



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

Appeal No: EA/2015/0006

**ON APPEAL FROM:
Information Commissioner's Decision Notice No: FER0545885
Dated: 3 December 2014**

BETWEEN

ALISTAIR EVANS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Tribunal

**Brian Kennedy QC
Narendra Makanji**

Hearing: 5 May 2015, 18 February 2015.

Location: Fox Court London.

Decision: Appeal Refused.

Date of Promulgation: 28 July 2015

Subject Matter: The Environmental Information Regulations 2004 ("EIR's") and reliance by the Appellant on Regulation 12(4)(a) EIR's to withhold disclosure of the requested information.

Regulation 12(4)(a) EIR's provides an exception to the general rule of disclosure under Regulation 5 of the EIR's where a public authority does not hold the information requested.

Introduction:

1. This decision relates to an appeal brought under section 57 of the FOIA as modified by Regulation 18 EIR's. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("the DN") dated 3 December 2014 (reference FER0545885), which is a matter of public record.
2. A paper hearing took place on 5 May 2015 the parties having agreed to this form of hearing and also having agreed to proceed with two panel members, the third having become unavailable.. The Tribunal has been provided with a paginated (1- 83) and indexed Open Bundle ("OB 1") along with an e-mail (2 pages) dated 18 February 2015 from the appellant. We also have the usual helpful pleadings of the DN, the grounds of Appeal and the Commissioner's Response much of which, for the sake of completeness, we repeat herein as there is little by way of issue between the parties on most of the factual matrix or legal issues in this appeal.

Background:

3. On 30 September 2013 the clerk to Dinnington St John Town Council made a request to information to Rotherham Metropolitan Borough Council ("the council"), as set out below. The appellant is the current clerk to the town council, and the Commissioner indicates that he appeals the handling of the request in this capacity and this appears to be agreed.
4. The request sought information from the council in the following terms:

"Birkdale Recreation Ground at Dinnington.

Given that Taylor Wimpey have published plans (via RMBC's Sites and Policies Consultation portal) to build on this land, could we ask for some information under FOIA. as follows: (a) on what date did RMBC agree to sell land to Taylor Wimpey and (b) can RMBC supply us with all documentation and discussion regarding potential developments between developers and RMBC in relation to this site.

You may not be aware but we have secured a land charge against this piece of land onto the Right to Bid, and yet we have not been informed of any developments with regard to Taylor Wimpey regarding the development of this site which is why we would like some information on discussions/negotiations to date."

5. The council responded on 16 October 2013. As to part (a) of the request, the council stated *"the Council has not agreed to sell the land in question to Taylor Wimpey"*. As to part (b), the council explained that it would not disclose the requested information. The council relied on exemptions to disclosure pro-

vided for under FOIA, specifically s.40 (personal information), s.41 (information provided in confidence) and s.43 (commercially sensitive information).

6. The clerk wrote to the Council expressing dissatisfaction with the response to part (b) of the request. The Clerk asked whether financial, personal and commercially sensitive that could be redacted from the requested information.
7. The Council conducted an internal review of the request. By response of 7 March 2014 the Council maintained its position that the information sought by part (b) of the request was exempt from disclosure, relying on sections 40, 41 and 43 FOIA. The Council explained that reduction of the information would not enable it to be disclosed, as even in redacted form it was likely that for example, the landowner owner could be identified from plans of areas of land, which might be included.
8. The Appellant complained to the Commissioner on 25 June 2014, expressing his dissatisfaction with the council's handling of his request. The Commissioner explained to the Appellant that his investigation would focus part (b) of the request. As to part (a), the Appellant informed the Commissioner that the request should have referred to anything "*discussed*" between the Council and Taylor Wimpey, and extended to include "*their agents*". The Commissioner replied to the appellant explaining that this constituted a different request to that submitted 30 September 2013, and that if the appellant wished to pursue this and you request be made to the Council. (Our emphasis).
9. The Commissioner investigated the Appellant's contentions as to part (b) of the request. The Commissioner informed the Council that it appeared the request concerned environmental information, such that it may fall within the scope of the EIR. On reconsideration, the Council concluded that the requested information did fall within the scope of the EIR. The council maintained its position the disclosure should be withheld, relying on the exceptions provided for by regulations r.12(3) and r13 EIR (personal data), and regulation 12(5)(f) (adverse effects to the interests of the provider of the information).
10. During the course of the Commissioner's investigation, the Council provided him with the small amount of information, which it considered fell within the scope of the request, and in respect of which it relied on exceptions to disclosure. Having examined this information, the Commissioner asked the council to clarify whether the information related to the site specified in the request, namely Birkdale Recreation Ground at Dinnington. The Council explained that none of the information related directly to this site. The Council further stated that it did not hold any relevant information (that is, documentation on discussions between developers and the Council as to potential developments) relating to the site.
11. The Commissioner wrote to the Appellant, explaining that having reconsidered the request, the Council had concluded it did not hold any relevant information relating to the site identified in part (b) of the request. The Appellant requested that the Commissioner continue his investigation on this basis.

12. The Commissioner continued his investigation, including asking the Council what searches it had conducted for the requested information and whether any information had been deleted, destroyed or mislaid. The Council was also specifically asked for any comments as to the appellant's contention that plans proposed by Taylor Wimpey appeared on the Council's website. The council explained that:
- a) the request had been passed to officers within the Council who would have had knowledge of, and/or been involved in, any formal or informal meetings;
 - b) no formal meetings had been held in respect of discussions relating to the Birkdale Recreation Ground site, and no minutes were therefore recorded;
 - c) there had been no correspondence between the Council and Taylor Wimpey relating to the site; and
 - d) as to the plans on the Council's website, the proposals could be submitted here via the Councils Consultation Portal with no prior involvement of the Council; and that the plan submitted by Taylor Wimpey had been provided in support of comments on a consultation, and was not a planning application or application proposal.

The Decision Notice:

13. By his DN of 3 December 2014 the Commissioner decided that, on the balance of probabilities, the Council did not hold the information requested by the Appellant.
14. The commission concluded the information requested is environmental information within the scope of regulation 2(1)(c) EIR, and the request therefore falls to be considered under the EIR. The Commissioner accordingly concluded that the Council had breached regulation 14(2) EIR by not providing a refusal notice citing regulation 12(4)(a) within 20 working days, regulation 5(2), of receipt of the request. These conclusions are not at issue in this appeal.
15. The reasons for the Commissioner's decision that the Council did not hold the information are set out in the DN, but were in summary:
- i) that the Council had explained the searches it had conducted, including whom it had consulted about the request within the public authority;
 - ii) that the nature of the searches the Council had conducted, and the explanations as had provided, were reasonable; and
 - iii) that the Council had confirmed that no formal meetings had been held in respect of discussions relating to the site, and therefore no minutes had been recorded.

The Legal Framework:

16.

- a) Public Authorities (“PA”) are under a general duty under the EIR to disclose information where it is requested: Regulation 5 provides a duty to make available environmental information on request.
- b) If the PA does not hold the information requested, Regulation 12(4)(a) provides a qualified exception to that duty, qualified with a public interest test at 12(1)(b);

17. Particularly pertinent to this appeal is Regulation 12(4); *“For the purposes of paragraph 12 (1)(a), 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;”* The Commissioner reminds us, and we accept, that the in determining a dispute as to whether information is “held”, the relevant test is whether the information is held on the balance of probabilities.

The Notice of Appeal and the Commissioner’s Response:

18. The Notice of Appeal advances the following three points and challenge to the decision. In summary, these are:

- I) that, in light of the requirements of the Council’s ‘Core Strategy’ there *‘must have been’* records falling within the scope of part (b) of the request;
- II) that the council had not referred to the covenants relating to the land in question, which restrict its use and development; and
- III) that the council had, in correspondence, stated that it relied on exemptions under FOIA to withhold the information, which response indicates the information must have been held.

19. Through the first and third points referred to at 18. above, the Commissioner recognises the Appellant challenges the Commissioner’s conclusion in his DN, that information falling within the scope of part (b) of the request was not held. The Commissioner has rejected this contention arguing that notwithstanding the appellant’s view, if reasonable searches by the council find no information, the Commissioner was right to conclude that on the balance of probabilities the information is not held. The Commissioner argues that the Council had explained the searches conducted, which included passing the request to those officials who would have had knowledge of any formal or informal meetings. The Council had confirmed that no minuted meetings had been held, and that there was no correspondence between the Council and Taylor Wimpey regarding the site identified in the request. This was informa-

tion that the Commissioner had gathered in the course of his investigation with the council.

20. The Commissioner argues that the appellant's second point, that the Council had not referred to the covenants relating to the land in question, did not disclose a ground of appeal to the decision. Further the Commissioner argues it does not give any reason to conclude that the Council does hold the requested information.
21. The Commissioner properly refers to the additional reference by the Appellant in his grounds of appeal to factual matters inter-alia; meetings conducted by the Council and the keeping of documentation and records. The Commissioner cannot assist this Tribunal beyond the issue of his own consideration of the Council's response to his investigations and suggests the Tribunal may wish to join the Council if we are to investigate further than the Commissioner has seen fit to do so.

Reasons:

22. The Tribunal accepts and adopts the Commissioner's reasoning throughout the DN. In fact the Appellant does not argue to any significant degree that the Commissioner is flawed in his reasoning. Rather he seems to argue that the Commissioner has been misled. The Appellant argues not against the reasoning per se except to say that it cannot be right because the Council must have some information within the scope of the request. As is often the case in this type of appeal, the grounds are based not so much by a demonstration that the Commissioner's reasoning is wrong, in fact or in law, but that the facts, as the Appellant sees it suggest to them that the PA must be withholding information and facts from the Commissioner in the course of his investigation.
23. Essentially the Appellant is arguing that the requested information "should" or "must" exist. They argue in the Grounds of Appeal that the implications of the Council's Core Strategy and the imperative nature and resultant consequences thereof mean there "must be (or have been) some informal meetings and documentation, and further, their understanding, for there to be a piece of land identified and "preferred" for development, it must have certain criteria that they indicate mean there: "must have been records". However we see this as speculative.
24. In his e-mail of the 18th February 2015, the Appellant argues that there is weight to support their (speculative as we describe it) cause for concern. He refers to the publication of a report by Louise Casey on 4 February 2015, which they allege branded the Council as "unfit for purpose". This report is not before the Tribunal and we are not going to speculate about it or draw any inferences that cannot be shown to have a direct effect upon the fundamental issue of whether or not the requested information was held by the Council at the time of the request on 30 September 2013.

25. Analysis of the DN illustrates the careful manner in which the Commissioner investigated the complaint by the Appellant. (see paragraphs 8 – 24 of the DN). We do not find the Commissioner erred on the facts, in his application of the scope of the request, or in the access regime (EIR rather than FOIA). Further his in depth investigation (as described at paragraph 12 et al of the DN) illustrates the true nature of the problem caused by the inept handling of the request by the Council. The Council was corrected and educated by the Commissioner in how to handle the request and in deed did not escape significant criticism and warning from the Commissioner (see paragraphs 27 – 31 of the DN).
26. We do not accept the Commissioner was misled in the manner or to the degree the Appellant suggests or implies “*must*” have been the case. It seems to us that clumsy as it may have been, the Council did respond to the Commissioners’ investigation and there is nothing in the grounds of appeal or the evidence before us to persuade us that the Council was engaged in deliberate misrepresentation to the Commissioner throughout the course of the investigation. Nor are we persuaded that the Council deliberately tried to mislead the Appellant, or that there was information as requested within the scope of, and at the time of the request of 30 September 2013.
27. The Appellant supported his grounds of appeal with correspondence of 5 & 12 August 2014 and, as we have referred to, by e-mail of 18 February 2015. These significantly post date the request of 30 September 2013 and in our view does not provide relevant evidence on the issues before the Commissioner at the time of his investigation. Nor do we believe they would have any impact, if investigated further, on the issues the Commissioner dealt with in the course of his investigation and reasoning leading to his DN. If the speculation put forward by the Appellant did support the suggestion of a cover up, conspiracy or serious misrepresentation by the Council in its response to the Commissioners’ investigation, it would be a most serious abuse of public office. We do not accept there are any or sufficient grounds to investigate such a speculative assertion. The Tribunal registrar, properly in our view did not join the Council as a second respondent. The papers arrived with the Panel when the matter was listed for hearing. The parties had agreed to a paper hearing and the matter proceeded in that way.
28. Perhaps the Council are not the only party to learn from this appeal. The communication to the Appellant from the Commissioner about the constitution of the request (see our emphasis at paragraph 8 above) is sound advice in demonstrating the wording of the precise nature and scope of any request are of vital importance.
29. For the reasons above we find that on the balance of probabilities the Council do not hold the requested information, the Commissioner was correct and the DN should stand. Accordingly we refuse the appeal. If the Appellant wishes to pursue his request further it might be prudent to target a more specifically particularised request where the Appellant more precisely encapsulates and describes the information he wishes to have as the Commissioner has indirectly suggested. If this further alternative request is pursued, the Council, will no

doubt bear in mind their obligation under FOIA and EIR to assist a requester in properly focusing their request.

Brian Kennedy QC
Tribunal Judge

5th June 2015.