



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

Appeal Reference: EA/2017/0268

**Decided without a hearing
On 9th July 2018**

Before

**KAREN BOOTH
JUDGE**

**PAUL TAYLOR AND JEAN NELSON
TRIBUNAL MEMBERS**

Between

GLENYS SENIOR

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decided on the papers on 9th July 2018 (following an adjournment on 26th February 2018 to seek further information) .

DECISION AND REASONS

1. For the reasons set out below, the Tribunal allows this appeal and substitutes the following decision notice for that issued by the Respondent on 23 October 2017.

“Barnsley Metropolitan Borough Council (“BMBC”) does hold information requested by the Appellant.

BMBC has failed to communicate that information to the Appellant.

BMBC has therefore failed to deal with the request for information in accordance with sections 1(1) of the Freedom of Information Act 2000 (FOIA) and has also failed to comply with sections 10 (time for compliance with request) and 17 (refusal of request).

BMBC is required to take the following steps within 35 days:

(a) re-send to the Appellant the information provided to her under cover of BMBC’s letter of 17/4/2018 with the names of the persons she requested unredacted; or

(b) give the Appellant a notice that complies with section 17 of FOIA (other than as to the time limit specified in subsection (1)).”

Background to the appeal

2. The Appellant is the resident and owner of a house in Mount Pleasant, Worsbrough Dale, Barnsley, which she and her late husband purchased from Barnsley Metropolitan Borough Council (“BMBC”) in 1986. Prior to this, the Appellant and her husband had been tenants of that property. The Appellant’s husband died in 2008. The Appellant asserts that, as tenants, they had rights of access over adjoining property to allow them to inspect and maintain their boundaries, by virtue of an 1894 Indenture. When they purchased the property in 1986 they believed that it came with the benefit of those rights of access. Consequently she believes that those rights of access were preserved (or should have been preserved) when the adjoining property was sold by BMBC in 2003. The nature of the legal interest that was transferred in 2003 is unclear. But the current “owners”, Barnsley Community Solutions (also known as “LIFTCo”, the public private partnership set up to develop and maintain community based primary health and social care premises in the Barnsley area) refute that claim. They say that her only rights over their property are as set out in the conveyance dated 22/8/1986 made between BMBC and the Appellant and her late husband, which did not grant/preserve any rights of access for the purpose of maintaining their boundary walls.
3. A record of the 1894 indenture is apparently held at the West Riding History Centre in Wakefield. The Appellant believes that the original indenture was deliberately and unlawfully destroyed or misplaced so that the adjoining land could be transferred in 2003 free of any such encumbrances.

4. The Appellant's property and the adjoining land were originally part of a former school site. The Appellant's husband worked in BMBC's education department and, in that role, he had to liaise with the then estates department, which was responsible for the facilities that now exist on the adjoining land. According to the Appellant, there were many "spats" between her husband and a particular individual in the estates department and she alleges that this resulted in a personal vendetta being waged against her husband, which is linked in some way to the missing Indenture and the past and current disputes relating to her property.

The request for information

5. The Appellant emailed her request for information to BMBC on 1/3/2017. After setting out a brief background to her request, her request for information read as follows:

"The information I request is the names of persons involved in the conveyancing in 2003, either at BMBC, but more importantly the PCT to ask if they were given or made aware of this indenture, which states the covenants of the land and the ones relating to my property's rights.,"

To set this in context, the remainder of her email is as set out below:

"This is to determine if the denial of such a document exists by the landlord is true, and if so why have they not been informed in the transfer of land that a Right of Way exists for our property. I am constantly being harassed by the owners as to what I should and should not do when I need to inspect my property, which involves stepping on to their premises, and there are no conditions attached to my Right of Way. The easiest option has been not to enter but this can no longer continue. And evidence of the covenant that they have to honour needs to be found.

This leads to my request for the relevant information as stated above."

6. BMBC responded by letter dated 9//3/17. They informed the Appellant that, following a search of their records, no relevant information had been found. The Appellant was advised to contact NHS Barnsley Clinical Commissioning Group ("BCCG") as the Barnsley PCT ceased in April 2013. BCCG subsequently informed the Appellant that they do not hold PCT information and she was advised to pursue her request with Community Health Partnership.

The complaint

7. ON 14/3/2017 the Appellant complained to the Respondent about BMBC's response to her request.

The Respondent conducted an investigation into the searches that had been conducted by BMBC for the requested information (i.e. the names of persons involved in the conveyancing in 2003 at BMBC and the PCT). The questions

raised with BMBC are set out on page 52 of the bundle and BMBC's response is at pages 58-61 of the bundle.

8. On 23/10/2017, the Respondent issued a decision notice (Reference: FS50672502) which concluded that, on the balance of probabilities, the information requested by the Appellant was not held by BMBC and that BMBC was not required to take any further steps.

The appeal and the appeal grounds

9. On 4/11/2017, the Appellant appealed to the First-Tier Tribunal against the Respondent's decision notice.

Her grounds of appeal can be summarised as follows.

- The search for names linked to the 2003 conveyancing transaction was insufficient and should have revealed the names of two specified employees of Liftco and that a search of payroll and a specified pensions authority had not been performed.
- The 1894 Debenture had been unlawfully destroyed, which was also a "data breach". She is a victim of "corporate bullying" and "an abuse of power" aimed at ensuring that the adjoining land was transferred free from the rights of access allegedly attaching to her property.

She stated that the outcome she was seeking was "whatever the Tribunal thinks appropriate", adding "I am seeking justice, not money."

10. The Respondent submitted a response to the appeal (pages 17-22 of the bundle) on 5/12/2017. She correctly pointed out that the Appellant had only requested the names of the persons involved in the conveyancing and that the whereabouts of the Indenture was, therefore, outside the scope of the request. She summarised why BMBC's searches were considered to be adequate but acknowledged that the Tribunal might wish to seek further explanation/clarification from BMBC. The Appellant replied on 11/12/2017 (pages 22A -22B of the bundle). Her response is summarised in her concluding paragraph.

Our task and the issues we had to decide

11. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
 - (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 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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

12. The issue we had to decide was whether the Respondent had correctly concluded, on the balance of probabilities, that the Trust did not hold any records that revealed the names of the officers in BMBC and/or the PCT who dealt with the 2003 conveyancing transaction.

In her decision notice and submission, the Respondent correctly explained that the case law relating to the issue of whether information is held by a public authority has firmly established that the test to be applied by the Respondent is whether, at the time of the request and on the balance of probabilities, the authority held information that fell within its scope. On a complaint by an applicant, the Respondent will investigate the adequacy of the search made by the public authority. Where the issue of whether information is held comes before the Tribunal, it is our task to review the Respondent's conclusions and we must also decide the issue on the balance of probabilities. We cannot demand certainty. We will need to be satisfied that the public authority has carried out a reasonable search (i.e. a search that has been conducted intelligently and reasonably). An exhaustive search conducted in unlikely places is not required. We need to consider all relevant factors, including the scope of the search and the rigour and efficiency with which it was conducted.

13. It was not within our remit to decide whether the Appellant's belief that her property continued to benefit from the rights of access that she and her late husband had apparently enjoyed as tenants was correct in law. And it was not within our remit to decide or comment on her unsubstantiated allegations that (a) the 1894 Indenture had been deliberately destroyed or lost, and (b) this had come about as a result of a personal vendetta against her late husband and the "corporate bullying"/abuse of power" to which she referred.

14. We convened on 26/2/2018 to determine the appeal on the papers. The Appellant and the Respondent had elected to have the appeal determined on the papers. After considering the evidence before us, we agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

Our decision and reasons

15. After reviewing the Respondent's conclusions, we were *not* satisfied that the search had been sufficiently thorough or rigorous. We noted in particular, for example, that the search terms used did not appear to include the former and current addresses of the Appellant's property. We decide to adjourn in order to seek further information/explanations from BMBC. We issued case management directions on 7/3/18 requiring BMBC to provide specified further information within a specified period.

16. In a subsequent undated letter, BMBC sent a detailed reply to our questions. Of particular relevance was the revelation that they had re-examined a handwritten conveyancing register and had found what appeared to be a relevant entry that had not previously been noted. That entry had identified an electronic file that was still in existence. In a subsequent letter dated 17/4/18 they confirmed that the electronic file included copies of letters and memos relating to the 2003 conveyancing transaction that included names of persons within BMBC who dealt with the conveyancing and the surname of a person employed by the solicitors acting for the PCT in that matter. They provided copies of those records to the Tribunal, the Appellant and the Respondent. However, they redacted the names and identifying particulars of those persons, asserting that they were entitled to withhold that information in reliance on section 40(2) (exemption relating to personal information) of FOIA for the reasons stated in their letter.
17. The Respondent provided a submission in response to BMBC's letter. In view of BMBC's responses to the Tribunal, she conceded that the appeal should be allowed. She suggested that the appropriate course of action for the Tribunal to take was to require BMBC to either disclose the withheld information or to issue a fresh response to the request. We agreed. In the event that BMBC does not disclose the withheld information and issues a fresh response, the Appellant may make a fresh complaint to the Respondent if she considers that her request has not been dealt with in accordance with Part 1 of FOIA.
18. On 10/6/18, the Appellant provided a late response to BMBC's letter (which we nevertheless considered). This referred to her related problems with the Land Registry and her desire to see BMBC being punished for their actions, neither of which were relevant to the decision we had to make.
19. We re-convened on 9/7/18 to determine the appeal. Our decision was to allow the appeal and to substitute the decision notice set out in paragraph 1 above for the decision notice issued by the Respondent on 23/10/2017.
20. It seemed to us that the Appellant's request was misconceived. Although she only asked to be provided with the names of the persons who dealt with the 2003 conveyancing, we suspect that what she really wanted was access to any information that might have thrown a light on the issue of whether the rights that she enjoyed as tenant were or should have been preserved when she and her late husband purchased their property in 1986 and whether the land that was transferred in 2003 should have been transferred subject to those rights. These are complex legal issues that are likely to require the advice of a specialist property lawyer. However, the Appellant's request was clear and unambiguous, and it was not for BMBC, the Respondent or the Tribunal to consider the provision of information that fell outside the scope of her request.

It was somewhat inevitable that the discovery of recorded information that revealed the names sought by the Appellant would lead to a refusal to provide that information in reliance on section 40(2). BMBC has suggested that the information they have now disclosed may be more helpful to the Appellant than the information she requested, and it is hoped that that is the case.

Signed: Karen Booth

Judge of the First-tier Tribunal

Date: 9th July 2018