



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

Appeal Reference: EA/2017/0128

**Decided without a hearing
On 6 November 2018**

Before

**JUDGE ANTHONY SNELSON
JEAN NELSON
ALISON LOWTON**

Between

MISS AGNES MOFFAT

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Miss Agnes Moffat, to whom we will refer by name, is a resident of Luton. On 5 July 2017 she wrote to Luton Borough Council ('the Council') requesting information specified in three numbered paragraphs, the first of which read:

1 Can you confirm the Government has given LBC¹ £30 million over 3 yrs for development improvement in the Paths Estate, Hightown, Luton.

If this figure is not correct can you confirm the exact amount allocated to Hightown Paths from the Government or local council allocation.

2. The Council replied on 23 August 2017. As to para 1 of the request, it stated that it did not hold the information asked for because no funding had been received from central government. Its response to paras 2 and 3 is not the subject of any complaint.
3. Miss Moffat was dissatisfied with the answer to para 1 but, following a review completed in September 2017, the Council confirmed that its position was unchanged.
4. By a letter of 11 October 2017 Miss Moffat complained to the Respondent ('the Commissioner') about the way in which the Council had dealt with her request.
5. The Commissioner proceeded to carry out an investigation. This took the form of considering the information supplied by Miss Moffat in support of her case and the Council's responses to a number of questions formulated by the Commissioner.
6. The key assertion relied upon by Miss Moffat in her letter of 11 October 2017 was that she had attended a meeting on 27 April 2013 arranged by the Council's Housing Department to discuss improvements to the High Town housing area and that "they" (presumably representatives of the Department) had stated at that meeting that central government had given £30m for the regeneration of the Paths Estate.
7. By a letter of 9 May 2018 Miss Moffat placed reliance in addition on two documents: the Council's 'High Town Masterplan 2016' and 'Luton's Investment Framework 2016-2035'. As to the former she drew attention to a reference on p61 to a sum of £1.4m to be spent on The Paths, although she acknowledged that there was no statement as to the source of the funding. As to the latter, she relied on a reference at p8 to a statement about funds received by the Council from central government, although she did not claim that it identified the alleged payment of £30m. She argued that there was "clearly a link" between the two documents and the alleged funding to which her request related.
8. The main points which emerged from the Council's responses to the Commissioner's questions were these.

¹ Luton Borough Council

- (1) The Council had checked the computer files relating to the estate refurbishment programme.
 - (2) In addition, it had reviewed its General Ledger records extracted against the project code to which the refurbishment work was charged.
 - (3) Further, the Service Manager of the relevant team had spoken to the members of staff who had been involved in the refurbishment project.
 - (4) The Council explained that if there had been government funding as asserted, it would have appeared in the computer files and General Ledger records.
 - (5) Searches of both categories of records had yielded no evidence whatsoever of any government funding of the sort referred to in the request.
 - (6) The relevant members of staff (see (3) above) had confirmed that there had been no such funding.
 - (7) The Council's records went back several years. Financial records in particular were retained for six years plus the current year.
 - (8) If there had been government funding, the Council would have needed to retain records not only for accounting purposes but also for production on audit inspections and in support of any feedback supplied in response to any request from central government.
 - (9) The Council held and had held no information within the scope of the request and no information similar to that requested.
9. By a decision notice dated 30 May 2018 the Commissioner determined that the Council had correctly stated that it did not hold the disputed information and had complied with its legal obligations. She noted that there was no evidence substantiating the alleged £30m funding. Specifically, she observed that no reference to it had been found in the 'Masterplan' document.
 10. By a notice of appeal dated 26 May 2018, Miss Moffat contended that the information sought did exist. She questioned whether the searches carried out were adequate and reiterated her reliance on things allegedly said at the meeting of 27 April 2013.
 11. In her submissions of 8 August 2018 responding to the appeal the Commissioner contended that the evidence pointed overwhelmingly to the conclusion that the relevant information did not exist and had never existed.
 12. In an email of 21 August 2018 the Claimant contended that the Council should be required to "re-examine" the "enquiry" to ensure that all necessary searches had been conducted. Her particular concern was that material records might have been missed owing to a tendency by the Council to use terminology carelessly (specifically by referring to The Paths estate as "Hightown"). As far as we are aware, no action was taken on this suggestion.
 13. The parties are agreed that this appeal should be dealt with on the papers.

The applicable law

14. The information sought by the Appellant falls within the scope of the Environmental Information Regulations 2004 ('EIR'). By reg 2(1) relevant information comprises "any information in written, visual, aural, electronic or any other material form".
15. Reg 5(1) enacts a general duty on public authorities holding environmental information to make it available on request.
16. In *Bromley and Information Commissioner-v-Environment Agency* EA/2006/0072, the Information Tribunal held that any question under reg 12(1) and (4)(a) is to be decided on a balance of probabilities, adding:

Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.

17. The appeal is brought pursuant to the Freedom of Information Act 2000, s57, as modified by EIR reg 18. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal consider -

- (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.

Conclusions

18. We are satisfied on a balance of probabilities that the Council's case must be preferred to that of Ms Moffat. We have no reason to doubt the truthfulness of the Council's response to the request. No motive for supplying a false response has been proposed and the risks of doing so are obvious. Nor is it plausible that the Council could have accidentally overlooked a payment from central government of £30m, or that the searches and other inquiries carried out, which appear to have been entirely rational and appropriate, could have left the error undetected. We have not disregarded what Miss Moffat says about the meeting of 27 April 2013 and we accept that she is sincere in her assertions about what she understood from things said on that occasion. But

ordinary experience reminds us that mistakes and misunderstandings happen, sometimes in circumstances which are not easily explained years later. The most striking weakness of her case, to our minds, is the fact that she is unable to point to *any* document which offers *any* support for the proposition that central government made the alleged £30m payment. It is particularly hard to see how the 2016 'High Town Masterplan' could have omitted reference to such a significant source of funds unless the reason was that no such payment was made.

19. For these reasons, we conclude that the Commissioner's finding that the Council did not hold the further information sought was in accordance with the law. The Council did not hold the information requested at the time of the request and it has not come into its possession at any time since. Accordingly, the duty to disclose under reg 5(1) did not arise.
20. It follows that the appeal must be dismissed.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

11 December 2018
Promulgated date: 12 December 2018