



Appeal number: EA/2016/ 0170

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**THE MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF HARINGEY**

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALISON MCKENNA
Mr ROGER CREEDON
Mr ANDREW WHETNALL**

**Heard in public at Fleetbank House London on 1 December 2017.
Peter Lockley counsel appeared for the Appellant, Leo Davidson counsel
appeared for the Respondent.**

DECISION

1. The appeal is dismissed. The Council is required to comply with the Information Commissioner's Decision Notice by making a response to the information request under the auspices of the Environmental Information Regulations 2004.

REASONS

Background to Appeal

2. An information request was made to the Appellant ("the Council") on 25 October 2015 in the following terms:

Please can you supply the following information:

- Full text and appendices of the Comprehensive housing options appraisal for the Noel Park Estate, prepared in 2015 by Homes for Haringey: as referred to in the Housing Investment Strategy, agreed at Cabinet, 14 July 2015, Appendix B: The Decent Homes Programme: Supporting Information, paragraph B3.*

3. The Tribunal was told that the Noel Park Estate is a turn-of-the-century planned development of 2,200 properties of which the Council owns the freehold of 1,200 properties. Almost all of the properties are subject to Conservation Area restrictions and a substantial part of the estate is subject to a Direction made under Article 4 of the Town and Country Planning (General Permitted Development) Order 1995, which imposes particularly stringent controls on external alterations. In 2014 the Council asked Homes for Haringey to review its options for the Noel Park Estate, including assessing the required physical improvements and costing them, so that the Council could adopt a strategy to manage its stock. Homes for Haringey commissioned independent reports including from a firm of architects, and then commissioned an Options Appraisal from Savills. This is the document which was treated as the subject matter of the request.

4. The Council refused the information request in reliance upon s.36 (2), 40 (2), and 43(2) of the Freedom of Information Act 2000 ("FOIA").

5. The Respondent issued Decision Notice FS50621014 on 16 June 2016, in which she directed the Council to reconsider its response and to respond to the requester under the framework of the Environmental Information Regulations 2004 ("EIRs"), which she found to be the applicable regime for this request. She did not consider whether the FOIA exemptions had been correctly applied.

6. The Council contends that FOIA, rather than the EIRs, is the applicable legal regime for considering the request and it appeals on that basis. This is the sole issue for the Tribunal.

Appeal to the Tribunal

7. The Council's Notice of Appeal dated 12 July 2016 relies on grounds to the effect that the Decision Notice was wrong to conclude that the information requested did not directly affect the environment but was nonetheless environmental information because it was inherently connected to a "bigger picture" which did affect the environment. The grounds also relied on the decision of a differently constituted First-tier Tribunal in *Black v IC*, which held that information relating to the internal fixtures of buildings did not constitute environmental information. The grounds accepted that the Options Appraisal constitutes "information on" a measure, but disputed that that measure was likely to affect the land or landscape because (a) the majority of works proposed are internal and (b) the external works are largely cosmetic changes to the fabric of existing buildings so are above the level of the ground. Where structural work was required, it would not make any visible difference to the buildings so would not affect the landscape. The proposed works were also said to present opportunities to restore features of the properties which had been subject to inappropriate degradation.

8. The Information Commissioner's Response dated 9 August 2016 resisted the grounds of appeal but took a slightly different approach to the Decision Notice. The Information Commissioner's case as set out in the Response was that there were two identifiable "measures" in play, firstly the broader measure concerning the redevelopment of Noel Park Estate (the Conservation Area Appraisal and Management Plan) and secondly, the narrower measure of the specific proposals for improvement works, prepared by the architects for Homes for Haringey and included in the Options Appraisal. The Information Commissioner considered that both measures fell within EIRs regulation 2 (1) (c) because they are both likely to affect the elements of the environment (or to protect them) and that the requested information is "*information...on*" those measures.

9. The Council's Reply dated 5 September 2016 responded to the Information Commissioner's different approach as follows: the Improvement Project and the Conservation Plan are completely different measures so that they cannot be regarded as sufficiently closely connected to form part of a "bigger picture" analysis. The information request is not concerned with "information on" the Conservation Plan but with the specific options for renovation of the Noel Park Estate.

10. The appeal was heard partly in public and partly in closed session, but both parties were present throughout. The Tribunal had both an open and a closed bundle of papers and heard evidence from two witnesses: Ms Chakraborty, who is the Council's Principal Conservation Officer, and Mr Sherrington who is the Director of Asset Management & Development of Property for Homes for Haringey, an Arms' Length Management Organisation which manages the Council's housing stock. The closed bundle contained the withheld information and some supplementary material which was revelatory of the withheld information. The information requester was not a party to the appeal.

11. The Tribunal is grateful to counsel for both parties for their helpful written and oral submissions.

The Legal Framework

12. Section 39 FOIA excludes environmental information from its ambit, so that requests for “environmental information” must be dealt with under the EIRs.

13. The EIRs regulation 2 (1) defines “*environmental information*” as “...any information in written...form on –

(a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

(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;*

(d) *reports on the implementation of environmental legislation;*

(e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

(f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).”*

14. The EIRs set out exceptions to the duty to disclose environmental information as follows:

“12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) *an exception to disclosure applies under paragraphs (4) or (5); and*
(b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

12 (2) *A public authority shall apply a presumption in favour of disclosure.”*

Powers of the Tribunal

15. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA (as applied by regulation 18 EIRs where relevant), as follows:

- 5 “(1) If on an appeal under section 57 the Tribunal consider -
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the
- 10 Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
- 15 (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

16. We remind ourselves that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

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Evidence

17. Mr Sherrington’s evidence (given in closed session) described the scope of works discussed in the Options Appraisal document. He did not think that the “man in the street” would notice any difference to some of the properties and took the view that enhancing existing properties did not have an impact on the landscape.

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18. Ms Chakraborty’s evidence (given in open session) explained that she regards “landscape” as including a townscape or streetscape, and that it referred to the public realm. She described her role in giving advice to the Council about the conservation aspects of proposed works and explained that any changes to the appearance of the area would of necessity be minimal due to its Conservation Area status.

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Argument

19. Mr Davidson, for the Information Commissioner, referred us to the Upper Tribunal’s decision in *Department of Energy and Climate Change v Information Commissioner and Henney* [2015] UKUT 0671 (ACC) and submitted that the UT’s Decision provides a “roadmap” for deciding whether the EIRs apply. This involves identifying first the measure for the purposes of regulation 2 (1)(c), second deciding whether that measure affects or is likely to affect the elements and factors referred to in regulation 2(1) (a) and (b) and third, deciding whether the information is “on” the measure.

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20. Taking that approach, the Information Commissioner’s Decision Notice concluded that the requested report is *information...on a measure* (namely the options for the future development and improvement of the Noel Park Estate) which is *likely to affect the elements of the environment, including “land” and “landscape”* as defined by regulations 2 (1) (c) and 2 (1) (a) EIRs.

21. The Information Commissioner’s submission was that alterations to the external features of buildings are capable of affecting *land and landscape*. She resisted the argument that minor or cosmetic alterations to buildings are below a *de minimis* threshold which was said by the Council to be implicit in the EIRs. She also noted that the range of options considered by the Council included works which were more wide-ranging than cosmetic alterations and internal improvements. She also submitted that the context of these works within a Conservation Area and subject to an Article 4 Direction suggested that the measure with which we are concerned may be one *designed to protect* the land and landscape within the meaning of the EIRs (although this conclusion did not feature in the Decision Notice).

22. The Information Commissioner’s case was therefore that the requested information was *environmental* by reference both to its own characteristics (proposed works to buildings and streetscape) and also, following the UT’s approach in *Henney*, by reference to its relationship to the broader measure of the redevelopment of Noel Park Estate.

23. The Council asked the Tribunal to adopt a common sense approach in finding that the proposed works to the Noel Park Estate would have so limited an impact on the land or landscape that they fell below the threshold for engagement of the EIRs. It also resisted the idea that the proposed works might be seen as *designed to protect* the environment because the object of the proposed works was renovation, whilst conservation was to be seen as a restraining factor in the context of that objective, rather than its aim.

24. Mr Lockley referred us to a number of First-tier Tribunal decisions which interpreted *landscape*, whilst accepting that they did not bind us. He asked us to note that a *landscape* has been found to involve significant scale, which approach contrasts with this case where the proposals are minor in nature. There are no reported cases on Conservation Areas, but he referred us to the decision in *Omagh District Council v IC* as an example of a first instance case in which a relatively low level impact was sufficient to engage the EIRs because of the “material effect” it had in the context of that case. He submitted that the proposals in the Options Appraisal had no comparable material effect on the Noel Park Estate.

Conclusion

25. The statutory remit of the Tribunal, as set out above, is to consider whether the Decision Notice was wrong in law. As such, we note that the refinements of the parties’ arguments that have taken place over the course of the pleadings in this case may not all be strictly relevant to our task. For that reason we have not found it necessary to reach conclusions on the new argument put forward in the Information

Commissioner's Response which did not feature in the Decision Notice. Neither party suggested that the Decision Notice was wrong in law not to have included the new point.

5 26. We have applied the "roadmap" approach outlined by Mr Lockley and referred to above and have concluded that the applicable regime in relation to this information request is the EIRs. Our reasoning is as follows.

10 27. Firstly, we take the view that *the measure* in this case is the plan for the future development and improvement of the Noel Park Estate so as to bring it up to the relevant standard. The material about this plan contained in the closed bundle and Mr Sherrington's closed evidence took us through the range of internal and external works required to achieve the "Decent Homes" standard on the Estate. We concur with the Information Commissioner that this is the "broader" *measure* within the meaning given to that word by the EIRs (*a policy, plan or programme*). We take the view that the Options Appraisal may itself also be regarded as an independent
15 "narrower" *measure* falling within EIRs regulation 2 (1) (e) (*a cost-benefit and other economic analysis...*) and this was not disputed before us. However, in any event, the Options Appraisal is in our view so closely connected with the "bigger picture" of the overall development plan that it also engages EIRs regulation 2 (1) (c) by virtue of that close association.

20 28. Secondly, we take the view that both the broader and the narrower measures we have identified above are *likely to affect the elements of the environment, including "land" and "landscape"* as defined by regulations 2 (1) (c) and 2 (1) (a) EIRs. We adopt Ms Chakrobarty's approach of including within the scope of an urban *landscape* the visible features of a "public realm". Such an approach naturally
25 includes green spaces, street furniture and so on. However, we also conclude that, in the particular context of a Conservation Area, the features of the "public realm" included in the *landscape* should be viewed holistically, to include the external appearance of houses which are subject to planning controls in order to protect their uniformity and distinctive heritage features.

30 29. Thirdly, we take the view that the Options Appraisal requested is *information...on* the measure. We understand it to set out the possible means by which the broader measure may be implemented in the specific context of the Noel Park Estate. It is one of several documents designed to inform the Council's decision-making in respect of the development and improvement of the Estate.

35 30. We agree with the parties that works of a purely internal nature would not affect the *landscape* and so would not fall within the remit of the EIRs. Turning to the proposed external works, we do not dispute that there must be a common sense *de minimis* threshold for the engagement of the EIRs, but it is difficult to determine where that threshold lies, otherwise than in the fact-specific context of each case. As
40 a matter of judgement in this case, we conclude that the impact of the proposed external works (as described by Mr Sherrington in closed evidence) does cross that threshold. We have taken that view because, as even relatively minor alterations to the external appearance of buildings subject to Conservation Area status are

controlled with the objective of preserving their heritage features, the tolerance of changes to the exterior of such buildings is low. We take the view that in such a landscape, the *de minimis* threshold must also be low in order to accommodate that particular sensitivity. The scope of the proposed works would, in our view, be likely to affect the external features of the houses on the Estate in a way which is more than minimal, so that the threshold for the engagement of the EIRs is crossed.

31. We conclude that there is no error in the Information Commissioner's Decision Notice and the Council's appeal is dismissed. The Council is accordingly required to respond to the request under the auspices of the EIRs.

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(Signed)

15 **ALISON MCKENNA**
PRINCIPAL JUDGE

DATE: 27 January 2017