



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2020/0029/P

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50829069
Dated: 17 December 2019

Appellant: Derek Moss

First Respondent: The Information Commissioner

Before
HH Judge Shanks
and
Suzanne Cosgrave and Paul Taylor

On the papers

Panel deliberations by video-conference on 14 October 2020

Subject matter:

Freedom of Information Act 2000 (FOIA)

Whether information held.

DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below the appeal is dismissed.

REASONS FOR DECISION

1. On 23 January 2018 the Strategic Housing and Planning Committee of the Council of the Royal Borough of Kingston-upon-Thames resolved that a Community Benefit Society (CBS) would be established as set out in a report prepared for the meeting and that the Director of Adult Social Services and the Monitoring Officer were authorised to agree and sign off any final documentation in relation to the creation of the CBS. No timescale was specified for the establishment of the CBS but the report for the meeting stated that it would be established as soon as practicably possible with a target to become operational from April 2018. The Committee resolution was confirmed at a full Council meeting on 27 February 2018.
2. In a Revenue and Capital Budget Monitoring Report relating to the period 2018/19 to 2020/21 made for the Finance and Contracts Committee dated 29 November 2018 at para 11 it was stated:

Community Housing are currently predicting an underspend of £573k, a reduction of £222k since month 4 [presumably August 2018] ... Movement from month 4 mainly due to exclusion of previously projected income from the proposed Community Benefit Society (CBS) project which is now postponed until 2020/21 and a small net increase in B&B numbers.

3. This entry led the Appellant, Mr Moss, to make the following FOIA request in relation to the CBS project:

I am unaware that this decision was debated by any Committee or full Council. Please provide documents showing who was involved in making

this decision, what information they considered before making this decision and their reasons for deciding to postpone the project.

4. The Council responded on 4 January 2019 by denying that it held any information answering the request and this position was confirmed in a review decision dated 17 May 2019. Its position was (and remains) that there was no decision to postpone the project and that para 11 of the finance report was referring to a financial decision to postpone projected income from the project and not to a decision to postpone the project as such.
5. On 12 March 2019, before he had received the review decision, Mr Moss complained to the Information Commissioner under section 50 FOIA that his request had not been dealt with in accordance with FOIA. Having made enquiries of the Council, the Commissioner issued a decision notice dated 17 December 2019 upholding the Council's position.
6. Mr Moss has appealed to this Tribunal against the Commissioner's decision notice. The parties have indicated that they consent to the appeal being determined on the papers and we are satisfied that is a proper way to determine it. On the appeal it is open to us to review the Commissioner's finding of fact that there was no information held which came within the request (section 58(2) FOIA). In doing so, we decide the matter on the balance of probabilities drawing any appropriate inferences from the material presented.
7. We have considered the papers. We understand why Mr Moss draws the conclusion he does from the November 2018 report, but, applying our collective experience, particularly in relation to the workings of local government, we are satisfied that his interpretation of the report is wrong and that the Council are right to maintain that the word "postponement" in the report relates to "projected income" and not to the project itself. On the balance of probabilities we find that the Council did not make a decision to postpone the project but that it had not come into operation by November 2018 and that, having appreciated

that this was the case, the finance team took a view as to the timing of “projected income” from the project for the purposes of their report.

8. It is fair to say the Council could have been more forthcoming in their response to Mr Moss but we consider that they were therefore entitled to say that there was no “decision” to postpone the project and accordingly that the requested information simply did not exist.
9. It follows that Mr Moss’s contentions that the Commissioner’s decision was irrational and breached section 50 and that the Council breached section 10 also fall. As to his allegation that the Commissioner breached Art 6 of the EHRC in relation to her section 50 enquiry, it is a moot point whether Art 6 applies to a section 50 enquiry but in any event, we can see no unfairness in the way she proceeded and his right to appeal the Commissioner’s decision would in any event satisfy any requirements of Art 6.
10. We unanimously dismiss the appeal.

HH Judge Shanks

(First Tier Tribunal Judge)

Date of Decision: 15 October 2020

Date Promulgated: 19 October 2020