



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

Appeal Reference: EA/2020/0158 (P)

**Decided without a hearing on:
17 November 2020**

Before

JUDGE BUCKLEY

GARETH JONES

ANDREW WHETNALL

Between

MARIE FAYON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

DECISION

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

MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules. The mode of hearing was: P.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50851987 of 3 April 2020 which held that Westminster City Council (the Council) did not hold the requested information. The Commissioner found that the Council was in breach of s 10 of the Freedom of Information Act 2000 (FOIA) because it did not respond within 20 working days. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

2. The request relates to two projects known as R137 and S161 being carried out in a residential block of flats owned by the Council, where Ms Fayon is a leasehold owner. The block also contains Council tenants.
3. The scope of the works under project R137 were:
 - Replacement of communal cold water cisterns and booster sets
 - Replacement access loft hatch/tank rooms doors and lock
 - Electrical installations - power and lighting to tank rooms
 - Upgrade or renew access ladders.
4. We understand from a letter from City West Homes dated 5 February 2019 that part of this work (on four of the water tanks) could not be completed due to access difficulties. It was therefore omitted from R137. The remaining work was to be completed as project W253/W253B.
5. The scope of the works under project S161 were:
 - Pitched Roof repairs
 - Upgrade door entry systems and overhaul
 - Windows, door repairs
 - Brick repairs
 - Concrete repairs
 - Communal repair and decorations
 - External repair and decorations
 - Asphalt walkway repairs
 - Resurfacing of car parks
 - Renew entrance paths

Chemical clean floors
Replacement communal lighting
Fire Risk Assessment works.

6. The leaseholders were billed and paid for 50% of the estimated cost of the works on R137, W253 and S161, divided between leaseholders on the basis of their bed spaces. Ms Fayon is concerned that she has paid a considerable amount of money but has not received any final accounts or financial details. She is concerned that, as a private leaseholder, she is being required to contribute to the maintenance of flats belonging to other tenants of the building rather than only the cost of works to the communal areas. She is concerned that she has been billed on the basis of the complete works to be carried out under R137 and billed again for the overlapping work under W253.

Request, Decision Notice and appeal

7. On 13 February 2019 Ms Fayon made a request for information to the Council, the material part of which reads:

I would be grateful if you could send me the following information pertaining to [address redacted] where I am a Leasehold owner.

Project R137

How was the work specified? and what work was contained in the contract specification?

Was there any variation from the contract specification?, what work was completed & what work is outstanding if any?

The detailed cost estimate or project budget, the final cost account of the project.

Payment/contribution made by council and payments by private owners for each flat in [address redacted] (to be clear I am not asking for any personal details of the flat owners, I am asking what contribution was paid by the private flat owners).

Project S161

How was the work specified? and what work was contained in the contract specification?

Was there any variation from the project plan? What work was completed & what work is outstanding if any?

The detailed cost estimate or project budget, the final cost account of the project.

Payment/contribution made by council and payments by private owners for each flat in [address redacted] (to be clear I am not asking for any personal details of the flat owners, I am asking what contribution was paid by the private flat owners).

8. The Council did not initially respond to the full request, because it was addressed to Citywest Homes, who were, at that time, considered by the Council to be a separate public authority for freedom of information purposes.
9. The Council's initial response dated 24 May 2019 was sent in response to Ms Fayon's follow up email dated 23 April 2019, which did not contain the full detail

of the original request. The Council interpreted that follow up email as a request for 'Estimates for the following schemes: R137, S161 and W253'.

10. In its response to the email dated 23 April 2019 the Council stated that it held the information and provided a number of tables for R137 and S161 setting out the total scheme costs, the total cost to the block, the total billed to leaseholders, the total left outstanding and the total recovered. It indicated that the figures were final account figures for R137 and estimates for S161.

11. The Council provided a further response on 5 July 2019, after it had seen the full request dated 13 February 2019. It provided short answers to each part of the request.

12. In relation to project R137 the Council attached the following documents:

Notice of Intention dated 1 August 2011
Pre-construction information plan
R137 Gate 3 Review Award Report CWH RB

13. In relation to project S161 the Council attached the following documents:

S161 St Johns Wood Blocks Spec Inc Electrical Densham
S161 Proposed Draft FA

14. In relation to the request for the detailed cost estimate or project budget and the final cost account of the R137 project the Council gave the following information:

Award of contract to Hertel (UK) Limited for the provision of city wide replacement communal water cisterns and booster sets for the sum of £985,216. The total scheme costs, including works and professional fees, for the sum of £1,223,448 to be funded from the capital programme 2012/13 to 2015/16.

15. In relation to the payment/contribution made by the Council and payments provided by private owners the Council included a number of tables setting out figures for the total scheme costs, the total cost to the block, the total billed to leaseholders, the total left outstanding and the total recovered. These were stated to be final account figures for R137 and estimates for S161.

16. The Council also included an extract from the spreadsheet used to calculate the individual liabilities for the tenanted and leased flats on the basis of bed spaces.

17. During the course of the investigation by the Commissioner, the Council provided a number of further documents including documents containing information on the final cost breakdown for R137. These were provided to Ms Fayon on 10

December 2019. The Council stated that it did not hold the final cost account for project S161.

Decision Notice

18. In a decision notice dated 3 April 2020 the Commissioner decided that on the balance of probabilities the Council did not hold any information within the scope of the request. The Commissioner found that the Council was in breach of s 10 of the Freedom of Information Act 2000 (FOIA) because it did not respond to the request within 20 working days.

Grounds of Appeal

19. In summary, Ms Fayon's grounds of appeal are that the Commissioner was wrong to conclude that the Council did not hold any further information within the scope of the request.

20. The Grounds of Appeal refer to the claimant's email to the Commissioner dated 15 April 2020. In that email the claimant states, in essence, that she has not been provided with the information requested i.e. the final cost accounts in R137 or S161. She also complains that the new works project W253B appears to be carrying out work that was already paid for within R137.

21. The Notice of Appeal itself states that she wants details of whether the works have been completed fully, and if not, what is outstanding. She also wants details of what the actual cost of the works has been, i.e. final accounts for the works in question.

The Commissioner's response

22. In summary the Commissioner contends that she was correct to accept, on the balance of probabilities, that the Council did not hold the requested information. The issue for the Tribunal and the Commissioner is not whether the Council should hold the information, but whether it does hold the information.

The Appellant's reply

23. Ms Fayon's reply is contained in a letter dated 22 August 2020.

24. She strongly believes that the Information Commissioner was wrong to dismiss the case and would like the Tribunal to consider:

24.1. As a layperson she is trying to get information from Westminster City Council who should be accountable and transparent. While she appreciates that it takes time to finalise information relating to specific

- major works 5+ years is unacceptable, especially because she understands that documents can be archived or destroyed after 7 years.
- 24.2. The Commissioner's decision that no further step is to be taken is unreasonable and takes the Council's representations at face value, without questioning or using reason.
 - 24.3. None of the information disclosed gave clear transparent answers to her specific request about variation from the original contract specification and final accounts; there is still no clarity or accountability and now there is a new demand for major works which seem to duplicate some of the works paid for before.
 - 24.4. If the council signs off major works before they pay, they will know if contracted jobs are outstanding. Why is the Commissioner satisfied that further information is not held?
 - 24.5. Given findings of "inconsistent and poor administrative practice" what proof is there that information is not being withheld, why is the Council's word being taken at face value?
 - 24.6. The ICO has failed to demand more from the Council in terms of the level and standard of search for papers and information.
 - 24.7. If the council does not hold the information, is that due to maladministration? Several years have elapsed since work was done and money recovered from private lease holders and it still does not have a final account.
 - 24.8. The consequence of the Commissioner's decision is that Ms Fayon has to lodge and keep lodging FOI requests to seek information which should now be in the Council's possession if construction contracts are being managed competently.
 - 24.9. Dismissing the appeal leads to more FOI requests, takes up more time and leads to more costs for Ms Fayon, ICO and Tribunal.

Legal framework

25. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities.
26. Unlike the relevant date for the balance of public interest when a qualified exemption is claimed, which has been the subject of extensive judicial consideration and commentary, the relevant date for disclosure under s1(b) is set in statute. s1(4)(b) FOIA provides that the information to be disclosed:

is the information in question held at the time when the request is received, except that account may be taken of any amendments or deletion made between that time and the time when the information is to be communicated under section 1(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
27. 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

28. We have read and were referred to an open bundle of documents.

Issues

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

Discussion and conclusions

30. We are deciding an appeal against the Commissioner's Decision Notice. It is not within our remit to decide whether the information held or withheld was defective in any way or whether the handling of the whole process (whether concerning the nature of information held, the handling of the requests or the process of arriving at lawful charges to leaseholders) reflects maladministration, still less whether any charges ultimately settled for leaseholders were fair and lawful.

31. We must decide whether, on the balance of probabilities, undisclosed relevant information is likely to have existed at the time of the request on 13 February 2019.

32. It is possible, on the information before us, that the Council does now hold and may have disclosed the final accounts for S161. The usual position is that it is open to the appellant, if she remains dissatisfied and feels that questions remain unanswered, to make a new request.

33. Ms Fayon has given her view on this option in her reply in no uncertain terms, as set out above in para 24. There is something in these points, and we have considered how far a continuing cycle of time and cost could be avoided within the framework of law governing our role. This constrains in particular, the point in time at which the question of whether or not information is held must be considered and the fact that our role is confined to reviewing the Commissioner's decision. This is not the only case in which it is difficult to establish in a context of poor record keeping what information is in fact held at what point in time.

34. We have considered whether it is open to us to order the public authority to provide information about developments since the request, during the period in which the Council hoped that relevant accounts would be finalised. We have concluded that such a course is not open to us because our remit is confined to a

review of the Commissioner's decision on whether, on the balance of probabilities, further information was held at the time of the request.

35. The Appellant requested final accounts, and if these were not ready at the time of the request it was not possible to disclose them. It may be that building blocks for the final accounts were available within the Council at the time, but finalisation seems to turn on billing by contractors which the Council will not necessarily have been in a position to anticipate. The final accounts appear to be a necessary step in finding answers to the Appellant's other issues, for example any difference between estimates and final payments, or any overlaps or duplications between successive contracts, or any work paid for but left undone.
36. We understand Ms Fayon's frustration in this matter. She has been asked to pay a proportion of the cost of major works being carried out on the block in which she is a leasehold owner on the basis of estimated costs. The information which she wants is not complex. She wants to know whether or not the contracted work has been completed, and, if not, what jobs are outstanding. She wants to know if the actual costs of the contracts were the same as the estimated costs. She has been told that some of the work that was originally to form part of R137 was not completed and has been included in a new project (W235B). She cannot understand why she is being asked to pay a proportion of the costs of W235B if this was included in the original cost of R137.
37. In response to her request, she has been sent, inter alia, a number of detailed and complex documents. From these documents it is not easy for a lay person to ascertain whether all the contracted work has been completed or whether the final costs were the same as the estimated costs. Nor is it easy to identify what has happened to the estimated costs which would have been spent on the work which could not be carried out due to access problems and has had to be carried out under a separate project (W235B).
38. Ms Fayon's concern about process - that the only way forward may be to put in a succession of information requests - is also understandable. She is right that this may be wasteful of both time and resources. Each new request effectively starts the clock again, potentially leading to the chain of steps through internal review, resort to the Commissioner, appeal to a First Tier Tribunal and then perhaps higher authorities.
39. Although it is outside our remit, we note that the Council did attempt to provide some explanations and summaries of the information it held in order to answer the questions asked by Ms Fayon. Notwithstanding those efforts, we observe that the Council could have provided a clearer explanation, in particular, of the effect on final expenditure on R137 of the hiving off of the work under W235B.
40. In relation to R137 we accept the Council's explanation that they hold no more recorded information within the scope of the request. They have provided the

specification in July 2109 and documents which show what work was completed and billed for in December 2019. They have provided documents with the estimated cost for Densham House and the final cost account. They have also provided the breakdown of contributions by the flat owners. They state that electronic searches have been carried out and all information in scope provided.

41. The fact that none of this provides Ms Fayon with a clear explanation of why there was no reduction in price as a result of the hiving off of some work into W235B is unfortunate, but it does not mean that the Council has not provided all recorded information that it holds within the scope of the request.
42. Although Ms Fayon says in her email to the Commissioner of 15 April 2020 that she has not received the final accounts for R137, we find that documents containing this information were sent to her in December 2019 (see for example p179 and p180 of the bundle).
43. In relation to S 161, we note Ms Fayon's arguments that a final account 'must' exist because of the passage of time. We accept that, in the normal course of events, a final account would be expected to exist by the time of the request and we take this into account when considering the balance of probabilities. Set against this is the clear evidence of the Council that the matter had not been completed at the relevant time and that a final account had not yet been drawn up. Taking all these matters into account we find, on the balance of probabilities that the Council did not hold the final account on S161 at the relevant time.
44. If the S161 final account has now been created, the Council can provide it to Ms Fayon, if it has not done so already, but that is outside the remit of this appeal.
45. Taking all the above into account, whilst we have a great deal of sympathy for Ms Fayon we find, on the balance of probabilities, that at the time of the request the Council held no further recorded information within the scope of the request.
46. This is a unanimous decision.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 14 December 2020

Date Promulgated: 16 December 2020