First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice: FS50658879

Appeal Reference: EA/2018/0092

Heard at Bury St Edmunds County and Family Court
On 22 October 2018

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBER(S)

ANNE CHAFER & HENRY FITZHUGH

Between

DESMOND LEE PRIOR

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (DEFRA)

Second Respondent

Appearances:

The Appellant:	**in person**
The First Respondent:	**did not appear**
The Second Respondent:	**Michael Armitage**

DECISION AND REASONS

1. The appeal is dismissed.

2. The Appellant has for many years been concerned that DEFRA implemented an EU Directive in a way inconsistent with the implementation by other member states and that his business suffered as a result. He has corresponded extensively with DEFRA since 2006, advancing his views and seeking information and at one stage he took preliminary steps in judicial review proceedings on the issue. In 2011 the European Commission wrote to the UK about this issue; shortly thereafter the UK wrote confirming that it would review the position it made some interim changes and in 2017 the UK made some amendments to its legislation.

3. On 1 November 2016 he sought information: -

   "The European commission wrote to the UK Government on the 14th October 2011 with regards documentary evidence not being required in other EU countries for both schedule birds under the wildlife and countryside act 1981, The Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 (the 1982 Regulations) the UK government responded saying: 'Further my authorities in England acknowledge that such documentary evidence is not required in other Member States from which birds are commonly imported into the UK, and that therefore such records are not routinely kept.' I am assuming DEFRA is one of the authorities the UK government makes reference to. Please can I ask that DEFRA supply me the following information under the FOI act?
   When did DEFRA find out that documentary evidence was not a requirement for both schedule birds in other EU countries?
   Can I have all the information requested and received for this information to supplied to DEFRA?
   Can you also tell me when and who first highlighted that documentary evidence was not a requirement in other EU countries?"

4. Following correspondence, the Appellant clarified his request on 6 January 2017: -

   'When did DEFRA find out that documentary evidence of captive breeding was not a requirement for both Schedule 3 part 1 of the countryside act 1981 and birds covered by GL-18 (non Schedule) see link [link provided] in other EU countries? Can I have all the information DEFRA requested and received that documentary evidence of captive breeding was not a legal requirement and routinely kept in other EU Countries for the above schedules bird for them to respond to the letter from the European commission of 14th October 2011 under PILOT 2583/11/ENTR - RESTRICTION OF FREE MOVEMENT OF GOODS BY THE UK AND NATURAL ENGLAND? Can you

also tell me when and who first highlighted to DEFRA that documentary evidence of captive breeding was not a requirement in other EU countries for both the above schedule birds?"

5. The Appellant was not satisfied with the Respondent's handling of the request and complained to the First Respondent ("IC"). During the course of her investigation the IC (in agreement with the parties) further clarified the request: -

   "(1) When DEFRA was made aware that documentary evidence of captive breeding was not required in other EU member states, and that records were not routinely kept by them.
   (2) Who first informed DEFRA that documentary evidence of captive breeding was not required in other EU member states.
   (3) All the information DEFRA requested and received regarding documentary evidence of captive breeding not being a legal requirement nor routinely kept in other EU Countries for the specified birds, in order for them to respond to the letter from the European commission."

6. With respect to the third limb of the request the IC concluded that DEFRA had been wrong to conclude that it could rely on s21 FOIA (information reasonably available to the Appellant by other means) and required DEFRA to issue a fresh response to the Appellant. Further information has been supplied to the Appellant as a result of this decision.

7. With respect to the first two requests DEFRA explained that following a search of its records it had not located the date that the UK became aware of this issue or who had notified DEFRA. DEFRA explained that there was no business need to keep such information. The Appellant remained unconvinced and argued that (DN paragraph 26): -

   "for them to suddenly agree to this infringement after just one letter from the EC within a month seems odd when I have been saying it since 2007. I am not sure how to put this but they only had a month to look into this to allow them to respond and if this is the case I believe I am entitled to the information which led to the admission of the infringement for obvious reasons, or is it more of a case they were fully aware of this infringement well before the EC contacted them."

8. DEFRA provided the IC with an explanation of its data storage arrangements and the searches it had carried out (DN paragraphs 27-31) which the Appellant did not accept. The IC 9DN 34-35) found: -

   "she notes that his request specifically asked for when and who first notified DEFRA about the relevant issues.
   35. The Commissioner is satisfied that DEFRA has carried out adequate and appropriately targeted searches for the information requested in parts (1) and (2) of the

request, and that, on the balance of probabilities, it does not hold any information falling within the specific scope of these requests."

9. The Appellant challenged this finding. In his appeal he submitted: -

"For the UK government to respond to the European commission with regards the infringement and for them to agree that documentary evidence didn't exist somehow, they knew this information to allow them to respond, which means someone must have told them, as such the letter from the European Commission could have been the persons informing them that documentary evidence doesn't exist in the EU surely this would have been picked up in DEFRA searches but it was not.
Do the ICO really believe that DEFRA have no record of this information but they were able to respond to the European commission agreeing with this.
DEFRA have been fully aware of this restriction and I have pointed it out a number of times even at a meeting at DEFRA offices and as far back as 2007."

10. In resisting the appeal, the IC maintained her position set out in the decision notice. She submitted that on the balance of probabilities the information sought by parts 1 and 2 of the request was not held by DEFRA. She submitted that the narrow and specific nature of the request and the length of time since the event under consideration: -

"reduces the inherent likelihood of whether a large organisation such as DEFRA would have retained a clear record of when and how it first became aware of the issues…. It has no need to be aware of other member states' provisions as the EU requirements were only in the form of a Directive, and not of a Regulation….It would not appear to be necessary for DEFRA to record when it first became aware, provided it recorded its considerations relating to the issue. Good information managements would ensure that not all emails and correspondence are kept, and only those that are suitably important for the official record, and DEFRA confirmed that routine emails are not kept."

11. DEFRA, in supporting the IC's position emphasised the specificity of the request *"When DEFRA was made aware…Who first informed".*

12. In a witness statement Mr Simon Mackown, (DEFRA's Head of Wildlife Management, Wild Birds and Wildlife Crime) set out the background history of the Appellant's concerns. These had led the Appellant to approach the European Commission alleging that the Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 affected the trade in imported captive-bred birds in a way which was unlawful. As a result, the European Commission raised the issue with the UK government in 2011. In 2013 DEFRA received a pre-action protocol letter from the Appellant on the issue and in response to it DEFRA disclosed to him a substantial body of records from the period 2008-2013. The Appellant between 2009-2019 had made 18 FOIA requests on the subject.

13. He detailed the searches carried out and confirmed that those searches had not disclosed the information sought. He further explained deletion and retention policies, importantly routine business correspondence was only kept for seven years. He confirmed that requests had been made to relevant individuals to check their personal computing records. He explained that when staff left DEFRA their e-mail accounts were deleted and any information within them was no longer available.

14. The Appellant submitted a significant number of documents which he had obtained from DEFRA and which he considered demonstrated that DEFRA held more information.

15. In his oral submissions the Appellant argued that he had been raising the issue with DEFRA since 2006 and could not understand why it had not been picked up in the searches. He was unable to accept that DEFRA would routinely delete information. He drew attention to some of the material he had received from DEFRA "*support evidence item 8*" which was correspondence from an organisation called Belangenbehartiging Europese Cultuurvogel (BEC) dated 6 August 2008 sent to him recently. He argued that it demonstrated that DEFRA knew then that it was in breach of EU trade law. He argued that the "*the answer to who first – this could be it*". He acknowledged that "*it could be another or it could be this letter*". The letter had been supplied to him as a result of the IC's intervention.

16. Mr Armitage for DEFRA submitted that the issue for the tribunal was whether the information requested by the Appellant was held at the relevant time. The request was very specific as to who first notified DEFRA of the issue and when. The UK regulations were made in 1982 and knowledge of issues around the regulations would have built up over time. What DEFRA does not have is a record of who first informed DEFRA. The BEC letter showed different positions in different EU jurisdictions and did not go to the lawfulness of the UK regulations. The disclosure of this record in 2018 did not show there was any breach of DEFRA's duty of candour with respect to the threatened judicial review as the duty and the requests for information raised different issues. The document had been provided by DEFRA in the course of its investigation with respect to this request and indicated that knowledge of the issue developed incrementally. He emphasised that routine emails were short-term and deleted after 3 years. Any such e-mails would have been deleted long ago.

Consideration

17. The problem the Appellant faces in this appeal is the very specific nature of his request and the statutory provisions upon which he relies. FOIA can require an organisation to disclose information, but only if it is held in some recordable form at the time of the request. The request was made on 1 November 2016. It was uncontested that it was for specific information – the

name of an informant and the date s(he) informed DEFRA that documentary evidence was not required in other EU countries. That information must have been received by DEFRA at some time in 2007 or earlier (support evidence 6 – emails between the Appellant and DEFRA - dates from July 2007). The first time therefore that DEFRA held any recorded information on the issue must have been over three years before the European Commission raised the issue with the UK, and over nine years before this request was made.

18. However, there is a further, fundamental problem with the request. In inspecting any records that DEFRA has (even of an event a few months ago) it may well be impossible to determine the "who" and "when" questions. Information may come in to an organisation in a series of communications. In this case the BEC document details the arrangements for ringing captive birds in Belgium and the Netherlands which do not require documents. It does not state that this is the first information that DEFRA had (indeed the Appellant had been in communication before this). In turn the response to the Appellant's e-mail at support evidence 6 does not establish that this was the first notification that DEFRA has received. Even a more felicitously worded request for example "*What is the earliest record you can find"* while it might have elicited a specific document which was the earliest available record, would not have answered the underlying question the Appellant has asked. DEFRA was correct to argue in its response (bundle page 34 paragraph 24):-

    It would in the circumstances be quite misleading of DEFRA to state that the date of the oldest, say, letter that could be found containing a notification of another EU member state's relevant requirements was "when DEFRA was made aware", or to state that its author is the person "who first informed" DEFRA in relation to those requirements. DEFRA simply does not know whether that is in fact the case and it could not therefore provide the information requested, as it does not hold the same."

19. It is clear that DEFRA (like all organisations) deletes large quantities of information on a regular basis, only retaining information deemed to be of significance. There was no reason to retain the information requested simply because it was the first. On the evidence the tribunal is satisfied on the balance of probabilities that it was deleted or destroyed a long time ago. Even if it was not deleted it is not recorded information which can now be identified. The decision of the IC is correct in law and the appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal
Date: 29 October 2018