



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

Case No. EA/2014/0219

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FER0536714
Dated: 7 August 2014**

Appellant: BAWA ENGINEERING LIMITED

First Respondent: INFORMATION COMMISSIONER

Second Respondent: BEDFORD BOROUGH COUNCIL

Heard at: Bedford Magistrates Court

Date of hearing: 24 March 2015

Date of decision: 13 April 2015

**Before
CHRIS RYAN
(Judge)
and
ANNE CHAFER
JEAN NELSON**

Attendances:

For the Appellant: Mr R Bahel, a director of the Appellant Company
For the Second Respondent: Mr M Neale, Senior Solicitor
The First Respondent did not attend and was not represented

Subject matter: Request for information, Reg 5 Environmental Information Regulations 2004

Date of Promulgation: 14 April 2015

PRELIMINARY DECISION OF THE FIRST-TIER TRIBUNAL

The Decision Notice under appeal records conclusions based on an investigation that was incomplete and flawed. On the materials provided to the Tribunal to date it is not possible to determine whether or not the Decision Notice was correct in concluding that the Public Authority held no more information than that which it has already disclosed. The Public Authority is therefore directed to submit evidence explaining the steps that have been taken to search for the information requested by the Appellant. The Public Authority is accordingly directed, within 28 days of the date of this Decision, to file a witness statement to that effect signed by an officer with appropriate seniority and knowledge. The Tribunal will give directions thereafter as to the further stages of the appeal process.

REASONS FOR DECISION

Summary

1. The Appeal arises out of the Appellant's dissatisfaction with the way in which the Bedford Borough Council ("the Council") has dealt with certain planning issues relating to commercial premises adjoining the Appellant's own. The Appellant claims that the Council must hold more information on those issues than it has disclosed to date in response to an information request submitted by the Appellant under the Environmental Information Regulations 2004 ("EIR") on 19 July 2013 ("the Request"). We have decided in this Preliminary Decision that the Council has not satisfied us, on the basis of the materials and submissions provided to date, that it did not hold additional information and that we therefore require it to file formal evidence containing a full explanation of the searches and enquires made, with particular reference to issues that have arisen during the Appeal and which are explained in detail later in this decision.

The Request for Information

2. The Request was set out at the end of an email to the Council dated 19 July 2013 identifying several complaints about the activities of the Council's Planning Department. It asked the Council to:

“...disclose all documentation relating to my various complaints since 2006, the actions taken and the resulting outcomes pursuant to the freedom of information act ...”

3. The request falls to be considered under EIR regulation 5(1), which imposes on public authorities an obligation to make environmental information available on request. However regulation 12(4)(a) provides that no disclosure obligation arises if the public authority establishes that it does not hold the requested information.
4. The manner in which the Council handled the Request left something to desired, as the Council has itself conceded. We describe what happened in greater detail below. It is sufficient, at this stage, to state that eventually, on 11 June 2014 (11 months after the Request had been submitted), the Council accepted that it was under an obligation to disclose information falling within the scope of the Request and provided the Appellant with copies of a number of documents (“the Disclosed Material”). The Appellant did not accept that the Council had disclosed all of the relevant documents it held at the time. It complained to the Information Commissioner who, after carrying out an investigation, issued the Decision Notice from which the Appellant appeals to this Tribunal. The Decision Notice is dated 7 August 2014 and concluded that the Council did not hold any recorded information relevant to the Request, beyond what it had already disclosed.

The Appeal to this Tribunal

5. The Appellant lodged an appeal with this Tribunal on 1 September 2014.
6. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also

consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Our jurisdiction is strictly limited and, as explained more than once during the course of the hearing, we are prohibited from determining wider issues relating to the Council's performance of its duties.

7. Case Management directions were issued providing for the Council to be joined as Second Respondent to the Appeal and (following a change of mind by the Appellant as to whether the Appeal should be determined on the papers only) for a hearing to take place in Bedford on 24 March 2014. A direction was also made for the Information Commissioner to prepare a bundle of documents for use at the hearing. In the event the Appellant was not satisfied that the bundle had been prepared properly. It commented that documents were made available to it in the bundle, which it had never seen in the course of pursuing its various complaints and which should have been disclosed previously. It also complained about some gaps in the materials and was allowed to supplement the papers coming before us for the purpose of the hearing. We should add, for our own part, that we found the organisation of documents in the bundle extremely confusing. In cases where the chronology of relevant events is important, documents should be set out in chronological order, even if that creates some duplication where the same documents appear as annexes to contemporaneous correspondence or written submissions. A detailed contents list is also required, in those circumstances, to ensure that documents may be clearly identified by the panel. Much time was wasted, both at the hearing and during the panel's subsequent determination, as a result of the inadequate organisation of relevant documentation.
8. The Appeal was heard at Bedford Magistrates Court on 24 March 2013. Mr Bahel junior, a director of the Appellant company, appeared for the Appellant, supported by his father, who originally founded the company. The Council was represented by Mr Neale, a Solicitor and member of its legal staff. Both Mr Bahel and Mr Neale presented their case in a clear, balanced and good humoured manner and we are grateful for their assistance. The Information Commissioner was not represented.

9. Because of the long history of this matter and the difficulty of tracing it through the materials in the Hearing Bundle we set out below (paragraph 10 to 34) the sequence of events following the Appellant's first planning complaint. We have included the parties' submissions at each stage. Then, in paragraphs 35 to 41, we trace the events following the submission of the Request, again interspersing the parties' submissions. Finally, in paragraph(s) 42 onwards we record our conclusions.

History of the Council's handling of planning complaints

10. In November 2006 the Appellant complained to the company occupying adjoining premises ("the Neighbour") about certain changes it had made to the property. It said that these had the effect of moving the main entrance to the rear of the building, which had created parking problems and broke planning law. A copy of a letter dated 17 November recording the complaint was sent to the Council, where it was referred to an Enforcement Officer for investigation. The Appellant has claimed that the Council breached Data Protection law in the way in which it handled its copy of the letter. However, our jurisdiction is limited to the manner in which the Request was handled under EIR and that part of the Appellant's complaints can therefore form no part of this Appeal.
11. On 21 November 2006 a Mr D K Bailey, the Council's Borough Planner, wrote to the Appellant stating that the matter would be investigated and that any further queries should be referred to a colleague called Mark Duffin.
12. The Appellant informed us that at this stage a meeting took place on site, attended by both the Appellant and the Neighbour, when the work that had been carried out was inspected and discussed. The Appellant stated very clearly that the Council's representative at that meeting was Mr Bailey himself and that he informed the Neighbour that it should discontinue further construction work and apply for planning permission. The Council has suggested that Mr Bailey, as head of planning, would not himself have been involved in a meeting of that kind and that, whatever the Council representative should or should not have done, the plain fact was that a search of the Council's records had not brought to light a copy of any note of

a meeting. The Appellant invited us to conclude that any planning officer attending such a meeting would certainly have prepared a note of what had been said and place it on file. The Council informed us that Mr Bailey currently works for a different local authority, but it provided no information about the scope of its search for documents and related enquiries and could not tell us whether any attempt had been made to contact Mr Bailey or, indeed, any other member of the Council's Planning Department who had been involved in the matter at any stage.

13. In December 2006 the Neighbour submitted an application for retrospective planning consent for having applied sand and cement render to the rear of the premises. We were told that the application was granted by the Council on 21 December 2006 but no documentation to that effect was provided to us and nor does it appear to have been included in materials disclosed to the Information Commissioner during the course of his investigation. The Appellant complains that permission should not have been granted, either so promptly or at all, in the face of the objections it had raised and the existence of other planning breaches which were not covered by the application. It also complains that the Council failed to notify it of the decision, with the result that it was unable to object (by Judicial Review or in any other way). We do not have jurisdiction to determine either of those matters.
14. On 3 January 2007 the Appellant wrote to the Neighbour again complaining that it had converted the rear of its premises to the main entrance, when its right of way over land at the rear was for fire escape purposes only. The letter was again copied to the Council.
15. No documentary record was provided to us as to the Council's reaction to this further complaint but the Disclosed Material included photographs of the Neighbour's premises, saved into a particular electronic folder on the Council's computer system and recorded there as having been taken on 12 January 2007. This suggests that a representative of the Council's Planning Department had visited the premises on that date. The Disclosed Material contained no written record of such a meeting.
16. On 15 January 2007 Mark Duffin, the Council's Planning Enforcement Officer, wrote to the Neighbour referring to a site visit (presumably the, apparently

undocumented, one referred to in the previous paragraph). He pointed out the need to apply for planning consent if the Neighbour wished to retain certain changes to the property, namely the addition of doors to the east elevation, the insertion of windows and rooflights, as well as a possible change of use. The Appellant complained about the apparently cooperative attitude adopted by the Council in relation to the Neighbour but that, again, is not an issue we have the jurisdiction to determine.

17. On 9 February 2007 the Appellant wrote to Mr Duffin advising him of the installation of air conditioning units on the Neighbour's premises and asking for the Council to have the works on site stopped.

18. On 15 February 2007 the Council wrote to the Neighbour (under "Enforcement case number 06/00468/UNDEV") in order to make an appointment on site in order to discuss the changes that had been made to the premises. The letter referred to the Appellant's complaint of 17 November 2007, but we assume that it was in fact the letter of 9 February 2007 which provided the Council's motivation to investigate. On the same date Mr Duffin wrote to the Appellant informing it that the investigation was "ongoing" and that it was hoped to organise a site meeting shortly. The letter went on to say:

"As I stated at our meeting, the Council are not in a position to mediate between tenants of the site regarding parking and access arrangements. At the culmination of our investigations comment will only be given regarding the planning aspects at the site. Should you feel that there are other issues regarding your access or parking arrangements you must take these up with your landlord or seek legal advice."

19. The Appellant suggested that the allocation of a case reference number at this stage provided a means of identifying the file of papers from which, it said, the Council would have been able, subsequently, to extract information for disclosure. It also suggested that the file would have included notes and memoranda recording the decision to investigate and the conversation at the meeting with the Appellant referred to in the letter. The Council reiterated that the role of the Information Commissioner and Tribunal is, not to consider

whether additional documentation should have been created by the Council, but whether all relevant information which had been recorded had been disclosed.

20. The Disclosed Material includes evidence of a series of photographs taken at the premises on 21 February 2007 and saved in the same electronic folder as the previous ones. It is common ground that a site meeting took place on that date. The Appellant complains that the Council should have adopted a stricter line during the meeting (an issue we do not have jurisdiction to consider) but also makes the more relevant comment that the Disclosed Material did not contain any note or report of the meeting.
21. A chronology prepared by the Council in connection with its own investigation into the handling of the planning issues, completed in January 2010, stated that a file note did exist, dated 23 April 2007 and mentions a discussion *“between Enforcement Officer and a planning officer in which it was concluded that the changes to the building noted on 21/02/07 site visit were within the ‘permitted development’ tolerance for the site and use”*. The note is said to conclude with the words *“case closed”*.
22. The chronology also records that on 17 July 2007, some four months later, a formal record was made of the decision to close the case. The Appellant complains that it did not receive the document at the time. That alleged failure by the Council to provide the Appellant with the outcome of its original complaint and to give it any chance of challenging the conclusion, (by Judicial Review or otherwise) is not an issue which we have jurisdiction to consider. However, the apparent absence of the document from the Disclosed Material is said by the Appellant to throw doubt on the completeness of the disclosure made to date. In that regard we record that it did not appear, either, in the hearing bundle or, more significantly, in the papers provided to the Information Commissioner during the course of his investigation.
23. On 18 March 2008 the Appellant wrote to Mr Duffin at the Council enquiring about the progress of its original complaint, over a year previously, and to ask, in particular, whether planning permission had been granted for the alterations in question. The letter was stamped by the Council as having been received on 25 March 2008 and allocated *“For Action”* to *“BW”*.

24. A series of photographs of the Neighbour's premises were saved into the same electronic folder as previous photographs on 4 April 2008. The Council has indicated that these were taken by its planning enforcement officer Bill Walsh (presumably the "BW" to whom the letter of 18 March 2008 had been passed). However, there is no other record of a site visit within the Disclosed Material.
25. On 29 April 2008 Mr Walsh wrote separate letters to both the Appellant and the Neighbour. The letter to the Neighbour acknowledged the previous grant of a "*certificate of lawful use of development on 21 December 2006*" (a Council decision which had in fact been limited to the rendering of the rear of the premises) and asked for information about its length of operation and the date when any doors, windows, air-conditioning units or CCTV equipment had been installed. The Appellant complains over the apparent 15 month delay in investigating those matters and the unsatisfactory circumstances in which the case was first closed (paragraph [21] above) and then apparently reopened nine months later. We do not have jurisdiction to investigate either of those issues. However, the Appellant's relevant complaint is that the Disclosed Material contains no record of the visit to the premises on 4 April 2008 (when photographs were apparently taken) or of any conversation that took place either at the time (with the Neighbour) or later (with a colleague or colleagues, leading up to the decision to instigate enforcement action).
26. On 13 May 2008 the Neighbour replied to Mr Walsh claiming (falsely, the Appellant contends) that windows had been replaced in January 2007 and that air conditioning/heating units and CCTV had been installed in the same month. On the following day, 14 May 2008, Mr Walsh wrote to the Neighbour pointing out that planning permission should have been sought for all of the work and requiring it to say, within a month, when it would be in a position to lodge an application. The letter included this passage:

"I have spoken to a Senior Planner and in his opinion there is no obvious reason why we would refuse, however there may be an issue over the siting of the air conditioning units. (This is just my informal opinion as a Planning Enforcement Officer and is not binding on the Council)."

27. The Appellant made the comment (which is not relevant to any issue we have jurisdiction to consider) that the Council took enforcement steps in May 2008 in respect of a case that had apparently been closed a year previously. The comment does, however, raise the relevant question as to the absence from the Disclosed Material of any record of the decision-making process leading to the reopening of the case or the conversation with the “*Senior Planner*” referred to in the passage quoted above.
28. On 20 May 2008 the Neighbour wrote to Mr Walsh requesting two months in which to gather necessary information to apply for planning permission, a request which Mr Walsh agreed to in a subsequent letter, which appeared among the Council’s documentation with the erroneous date of 14 May 2008. One of the Appellant’s complaints is that he has not received copies of all correspondence passing between the Council and the Neighbour. The Council’s response is that it has disclosed all that it holds and there is no evidence of any more ever having come into existence.
29. On 5 September 2008 the Council appears to have written to the Neighbour enquiring why the planning application had still not been received. The Appellant referred to this letter as evidence of “*further time wasting*” but made no submission about it which had relevance to the issue we have to determine.
30. The Council informed us that on 28 November 2008 it had recorded the lodging of the relevant planning application. The Appellant criticised the application on a number of grounds and said that it was intended to confuse the planning committee on certain issues. Those are points that might have been made to the planning committee but it is not for us to say whether there is any substance to them. However, it is relevant for us to consider what documentary information came into existence following the submission of the application and whether all of it was included in the Disclosed Material.
31. The Council’s chronology recorded that the Appellant was sent written notification of the planning application on 3 December 2008, giving it until 24 December 2008 to submit written representation. The chronology also recorded that the Environmental Health office confirmed that it had no

objection. No other documents have either been recorded by the Council or included in the Disclosed Material. The Appellant submitted that internal notes or memoranda must have been created in the course of the planning department finalising its recommendations to the Planning Committee. It drew attention to the fact that on 22 December 2008 it delivered a letter to the Council objecting to the application. The hearing bundle contained a one and a half page letter of objection, but the Appellant informed us that the objection document ran to 15 pages and was accompanied by supporting documentation. The date of submission was before the deadline imposed for written representations but it appears not to have been taken into account in the Officer's Report that was submitted to the Planning Committee. The reason for this appears to have been that the Report had been completed before the deadline and therefore before the date by when the Appellant had been told to lodge any objections.

32. On 5 January 2009 the Planning Committee considered the planning application. The Council concedes that the Committee did not have the Appellant's written representations before it, but argued that the relevant issues raised by the Appellant (that is to say those having significance to planning issues but not those relating to legal or practical issues arising out of the Neighbour's obligations under its lease to the tenant of adjoining premises) were reported to the Committee orally. It relies, in this respect, on the following passage in the minutes of the meeting:

"The Acting Head of Planning and Housing Services reported that a letter had been received from a neighbour expressing concern about the length of time it had taken for the application to be submitted and that the alterations that had been carried out had resulted in the rear of the unit becoming the front entrance. This had a knock on effect on where people were parking their vehicles which had lead (sic) to complaints from occupiers of other units."

At the risk of repeating ourselves we record that we have no jurisdiction to consider whether the appropriate procedures were followed in relation to the Planning Committee meeting, let alone whether the decision reached was justified.

33. We have been provided with one page of the Officer's Report. It included a section headed "*Consultation*" and indicating that no objection had been raised in respect of Environmental Health issues. The Appellant argued that this part of the Report demonstrated that disclosure had not been made of the feedback received from the Council's Environmental Health team, but the Council sought to persuade us that it in fact demonstrated that there was no objection to be reported. Similarly, the form on which the Report was written included a section in which to record comments received from the "*Cauldwell and Kingsbrook Urban Community Council*". This part of the form, as completed, simply stated "*Any comments to be reported*" and contained no information. The Appellant suggested that the Urban Community Council would have made representations and that these should have been reported and made available. The Council, on the other hand, suggested that the Urban Community Council might well not have had anything to contribute to an application of this kind.
34. The Council's decision to grant planning permission was notified to the Appellant by a letter from the Council dated 13 January 2009 and although there have been subsequent communications concerning the Appellant's continuing dissatisfaction with the manner in which the Council dealt with the planning issues, (including the January 2010 report on the Council's own investigation of the Appellant's complaints), none of them are relevant to whether or not the Council disclosed all of the information falling within the scope of the Request.

History of the Request

35. As mentioned the Request was submitted to the Council on 19 July 2013. On 3 October 2013, sometime after the 20 working day time limit for responding to a request under EIR regulation 5(2), an Assistant Director of the Council's Planning, Strategic Transport and Housing department wrote to Mr Bahel the Appellant stating:

"You are not entitled to receive this under the Data Protection Act 1998 as it is personal data. To obtain your personal data you must make a Data Subject Access Request."

36. The Appellant had no reason to know that the Council's advice was completely wrong (as the Council ultimately conceded) and accordingly lodged a Data Subject Access Request on 21 October 2013. This led to the Council disclosing (under cover of a letter dated 28 November 2013) copies of the Appellant's own correspondence, which clearly went nowhere near complying with the Request. However it was not until 13 May 2014 that the Council finally wrote to the Appellant conceding that its original response had been incorrect. Even then it did not disclose additional information but simply stated that the Planning Service was being asked to reconsider its response.
37. By that time the Appellant had complained to the Information Commissioner, who had written to the Council on 2 April 2014 urging it to treat the Appellant's continuing complaints as a request for an internal review. As the Council did not respond to that suggestion (even though, as mentioned in the previous paragraph, it did undertake a review of its original response) the Information Commissioner appears to have pursued his investigation.
38. On 11 June 2014, eleven months after the original request for information, the Council wrote to the Appellant informing it that the information on the Council's enforcement files had been reviewed and could, after all, be disclosed.
39. On 2 July 2014 the Information Commissioner, understandably still unaware of the action which the Council had taken, wrote to it again summarising his understanding of the history of the matter and posing a number of questions. The Council submitted a detailed response to each question in a letter dated 24 July 2014. It included the statement that additional information had been disclosed under cover of the 11 June 2014 letter. However, it subsequently transpired that the Council had put insufficient postage on the envelope containing the letter and it was not ultimately received until mid-August).
40. The Information Commissioner appears to have had no further communication with either the Council (to follow up his questions) or the Appellant (for its comments on the replies) before he concluded his investigation and issued the Decision Notice on 7 August 2014. In it he

recorded that the Council had agreed to undertake an internal review but made no mention of the outcome of that review and the consequent statement by the Council that it had disclosed further information.

41. Based on that clearly incomplete summary of his own investigation the Information Commissioner concluded in the Decision Notice that at the relevant time the Council did not hold any information beyond that disclosed in response to the original Subject Access Request. That was clearly wrong for at least two reasons. First, the response to the Subject Access Request would not have included, and did not include, the Council's internal communications in respect of the relevant planning issues, but only the correspondence with the Appellant. Secondly, the Information Commissioner had by that time been told by the Council that further information certainly did exist and he had in fact been sent copies of it under cover of the Council's letter of 24 July 2014.

Conclusions

42. The Information Commissioner submitted a Response to the Appeal in which he asserted that he had not been aware of the disclosure made to the Appellant in August 2014, despite the content of the Council's letter to his office of 24 July 2014. He nevertheless persisted in asserting that the Decision Notice had been correct. He argued that there was no evidence of an inadequate search by the Council and that he was not required to carry out a forensic investigation in every case. He was entitled to rely upon the evidence of the public authority.

43. In our view the Information Commissioner did not carry out an adequate investigation. It must have been clear to him that the Council, having originally delayed making any response, had then misled the Appellant into believing that he was only entitled to receive information covered by a Subject Access Request under the Data Protection Act 1998. That should have been enough for him to test the Council's evidence and arguments with more than usual care. Not only does he appear not to have done so but, when the Council did write to him admitting its original mistake and explaining what information it had released in an attempt to remedy the position, he appears to have completely ignored the letter.

44. We have indicated above, when reviewing the history of the information request, the arguments and counter-arguments as to whether the Council has disclosed all of the information it held at the date of the request. We believe that there are grounds for concern at the apparent absence of any file notes or internal communications (paragraphs [12, 20 and 24]), particularly in relation to the various site visits that took place and the internal consultations (paragraph [15, 19 and 21]). Against that background, and in light of the Information Commissioner's incomplete and flawed investigation, we do not think that it would be appropriate for us to proceed, without more evidence, to a final determination as to whether or not, on the balance of probabilities, the Council held more information on the relevant date than it has disclosed to date. We therefore direct the Council to file a witness statement, signed by an officer having an appropriate level of knowledge and seniority, setting out the enquiries and investigations it undertook originally and any supplementary ones conducted at this stage in light of the specific criticisms that have been made. The witness statement should relate, in particular, any enquiries made of individuals handling the planning dispute at the time.
45. The witness statement should be lodged with the Tribunal, with a copy served at the same time on each of the other parties, within 28 days of the date of this decision.
46. Our decision is unanimous.

Chris Ryan

Judge
13 April 2015