



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

Appeal Reference: EA/2017/0257

**Decided without a hearing
On 14 May 2018**

**Before
KAREN BOOTH
JUDGE**

**ROSALIND TATAM and DAVE SIVERS
TRIBUNAL MEMBERS**

Between

RUSSELL MURRAY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

LANCASHIRE COUNTY COUNCIL

Second Respondent

Decided on the papers on 14 May 2018 at Field House, London

DECISION AND REASONS

1. The decision notice issued by the Respondent on 19 September 2017 (reference: FER0652996) is in accordance with the law and the appeal is dismissed.

Background to appeal

2. This appeal relates to an application for “a Definitive Map Modification Order under the Wildlife and Countryside Act 1981 for the Addition of a Public Footpath from two points on Public Footpath 5 Wilpshire.” As the owner of potentially affected property, the Appellant has an interest in that application. The importance of that application (and the linked matter referred to below) is explained by the Appellant in the final paragraph of the first page of his letter at page 42 of the bundle of evidence.

The request for information

3. On 26/8/2016, the Appellant made a request to LCC for information relating to that application. The request was made in the following terms:

“Please provide me with all information regarding the above application:

a) A copy of all recorded information held by Lancashire County Council (LCC). This shall include application documents and associated communications along with a copy of all related communications including any application to modify the application route received by and sent out by LCC along with drafts, emails, notes and recordings of telephone conversions [sic].

b) The name of the LCC officer in charge of the application and the progress of the application.”

4. The Appellant made a related request for information on 16/8/16, which is the subject of a linked, but separate, appeal (appeal ref: EA/2017/0256 and ICO ref. FER0652960) which we also decided on the papers on 14/5/2018.
5. LCC sent a preliminary response on 2/8/16 followed by a further response on 14/9/16. They correctly treated the request as a request for information under the Environmental Information Regulations 2004 (“EIRs”).

With the latter, they provided a copy of an Application for a map modification order. They withheld the other information that they held in reliance on regulation 12(4)(d) (material still in the course of completion/unfinished documents/incomplete data). They informed the Appellant that the report on the application was due to be presented to the Regulatory Committee on 28/9/16 and was in the process of being finalised (we noted that the Committee rejected the application).

6. The Appellant responded on 15/9/16 saying that LCC had provided the wrong Application (application 804/567) rather than the one he was seeking (804/565) and disputing the application of regulation 12(4)(d). He asked them to treat his email as a formal complaint. Despite various reminders, he did not receive any further substantive response prior to his complaint to the Respondent, although he did receive copies of LCC's "Access to Information Policy 2016 and its complaints procedures.

The complaint to the Information Commissioner

7. The Appellant made a complaint to the Respondent on 29/10/2016 about LCC's handling of his request.
8. On 22/12/2016 LCC's Information Governance Team ("IGT") provided the Appellant with a copy of the correct (original) application with some redactions of information relating to third parties. On 26/1/2017 they sent the Appellant a CD containing what they said was the remaining information relating to this request.
9. In his letter of 10/2/17 to the Respondent, the Appellant complained to the Respondent about the following matters:

File 001 – application for order and certificate of service
Parts of addresses on the applicant route had been redacted (allegedly contrary to legislative requirements) whereas *his* address (not on the route) should have been redacted

RM Files

Files RM 8 and 9 (user evidence forms)

Parts missing and substantial redactions. Several pages being poorly printed and illegible in part/whole.

General –

The Appellant was unclear as to why LCC had delayed providing the information.

He considered that more information was held by the Council. For example, information provided informally before the EIR request was submitted had not been resent or referred to.

10. The Respondent's case worker took those (and other) matters up with LCC in his detailed and lengthy letter dated 17/3/17 (pages 233-239 of the bundle). LCC's IGT officer responded to those queries on 18/4/17 (pages 257-262). He advised that no information had been withheld under section 12(4)(d). He also advised that the search undertaken was a search of the electronic folder for the relevant DMMO, within the Public Rights of Way path files, as all relevant information would be held in that folder. He added that Public Rights of Way files are held on servers (not manually) and not on hard drives of laptops/PCs and that emails relating to those files are not left in mailboxes. He advised that all information held had been provided and that an attempt would be made to replace copies of any illegible information with better copies if possible

(although he did point out that Mr Murray had not identified the information concerned).

11. The Respondent's case worker responded to LCC's letter on 7/6/17 (pages 283-285). He requested an update regarding the provision of better copies of some of the information. He requested sight of the unredacted copies of the redacted information provided to the Appellant. He said that it was evident in his view that LCC had considered far more evidence in its consideration of the application than had been disclosed (citing references to information that he considered must be held). He queried the basis for redacting the personal data of relevant LCC officers.
12. LCC's IGT officer responded on 27/6/17 (pages 287-288). He said he believed that he had identified the illegible information and confirmed that he would check this with the Appellant and provide better copies if legible information was held. He agreed to provide unredacted copies of the redacted information to the Respondent. He explained the reasons for redacting the personal information relating to the council officers. Most significantly, he advised that, after chasing up the relevant LCC department, an additional file held by legal services which contained a considerable amount of additional and potentially relevant information had been found and would be reviewed and provided to the Appellant (subject to any applicable exemptions). He apologised for LCC's failure to find that information earlier.
13. The communication at page 293 indicates that the additional information was sent to the Appellant on 14/8/17. LCC advised that the Appellant had not clarified which illegible information he was complaining about and that they had therefore had to make a guess as to the documents concerned, which would be re-sent.

The Information Commissioner's decision

14. On completion of the investigation, the Respondent issued her decision notice dated 19/9/17 (Ref: FER0652996). She decided as follows:
 - it was correct to apply regulation 13 of the EIRs to (a) the addresses and the identity of individuals who provided evidence for the DMMO consideration and (b) the identities and contact details of [LCC] officers, other than a Director, a Principal Lawyer and a Public Rights of Way Manager;
 - on a balance of probabilities, no further information that fell within the scope of the request was held by LCC;
 - LCC had failed to comply with the requirements of regulations 5(2) and 11(4) and (5) in responding to the request for a review;
 - LCC should take certain specified steps within 35 days; that is, to re-disclose to the Appellant copies of the correspondence previously disclosed but with the names of the Director, the Principal Lawyer and the Public Rights of Way Manager unredacted.

The appeal to this Tribunal

15. On 17/10/17 the Appellant appealed to this Tribunal against the Respondent's decision notice.
16. His original grounds of appeal are set out on pages 25-36 of the bundle (although some points relate to the linked appeal referred to above). The summary of his appeal grounds is at page 25:

Appeal against Respondent's decision –

- not to require LCC to comply with regulation 11 of the EIRs;
- not to require LCC to provide clear copies of information to replace poor quality copies of information;
- that, on the balance of probabilities, LCC had provided all of the information which it holds to the Appellant.

His desired outcome (page 36) reflected those points.

17. The Respondent submitted a detailed response to the appeal on 27/11/17 (pages 95a-95l). LCC submitted a very brief response, agreeing with the Respondent's decision (pages 122-123).

The Appellant submitted further responses, the last of which was his (substituted) detailed and final written submission of 3/5/18. This was the focus of our attention as this was his "last word" on the matter and drew together his previous arguments. That submission covered both this appeal and the appeal relating to the linked decision notice referred to above. The relevant part of paragraph 0.07 of that document summarises his 3 grounds of appeal for this case, which were as follows:

- On a balance of probabilities, LCC had not provided all of the information that it held. In the linked appeal referred to above, this was the sole ground of appeal and the Appellant used the following arguments for both cases:
 - LCC's initial reliance on regulation 12(4)(d) was a deliberate tactic to delay providing the information requested. It was a means to ensure that the Appellant did not receive "inconvenient information that could be used at a review, regulatory committee or suchlike, for the information in question may affect the Authority's preferred outcome." (paragraph 0.18). That tactic is central to the balance of probabilities argument as it indicates a lack of willingness to comply with the EIRs and a lack of reliability and integrity (paragraphs 0.09 and 3.06).
 - The Respondent never received confirmation from LCC that LCC was no longer relying on regulation 12(4)(d). The Respondent did not share the outcome of its investigation into the initial reliance on that regulation with the Appellant.

- The Respondent took LCC’s assurances that they held no further information at face value “without adding compelling facts to the scales of her balance” (paragraph 3.05).
- The Respondent should have required LCC to comply with regulation 11.
- The Respondent should have required LCC to provide clear copies of information to replace poor quality copies of information.

18. At several junctures in that submission, the Appellant requested confirmation that the additional evidence he submitted with it (and previously) had been added to the bundle. As I did in our decision relating to the linked appeal, I confirm that we considered all of the evidence submitted to the Tribunals Service by the Appellant.

19. All three parties had elected to have the appeal decided on the papers rather than attended an oral hearing. After considering the evidence before us (which included very detailed submissions from the Appellant and the Respondent), 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 task and the issue we had to decide

20. 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.

21. The issues we had to decide were:

- Issue (a)** - whether the Respondent had correctly concluded that no further relevant information was held;
- Issue (b)** - whether the Respondent’s decision notice should have required LCC to comply with regulation 11;

Issue (c) - whether the Respondent's decision notice should have required LCC to provide clear copies of information to replace poor quality copies of information.

We did not need to need to consider the regulation 13 points or the failure by LCC to comply with the time limit specified in regulation 5(2) as neither was in issue.

Our decision and reasons

Issue (a)

22. 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.
23. As regards LCC's initial reliance on regulation 12(4)(d), it was not within our remit to consider the Appellant's unsubstantiated allegations that LCC had cited that exemption with the deliberate intention of delaying the provision of relevant information. We did not accept that the initial reliance on regulation 12(4)(d) indicated a lack of willingness to comply with their legal obligations under the EIRs.
24. A public authority is entitled to withdraw its reliance on an exemption whilst a complaint is being considered by the Respondent (and may also cite exemptions that it had not previously relied upon).
25. In his appeal (page 29), the Appellant stated: "I can show clear evidence that information is still being withheld". However, no such evidence was provided to us. We agreed with the Respondent's conclusion that, on the balance of probabilities, further information was not held.
26. We noted the detailed and searching questions that had been raised by the Respondent with LCC and LCC's responses (as detailed above). We noted LCC's explanation about which electronic file the information would have been expected to have been located in and we considered that explanation to be logical and credible. Although further information was subsequently discovered in another file held by legal services and should have been located sooner, we viewed its belated discovery and communication (and the related apology) in a

positive light and not as an indication that LCC was trying to withhold relevant information.

27. With reference to the second bullet point in paragraph 17 above, we rejected the Appellant's view that LCC had a motive to withhold information. The DMMO was not in fact made (paragraph 59 of the Respondent's decision notice – page 12 of the bundle), which was the Appellant's desired outcome and thus no further disclosure of "inconvenient information" would have assisted his case at Committee. We also noted that the Appellant seemed to have accepted by December 2017 that he had received most of the information he had requested (page 99: "Now that it is likely I have received the most part of the information requested,").
28. On the evidence before us, we were satisfied that LCC had conducted a reasonable search of the records where the information would be likely to be located and that the Respondent had properly investigated the adequacy of the search. We noted (as we did in the related appeal) that the Appellant had previously complained to the Local Government Ombudsman about other matters of concern involving LCC's public rights of way team and, in 2016, was awarded compensation. In our judgement, this would be likely to have led to increased care and caution on the part of LCC when searching for requested information and supports our conclusion based on the balance of probabilities.
29. It has been accepted by all parties that LCC failed to comply with the EIRs time limits. It did not follow from this that their searches for information were inadequate.

Issue (b)

30. The Appellant's arguments with regard to this issue are summarised in paragraphs 1.01 to 1.16 of his final submission.

Regulation 11 provides as follows:

11 Representations and reconsideration

- (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.
- (2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.
- (3) The public authority shall on receipt of the representations and free of charge—
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

31. The Respondent decided that LCC failed to comply with the requirements of regulation (4) and (5) but she did not require LCC to take any steps to rectify this. We decided that the Respondent's decision was correct in that respect.

32. LCC originally relied on regulation 12(4)(d) to withhold the information requested (other than the application for the DMMO). After receiving the Appellant's complaint, LCC (albeit in breach of the relevant time limits) subsequently provided information within the scope of the request in various tranches. By 26/1/2017 LCC had clearly reconsidered their initial decision to rely on regulation 12(4)(d), despite not having specifically informed the Appellant of this. In their letter of 18/4/17, LCC confirmed to the Respondent that they were not withholding any information under that regulation. The Respondent was under no obligation to investigate the initial reliance on regulation 12(4)(d). That would have been a waste of its resources given that it was no longer an issue.

33. Section 50 of the Freedom of Information Act 2000 (FOIA) empowers a person to apply to the Respondent if he/she considers that a request for information has not been dealt with in accordance with Part I of FOIA or the EIRs. On receiving an application under that section, the Respondent must make a decision *unless it appears to him/her* that (amongst the things) the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45 of FOIA.

In our judgement, the Respondent had correctly decided that she could make a decision in this case because, after making relevant enquiries, it was clear that LCC had considered the Appellant's complaint and decided (by 26/1/2017, some 8 months prior to the Respondent's decision) that information previously withheld under regulation 12(4)(d) could be provided. The Appellant had, therefore exhausted the complaints procedure in that respect and the only outstanding issues were whether any further information was held (and whether better quality copies of some information were available).

It would have been pointless for the Respondent to have required LCC to issue a notification under regulation 11(4) and (5) in September 2017, long after LCC had changed its mind about the application of regulation 12(4)(d). The relevance of that exemption had ceased to be an issue well before the Respondent's decision was made. As mentioned above, a public authority is entitled to change its mind following a complaint to the Respondent about the application of an exemption (and/or to rely on different exemptions). The Respondent had correctly concluded that LCC had failed to comply with regulation 11(4) and (5) but had decided not to require any steps to be taken to rectify that breach. The Appellant has cited a 2010 decision made by the Respondent (ICO ref. – FER0311833 2010), in which the Respondent decided that the public authority had failed to comply with regulation 11(3) and 11(4) and required the public authority to undertake an internal review which complied with regulation 11(3). It is for the Respondent to decide in each case where breaches of the requirements have occurred what, if any, steps it requires the public authority to take to remedy those breaches. In this case we were satisfied that the Respondent had correctly decided not to require a notification to be provided when the initial reliance on regulation 12(4)(d) had been dropped some considerable time prior to the issue of the Respondent's decision

Issue (c)

34. In paragraph 27 of his detailed appeal grounds submitted on 17/10/17 (page 29 of the bundle) the Appellant referred to "examples" of illegible documents", copies of which he provided at attachment 14 (pages 63 to 68 of the bundle). Those pages are clearly from the "evidence of use on foot" claims that were submitted in support of the DMMO application.

Prior to this, LCC had mentioned on a number of occasions that they were not clear as to which information the Appellant considered to be illegible. There is no evidence within the bundle of evidence that indicates that the Appellant ever provided any clarification in that respect.

35. In his letter of 14/8/18 to the Appellant with the 3 CDs (page 338), LCC's IGT officer made the following comment "... I am still trying to provide copies of documents previously supplied that you state were illegible. However, I would be grateful if you would provide me with further information as to which documents these were to assist me." But in an email of the same date (page 293) to the Respondent's case worker he said: "With regard to the illegible documents, [the Appellant] has never provided us with any clarity as to which documents he is referring to. I have therefore had to guess which documents these are and will send them out also."

36. On 29/12/17 (unnumbered page following page 338), LCC's information officer wrote to the Appellant and referred to the letter of 14/8/17, asserting that clearer (paper) copies of the relevant information had been posted to him (but not saying when) but that he understood from the Respondent's caseworker that the Appellant had claimed not to have received them. Under cover of that letter he enclosed a CD containing further copies of that information.

Hard copies of that information are included in the bundle of evidence immediately after the letter of 29/12/17. The information consists of 31 “Evidence of use on foot” forms with redactions, which appear to be fully legible. They include legible copies of the documents at pages 63-68. In paragraph 3.11 of his final submission of 13/5/18 the Appellant makes the following comments, apparently in relation to those forms (which he refers to as User Evidence Forms (UEFs)): “I understand that there were about 28 of these original UEFs. The Council has not provided me with a single copy of the original UEFs in response to my [request for information] dated 26 August 2016”.

37. It was not clear from the evidence before us whether LCC had, as claimed, provided that information before 29/12/2017. But as it was clear to us that it was communicated to the Appellant on that date at the latest (despite what he said in paragraph 3.11 of his final submission) and he has not claimed that it is not the information that he was seeking better copies of, his third ground of appeal was no longer an issue and no further steps need to be taken by LCC in that respect.

Conclusion

38. For the reasons set out above, we decided that the Respondent’s decision notice was in accordance with the law and we therefore dismissed the appeal.

Signed: Karen Booth

**Judge of the First-tier Tribunal
Date: 3rd August 2018**

Date Promulgated: 6th August 2018