First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2019/0451 (V - CVP)

Heard remotely by video conference
On 14 April 2021

Before

JUDGE HAZEL OLIVER
ROGER CREEDON
JOHN RANDALL

Between

PETER FRANCIS SAYER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

Appellant – in person
Respondent – did not attend

Determined at a remote hearing via video (Cloud Video Platform) on 14 April 2021

DECISION

The appeal is dismissed.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The appellant appeared in person by telephone only. The Information Commissioner did not attend the hearing.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 14 November 2019 (FS50821434, the "Decision Notice). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about a decision made by a planning inspector as held by East Hampshire District Council (the "Council").

3. The background to this issue relates to a specific planning application. As part of this application, there was a Deed of Agreement made under section 106 of the Town and Country Planning Act 1990 between the owner of the property, the developer and the Council, dated 25 January 2008 ("the section 106 Agreement"). As part of this agreement, the owner gave a covenant to make a financial contribution to the Council for open spaces and the integrated transport network, prior to the first occupation of any dwellings at the property.

4. The planning application was initially refused. The application was then granted after an appeal, in a decision dated 16 October 2008. The planning inspector's appeal decision refers to the section 106 Agreement as follows (paragraph 8) – "*The appellants have submitted an undertaking made in accordance with section 106 of the Town and Country Planning Act 1990 to make contributions towards the provision of open space and the integrated transport network. I have not been provided with adequate supporting information to show that these contributions are necessary to allow the development to proceed, and therefore I give this aspect limited weight*."

5. There are concerns that the development of the property has taken place, but the local village has not received the contributions set out in the section 106 Agreement.

6. On 23 March 2019, the appellant wrote to the Council and requested the following information (the "Request"):

> *"My request under the FOI 2000 Act is for clarification by the EHDC of the Inspector's decision in respect of the APPELANTS offer of s106 contributions. This would have been provided at some stage for the Benefit of the Appellant otherwise he would be unaware of any financial commitment to his business."*

7. The Council initially responded on 10 April 2019 on the basis that this was not a valid request. Following an internal review, on 14 May 2019 it provided a general explanation regarding the enforceability of what it called a section 106 agreement, maintained this was not a valid request, and said the appellant had already been provided with its "interpretation" of the Planning Inspector's comments.

8. The appellant complained to the Commissioner following the review on 1 June 2019. The Commissioner conducted an investigation into the complaint. The Council changed its position during the investigation. The Council accepted that this was a valid request and should be dealt with under EIR. However, it refused the request under regulation 12(4)(a) EIR on the basis that it did not hold any further relevant information. During her investigation, the Commissioner asked the Council to provide details of the searches undertaken to locate any further information in scope of the Request.

9. The Commissioner decided:

a. The requested information is environmental and so was correctly dealt with under EIR.
b. On the balance of probabilities, no further information in scope of the Request is held by the Council. This was based on the actions taken by the Council to check whether further information is held and the background circumstances of the case, including prior correspondence with the appellant about the underlying issue.

The Appeal and Responses

10. The appellant appealed on 9 December 2019. His grounds of appeal are that the Commissioner's decision is flawed. He complains that this decision relies on an Agreement which does not exist. He says there has been a misrepresentation of fact, as the first section 106 undertaking had no standing in law once planning permission was refused. He asks for a copy of the section 106 Agreement referred to by the Council in their correspondence.

11. The Commissioner's response maintains that the Decision Notice was correct.

a. The applicable test is the balance of probabilities.

b. The appeal appears to say that the Council should hold the information, based on the appellant's interpretation of the planning inspector's appeal decision as meaning the developer was not liable to make section 106 contributions. The Council has confirmed its view in correspondence with the appellant that the section 106 agreement stands. Even if the appellant is correct in his interpretation, the issue is whether the Council did hold information at the time of the request.

c. The Commissioner correctly pressed the Council for information about the searches it carried out and is entitled to accept the Council's representations and assurances. The correspondence relied on by the appellant is insufficient evidence to show that the requested information is in fact held by the Council.

12. The appellant submitted a reply which asserts that the Commissioner's decision is based on a section 106 Agreement which does not exist and says that this document as referred to by the Commissioner should be provided.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) *… "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

……

5(1) *…a public authority that holds environmental information shall make it available on request.*

……

5(4) *For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.*

……

12(4) *…a public authority may refuse to disclose information to the extent that –*
(a) it does not hold that information when an applicant's request is received.

14. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC.

15. In determining whether or not information is held, the standard of proof consistently used by the First-Tier Tribunal and the Commissioner is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

16. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the*

basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

Issues and evidence

17. The issue in the case is whether, on the balance of probabilities, the Council held further information within the scope of the appellant's request. It is not the Tribunal's role to determine what information the Council ought to hold.

18. In evidence we had an agreed bundle of open documents, which included the appeal, Commissioner's response, and appellant's reply. We also had oral submissions from the appellant at the hearing.

Discussion and Conclusions

19. ***Does EIR apply to the Request?*** We are satisfied that EIR rather than FOIA applies to the Request. "Environmental information" has a broad meaning, and it is well established by many other decisions that requests for information relating to planning permission relate to the state of the environment, as planning permission relates to the use of land.

20. The appellant said at the hearing that he had no objection to the matter being dealt with under EIR, but that his original request was under FOIA, and this had been changed during the Commissioner's investigation. It may be helpful to the appellant if we confirm how the two regimes fit together. FOIA and EIR both relate to the same issue – the obligations on public authorities to provide information when requested to do so. EIR must be used instead of FOIA where the request relates to environmental information. This is why we are considering EIR rights only in this case. The request relates to a planning permission decision. This must be dealt with under EIR instead of FOIA.

21. ***The appellant's submissions at the hearing.*** At the hearing, the appellant explained the background to his Request. He said he initially asked the Council for information previously, when it appeared that the developer was depriving the local parish council of money due under the section 106 Agreement. He did not get satisfactory answers but decided to leave the issue. He later saw information in the Guardian newspaper about FOIA and contacted the Commissioner. He was provided with advice about how to submit a new request, and as a result sent the Request on 23 March 2019.

22. The Tribunal asked the appellant what information he was saying he should have been provided with. The appellant said that he should have been provided with the planning inspector's appeal decision. He also referred to a letter from Ms Potter (Executive Head, Planning and Build Development) to Mr Dark (chair of the parish council) which he says puts words into the planning inspector's mouth that he did not say. The appellant says that he found both of these documents on the Council's "computer", using a link provided to him in the Commissioner's decision (footnote 1 on page 2 of the Decision Notice). The appellant did not say at the hearing that he should have been provided with a copy of a second section 106 Agreement. However, as this was part of his written appeal, we also address this below.

23. ***The planning appeal decision.*** The appellant said at the hearing that this is what he had been asking the Council for. Paragraph 8 of the reasons sets out the planning inspector's

position on the section 106 Agreement. The appellant says that this should have been provided to him in response to his request, and also to the parish council under regulation 4 EIR (which relates to dissemination of environmental information). He found the planning inspector's appeal decision by searching using the link provided by the Commissioner in her Decision Notice. Although the appellant described this as searching the Council's computer, the link is actually a web link for "planningpublicaccess.easthants.gov.uk". This appears to be the website where all publicly-accessible planning documents are published by the Council.

24. It seems that neither the Council nor the Commissioner understood that the appellant was simply asking for a copy of the planning appeal decision. The request asks for "clarification" of the inspector's decision, which implies that the appellant has seen the decision and is asking for more information about it. The Tribunal can see why the Council did not understand the Request to be asking for a copy of the decision itself – particularly as this decision was published on its public website. We also find the appellant's submission puzzling because the appellant himself quotes from the planning appeal decision in the documents he attached to his complaint to the Commissioner (page 62 in the bundle).

25. If the information in the planning appeal decision is all the appellant was asking for, it is unfortunate that this was never clarified by either the appellant or the Council at an early stage. However, the appellant now has the planning appeal decision. This was already publicly available on the Council's website at the time of the Request. He also appears to have had information about the planning inspector's comments on the section 106 Agreement at the time he made his complaint to the Commissioner. We therefore do not find that there was any breach of regulation 5(1) EIR by the Council in relation to the planning appeal decision. Although not the issue we are deciding in this appeal, we also note that publication on the public website would satisfy the requirements of regulation 4 EIR.

26. ***The letter from Ms Potter to Mr Dark.*** The appellant submits that this letter wrongly represents the planning inspector's position on the section 106 Agreement. This is not an issue which we are able to deal with in this appeal. The issue in this appeal is whether the Council held further information within the scope of the Request.

27. ***The existence of a second section 106 Agreement***. The appellant's written appeal and reply refer to the existence of a second section 106 Agreement which he says should be disclosed to him. The need to disclose this document did not form part of his oral submissions at the hearing. In addition, it is not clear that this second agreement (if it exists) would fall within the scope of the Request – this asked for clarification of the planning inspector's decision, not for other background documents. Nevertheless, for completeness we deal briefly with this point.

28. The appellant says that there was an original section 106 deed of agreement dated 25 January 2008, and we have seen a copy of this agreement. He believes this agreement ceased to have effect. This is because paragraph 5 of the covenants by the owner says that the deed of agreement shall "forthwith determine and cease to have effect" if the "permission granted pursuant to the Planning Application…shall at any time be revoked". The appellant says this means the deed of agreement ceased to have effect when the original planning permission was refused. He believes a new section 106 agreement was prepared for the appeal, and the planning inspector at the appeal was referring to this new agreement. He says he should be provided with a copy of the new agreement.

29. Having considered the documents, we do not agree that a second agreement was prepared for the appeal. The section 106 Agreement says that it would cease to have effect if planning permission was "revoked", i.e. withdrawn after it had been granted. That is not what happened in this case. Planning permission was originally refused. Permission was then granted on appeal. The permission was never revoked. There is no indication that the planning inspector at the appeal was referring to a new agreement. We also note that the Council referred to a section 106 undertaking dated 25 January 2008 when it wrote to the developers on 15 October 2014 about the obligations to pay contributions (page 117 in the bundle). This is clearly the section 106 Agreement that we have seen. There is no reference to a second agreement.

30. ***Searches conducted by the Council.*** Although not raised by the appellant at the hearing, we have also considered the searches conducted by the Council in order to assess whether, on the balance of probabilities, it has disclosed everything within scope of the Request.

31. On 4 November 2019, the Commissioner sent an email to the Council acknowledging that it had provided evidence of providing an explanation/interpretation of its position on a number of occasions, and asking for the following specific information about the Request – "*I consider that Mr Sayer may be asking for any recorded information which was generated at, or after, the appeal hearing and provided to the appellants (Chertsey Homes) regarding whether or not the contributions would be payable…Please can you confirm (for the avoidance of doubt) that the Council's position is that there is no recorded information in this respect? If so, please can you explain what searches were carried out for this, or why the Council is otherwise aware that this information is not held*."

32. The Council provided information in a reply to the Commissioner on 5 November 2019:

a. According to the electronic planning file, there was no written correspondence between the Council and either Chertsey Estates Ltd (or any other party) regarding any aspect of the appeal decision. There may have been telephone conversations or emails but there is no record on file.

b. The relevant case officer no longer works for the Council and emails would no longer be retained.

c. The legal department's case management system has documents about the planning letter, but none relating to this question. Any correspondence about the planning appeal would have come from the legal team and the information would be held on file.

d. The Council had written to the appellant (Mr Sayer) to explain that Council's view that section 106 contributions were payable but the Council had decided not to pursue the sums. There is the possibility or probability that the Council did not write to Chertsey Estates Ltd or any other party to inform them that sums were due but not payable.

33. We have considered the extent of the searches conducted by the Council. We find that these searches were both relevant and appropriate, and covered the files where information within the scope of the Request would be expected to be held. The Council has explained why

it searched these particular files, and the fact emails from the case officer have not been retained.

34. For the above reasons, we therefore find on the balance of probabilities that the Council did not hold further information within the scope of the appellant's request.

35. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 19 April 2021
Promulgated Date: 20 April 2021