



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/0124

**Heard at Field House, breams Buildings, London EC4
On 18 October 2016**

Before

JUDGE CHRIS HUGHES

Between

MARC BERGER

and

Appellant

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. The Appellant is a field archaeologist. He has had a successful practice for some years in Lincolnshire. However he has experienced difficulties in recent years due to a difference of professional opinion between himself and a relevant part of Lincolnshire County Council ("the Council"). The professional difference relates to the rights, duties and obligations of the landowner and the archaeologist in relation to archaeological investigations which are being undertaken as a condition of the grant of planning permission by a District Council, the responsibility for the deposit of any articles and the report of the investigation with the County and its museum service and the charging for the making of any such deposit.
2. The responsibility for considering smaller scale planning applications and for the granting of permission subject to conditions is a question for the District,

rather than the County, Council. However the provision of archaeological advice to District Councils in Lincolnshire is undertaken by the County Archaeological Service. As a result of the conflict it is increasingly hard for the appellant to conduct his business in Lincolnshire, despite otherwise good relationships with his local district, East Lindsey District Council.

3. On 24 September 2015 he requested information about this arrangement from the Council:-

"East Lindsey District Council claim to have an "arrangement" with Lincolnshire County council for which they have paid a fee of £12,174 for 2014/15. As this arrangement is not written down it is unclear what the fee is for. The fee appears to change from year to year:

2014/15 £12,174

2013/14 £11,877

2012/13 £11,724

2011/12 £11,438

which would suggest that the arrangement has some arrangement for these changes. I would like to know what Lincolnshire County Council thinks the arrangement is for, how is the fee worked out and when was the arrangement last made?

I would also like to know how much it costs Lincolnshire County Council to provide archaeological services to East Lindsey District Council for either of the years 2014/15 or 2013/14 or where the figures might be found publically. I would expect the figures to include the costs of providing a Historic Environment Record for East Lindsey, providing heritage advice for planning decisions and for museum services such as providing accession codes and the storage of artefacts."

4. The Council responded confirming that the figures were correct and explaining that it did not hold any other requested figures. The Appellant was dissatisfied; he did not consider that the Council had responded to the second part of the request and complained to the Respondent in these proceedings ("the ICO"). The ICO, in the light of the Appellant's explanation of his expectations of what the request would reveal, explored the nature of the records the Council held which would include figures and/or references to the second part of the request.
5. The Council explained that it did not hold separate accounts for any of the bodies to which it provides archaeological services. Details of the relevant budget account within the Council's finance system had been referred to in the initial response and the invoices provided. It had made searches of the relevant parts of the Council including electronic searches and no further information had been forthcoming. The ICO concluded that no further information was held.
6. In his appeal the Appellant criticised unrecorded arrangements between the two Councils. He queried the terminology used by the Council to describe its accounts. He wished to know the nature of the arrangements between the Councils and the attempts to find costs was to help define the arrangement. He expected to find a written service agreement relating to the various statutory duties, with regular amendment and renegotiation of costs. He queried whether proper searches had been carried out for "archaeology" as well as "archaeological". He wanted the Tribunal to "tell me what they think

- is in the unrecorded arrangement and to qualify the arrangement by how much it costs Lincolnshire County Council to service it." He was concerned about the conduct of the Council with respect to data protection.
7. In responding the ICO resisted the appeal. The scope of the investigation had been sent to the Appellant and he had not objected to it excluding the first part of the request. The DPA issue was not within the scope of the investigation. Both "archaeology" and "archaeological" had been search terms used to find information relevant to the request. It was not the ICO's role to require public bodies to produce new information or to comment on alleged poor record keeping.
 8. In the hearing the appellant explained that he was using FOIA to find out what authority had been given by the East Lindsey District to the Council. He was concerned that as a result of the dispute the Council had taken steps which had harmed his professional activities beyond the County of Lincolnshire.
 9. The tribunal explained that it was not the role of the ICO or Tribunal to fill in the gaps of what an agreement should be, only to determine whether information within the scope of the request was held. The appellant was unable to suggest further searches which could have been carried out. He considered that it would have been reasonable to aggregate the various costs within the field of archaeology and divide them by the number of customers to find a real cost. The tribunal explained that FOIA did not require public authorities to create further data, or construct models from which reasonable inferences could be drawn as to the actual costs of an operation.
 10. The bundle, at page 148 contained a 1991 letter from East Lindsey District Council to the Council about the contribution to the County Archaeological Service.

Consideration

11. During the course of the hearing the Appellant confirmed that seeing the 1991 letter was "almost worth the effort". He acknowledged that the Respondent had been correct in concluding that there was no further information held by the Council which related to the first paragraph of the request i.e. "what the fee is for".
12. It was clear to the Tribunal that the Council had no business reason to measure or model the actual cost of the service it provided to East Lindsey district Council. There was an arrangement going back over at least 25 years by which the District Councils made a contribution to the overall costs of the County Service. While financial pressures over the coming years might lead to changes to that service, there were no grounds for concluding that the ICO had erred in law and no grounds for concluding that the facts he relied upon were incorrect.
13. The Tribunal dismissed the appeal.

Signed Chris Hughes
Judge of the First-tier Tribunal
Date: 7 November 2016
Date of Promulgation: 16 November 2016