



Appeal number: EA/2019/0341P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

PAUL ASTLE

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**Before:
JUDGE C L GOODMAN**

Determined on the papers, the Tribunal sitting in Chambers on 26 March 2020

DECISION

1. The appeal is dismissed.
2. The Commissioner's Decision Notice FER0813282 is in accordance with the law.

MODE OF HEARING

3. The Chamber President has determined that this appeal is suitable to be decided by a judge alone. The parties consented to this matter being decided on the papers without a hearing. I am satisfied that I can properly determine the issues alone without a hearing and that it is fair and in the interests of justice to do so.

4. I had before me:

- (1) an open bundle numbered pages 1-134;
- (2) a supplementary open bundle numbered pages A1-A683 and B1-695, which included submissions from Mansfield District Council;
- (3) the Appellant's Reply to the Commissioner's Response dated 19 November 2019 and numbered pages 1-35; and
- (4) Case Management Directions and emails from the Appellant to the Tribunal.

REASONS

Background

5. This appeal relates to a new residential development by Bellway Homes at the former Royal Estate in Worksop. Planning permission for the development was granted by Mansfield District Council ("the Council"). The Appellant bought a home on the estate in 2016. Building works were completed in 2018.

6. An undated Maintenance Plan (page A130) was submitted to and approved by the Council as part of the planning condition discharge process ("the Maintenance Plan"). The Maintenance Plan provides that Meadfleet Limited are "*the appointed Management Company for the long term stewardship of the various areas and features of the Public Open Space on the Royal Estate*". The 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*".

7. The Appellant submitted a request for information to the Council under the Environmental Information Regulations 2004 ("EIR") on 14 December 2018 ("the Request"). The Council gave the Request the reference 2018/EIR/8701.

8. The full Request is at page 20. I have reproduced part of the Request in this Decision, but taken it into account in its entirety in reaching my Decision. The Appellant suggested in his Reply that the Council must submit the actual email sent by him, not a forwarded version. However, as he has not identified any editing or error in the text at page 20, I am satisfied that this is an accurate representation of the Request.

9. In the Request, the Appellant first sets out his reasons for requesting information. He contends that the Royal Estate was "illegally" handed over Bellway Homes to

Meadfleet in April 2018. He refers to the Maintenance Plan and contends that the Council has “absolute legal responsibility” for ensuring that Bellway Homes comply with its terms. He goes on:

“My formal EIR 2004 request of 14th 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 to Meadfleet Ltd in April 2018.”

10. The Appellant sent multiple emails to the Council around this time, including several requests for information. On 27 December 2018, the Council wrote to the Appellant referring to its Unreasonable Behaviour Policy and asking him to restrict the volume of emails (page A108).

11. The Council replied to the Request on 14 January 2019 stating that it did not have any documentation requested. The Appellant complained to the Commissioner who advised him to request an internal review – which he did on 23 January 2019.

12. After carrying out an internal review, the Council confirmed on 14 February 2019 that its original response was correct and that it held no information relating to the Request. The Council explained that it “*did not issue any approval for the handover that took place from Bellway to Meadfleet in April 2018*”.

13. The Appellant complained to the Commissioner. On 1 August 2019, the Council provided the Commissioner with details of the searches it had carried out in response to the Request and an extract of its data retention schedule (pages 125-133).

14. The Appellant has raised other issues about the Royal Estate development with the Council since the Request, such as the condition of newly planted trees, fire barriers between connected houses, construction within 8 metres of the River Meden, ground water drainage and protection of water voles. The Council has acknowledged (for example in August 2020, at page A122) that Bellway Homes did not implement the development as approved. Additional planning applications have been made as a result.

Decision Notice

15. The Commissioner issued Decision Notice FER0813282 in relation to the Request on 17 September 2019. The Commissioner decided on the balance of probabilities and having considered the searches carried out by the Council, that the Council had stated correctly that it did not hold the requested information in compliance with Regulation 12(4)(a) EIR. The public interest test was not applied on the basis that it is an unnecessary exercise where information is not held.

Appeal and Submissions

16. The Appellant appealed to the First-tier Tribunal on 18 September 2019. In her Response dated 29 October 2019, the Commissioner stood by the Decision Notice. The Appellant made a number of representations to the Tribunal and submitted a Reply to the Commissioner's Response.

17. The appeal was considered and dismissed on the papers by Judge Buckley on 24 March 2020. However, that decision was set aside on 20 August 2020 for procedural irregularity because Judge Buckley had not seen the Appellant's Reply. I did not take Judge Buckley's decision into account in reaching my decision on the appeal.

18. A number of Case Management Directions were issued after Judge Buckley's decision was set aside. Tribunal Judge Macmillan decided on 9 November 2020 that the appeal should be limited to the Request and that the Council should not be joined to the proceedings. At her invitation, the Council made submissions dated 1 October 2020 and 19 November 2020. The Council exhibited to its first submission a letter from the Council's Head of Law and Governance to the Appellant dated 20 January 2020 and a further "unreasonable behaviour" warning letter issued to the Appellant on 14 Feb 2020. The Appellant also made further representations.

The Law

19. The information sought by the Appellant is "environmental information" as defined in Regulation 2(1) EIR because it relates to land and landscape and to measures and activities affecting and designed to protect land and landscape. This was not disputed by either party.

20. Regulation 5(1) EIR provides that subject to certain exceptions, a public body that holds environmental information shall make it available on request. Regulation 12(1) EIR provides that:

"a public authority may refuse to disclose environmental information requested if: (a) an exception to disclosure applies under paragraphs (4) or (5); and (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

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

22. Where the Commissioner finds that a public authority is entitled to refuse a request pursuant to Regulation 12(4)(a), the Tribunal must be satisfied on the balance of probabilities that the information is not held. As the Tribunal said in *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072, paragraph 13), relevant factors include 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 be relevant, such as the discovery of materials elsewhere which point to the existence of further information within the public authority.

23. The powers of the Tribunal in determining this appeal are set out in s.58 of the Freedom of Information Act 2000, as follows:

“If on an appeal under section 57 the Tribunal considers -

(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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

24. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence and Scope of Appeal

25. Some of the evidence before me relates to other requests for information made by the Appellant and other issues about planning approval for the Royal Estate development. In particular, the redacted correspondence between the Council and Bellway Homes at pages A206-A572 was provided by the Council to the Appellant in response to another request for information and post-dates the Request.

26. I have taken into account all the evidence before me. However, this appeal is limited to the Commissioner’s Decision Notice FER0813282 which related to the Request and not any other requests for information made by the Appellant.

Analysis

27. As explained in paragraphs 21 and 22 above, my task is to decide whether on the balance of probabilities, the Council was likely to be holding information relevant to the Request, when it was received. I must take into account the quality of the Council’s

initial analysis of the Request, the scope of the search it carried out, the rigour and efficiency with which the search was conducted, and any other relevant factors.

Analysis of Request

28. I find that the Council was correct to analyse the Request as relating only to the handover of the Royal Estate by Bellway Homes to Meadfleet Limited in April 2018 and specifically, documents demonstrating whether or not the Council was aware of the handover, whether it carried out an inspection to confirm compliance with the Maintenance Plan, and whether or not it had issued official approval for the handover.

29. In his Notice of Appeal, the Appellant says that “*it frankly defies belief*” that the Council had no documentation relating to inspections of the Royal Estate development nor contact with Bellway Homes as the main developer. However, the Request was not for information about every inspection of the development nor for copies of all communication between the Council and Bellway Homes. The Request was limited to documents demonstrating certain matters in relation to the handover from Bellway Homes to Meadfleet in April 2018.

30. The Request also did not relate to later concerns raised by the Appellant about the development nor to Bellway Homes’ compliance with planning conditions generally.

31. I find that the Request was sufficiently clear and specific that the Council was not required to ask the Appellant to explain or clarify the Request under its duty to advise and assist (Regulation 9, EIR). The Appellant set out in the Request the context and reason for the Request.

Scope of search

32. The search carried out by the Council involved the checking of paper and electronic planning application files and emails of officers involved in or previously involved in applications relating to the Royal Estate development (letter dated 1 August 2019, page 125). The Council told the Commissioner that the search would have identified any electronic document held in the relevant files, or that had been sent or received by email, because all computers, including laptops, are networked to the Council’s main server.

33. Given my findings about the Council’s analysis of the Request and that the Maintenance Plan was submitted to and approved as part of the planning condition discharge process, I am satisfied that it was appropriate for the Council to restrict its search to planning application files and officers involved in those applications. The Request referred to the Council’s responsibility as local planning authority.

34. I do not accept, as suggested by the Appellant, that this limited the search to information created before planning permission was granted. I am satisfied that the Council’s planning application files remained open while the development was ongoing and planning conditions remained outstanding. As noted at paragraph 14 above, the Council’s planning team continued to be involved after the handover in April 2018.

35. The Appellant expressed concerns in his Reply about the ability of the Council to search emails of former employees and whether all relevant devices were networked to the Council's main server. I have taken his concerns into account but accept on the balance of probabilities and evidence before me that the Council was able to search emails of officers involved or "previously involved", as it told the Commissioner. The extract from the Council's data retention schedule at pages 128-133 indicates a thoughtful and robust approach to data retention. I accept that in the circumstances, the Council's search encompassed sufficient devices to identify whether the requested information was held.

36. The Council told the Commissioner that it did not have a record of the search terms used, although "*the words "Royal Estate" and "Meadfleet" would have been included*". The Appellant submitted that other terms, such as "*inspection*" and "*Bellway*", should also have been used. The Commissioner points out that the Council may have searched for these terms – it is simply not known what was searched.

37. It would have been preferable if the Council had kept a more careful record of the search which was conducted. However, I am satisfied on the balance of probabilities and given its analysis of the Request, that the Council did search for the terms "*Royal Estate*" and "*Meadfleet*" and that this search was sufficiently wide to identify information covered by the Request. The request was for information relating to the handover of the "Royal Estate" to "Meadfleet" – searching for these terms was more likely than not to find the requested information.

38. The Appellant suggested that the search should have been extended to Ashfield District Council with whom the Council share legal services. The Council's Head of Law and Governance confirmed in her letter dated 20 January 2020 that planning services were not shared and that a subsequent search conducted at Ashfield found no relevant information. I am satisfied on the balance of probabilities that Ashfield was not likely to hold information relevant to the Request on behalf of the Council.

Rigour and efficiency of search

39. The search carried out by the Council identified no information relevant to the Request. The Head of Law and Governance explained that the Council did not need to be informed of, and was not a party to, the handover of the Royal Estate to Meadfleet in April 2018 (page A115). The Council had discretionary powers to enforce the Maintenance Plan if it became aware of non-compliance, but its approval was not a prerequisite to handover.

40. I find this credible and consistent with the evidence before me. This explains why no information was found by the Council which was relevant to the Request. In this context, the failure of the Council to find relevant information does not suggest that its search was less than rigorous or efficient.

41. While the EIR definition of "environmental information" includes "aural" and "visual" information, this is only when held in "material form". The Council does not "hold" information which exists only in the heads of its staff or which they have heard

or seen, as submitted by the Appellant in his Reply, unless these sights and sounds are captured in material form as recordings or photographs. I am satisfied that any recordings or photographs held by the Council which were relevant to the Request would have been identified by the searches carried out by the Council.

42. The Appellant refers in his Reply to emails he received from a Council employee in December 2018 about Bellway Homes' compliance with planning conditions which, he submits, indicate that the Council does hold information relevant to the Request. I find that the extracts provided by the Appellant at page 28 indicate only that the Council is investigating an alleged breach of planning control, not that it holds information about the handover to Meadfleet in April 2018.

43. The Maintenance Plan itself is not covered by the Request because it is not a document which demonstrates that the Council approved or was aware of the handover to Meadfleet in April 2018.

44. Taking all this into account and noting in particular that the Council was not a party to the handover of the Royal Estate in April 2018 and that its approval as local planning authority was not required, I am satisfied on the balance of probabilities that the Council's search for information relevant to the Request was sufficiently rigorous and efficient.

Conclusion

45. For the reasons given above, I find on the balance of probabilities that the Council did not hold information relevant to the Request when the Request was received. The exception in Regulation 12(4)(a) applies. As the Council held no information relevant to the Request, the public interest test in maintaining the exception in Regulation 12(4)(a) outweighs any public interest in disclosure. I conclude that Decision Notice FER0813282 is in accordance with the law and dismiss the appeal.

Signed digitally by:

Judge CL Goodman

DATE: 26/03/2021

Promulgated:

DATE: 30/03/2021