Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2005/0024
Information Commissioner's Ref: FS50067951

Heard at Audit House, London, EC4
On 9 October 2007

Decision Promulgated
26 October 2007

BEFORE

CHAIRMAN

ANDREW BARTLETT QC

and

LAY MEMBERS

JENNI THOMSON
MALCOLM CLARKE

Between

KESTON RAMBLERS ASSOCIATION

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

LONDON BOROUGH OF BROMLEY

Additional Party

Representation:

For the Appellant: Henry Fulwood
For the Respondent: Timothy Pitt-Payne
For the Additional Party: Garreth Wong

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 2 November 2005:

Information Tribunal Appeal Number: EA/2005/0024

Information Commissioner's Ref: FS50067951

SUBSTITUTED DECISION NOTICE

Dated 26 October 2007

Public authority: **London Borough of Bromley**

Address of Public authority: **Civic Centre**
Stockwell Close
Bromley
BR1 3UH

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the Council did not comply with the provisions of the Environmental Information Regulations 2004, in that it failed to make available to the applicant on request the information referred to in paragraph 43 of the Tribunal's determination.

Action Required

Since the information referred to above has been provided to the applicant, no action is now required.

Andrew Bartlett QC Dated this 26 day of October 2007

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal is concerned with the quality of a local council's response to an information request. It does not raise any issues concerning the applications of exemptions or the balance of public interest. Our decision includes guidance on the duty of advice and assistance (in paragraphs 56-59 below).

2. We refer to the Freedom of Information Act 2000 as "FOIA" and to the Environmental Information Regulations 2004 as "EIR".

The request for information and the complaint to the Information Commissioner

3. On 24 January 2005 the Keston Ramblers Association ("the Association") made an information request to the London Borough of Bromley ("the Council") in relation to a definitive map modification order made on 1 February "2002" (stated erroneously as "2001" but later corrected to 2002) and the Keston Park Estate. It asked for provision of

> "copies of the duly made representations/objections and correspondence [sic] thereafter conducted by officers of the Council with the following:
>
> 1. Representors and Objectors
>
> 2. Keston Park (1975) Limited
>
> 3. Messrs. Charman and Gore – Solicitors
>
> 4. The Planning Inspectorate
>
> 5. Messrs. Steele & Co. – Solicitors
>
> 6. Rights of Way Sub-Committee
>
> 7. Government Office for London"

4. A follow up letter of 17 February 2005 indicated that the request was made under both FOIA and EIR, agreed the Council's copying charge, and asked for suitable dates and times for inspection of the information held by the Council's Legal & Democratic Services Department. A further follow up letter of 3 March 2005 asked why dates and times for inspection had not been provided.

5. The Council did not respond adequately, and the Association complained to the Information Commissioner. After payment of fees by the Association under protest, information was provided by the Council to the Association on 11 April 2005. This comprised some 335 (sometimes described in our papers as 345) pages of documentation.

6. The Commissioner considered that the request related to environmental information, and therefore considered the matter under the EIR. Following the provision of the further documentation, the Commissioner decided, in a Decision Notice dated 2 November 2005, that the Association had been provided with all the information to which it was entitled and that no further information falling within the scope of the request was held by the Council.

The appeal to the Tribunal

7. The Association appealed to this Tribunal pursuant to s57 of the Freedom of Information Act 2000.

8. The grounds of appeal are in paragraphs 12-13 of the statement of Mr Fulwood dated 24 November 2005. Mr Fulwood is an officer of the Association. His central point is that the Commissioner was wrong to conclude that the Association was provided with all the information to which it was entitled. His statement shows a particular concern with information generated in the period July 2002 to October 2004 relating to a witness statement of a Mr Chatfield. His substantive complaint is that the Council is still withholding information concerning the Council's consideration of that statement and the actions that flowed from it, and that the Commissioner ought to have required the Council to permit inspection of the withheld information. In his statement of 2 March 2006, pursuant to the Tribunal's direction, he gave more detail of what documents he thought should exist and had not been disclosed.

9. He also raises complaints of a more procedural nature that (a) the date and (b) the content of the Association's complaint to the Commissioner were not recorded in the Commissioner's Decision, and that (c) no reference was made in it to the Council's failure to comply with section 10 of the Act.

10. The hearing of the appeal was originally ordered to take place in April 2006. It was delayed by several requests by the Association for postponements, for a variety of reasons which it is not necessary to go into, other than to say that the longest period of delay was caused by unsuccessful judicial review proceedings brought by the Association following the Tribunal's refusal to issue a witness summons for a witness who did not appear to the Tribunal to be able to give relevant evidence.

The questions for the Tribunal

11. The procedural complaints raised in Mr Fulwood's statement do not require lengthy consideration.

12. As to (a), it is correct that the date of the Association's complaint to the Commissioner was not recorded in the Commissioner's Decision. It is usual for the Commissioner to record the date of the complaint in the Decision Notice, but there is no legal requirement to do so.

13. As to (b), it is not correct that the contents of the Association's complaint were not recorded in the Commissioner's decision. It is certainly true that the Association's complaint could have been more fully set out in the Decision Notice, but the gist of the complaint was accurately stated as being that the Association had not been provided with all the requested information to which it believed it was entitled.

14. As to (c), it is true that the Commissioner did not refer in his Decision Notice to a failure by the Council to comply with s 10 of the Act, which is concerned with the time limit for responding to information requests under FOIA. The Commissioner took the view that the request was governed by the EIR rather than FOIA, so that Regulation 5 applied in place of s 10. More relevantly, during the Commissioner's investigation, the Association wrote on 26 July 2005, stating:

We are pleased to confirm that our appeal to you is solely directed at securing your affirmation of our right of access to recorded actions within the Legal & Democratic Services Department that led to and followed The Secretary of State refusal to accept that Departments negligently flawed legal drafting of Definitive Map Modification Order 2001.

15. In light of this letter, the Commissioner was entitled to take the view that the Association was not complaining about the Council's procedural delay in replying and was limiting its complaint to the substantive issue.

16. For the above reasons we reject the procedural complaints contained in the grounds of appeal.

17. The sole issue formally raised by the appeal which requires our further consideration is the substantive question whether the Council has withheld information which it holds and which falls within the request. For this purpose it makes no difference whether the matter falls within FOIA or EIR. No exemptions are relied on by the Council. Thus under either regime, if the information requested is held, it must be disclosed.

18. During the course of the hearing of the appeal Mr Fulwood raised a number of other complaints, which were not detailed in his grounds of appeal. We consider these below.

Evidence and findings of fact

19. Mr Fulwood's evidence before us was contained in his written statement of 24 November 2005 enclosed with the notice of appeal.

20. We received statements and heard oral evidence from Mr Anthony Tompkins, a solicitor in the employ of the Council, Mr Duncan Gray from the Environment and Leisure Services Department, and Mr Martin Kelly, who at the time of the request was the Council's information officer.

21. While their recollections were understandably incomplete, and in some instances the contemporary documents were of more help to us than the witness evidence, we considered that the witnesses were genuinely trying to assist us. Taking account

of their evidence, of the large volume of documents provided to us, and the submissions made by the parties, our findings of fact are as set out below.

22. The Council is the surveying authority for public rights of way in the Borough and as such is the body responsible under the Wildlife and Countryside Act 1981 for the preparation and upkeep of the Definitive Map and Statement of Public Rights of Way.

23. On 28 August 1998 the Association applied to the Council for registration of a pedestrian right of way through Keston Park. After conducting an investigation the Council concluded pursuant to s53 of the 1981 Act that the right of way was reasonably alleged to subsist. This conclusion was resolved upon by the Environmental Services Committee on 6 June 2001.

24. Where a Council reaches this conclusion, it is required to make an order amending the definitive map. The making of such an order enables any persons aggrieved by it to invoke the procedure under Schedule 15 of the 1981 Act for having their objections heard and the evidence tested at a public inquiry. The order does not take effect until confirmed. If there are no objections (or if any objections made are withdrawn), it can be confirmed by the Council. Otherwise it can only be confirmed by the Secretary of State.

25. There was then some delay by the Council's external solicitors, who did not submit the Order to the Council for sealing until December 2001. The amending order was made on 11 December 2001 and advertised as from 1 February 2002.

26. On 6 March 2002 the Keston estate company, Keston Park (1975) Ltd, wrote to the Council's external solicitors making strenuous objections to the Order and requiring a public inquiry. On 16 April 2002, the company submitted a further objection, supported by three witness statements. On 8 July 2002 solicitors wrote on behalf of the Keston Park Residents Association to the Council, making further objection. They enclosed a report dated 3 July 2002 by an investigator, a Mr Chatfield, which cast doubt on the reliability of the evidence which had been considered by the Council as the basis of the June 2001 resolution. This was followed up on 29 July 2002 by a further letter, enclosing a signed witness statement by Mr Chatfield.

27. It was suggested to the Council on behalf of the objectors that the Order should be withdrawn because of the unreliability of the original evidence. The Council's view (set out in its letter of 28 August 2002) was that, having made the Order, under the terms of paragraph 7(1) of Schedule 15 to the 1981 Act, it had no option but to submit the order to the Secretary of State for confirmation. This position was driven by the Council's understanding of the relevant legislation, not by any evaluation of the Chatfield evidence.

28. Accordingly, the Council instructed its external solicitors to make the necessary arrangements. Mr Gray gave detailed instructions in his letter of 27 February 2003. That letter referred to an "attached document headed Reasons for Making the order" which was said to address "the Council's comments on the objections". The attachment was not in the papers supplied to the Association or the Tribunal. During the hearing we directed the Council to produce it within 7 days. It was supplied to us a few days after the hearing. It contains a brief discussion of the objections, and was clearly within the scope of the information request. We do not accept Mr Gray's evidence that he thought the attachment was not within the scope of the request; he gave no convincing reason for that view.

29. After some delay the Order was referred on 20 May 2003 to the Planning Inspectorate (acting on behalf of the Secretary of State).

30. On 21 July 2003 the Inspectorate wrote to the Council's solicitors, stating that the Order which the Council had made was invalid. The reason for the invalidity was said to be that the Order had been made more than 6 months after the resolution of 6 June 2001, and that this was contrary to Statutory Instrument 12/93. (This requirement is contained in a footnote to Schedule 2 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993.) Accordingly, the Secretary of State declined to exercise the power of confirmation conferred on her by paragraph 7 of Schedule 15 to the 1981 Act.

31. As a result, the Order was of no effect, and no public inquiry was held.

32. Because the Order was invalid it was necessary for the Council to consider the matter afresh. At a meeting of the Rights of Way Sub-committee held on 12 October 2004 the Council decided not to proceed with a new Order. This decision was

based on the objections which had been received after the making of the original Order. The formal resolution read-

> *RESOLVED that, in the absence of clarification from the Keston Ramblers Association of the further evidence submitted by the Keston Park Estate in the form of their objection to the undetermined Order, no Order be made to show a footpath on the claimed route as, on the balance of probabilities, insufficient evidence has been adduced to support a reasonable allegation that a path on that route subsists.*

33. It is not entirely clear from the evidence what communications took place between the Council and the Association prior to the reconsideration. An Association letter of 11 October 2004, written by Mr John Jones, stated that it enclosed an "Initial Draft of my Witness Statement", but the Council's date stamp shows that it was received by the Council on 13 October 2004, that is, after the relevant meeting had been held. The initial draft statement does not appear among the papers disclosed to us. Mr Jones' letter also referred to an earlier letter of 9 October 2004, which we do not have.

34. On the Council's side, what preceded the decision of 12 October 2004 was a report by Mr Duncan Gray to the Rights of Way Sub-committee. Before making his report, Mr Gray discussed the matter with Mr Tompkins, a solicitor employed in the Council's Legal and Democratic Services Department. Mr Tompkins advised him orally that in his opinion, in the light of the additional evidence received subsequent to the making of the original Order, it was no longer appropriate to conclude that the test in s53 of the 1981 Act was satisfied.

35. The second page of this report was missing from the documents supplied to the Tribunal. At the request of the Tribunal, it was supplied on the morning of the hearing. Mr Kelly speculated in his evidence that this second page of the report would have been included in the documents supplied to the Association pursuant to the information request, but he was not in a position to give positive confirmation that it was. Mr Fulwood told us (without objection from the other parties) that he had not seen it before. We have concluded that there was an inadvertent copying error,

and this page, which clearly fell within the terms of the information request, was not supplied to the Association.

36. It contained a very brief evaluation of the material submitted by way of objection, which included the Chatfield statement. It contained Mr Gray's summary that "the objection challenges the likelihood of a number of the witnesses having used the subject path with the frequency claimed, based on evidence that they lived some distance away at the time". It recorded Mr Tompkins' advice as follows:

> *... he is now of the opinion that the evidence submitted on behalf of the Keston Park Estate throws considerable doubt on the validity of the previous evidence making that evidence unreliable. He, therefore, takes the view that on the balance of probabilities the cumulative effect of the evidence now before Members is not sufficient to support the making of an order to amend the Definitive Map and Statement to show a footpath on the claimed route.*

37. This was reflected almost word for word in the minutes of the meeting, which were provided to the Association pursuant to their information request, and which included a statement that-

> *The Director of Legal and Democratic Services was of the opinion that the evidence submitted on behalf of the Keston Park Estate cast considerable doubt on the validity of the previous evidence which now made that evidence unreliable. He took the view that, on the balance of probabilities, the cumulative effect of the evidence now before the Sub-Committee was not sufficient to support the making of an Order to amend the Definitive Map and Statement to show a footpath on the claimed route*.

38. In the normal way, the reference to the Director was made because his Department acted in his name, the particular employee who gave the advice being Mr Tompkins.

39. Mr Fulwood contended that there must be some further record of a reassessment of Mr Chatfield's statement, beyond Mr Tompkins' handwritten jottings which could be seen on the copy held by the Council. Mr Tompkins explained in cross-examination that there was a practice within the Council of providing internal legal advice orally

rather than in writing, since this was considered to be more efficient, and that there was no other record than those which were produced to us. We accept his evidence. Whether that was good practice is not for us to say, and is not relevant to the issue before us. On the evidence, we find that there was not any further record of reassessment.

Legal submissions and analysis

40. Mr Wong contended on behalf of the Council that we should be concerned only with the specific documents identified in Mr Fulwood's statement of 2 March 2006, namely, the Legal and Democratic Services Department's record of in-house discussions and internal memoranda following the Secretary of State's letter of 21 July 2003, and the responsible officer's evaluation and re-evaluation of the Chatfield statement. On that basis the documents written by Mr Gray would be outside the scope of the appeal.

41. We think that is an unduly formalistic approach in the circumstances of the present case. Mr Fulwood was not in a position to know exactly what records existed. Where documents were written on the above topics, but by an officer in another department, reflecting or influenced by the views of the Legal Department, we consider that such documents should be regarded as falling within the scope of the appeal, provided that they also fall within the original information request.

42. Mr Wong suggested in closing that Mr Gray's report of October 2004 would have been attached to the Sub-Committee's minutes, and would therefore have been available to the public at the central library in Bromley. We were not satisfied on the evidence that that was in fact the case, but in any event the Council did not, in answer to the request, refer the Association to the published minutes available at the library. Instead, they sent an incomplete copy. If they had decided to deal with the request by referring the Association to the library copy, it was incumbent on them (by virtue of EIR regulation 6) to explain that to the Association, which they did not do. They cannot now rely on the possibility that the full report was available at the library as an answer to the criticism that the copy report sent to the Association was incomplete.

43. Mr Pitt-Payne in his closing submissions conceded that the Commissioner's Decision Notice was incorrect in so far as it stated that there was no further information held by the Council which ought to have been disclosed. In our judgment he was right to do so. We hold that the Council wrongly failed to disclose (1) the February 2003 attachment 'Reasons for making the order' and (2) the second page of Mr Gray's report of October 2004. However, we also hold that the Council held no other recorded evaluation or re-evaluation of Mr Chatfield's statement.

44. At the time of the request FOIA had only recently come into force. The Council's failures were inadvertent and not deliberate. A close reading of the copied documents by the Commissioner's staff or by the Association would have identified the missing items. We should mention here that the 335 pages contained some material which related to a different footpath application and was of no relevance to the Association's request. The Council's response to the request was not of a high quality, and we express the hope that the Council now handles information requests with greater accuracy and efficiency.

45. Mr Fulwood submitted that, in addition to the two missing documents which we have referred to, the Council ought to have disclosed the terms of engagement of their external solicitors. We were not persuaded by this submission. Mr Wong and Mr Pitt-Payne both submitted that, on a fair reading of the information request, the terms of engagement of the solicitors were not within its scope. We agree with them on that point.

46. Mr Fulwood contended that a full copy of the application to the Secretary of State, as sent by the external solicitors to the Planning Inspectorate, ought to have been provided. Mr Wong submitted that the application as submitted by the external solicitors to the Planning Inspectorate was not within the terms of the information request, because it was neither a communication between the Council and the Planning Inspectorate nor between the Council and the external solicitors. We accept that submission as regards the original, but a copy of it might have constituted a communication between the external solicitors and the Council.

47. Mr Gray stated in evidence that he did not have a copy. He speculated that the external solicitors should have a copy, and that it was possible that the Legal and Democratic Services Department might hold one. However, there was in our judgment no satisfactory evidence that the Council held a copy of the as-sent application at the time of the Association's request. Mr Pitt-Payne invited us in the course of the hearing to direct the Council to look at their files again and see if they contained such a copy. We did so. The Council confirmed in writing, after the hearing of the appeal, that a copy was not held. We are unable to find that the Council held a copy which it failed to disclose to the Association.

48. We deal next with the additional points raised by Mr Fulwood during the hearing.

49. Mr Fulwood contended that his letters of 17 February and 3 March 2005 were further information requests, which the Commissioner ought to have recognised and considered. We do not agree. Those two letters did not ask for any additional recorded information, and were not information requests within the meaning of FOIA or EIR. The Commissioner was correct in not treating them as information requests.

50. Mr Fulwood next submitted that the Council's response did not comply with EIR regulation 6. This requires the public authority, subject to certain important qualifications, to make the information available in a particular form or format requested by the applicant. He contended that the documents should have been sorted and supplied to him under the seven headings set out in his request. We reject this complaint for the following reasons:

    (1) While it is true that his grounds of appeal described the supplied documents as "neither indexed nor page numbered", it was not reasonably apparent to the Commissioner or to the Council at any time prior to the hearing of the appeal that he was making a complaint about format under regulation 6.

    (2) The information request did not expressly ask for the documents, when supplied, to be divided between the seven headings. Indeed, such a division would be inherently impracticable, since numerous items would fall under more than one of the headings.

(3) While it is not necessary for us, for the purposes of this appeal, to take a definite view on the proper interpretation of regulation 6, Mr Pitt-Payne and Mr Wong submitted that the expression "form or format" is not a reference to categories of subject-matter, but is a reference to whether the information should be supplied by means of paper copies, or electronically, or by viewing of a microfiche, and so on. We think that submission is probably correct, and on that basis the contention that there was a breach of regulation 6 would not succeed even if we were to hold that it formed part of the appeal.

51. At one point Mr Fulwood raised a point about the fees charged to the Association pursuant to EIR regulation 8. However, it was clarified in the course of the hearing that he was not pursuing any point on this, and in any event the Council agreed during the hearing to refund to the Association the charge that had been made, so the point became academic.

52. Mr Fulwood submitted that the Council had failed to provide reasonable advice and assistance pursuant to EIR regulation 9, in respects set out in the Commissioner's letter of 22 June 2005. Mr Wong objected to this submission, on the ground that no such allegation was contained either in the grounds of appeal or in Mr Fulwood's subsequent statement of 2 March 2006. We uphold this objection. A party is entitled to reasonable advance notice of the points to be pursued on appeal. While they were raised in the Commissioner's correspondence during his investigation, they were not raised in the appeal itself until the day of the hearing. The Council may well have wished to prepare additional evidence to deal with this allegation if suitable advance notice of it had been given. (However, the matters which Mr Fulwood wished to go into gave rise to a point of general interest in relation to the duty to give advice and assistance, and we therefore include separately below a comment upon it, notwithstanding our decision not to allow Mr Fulwood to pursue it as a complaint against the Council.)

53. To meet other parties' objections to his submissions on matters not raised in the grounds of appeal, Mr Fulwood referred to the Tribunal's power in FOIA s58(2) to review any finding of fact on which the Decision Notice was based. That power does indeed enable the Tribunal to review findings of fact, but that is a separate

question from determining what matters are fairly included within the scope of the appeal.

54. Mr Fulwood submitted in addition that the Council was in breach of EIR regulation 11. Mr Wong objected that breach of regulation 11 was not alleged in the grounds of appeal. We uphold the objection, for the same reasons as the objection to the allegation of breach of regulation 9.

55. For completeness, we record that the Council's delay in answering the request did not form part of the appeal, and in any event the Council conceded that it did not deal with the request as quickly as it ought to have done.

Advice and assistance where fees may be charged

56. We wish to add some observations on the interaction of EIR regulations 8 and 9.

57. Regulation 8 entitles the public authority, subject to certain restrictions, to charge the applicant for making information available. Regulation 9 requires the public authority to provide advice and assistance to applicants and prospective applicants, so far as it would be reasonable to expect the authority to do so.

58. Mr Pitt-Payne submitted that, where the authority has collated the requested information, and offers to copy it in return for a fee, the duty of advice and assistance would normally require the authority to offer the documents for inspection, so that the applicant can see them and decide whether he wants to go ahead with paying for copies, or whether he is satisfied with inspection of them.

59. While of course the requirements of the advice and assistance duty must vary according to the particular circumstances, it does seem to us that in general Mr Pitt-Payne's submission is likely to be correct. As he said, this procedure would avoid any sense of grievance, as could have occurred in the present case, arising from the copying of information that was not relevant to what the applicant was actually wanting.

Conclusions and remedy

60. Our conclusion is that the Council did not deal with the request in accordance with the requirements of EIR, in that it did not disclose the two documents identified at paragraph 43 above. To this extent only the appeal is allowed.

61. In support of our power both to allow the appeal and to substitute an amended Decision Notice, notwithstanding the terms of FOIA s58(1), we refer to paragraphs 16-23 of the Tribunal's decision in *Guardian Newspapers v Information Commissioner and British Broadcasting Corporation* 2006/0011, 2006/ 0013.

62. Since the missing documents have now been provided to the Association, no further remedial action is required.

63. Our decision is unanimous.

Andrew Bartlett QC

Deputy Chairman

Date 26 October 2007