IN THE INFORMATION TRIBUNAL

Case EA/2005/0024

BETWEEN:

KESTON RAMBLERS ASSOCIATION

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) LONDON BOROUGH OF BROMLEY

Respondents

RULING ON APPELLANT'S APPLICATION FOR WITNESS SUMMONS

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1. This case is concerned with an information request made by the Keston Ramblers Association to the London Borough of Bromley on 24 January 2005.

2. The request was:

> "*Following the making and publication on the 1st February 2001 of the Definitive Map Modification Order 2001 would you please provide*

this Association with copies of the duly made representations/objections and correspondance [sic] thereafter conducted by officers of the Council with the following:

1. Representors and Objectors

2. Keston Park (1975) Limited

3. Messrs. Charman and Gore – Solicitors

4. The Planning Inspectorate

5. Messrs. Steele & Co. – Solicitors

6. Rights of Way Sub-Committee

7. Government Office for London"

3. The Council did not respond adequately and the Association complained to the Information Commissioner. Information was subsequently provided by the Council to the Association on 11 April 2005. This comprised some 345 pages of documentation. The Commissioner decided that the Association had been provided with all the information to which it was entitled. The Association appealed to this Tribunal pursuant to s57 of the Freedom of Information Act 2000.

4. The grounds of appeal are in paragraphs 12-13 of the statement of Mr Fulwood dated 24 November 2005. (Mr Fulwood is the chairman of the Association.) His central point is that the Commissioner was wrong to conclude that the Association was provided with all the information to which it was entitled. His statement shows a particular concern with information generated in the period July 2002 to October 2004 relating to a witness statement of a Mr Chatfield on behalf of the Keston Park Estate.

5. On 13 January 2006 I ordered that the Council be joined as a party. I gave further directions on 23 February 2006, pursuant to which the Association gave a more detailed statement of its case (by letter of 2 March 2006) and the Council served a number of witness statements in response.

6. The Association's letter stated in part:

> "*On the 12th October 2004 the London Borough of Bromley accepted the personal recommendation of Mr. Timothy Leader – Director of Legal and Democratic Services that the Witness Statement of Jonathon [sic] Alexander Chatfield that his Department received in July 2002 provided the Council with an opportunity to evade their long outstanding obligation to prepare and submit a corrected Definitive Map Modification Order to The Secretary of State.*
>
> *WITHHELD INFORMATION*
>
> *The bundle of documents provided by the London Borough of Bromley does not contain a re-evaluation of the Witness Statement of Jonathon Alexander Chatfield that was submitted on behalf of Keston Park Estate and the Keston Ramblers Association request the attendance of Mr. Timothy Leader as a Witness at the Information Tribunal Hearing."*

7. One of the statements served by the Council was that of Mr Anthony Tompkins, a solicitor employed in the Legal and Democratic Services department. His statement explained that it was he who evaluated the Chatfield statement and who gave legal advice to the Council Sub-Committee upon it for their meeting of 12 October 2004. Mr Tompkins says that Mr Leader did not give the advice himself, nor did he attend the Sub-Committee meeting or have any personal knowledge or involvement in any aspect of the matter. Matters were conducted in his name because he was the Director.

8. By letter of 27 March 2006 Mr Fulwood complained about the absence of a statement from Mr Leader and sought an order that the Council provide a statement from him in order that the Tribunal might be briefed on the management strategy that resulted in the Council's decisions. This was opposed by the Council on the grounds that Mr Leader had no personal knowledge and that the proposed subject matter of the evidence was beyond the ambit of the issues before the Tribunal: the issue was not "the management strategy" (assuming such to exist), but whether information had been withheld.

On 20 April 2006 I indicated that I was not then persuaded of the need for a witness statement from Mr Leader, but that an order could be made subsequently if it became apparent that his participation as a witness was required.

9. By letter of 12 May 2006 Mr Fulwood renewed his application for an order that the Council should serve a witness statement by Mr Leader. I refused this application in a written ruling dated 17 May 2006 on the ground that the available evidence did not demonstrate that Mr Leader was personally involved in the subject matter of the information request.

10. By letter of 22 May 2006 Mr Fulwood raised this matter again. From this letter it appeared that the Association wished to call Mr Leader as a witness. In my written ruling of 25 May 2006 I stated:

> "If the Ramblers wish to call Mr Leader as a witness, it is up to the Ramblers to contact Mr Leader and make arrangements for his attendance at the hearing. They should also serve as soon as possible a signed statement of the evidence that he is to give.
>
> If Mr Leader declines to co-operate and to provide a statement on behalf of the Ramblers, and refuses to attend voluntarily, the Ramblers can apply for a witness summons under rule 18 of the Information Tribunal (Enforcement Appeals) Rules 2005. On such application the Tribunal will consider whether or not to issue such a summons to enforce his attendance. By way of guidance, a witness summons is unlikely to be issued unless the Ramblers can indicate why it is thought that he can give relevant evidence, contrary to the explanations given in paragraph 9 of Mr Tompkins' statement dated 20 March 2006." [emphasis added]

11. By letter of 27 May 2006 the Association indicated that the Council would not release Mr Leader's current address and applied, purportedly under rule 18, for a witness statement by Mr Leader. I understood this to be a repetition of the application for an order requiring the Council to serve a statement from Mr Leader. Since the Association still did not say why it was thought that,

contrary to Mr Tompkins' explanation, Mr Leader could give relevant evidence, I declined to reconsider. The Association was so notified in a letter from the Tribunal Office dated 1 June.

12. By letter of 5 June 2006 Mr Fulwood stated:

> "*The Keston Ramblers Association submit that it is inadmissible that their requested provision by the London Borough of Bromley of a witness statement by the former Director of Legal and Democratic Services has remained outstanding since the 3rd March 2005 and that recourse to its requested provision under Rule 18 of the Information Tribunal (Enforcement Appeals) Rules 2005 continues to be disputed by Mr. Andrew Bartlett QC."*

13. Since the Association is acting in person and without the benefit of legal representation, I consider that I ought to interpret this further letter as an application under rule 18 for a witness summons to require Mr Leader's attendance at the hearing of the appeal.

14. Rule 18(1) provides:

> *(1) Subject to paragraph (2) below, the Tribunal may by summons require any person in the United Kingdom to attend as a witness at a hearing of an appeal at such time and place as may be specified in the summons and, subject to rule 27(2) and (3) below, at the hearing to answer any questions or produce any documents in his custody or under his control which relate to any matter in question in the appeal.*

15. The cross-reference to paragraph (2) deals with the requirement of 7 days' notice. The cross-references to rule 27 refer to the same limits on compulsion as apply in the ordinary courts of law and to the giving of evidence on oath or affirmation.

16. Rule 18(3) provides:

> *(3) The Tribunal may, upon the application of a person summoned under this rule, set the summons aside.*

17. Rule 18(4) deals with compensation for attendance and travelling.

18. This application raises for the first time the question, what test should the Tribunal apply when considering whether to issue a witness summons. The rule provides a discretion, but is silent on how it should be exercised.

19. In my judgment the proper exercise of discretion under this rule in an appeal under s57 must take account of the particular context provided by the nature and purpose of the Tribunal's jurisdiction under that section.

20. The requesters of information may be researchers, journalists or representatives of lobby groups. They may be persons who have unredressed grievances and who legitimately exploit the provisions of the Act as a step towards obtaining redress. Sometimes the requests are from people with grievances that are unreasonable or that are pursued in an unreasonable or obsessive fashion. Many appeals are brought by persons who do not have the benefit of legal representation and who may not be in a good position to judge whether the evidence of a particular witness will be relevant to the issue which the Tribunal has to determine. The wide variety of requesters and the frequent absence of legal representation suggest to me that the issue of a witness summons should not be an automatic response to a request under rule 18. Before issuing the summons the Tribunal should give some consideration to the possible relevance of the witness's evidence. If it appears that the evidence of the witness is not going to assist the Tribunal, it is unfair and unnecessary to place on the witness the onus of making an application under rule 18(3) to set the summons aside.

21. Conversely, where there is a real possibility that the evidence of the witness will be relevant to the issues in the appeal, it would be wrong to refuse to issue a summons simply because one party states, perhaps forcefully, that the evidence would not be relevant. If the applicant for a witness summons has cogent grounds for believing that the evidence will be relevant, the summons should be issued. A party should not be shut out from calling potentially relevant evidence simply because of a disputed assertion that the proposed witness has no relevant evidence to give.

22. I therefore consider that in the context of an appeal under s57 the primary consideration for the exercise of the discretion under rule 18 should be whether there is a real possibility that the proposed witness will be able to give relevant evidence which will assist the Tribunal to determine the appeal. In the absence of that real possibility, the summons should not be issued. If it is adjudged that there is a real possibility that the evidence will be relevant, it may then be appropriate to go on to weigh other factors in the circumstances of particular cases, such as the personal circumstances of the proposed witness or whether the same evidence is available from other witnesses or documents.

23. This interpretation of rule 18 sits comfortably alongside the provisions of rule 14, which empower the Tribunal to give such directions as it thinks proper to assist the Tribunal to determine the issues.

24. In my ruling of 25 May 2006 I drew particular attention to the need for the Association to specify why it was thought that Mr Leader would be able to give relevant evidence, contrary to the explanations given in Mr Tompkins' statement. The Association has not done so. Mr Tompkins' statement was unequivocal that it was he, Mr Tompkins, who dealt with the matter, and that Mr Leader was not involved. The explanation that matters were conducted in Mr Leader's name because he was the Director is credible and in accordance with everyday experience. Despite the explicit guidance offered in my previous ruling and repeated in the subsequent letter, the Association has given me no reason for supposing that Mr Tompkins' evidence may be incorrect on this point, and has put forward no reason or consideration of any kind to support the possibility that Mr Leader was personally involved and can give evidence concerning information withheld by the Council from the Association.

25. On the material at present before me, I have not reached the conclusion that there is a real possibility that Mr Leader can give evidence relevant to the issue of withheld information.

26. In the circumstances I decline to exercise the jurisdiction under rule 18 to issue a witness summons to compel the attendance of Mr Leader at the hearing of the appeal.

Andrew Bartlett QC

Deputy Chairman, Information Tribunal

7 June 2006