



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

**Appeal Reference: EA/2019/0341P**

**Before**

**JUDGE BUCKLEY  
Sitting alone in Chambers on 24 March 2020**

**Between**

**PAUL ASTLE**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

Determined on the papers, the Judge sitting alone in Chambers on 24 March 2020.

### **DECISION**

1. For the reasons set out below the tribunal dismisses the appeal.

### **MODE OF HEARING**

2. All parties consented to this appeal being heard on the papers. The Chamber President has determined that this appeal is suitable to be decided by a judge alone. I am satisfied that I can properly determine the issues sitting alone and without a hearing.

### **REASONS**

#### **Introduction**

1. This is an appeal against the Commissioner's decision notice FER0813282 of 17 September 2019 which held that Mansfield District Council (the Council) held no information within the scope of the request. The Commissioner did not require the public authority to take any steps.

### **Factual background to the appeal**

2. This appeal relates to a site known as 'The Royal Estate' at Warsop. This is a new build residential housing estate built by Bellway Homes Ltd.
3. Mr Astle relies on a document entitled 'Maintenance Plan' ('the Plan') which was produced as part of the original grant of permission for the site. Mr Astle asserts that the Plan was compiled by horticultural experts on behalf of the Council's Planning and Building Control Department. The Plan is not included in the bundle, but Mr Astle sets out the relevant extract in full in the letter dated 14 December 2018 in which he made his request for information:

This Maintenance Plan is to be implemented immediately following handover of the various facilities in an acceptable condition and having been laid out in accordance with the approved scheme of landscaping.

4. Mr Astle asserts that the Plan makes Meadfleet Limited responsible for implementing the Plan as the Land Management Company. Mr Astle states that handover of the site from Bellway Homes to Meadfleet Ltd took place in April 2018.
5. Mr Astle is of the view that the the Council has a legal responsibility to ensure that the terms and content of the Plan are adhered to by Bellway Homes before handover, and Meadfleet Ltd after handover. It is apparent from the letter containing the request for information that Mr Astle is of the view that this legal responsibility includes:
  - (i) an obligation to inspect the estate before handover to ensure that the facilities were in an acceptable condition and/or laid out in accordance with the approved scheme of landscaping.
  - (ii) an obligation to 'issue official approval' for handover and/or officially notify Bellway Homes and Meadfleet Ltd that the facilities were in an acceptable condition and/or laid out in accordance with the approved scheme of landscaping.
6. Mr Astle contends that handover took place 'illegally'. It appears that Mr Astle believes that this is the case because, in his view, the facilities were not in an acceptable condition and/or not laid out in accordance with the approved scheme of landscaping and/or that the Council did not comply with the obligations set out above.

## **Request, Decision Notice and Appeal**

### *Request*

7. On 14 December 2018 Mr Astle made the following information request:

My formal EIR 2004 request of 14<sup>th</sup> December 2018 is for a copy, or copies of any and all documents that demonstrate the following:

That a representative[s] from MDC Planning and Building Control Department inspected the estate and 'officially notified', electronically, digitally or in writing, both Bellway Homes Ltd and Meadfleet Ltd that:

- 1) 'The various facilities on The Royal Estate at Warsop were in an acceptable condition.
- 2) That the site had been laid out in accordance with the approved scheme of landscaping.'

Documents that prove MDC Planning and Building Control Department, in due diligence of MDC's duty to the public, either did, or did not issue official approval for 'handover to take place 'legally'.

That MDC were aware, or not aware of 'handover' of the site taking place from Bellway Homes Ltd to Meadfleet Ltd in April 2018.

### *Response*

8. In its response dated 14 January 2019 the Council stated that it did not hold any information within the scope of the request. Mr Astle referred the matter to the Information Commissioner 15 January 2019.
9. Mr Astle requested an internal review on 23 January 2019. By letter dated 14 February 2019 the Council upheld its decision on internal review.

### *Decision Notice*

10. In a decision notice dated 17 September 2019 the Commissioner concluded that the information requested was environmental information within the Environmental Regulations 2004 (EIR) because it related to planning and building issues which were measures that may affect several of the environmental elements listed in regulations 2(1)(a) and (b).
11. The Commissioner considered the searches carried out by the Council and the explanations as to why the Council held no information and decided, on the balance of probabilities, that the Council does not hold any information within the scope of the request. The Commissioner concluded that regulation 12(4)(a) was engaged. Although the public interest technically applies, the Commissioner concluded that she could not consider the public interest factors

for and against disclosure when she has found that there is no recorded information held.

12. The Grounds of Appeal are in summary that the Commissioner was wrong to conclude that the Council did not hold the requested information, for the following reasons:

1. The Commissioner failed to take proper account of the scope of the last paragraph of the request from her Decision Notice.
2. The search was inadequate because the Council did not use the keyword 'Bellway Homes Ltd'.
3. The Maintenance Plan is within the scope of the request and the Council has failed to disclose it. This suggests that other documents within the scope of the request are held by the Council.
4. The Commissioner was wrong to conclude that the Council did not, on the balance of probabilities hold any documentation relating to any inspections of the estate. As the authority which passed the plans for the estate it is highly likely that they hold such information. Further the Commissioner should not have considered it reasonable that the Council had 'no' contact with Bellway Homes Ltd the main contractor.

#### *The Commissioner's response*

13. In summary the Commissioner submits:

1. It is unclear how the Appellant considers that the final paragraph in isolation undermines the Commissioner's decision.
2. The Council's search was not limited to the terms 'Royal Estate' and 'Meadfleet'. It might therefore have used the term 'Bellway Homes Ltd'. In any event it is unclear why this term would have returned information not returned under the included terms.
3. The Maintenance Plan does not fall within the scope of the request.
4. The scope of the request is more limited than 'any documentation' relating to 'any' inspections of the estate or any information which would show any contact with Bellway Homes.

#### **Legal framework**

14. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities. If a public authority does not hold the information, there is no meaningful public interest balancing exercise that can be undertaken under the EIR.

15. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive

evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

## **Evidence and submissions**

16. I have read an open bundle of documents, including a number of supplementary emails from Mr Astle. Mr Astle made the following additional submission in writing by email dated 27 November 2019. Having sent a joint email to the Council and to the legal department of Ashfield District Council ('Ashfield'), he received two separate 'receipts' from two different email servers. Because the Council use Ashfield's legal department the search should have included a search of Ashfield's email servers, computer network and main frame.

## **Issues**

17. The issue I have to determine is whether, on the balance of probabilities, the Council held any information within the scope of the request.

## **Discussion and conclusions**

### *Preliminary points*

18. Mr Astle is concerned that the tribunal will be overwhelmed by irrelevant documentation provided by the Commissioner. Mr Astle should be reassured that I have taken proper account of any relevant information and disregarded any irrelevant information.

*On the balance of probabilities did the Council hold any information within the scope of the request?*

19. In Mr Astle's letter to the Commissioner dated 15 January 2019, he asserts that his request should have been interpreted broadly, and that documentation exists that falls within its scope. He relies on the following extracts from emails from Philip Cook in the Council's Planning and Building Control Department:

Further to your various emails and complaint regarding the above and please be assured we are currently looking into these matters and have made contact with Bellway Homes and await a response. (Email from Philip Cook dated 4 December 2018)

The previous Planning Enforcement Officer (for your information the council has only one such post) was investigating an alleged breach of planning control, unfortunately these had not been concluded prior to his departure but are ongoing.

...

The Council has a full understanding of what your concerns are and it is only reasonable, as in any enforcement investigation, to raise these with Bellway Homes as

part of the investigation, therefore getting input from all parties concerned. (Email from Philip Cook dated 10 December 2018).

I can only advise that the planning matters you raise are being investigated. (Email from Philip Cook dated 18 December 2018).

20. Mr Astle argues that the 'contact' made with Bellway Homes referred to in the email dated 4 December 2018 would fall within the scope of the request, as would the Plan.
21. The Council, in its response to the request for an internal review, argues that the quotes from emails from Philip Cook make no reference to any documentation relevant to the request. The fact that contact has been made with Bellway Homes does not mean that the Council holds documentation within the scope of the request. The emails do not relate to the handover and inspections of the site. They relate to enforcement issues.
22. In a letter to the Commissioner dated 1 August 2019 the Council describes the searches that it undertook. It states that the paper and electronic planning application files relating to the development at the Royal Estate were checked. Searches of all emails of all officers involved or previously involved in applications relating to the Royal Estate development were undertaken. The information requested, if held, would have related to the residential development at the Royal Estate and therefore would either be on the planning application file or within emails of relevant officers working within the planning department.
23. The Council stated that no records were kept of the search terms used, but the words 'Royal Estate' and 'Meadfleet' would have been included as they are the key terms that Mr Astle used. All computers, including laptops, are networked to the Council's main server therefore the search would have identified any electronic document held within the relevant development file or that had been sent/received by email. The Council stated that there is no business purpose for which the requested information should be held.
24. Dealing first with the scope of the request, it should be read objectively in the light of any relevant background facts. The request is expressly limited to documents that 'demonstrate' or 'prove' a list of specified matters. Because of this limitation I do not accept that the request is broad enough in scope to include the Plan itself.
25. Further, it is quite possible that the 'contact' referred to in the emails from Philip Cook was either oral, or, if written, did not demonstrate or prove anything listed in the request. The Council has stated that these communications relate to enforcement rather than handover and inspections and on that basis, I find that any records of the 'contact' probably would not demonstrate or prove any of the

matters on the list and therefore would be outside the scope of the request. I have specifically had regard to the final paragraph of the request and it does not alter my conclusions on this point.

26. Turning to the searches carried out by the Council, the Council states it searched for information within the scope of the request in both electronic and paper planning application files and in relevant email accounts. The Council did not keep a record of the search terms used, but stated that the terms would have included 'Royal Estate' and 'Meadfleet'. I do not know if the Council also searched for 'Bellway Homes'.
27. I find that the Council's search was reasonable. It is likely that any documents that demonstrated or proved any of the matters specified in the request would have contained the words 'Royal Estate' or 'Meadfleet'. Although it might have been desirable to include the term 'Bellway Homes', the failure to do so does not, in my view, make the search unreasonably narrow.
28. I do not accept that the search should have included a search of Ashfield's email servers, computer network and main frame. The Council concluded that documentation which fell within the scope of the request was likely to be in the email accounts of officers in the planning department involved or previously involved in applications relating to the Royal Estate development. I accept that this is a reasonable conclusion. I do not accept that it was also necessary to search the email accounts of the legal department in order to undertake a reasonable search.
29. Taking account of all the above, I conclude that the Council has undertaken a reasonable search for information within the scope of the request.
30. The Council was asked whether there was a 'business purpose' for which the information should be held and rather unhelpfully answered 'no' without further explanation. I have considered whether Mr Astle's reason for making the request, set out above under 'factual background', provides a business purpose for which the information should be held by the Council.
31. I am not persuaded, on the information before me, including the extract from the Plan, that Mr Astle is right to conclude that the Council is under the legal obligations on which he relies. There is nothing before me, for example, to support an argument that the Council was under a legal obligation to inspect the site before handover or to issue official approval of the handover. Mr Astle may be right, but there is nothing before me to support a conclusion that the Council is under those or any of the other obligations which might either provide a business purpose for the Council to hold information within the scope of the request, or which might support an argument that the Council is likely to hold information within the scope of the request.

32. On the basis of all the matters set out above, I conclude on the balance of probabilities that the Council does not hold any information within the scope of the request. As no information is held, no meaningful public interest balancing exercise can be carried out and I conclude that reg 12(1)(b) is satisfied. The appeal is dismissed.

Signed Sophie Buckley  
Judge of the First-tier Tribunal

Date: 8 April 2020

Date Promulgated: 24 April 2020