First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0019

Heard at Oxford
On 30 May 2018

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS MELANIE HOWARD AND NARENDRA MAKENJI

Between

ALEX TAYLOR

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

1. This is the appeal by Mr Alex Taylor against the rejection by the Information Commissioner (the Commissioner) on 16 January 2018 of his complaint that the Vale of White Horse District Council (the Council) had wrongly refused to disclose certain information to him under regulation 5(1) of the Environmental Information Regulations 2004 (EIR). The Council has supplied a good deal of information but says that it does not hold any more. Mr Taylor disputes that.

2. Mr Taylor opted for an oral hearing. The Commissioner did not attend. The Council is not a party to the appeal.

The requests

3. Mr Taylor made two requests of the Council **[84]** and **[85]**. On 25 October 2016, he made this request:

> '*Under the freedom of information act can you supply all the information you have relating to planning, planning applications, refusals, planning enforcement, breaches of planning, building control notices and everything else you have relating to the properties at 2, 4, 6 and 6a High Street, Steventon from 1964 …*'

4. The following day, he made a further request:

> '*Further to my request for information on OX13 6RS, could you please supply the information for 8 and 10 High Street, Steventon as they are next door to our property. Could you make sure it includes all objections, pictures and legal action threated or taken*'.

5. During the course of his complaint to the Commissioner, Mr Taylor narrowed the requests (see below). There was considerable continuing correspondence between him and the Council. The Council considered that, in certain respects, he was seeking to expand his request. (A requester may narrow his request but he may not expand it. If he wants further information, he must submit a fresh request).

6. In this connection, there is an issue about the proper scope of the requests and in particular whether they extended to information held by the Council's Environmental Services department or were limited to information about planning and building control. The Tribunal will return to this.

Factual background

7. It is necessary first to explain something of the background. Until recently, Taylor's family business, WJ Taylor & Sons (the business), ran a service station in Drayton, Oxfordshire. It also owns commercial premises at 2 High Street, Steventon, also in Oxfordshire. The business used to rent out the premises but they have been empty for a while. Amongst the neighbours – at 6 and 6A High Street – are two catering establishments, a restaurant which used to be called *The Blue Ginger* (now the *Mira Spice*) and a takeaway called *Munchies*. There is a retail shop (run by the Co-op) and a service station at Nos 8 and 10.

8. There have been problems with the extractor fans of the two catering establishments, with particular problems with *The Blue Ginger*'s. The former owners of that restaurant obtained planning consent in 2000: reference number P00/V0831 (the 2000 planning consent). The application was submitted to '[r]egularise existing temporary division between adjoining retail units. Provision of separate front and rea access and toilet accommodation. Change of use of one

unit (vacant) from class A1 (retail) to class A3 (Restaurant/food takeaway)' **[41]**. Condition 3 related to the extractor fan, [1] on which Environmental Services led. Mr Taylor maintains that the condition has systematically been breached. For a long time, the Council disagreed. However, in 2015 Mr Taylor discovered that it had considered issuing a breach of condition notice (BCN) in 2005, although for reasons which are unclear it did not do so and there was no prosecution.

9. The owners of *Munchies* obtained retrospective planning consent in 2015 - P15/V 0401/FUL (the 2015 planning consent) - to regularise their extractor fan, installed in 2011.

10. Mr Taylor says that both fans vent onto his premises. There are also problems with noise and a dispute with the *Blue Ginger* over a claimed right of way via a side-door onto his premises. The blight resulting from the pollution has, he argues, made the premises unusable and therefore worthless. They can no longer be rented out and lie empty. The irony is that, when in 2014, supported by the parish council, he applied for planning permission for a residential development, one of the reasons for rejection was the difficulty with the extractor fans. 'He claims to have lost hundreds of thousands of pounds due to the fall in the value of the property as well as legal fees. He has already brought proceedings for trespass against the owner of the *Blue Ginger*. These were settled by consent order but the owner has not, he says, abided by its terms, one of which was the removal before the end of June 2016 of the extractor where it encroached onto 2 High Street. Mr Taylor has been prosecuted for criminal damage (via the use of spray paint).

11. At some point, the business served a purchase notice on the council to buy the property at 2 High Street because of the blight (see the email at **[133]**). The Council declined.

12. One of the initiatives Mr Taylor says he would consider if he had the full picture is a private prosecution.

The Council's response to the requests, further correspondence with Mr Taylor and his complaint to the Commissioner

13. Ms Becky Moore, business support officer at the Council, replied to the two requests on 22 November 2016 **[86]**. She said that the Council had that day posted on its website all the documentation it held within the scope of the request relating to enforcement and building control.

[1] 'Prior to first use of the development hereby permitted, details of the proposed flue and a scheme for the installation and maintenance of grease and activated carbon filters to be installed in the ventilation/ extract system shall be submitted to and approved in writing by the district Planning Authority. A scheme for the acoustic treatment of the flue to be submitted to and approved in writing by the district Planning Authority prior to the first use of the development. The approved flue and both approved scheme should be fully implemented prior to the first use of the development hereby permitted'.

14. In relation to planning information since 1964, Ms Moore said that there had been 35 applications. She listed the reference numbers and to which property the applications related. She indicated which were publicly available on its website with no other documents held, and where the Council also held a case file which was not publicly available. There were 73 documents in this latter category, with the largest consisting of 110 pages. There were a total of 759 pages which it would need to check for confidential or personal information. Ms Moore estimated that it would take an officer five minutes to read and redact each page. This would total approximately 63 hours. For this reason, the Council considered this part of the request as manifestly unreasonable within regulation 12(4)(b) of the EIR:

> *'… a public authority may refuse to disclose information to the extent that –*
>
> *…*
>
> *(b) the request for information is manifestly unreasonable'*

15. Ms Moore invited Mr Taylor to narrow this part of his request. For example, was there a specific planning application, or specific documents, in which he had a particular interest?

16. There then followed a telephone conversation between Ms Moore and Mr Taylor. It may be that this conversation constituted a request by Mr Taylor for a review of the Council's reply. Ms Moore summarised the conversation in an email on 23rd December 2016 **[89]**. She noted that, during the conversation, Mr Taylor had narrowed his request to 13 planning applications, relating to 2, 6 and 8-10 High Street. In relation to applications containing documents which were not publicly available on the Council's website, Ms Moore said that there were a total of 78 documents comprising 633 pages in total. This would take an officer more than 50 hours, even before printing was taken into account. As a result, the request was still manifestly unreasonable. Ms Moore again invited Mr Taylor to say whether there were specific documents which he wanted to see.

17. She also recorded that Mr Taylor had during the conversation asked for information about any complaints relating to any of the sites and/or applications covered in his original request together with the Council's responses. Ms Moore said that the request was too broad and the Council again regarded it as manifestly unreasonable. Once again, she invited Mr Taylor to narrow the request to a specific application, property or subject matter.

18. Mr Taylor made a complaint to the Commissioner on 4th March 2017 **[92]**, explaining the history. He said that he had been given an appointment to view documents at the Council offices on 28th February 2017. However, all that had happened was that two Council employees had asked him why he wished to see the documents and how the Council could resolve the problems. He did not see any of the requested documents that day. He had requested another appointment but this had not yet been given (the request was later turned down).

19. Following his complaint, the Council, at the instigation of the Commissioner, provided a formal review of its decision to rely on regulation 12(4)(b). At the same time it responded to other correspondence from Mr Taylor. The Council was satisfied that it had replied in full to all his requests including the EIR request. It would be manifestly unreasonable to dedicate any further time or resource to responding to the latter request.

20. However, some months later, on 19th October 2017 **[161], t**he Council wrote to the ICO attaching an email it had sent Mr Taylor the same day. In that email, Mr Andrew Down, head of devolution and government at the Council and South Oxfordshire District Council, said that, as part of an ongoing project in which the Council was digitising and publishing historic planning records, he had discovered that the history Mr Taylor had requested regarding four particular planning applications could now be found on the Council website. Ms Moore would review the unpublished documents on the remaining applications in which she thought he was interested – the 2015 planning consent and P 14/V1665/FUL - and provide Mr Taylor with copies, redacted as necessary to protect personal data and confidentiality. Mr Down believed that this would be sufficient to fulfill Mr Taylor's requests for information. He explained to the ICO that the remaining information not available on the Council website now fell within reasonable bounds and it would proceed with his request. In other words, the Council was abandoning its reliance on regulation 12(4)(b) EIR. It subsequently, on 13 November 2017, provided additional information to Mr Taylor via a CD **[167]** (at the hearing, Mr Taylor was unclear what documents the CD contained). An email from Ms Moore to Mr Taylor on that day said that the Council had now disclosed everything it held.

21. Mr Taylor was not satisfied. In an email to Mr Down on 20th October 2017 **[169]**, he set out a long list of the information he still required relating to the two extractors. [2]

22. On 30 November 2017 **[171]**, the ICO wrote to Mr Taylor explaining that the Council had informed it that the further questions he had raised were outside the

[2] all internal correspondence, memos, letters, photographs etc relating to the extractor in the 2000 planning application (he referred to condition 3 not being met); why the BCN was not served; how the extractor had been allowed to remain as it was despite numerous complaints and it's not meeting the planning conditions or the Council guidelines for a cooking extractor; all records of complaints about that extractor and all the Council's replies that there were no breaches of planning conditions; why it had been approved when it was identical to the original 2000 application apart from an internal door and why all the original objections were omitted from the second application when not everyone was notified of flat application; any correspondence etc relating to the side door when the Council was fully notified it should not be there as it as it exited onto private property and there was no right of way onto this property; all the correspondence, objections, photographs etc relating to the 2015 planning consent as it was passed when the council 'had been notified that the whole application was untrue and it was not drawing fresh air into a seating area and store room but renting a cooker/hob (again not meeting the council for an extractor)'

scope of the initial request and therefore would be treated as a new request. The ICO informed Mr Taylor that, since the Council had now complied with its duties under the EIR, the Commissioner did not propose issuing a formal decision.

23. However, on 1st December 2017 **[173]** Mr Taylor informed the ICO that he was still not satisfied with the information he had received with regard to the 2000 planning permission. There had to be further information. Where did Mr Tim Small, Senior Enforcement Officer (Planning) at the Council and South Oxfordshire District Council, belatedly get information that there was a breach of planning condition and that a BCN should have been served in 2005 but was not? (This was a reference to Mr Small's email to Mr Taylor of 13 February 2015 **[41]**, explaining that there had been discussions between 2002-2005 in relation to condition 3 of the 2000 planning consent. Environmental Service had told Planning Enforcement that a BCN was required but there was no record of one being served or of any subsequent prosecution). Where were all the copies of the correspondence which supposedly took place between 2002 and 2005 referred to in the 13 February 2015 email? Where were the reports into the numerous complaints which had been made? In relation to the 2015 planning consent, there again had to be more than was shown on the Council website as he had complained numerous times about the extractor.

24. In light of Mr Taylor's refusal to withdraw his complaint, on 7 December 2017 **[174]** the ICO wrote to Mr Down asking a series of questions in relation to the two planning applications.

25. Mr Down replied on 22nd December 2017 **[179]**. He explained (*inter alia*) that the Council had searched its database Ocella (introduced in 2012), which held details of building control and planning records including enforcement. On its introduction, it was decided not to migrate some historical information. A copy of the previous Uniform database was held for several years but was no longer available. The Council had also searched its Images drive, which held scanned copies of historical correspondence and other documentation. Any further information would be held electronically. The Council did not hold manual records dating back to the period in question (2000 to 2005). There had been a fire in January 2015 when the Council offices were destroyed. Only very limited paper records could be salvaged. The Council was coming to the end of a project in which historical records were being transferred from microfiche (which did survive the fire) and put online: this was how some of the planning history had become available after the request. He had checked the microfiche to ensure that everything held there in relation to the properties in question had now been made available on the website.

26. Mr Down continued that the Council had not searched the local information on personal computers as the policy was for officers to hold information only on shared network resources. Most staff used 'thin client devices' which did not have any local storage. The Council had not searched its email system because it had

changed it twice since the period in question and it did not have an email archive going back to 2000 to 2005 [this is relevant to the 2000 planning consent]. It had provided several hundred pages of documentation to Mr Taylor. It did not keep a record of a document's destruction. Its current approach was to retain records indefinitely but that was not the position in 2012 when it introduced the Ocella database. While an enforcement case was still open, the information should be kept (but there were no relevant ones). There were no statutory requirements for the Council to retain information of the sort falling within the scope of the requests.

27. Mr Down also said that, in the course correspondence with Mr Taylor, it had become clear that part of his interest was actually with environmental health information rather than planning and enforcement. He had provided him with some information obtained from the environmental health team (which Mr Down in turn attached to his letter to the ICO), though as with the planning information that team did not hold extensive information dating back to the early 2000s. In an undated email to Mr Taylor at **[196]**, Mr Down identified the information: a log from 2002 to 2005 relating to the *Blue Ginger*; a summary of visits to the premises in the same period made by the food and safety team; and a scanned copy of a pair of historical (planning) index cards relating to the property.

28. In a further email to the ICO on 11 January 2018 **[194],** Mr Down confirmed that Mr Taylor had been provided with all information held on the case file relating to the 2015 planning permission (subject to redaction of personal data), including any relevant emails held on the file so that they were not lost when planning officers moved on. As a result, Mr Down did not consider that searching the email system would reveal any records relating to this application which had not already been provided to Mr Taylor. There were no enforcement cases open for the property in question and the history of previous enforcement cases had already been given to Mr Taylor.

The Commissioner's decision

29. The Commissioner issued her decision on 16 January 2018 **[1]**. She explained that regulation 5(1) of the EIR required a public authority to make environmental information it held available on request. Where there was a dispute about the extent of information held, she considered the actions taken by the authority along with any explanation it offered as to why the disputed information was not held. She would consider whether it was inherently likely or unlikely that it was not held. She made a judgment on the balance of probabilities. She summarised the Council's answers to the questions she had asked. She did not believe there was any reason for the Council to conceal information, despite Mr Taylor's assertion that it was covering up for its failure to take appropriate enforcement action. On the balance of probabilities, no further information was held.

The Grounds of Appeal and the Commissioner's Response

30. In his **Grounds of Appeal [12]**, Mr Taylor posed a number of rhetorical questions: (i) if all the information had been disclosed on the disc provided by Ms Moore, where had all the attachments to his Notice of Appeal (the two index cards, the *Blue Ginger* log, correspondence with the restaurant, a covering letter for the 2015 consent application, Mr Small's 13 February 2015 email and photographs of one of the extractors) come from?; (ii) where were the objections to the 2000 application that the side door opened onto private property with no right of way? (iii) where was the information relating to the fact that the *Blue Ginger* fan was not in accordance with consent?; and (iv) when did the BCN start and end?

31. Mr Taylor said that he sought an order mandating the Council to enforce the requirements relating to the 2000 planning consent, or failing that compensation for its shortcomings. The Tribunal explained to Mr Taylor at the hearing that it did not have the power to make any such order.

32. In her **Response**, the Commissioner again set out the history. The Council had provided sufficient information to satisfy her, on the balance of probabilities, that no further information was held. Most of the information Mr Taylor had identified related to the 2000 planning application – the Council's database and emails systems had changed in the intervening years

Post-hearing directions

33. After the hearing, the Tribunal issued directions to satisfy itself that the Council had indeed carried out appropriate searchers for any documents. The directions and the Council's responses are as follows:

Direction	Council's response
Whether the Council has conducted a search of its environmental health records in relation to extractor fans at 6 and 6A High Street since 2000 and 2011 respectively (and, if so, what kind(s) of search). Although Mr Taylor's request is primarily directed at planning and building matters, the Council is aware from extensive previous contact that he was concerned about the extractor fans in particular. As Mr Small, Mr Down and Mr Williams have all recognised, there has been overlap between Environmental Service and Planning Enforcement at least in relation to the Blue Ginger fan	Mr Taylor's request for environmental health records was narrowed in his email correspondence (27 November 2017, open bundle page 227-229) to focus on the period 2002 to 2005. The council explained its search of historic environmental health records in its email of 22 December 2017 to Mr Taylor, also provided to the ICO (open bundle pages 179-192). Historic paper records were destroyed by a fire in the council headquarters in January 2015. The environmental health database does not hold history prior to 2012.
If the Council has conducted a search of	Although the council's records do not in

environmental health records, what was the result?	general go back that far, the senior environmental health officer who dealt with the case in the period 2002-2005 was able to locate his own log of events dating back to that timer This was provided on 22 December 2017.
How it came across the two historic index cards (despite previously telling Mr Taylor that there were no further documents relating to consent P00/V0831)	The council's planning records are filed electronically, indexed by planning application reference number. All of the information held on the planning files had been provided to Mr Taylor. The historic index cards are indexed by address and are held separately by the council's data capture team which is currently engaged in a project of digitising historic records, mostly held on microfiche. An address search on the record cards revealed the two cards in question; the microfiche for the planning applications at these addresses has all been digitised and is now published on the council
What were the broad categories of documents included on the disk containing information relating to P15/V0401/FUL. In particular, were all the internal documents relating to the application and its approval included?	The documents provided on the disk were those which are not published on the website, that is the case folder (details of constraints, map extract} photo of the premises) and any comments received in response to consultation (including letters from neighbours as well as internal responses for example from the environmental protection team).
Who decided that that consent should be granted – was it officers under delegated authority or the planning committee?	Planning application P15/V0401/FUL was determined by officers under delegated powers. The officer report and decision notice are published on the council's website

34. The Tribunal also gave the Council the opportunity of saying whether the requests, properly construed, extend to environmental health information (in particular, relating to the two fans). The Council replied: '… the council's view is that the initial focus was very clearly on planning and related matters. As the lengthy correspondence with Mr Taylor developed, it became apparent that his interest was very specifically in the extractor fans at the property, and the council did then provide what limited environmental health information is held for the period in question'.

35. Mr Taylor commented on the Council's response on 13 July 2018. He continued to maintain that there should be further information, for example information relating to a complaint he had made in 2011 (about the Munchies extractor, it seems) and an 'independent review' carried out in November 2011. Some of the information he expected to see post-dated the fire.

Discussion

The proper scope of the request

36. The requests are mainly directed at planning and building control matters. However, the words 'and everything else you have relating to the [named properties]' are clearly broad enough to examples other matters, and in particular the disputes over the two fans. In addition, the Council was aware from extensive previous dealings with Mr Taylor that it was the fans which particularly exercised him. The requests therefore encompassed information about those disputes.

37. The Council clearly thought for a long time that it had been asked only for information about planning and building control matters. In the event, however, it also conducted a search for information held by Environmental Services about the history of the extractor fans. There is, inevitably, a degree of overlap between planning, building control and environmental information in a case of this nature.

Is the requested information 'environmental information'?

38. If it is, the request is indeed covered by the EIR. If it is not, it is covered by the Freedom of Information Act 2000 (although on the facts of this case the outcome would be the same under either regime).

39. The definition of 'environmental information' is extremely wide. In *BEIS v Information Commissioner and Henney*, [3] the Court of Appeal looked for a sufficient connection between the information requested and the environment.

40. In the present case, the fact that Mr Taylor was particularly interested in information about the fans and the olfactory and noise pollution they generated makes it clear that the request was for 'environmental information'. Neither of the parties or the Council has sought to argue to the contrary.

Does the Council hold any further information within the scope of the request?

41. Having considered carefully the extensive evidence and Mr Taylor's arguments about information gaps. the Tribunal is satisfied that, essentially for the reasons given by the Commissioner, the Council has disclosed all the information it has

[3] [2017] EWCA Civ 844

falling even within the extended scope of the requests as construed by the Tribunal.

42. Mr Taylor complains that information about the proposed BCN relating to the *Blue Ginger* extractor was withheld from him for 10 years (by which time enforcement action was no longer possible). The Tribunal cannot comment on that. It can, however, say that, since the requests, the Council has been assiduous in the searches it has conducted (even of the information held by Environmental Services which it considered fell outside the scope of the requests). Mr Taylor acknowledged at the hearing that Mr Down had been very helpful.

43. The requests are extremely broad, seeking information about a large number of planning applications for several properties dating back to 1964, as well as 'everything you have relating to' the properties. The Council would have been fully justified in maintaining its initial reliance on regulation 12(4)(b) and in refusing to enter into further correspondence, instead of which it supplied considerable information, directed Mr Taylor to its website, assisted him in narrowing his requests to make them more manageable and then forewent reliance on regulation 12(4)(b) and supplied him with additional information (held by Environmental Services) even though it considered that it fell outside the scope of the requests. It answered fully the numerous questions put by the Commissioner and cooperated just as fully with the Tribunal. It has explained why information which would once have been held is no longer held. The Tribunal finds its explanations compelling.

44. The Tribunal agrees with the Commissioner that there is no evidence that the Council has deliberately withheld information to cover up any past enforcement failings.

45. The sole question for the Tribunal is not whether the Council should hold further information, nor whether its record-keeping could be improved, but whether, on the balance of probabilities, it has provided (either directly or by pointing Mr Taylor to its website) everything it still holds falling within the scope of the request. The Tribunal is satisfied that it has.

46. The Tribunal has sympathy for Mr Taylor. The problems with his neighbours have taken up a good deal of his time over an extended period and have no doubt caused him and his family considerable distress as well as expense. He feels that he was entitled to more support from the Council to address the environmental nuisances he identifies. He is left, he says, with commercial premises which are currently worthless, with the added irony that he has not been allowed to redevelop in part because of the nuisance caused by the extractor fans. However, in the final analysis, the Council cannot disclose what it no longer has. Mr Taylor accepted that at the hearing.

47. He should nevertheless content himself with the knowledge that his requests have generated considerable further information.

Conclusion

48. For these reasons, the appeal is dismissed. The decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 3 September 2018
Promulgation date: 4 September 2018