



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2016/0308

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FER0628737
Dated: 22 November 2016**

Appellant: Steven Jones

Respondent: The Information Commissioner

Heard at: Norwich

Date of Hearing: 4 April 2017

**Before
Chris Hughes
Judge**

and

Anne Chafer and Marion Saunders

Tribunal Members

Date of Decision: 8 April 2017

Attendances:

For the Appellant: in person

For the Respondent: did not attend

Subject matter:

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22 November 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings has lived, for many years, at the end of a “no through road” in rural Norfolk. Swamp Road which has been maintained at public expense stops a short way to the west of his property, he maintains a stretch of private road in front of his house and a short way to the east the roadway comes to an end at the edge of Brewers Green, an area of common.
2. In 1998 following “highway research” Norfolk County Council (“the Council”) concluded that across Brewers Green from the end of Swamp Lane was an ancient highway and therefore added a continuation of Swamp Lane across Brewers Green as a highway maintainable at the public expense to its records of highways. (email the Council to the Appellant 6 July 2016 bundle page 106). In about 2007 the Council constructed across Brewers Green a “2.5m wide breedon gravel footway laid 45mm thick with timber edging” (bundle page 110; Norfolk County Council construction plan supplied to the Appellant in about March 2017 by South Norfolk Council).
3. In recent years the Appellant has been inconvenienced and annoyed by vehicles relying on computerised navigation systems incorporating information from the Council attempting to use Swamp Lane as a route east across Brewers Green and having to turn round when they realise that there is no way for vehicles to cross the common. He examined the Council’s highways map on 21 July 2014 and has subsequently has disputed the status of the part of Swamp Lane which the Council states crosses Brewers Green with the Council (letter 26 September 2016 bundle pages 64 – 83 Council to the Respondent Information Commissioner (the “ICO”)). After correspondence he made requests under the Freedom of Information Act 2000 which were replied to on 27 January 2016, 10 February 2016 and 16 February 2016

for information about this pathway. He made a further request on 10 February 2016 (the subject of this appeal):-

“Please can you supply me with the following information under this “Freedom of Information Request” all the questions relate to a section of Brewers Green a registered common CL190. Roydon, Norfolk, which is approximately between IP22 5FY to IP22 5QR. Which is 42 metres of tarmac outside Birds Cottage and The Sycamores and 85 metres of new gravel path in between Swamp Lane to Snow Street in Roydon as highlighted on the enclosed map. The period in question is only around when these works were done, which is around 2007.

- 1. Can you send me full details of the planning Consent which is needed for these works.*
- 2. Can you send me full details of the Approval of the Planning Inspectorate for these works on registered common CL190.*
- 3. Can you send me full detail of all plans, correspondence, you have regarding these works?*
- 4. Can you tell me what notice Roydon Parish Council had with these works?*
- 5. Can you tell me who authorised these works on Registered Common CL190.*
- 6. Can you send me copies of any other internal details, correspondence, letters you have regarding these works.”*

4. The Council replied in a detailed narrative explaining its understanding of the position (email 2 March 2016, bundle pages 38-42). Crucially it explained its understanding of the position. The carrying out of the footpath works after 1 October 2007, in this case the creation of a loosely surfaced footpath “for public use where the path is in keeping with the character of the common and facilitates a legitimate use of the common” appeared not to require the consent of the Secretary of State under s38 of the Commons Act 2006. Before that date the relevant legislation was section 194 of the Law of Property Act 1925 which required Ministerial consent for “the erection of any building or fence, or the construction of any other work, whereby access to common Land is prevented or impeded”. It explained that its records were limited and it was “unable to find plans, general correspondence or correspondence with Roydon Parish Council about the works”. The email suggested contacting the Parish

Council directly. The response also provided maps of the common and the highways and an explanation of its view of the interaction of laws relating to highways and common land and its view that the works carried out had not required consent.

5. On 8 March in response to a further request the Council explained how its records management system worked:-

“Information of this nature is only retained for seven years before being securely destroyed. This scheme took place at the end of 2008, and therefore, the information that you require in respect of questions 1, 3 & 5 was destroyed at the end of 2015.

Approval of the Planning Inspectorate was not required as this area does not form part of the Common.

The construction of the access did not take place on The Common. However as part of the scheme delivery, the Local Member and Parish Council would have been made aware. We cannot provide you with an exact date they were made aware, as this information has been destroyed.

The Complaint to the ICO and the Appeal

6. The Appellant was dissatisfied with the response to the request of 10 February. Following an internal review the Council communicated with the Appellant on 26 April confirming that both tarmac works and the gravel path were permitted developments for the Council to carry out as a Local Highways Authority and no approval by the Planning Inspectorate was required for these works (this answered parts 1, 2 and 5 of the request) and the records retention policy of the Council meant that no records were retained (parts 3, 4 and 6 of the request).
7. The Appellant was dissatisfied and complained to the ICO. Following an investigation to determine whether there had been compliance with the Environmental Information Regulations (“EIR” the relevant legislation for this sort of information) the ICO issued her decision notice. This considered the extent to which the Council held information within the scope of the request (decision notice paragraph 14). She reviewed some of the background information about the Common. She reviewed the Council’s explanations as to how it kept its records and the searches it had carried out (DN paragraphs 26-31), its record retention and destruction practices (DN 32-38). In the light of this information and the assurances given she concluded on the balance of

probabilities that no undisclosed records were held and the Council had complied with its obligations under EIR.

8. In his appeal the Appellant challenged the Council's interpretation of the legality of the works it had carried out. The works which had been carried out required consent and would have required authorisation. He argued that there had been a cover up, that Swamp Lane was not an ancient highway crossing Brewers Green and:-

“The constant denial that they have no information on the building of this road over this registered common is utter rubbish, when it was only completed less than 9 years ago. I have been asking for details of this road since 2010, but have got nowhere with them.”

9. In her response the ICO maintained the position set out in her decision notice. She emphasised that the issue was whether as a matter of fact information was held. She noted that even if the Appellant was correct in his claim that consents should have been obtained the question was whether the Council held the information at the time of the request. She noted the searches that the Council had carried out and remained satisfied as to the adequacy of those searches; she had legitimately accepted the assurances given by the Council.
10. In his extensive oral presentation the Appellant was determined (despite the promptings of the tribunal) to demonstrate the history of the Common and, using old maps and aerial photographs, to prove to his own satisfaction that no “ancient highway” had existed on the Common along the line that the Council had built the gravel path. He very reluctantly accepted that he knew that the Council had not applied for consent for the works to a Minister or the Planning Inspectorate. He drew attention to the plan which he had very recently obtained (bundle page 110) as proof that further records were held by the Council. On probing by the tribunal he stated that he had obtained the plan from the microfiche records of South Norfolk Council – the district council, not from Norfolk County Council. He argued that “I’ve got stuff from 1637, this is only from 2008. When it was put to him that the Council’s records policy allowed them to no longer retain records of this age his view was “they can’t carry out so much work on a registered common”. He explained that he was disturbed by the traffic coming along Swamp Lane believing it could cross the Common and believed that he was helping to protect the Common from development.

Conclusion and remedy

11. While the Appellant has a very strongly held belief that the Council acted unlawfully in carrying out the works it did, this is not evidence that the Council holds the records he has sought. Indeed the fact that the Council believed that it could lawfully carry out the works under its powers as a highways authority would clearly mean (as the Appellant was very reluctant to accept) that it would not have records of formal consents from the Planning Inspectorate and others. It is not the role of this tribunal to adjudicate on whether the Council was correct in its view and it does not do so. The Council, acting on the basis it did, treated the works as part of its general functioning as a highways authority and treated the records of the works in the usual way. Its retention policy meant that it would not hold records of the works at the time that the Appellant made the request for this information in February 2016.
12. The Appellant has advanced no evidence to show that the facts the ICO relied upon in coming to her conclusion were incorrect. He has shown no error in law in her decision notice. The appeal is dismissed.
13. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 6 April 2017

Promulgated 7 April 2017