IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0219**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

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

Decided on the papers

Date of decision:

Before
CHRIS RYAN
(Judge)
and
ANNE CHAFER
JEAN NELSON

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

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0219**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Appeal is dismissed on the basis that further evidence filed by the Public Authority, under direction of our Preliminary Decision of 13 April 2015, has satisfied us that the Public Authority did not hold information at the date of the Appellant's original request for information, beyond that which was disclosed at the time.

REASONS FOR DECISION

1. On 13 April 2015 we issued a Preliminary Decision in this matter ("the First Decision"). Capitalised terms in this Decision have the same meaning that was attributed to them in the First Decision.

2. We were not able to say in the First Decision whether, on the basis of the evidence provided to us at the time, full disclosure had been made by the Council in response to the Request, or whether the Council held additional information at the time which had not been disclosed. We therefore directed the Council to submit evidence explaining the searches that had been conducted in response to the Request.

3. In response to the First Decision the Council filed a witness statement signed by a senior member of its planning department, Paul Rowland, who had been employed by the Council since 1993 and was in a position to comment on the matters raised in the Appeal. Mr Rowland provided helpful evidence on the role played by the individual Council officers mentioned in the First Decision, the systems operated by the planning department at the relevant times (including the record keeping procedures) and the search for information undertaken at the time of the Request. The evidence Mr Rowland provided addressed the concern, expressed in the First Decision, that no records had been disclosed in respect of certain events which we thought would normally have been documented.

4. We subsequently directed the parties to submit written submissions on the content of the evidence received and on whether the final decision should be made on the papers or at a further hearing. None of the parties chose a further hearing and we are satisfied that it is appropriate to make our final decision on the basis of the papers filed.

5. The Information Commissioner filed written submissions in response to the Council's evidence and the Appellant also sent the Tribunal an email in which it raised comments. The Information Commissioner invited us to conclude (with one exception) that Mr Rowland's evidence demonstrated that the Council had carried out reasonable and proper enquiries and investigations into what information it held at the time of the Request.

6. The exception mentioned by the Information Commissioner came to light in this way. Mr Rowland's witness statement recorded that some copy correspondence had been retained on a particular planning application file, adding that *"…the content of this file is available as part of the planning register and not therefore strictly subject to* [FOIA]*".* The Information Commissioner pointed out in his written submission that the Appeal was not concerned with FOIA but EIR and that, under that regime, there is no equivalent to FOIA section 21 (exemption for information already reasonably accessible to the information requester). The Information Commissioner therefore argued that, if it were the case that the Council holds further information falling within the scope of the Request as part of the Planning Register, it was still strictly required to disclose it to a requester.

7. We see the force of the Information Commissioner's argument, although we think that little is likely to turn on the point (if for no other reason than that the Appellant is likely already to have searched publicly available records).

8. On balance, we conclude that we are satisfied, on the evidence now made available to us, that (save for any further information within the scope of the Request which is held on the Planning Register), no further information was held by the Council at the relevant time, which should have been disclosed in response to the Request. The Decision Notice was therefore correct in its conclusion and the Appeal should be dismissed.

9. We add that we would expect the Council, as a matter of good practice, to clarify with the Appellant precisely what information is available on the publicly available Planning Register. One of the concerns behind the Request, and the Appellant's pursuit of it, was the belief that the planning history relied on in the Neighbour's planning application was in fact the planning history of the Appellant's own premises and the content of the Planning Register may cast light on that issue.

10. The response received from the Appellant in response to Mr Rowland's evidence questioned why the Council had not kept more complete records. However, the Information Commissioner reminded us that the test we should apply is, not whether a public authority should have retained more information, but whether it in fact did so. The evidence of Mr Rowland satisfied us that it did not. That is as far as our enquiries may go.

11. Our decision is unanimous.

12. There is one further issue we should address, in fairness to the Information Commissioner and his staff. The First Decision included some criticism of the manner in which the Information Commissioner carried out his investigation and the written submissions filed by the Information Commissioner included a response to those comments. We think it appropriate, in the circumstances, that we incorporate in the Annex to this Decision the relevant paragraphs of those submissions.

Chris Ryan

Judge
20 July 2015

ANNEX

17. The Tribunal notes, (in paragraph 40 of its decision) that it is recorded in the decision notice that the Council had agreed to undertake an internal review but that the decision notice made no mention of the outcome of that review and the consequent statement by the Council (in its letter of 24 July 2014 [O/B 126]) that it had disclosed further information to the Appellant.

18. The Tribunal, in paragraph 41, concluded that:-

"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".

19. The Commissioner firstly accepts that he should have referred to the letter of 24 July 2014 in his summary of the request and response in his decision notice and, further, was wrong to suggest, in paragraph 14 that the Commissioner was only aware of the letter to the Appellant of 11 June 2014 (sent with the further disclosures) since the Decision Notice was issued (given that a copy of the letter of 11 June was attached to the letter of 24 July).

20. However, despite the above, the Commissioner would submit that he did in fact consider and take account of the letter (and enclosures) from the Council to the Commissioner dated 24 July 2014 when reaching his decision in his decision notice. Whilst the letter, albeit erroneously, may not have been explicitly referred to in the Decision Notice, the Commissioner would submit

this it is nevertheless implicit from the wording of the Decision Notice that the letter was taken into account.

21. For example, in paragraph 36 of his decision notice, the Commissioner refers to what the Council advised the Commissioner *"it its response to his enquiries"*. The Council did not substantively respond to the Commissioner's enquiries until the letter of 24 July 2014. The Commissioner was therefore referring to this letter in paragraphs 36-39 of the decision notice.

22. More specifically, the Commissioner directly quotes from the letter of 24 July 2014 in paragraph 39 of his Decision Notice when he notes that the Council advised the Commissioner that:-

"it is not considered likely that [the named officer] would have been involved in any such meeting" and, *"in any event no such notes exist"* [O/B 127 – final paragraph].

23. In light of the above, the Commissioner confirms that the content of the letter of 24 July 2014 was taken into account before reaching his decision and that he took into account the further disclosures referred to in that letter when reaching his conclusion that, on the balance of probabilities, the Council did not hold any further recorded information within the scope of the request beyond the information already disclosed.