned documents are not applicable to the decision and the information provided thus far does not justify the Council's decision, the

¹¹ the Council's Safety Audit Adopted Policy, the Council's Local Design Guide, The Department for Transport's Manual for Streets, The Department of Transport's Traffic Advisory Leaflet 04/93, The West Sussex Design Commission's Design Principles March 2007

Council are wrong to rely upon the Highways Act 1980 and the 2 disclosed manuals to justify their decision.

42. These grounds can be dealt with together. The request is fixed in time to a specific decision. The Appellant argues that the Council have construed the regulations wrongly, and failed to take into consideration policies which it ought to have done, but these are his arguments as to why the Council's decision was wrong, in effect he is asserting that this is what he thinks they SHOULD have taken into consideration. As set out above, we are satisfied that his request was for what they DID take into consideration, we are satisfied that they have supplied this information.

43. This is not a case where there are any grounds for believing that any further searches could or should have been conducted. The Council does not dispute the existence of or their ability to disclose the documents cited by the Appellant, but it is not required to disclose information that is out of scope of the request. The test of a balance of probabilities is relevant in assessing the credibility of the Council in their assertion that no further searches were undertaken because the staff involved providing the information to the Appellant were the ones who took the decision and thus were clearly able to identify the relevant statute on which they relied, and identify the sources of guidance they consulted, and that therefore the Council have provided a complete answer to the request.

44. The Tribunal has had regard to the role and knowledge of those who were consulted in formulating the response as set out in the Council's letter to the Commissioner of 13th October 2014¹² which stated that enquiries were made of the Team Leader and Senior Assistant in Highways, Highways Commissioning Manager, Routine and Cyclic Maintenance Team Manager. *"They confirmed that the relevant guidance to staff was contained in the Council's "Safety Plus" and "Superintendent's" manuals and that the guidance was based on the Highways Act s137..."*

¹² P108 bundle

45. The Tribunal is satisfied that these are senior advisers to Highways and Senior Highways Operational Managers who would be aware of the relevant guidance available and the statutory context. Additionally the Council have referred the Appellant's correspondence to their legal department and commented upon the documents relied upon by Mr Weale and given their reasons for concluding that they are not in scope. As set out above, the Tribunal has looked at the Council's correspondence with the Appellant including their reliance upon the FOIA code of practice to ask the Appellant to clarify his request and is satisfied that there is no evidence that they have been deliberately evasive, or that this provides any grounds for disbelieving their evidence. We are therefore satisfied on a balance of probabilities that the information has been provided in full and no further information is held within the terms of the request.

Public Interest test

46. As set out above, we are satisfied that the information in scope of the request has been provided, for these reasons we are satisfied that no further information is held. As such it is not in the public interest that they be required to disclose information which does not exist.

Conclusion

47. For the reasons set out above we refuse the appeal and uphold the decision notice with the amendment that in our judgment the request should have been considered under EIRs rather than FOIA.

48. Our decision is unanimous.

Dated this 21st day of July 2015

Fiona Henderson
Tribunal Judge