



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

**Appeal Reference: EA/2020/0210P**

**Decided on the papers**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**MARION SAUNDERS & ANDREW WHETNALL**

**Between**

**NADINE OWEN**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**DECISION**

1. The appeal is dismissed.

**REASONS**

2. Mrs Owen moved into a newly built house in Lincolnshire in about 2016. There was contact between the Lincolnshire County Council and the builder about the steps which needed to be taken before the road could be adopted as a public highway. There has been delay and Mrs Owen is dissatisfied with

the lack of progress and has sought information from the Council seeking to understand the cause of the delay. On 7 November 2018 she asked the Council:-

*"I should like to know the status of the road adoption please?*

*I would like to know the various things that LCC have been telling the builder are wrong, and when these were pointed out please? I note that the verge works seem to stop before the last house on the street and there have been previous rumours that the very end of the road of the street that I live on, including that in front of the last property on the stretch, are not proposed for adoption.*

*Are you able to also confirm if this is correct, and if not, why the whole of the verge has not been amended in the same way recently and why the changes stop a couple of feet from the end of the road?*

*I should like to find out what LCC have been determining is wrong with the area/proposed highway over the past 2 years (what you have asked Beal to make right, what, when and where?) and how these defects have affected the road adoption process/speed at which it has occurred?*

*I should also like to know how close to road adoption we actually are at today's date and when and if residents may expect this to be fully complete?*

*I should also like to know what effect the state of my drive is currently having on the process and whether this (and/or the ongoing boundary dispute – to include the lamp post) will have an impact on road adoption being approved by LCC.*

*In view of the legal and boundary disputes, any relevant plans and maps would also be appreciated please."*

3. The Council replied providing some information on 7 December. In the letter of reply it explained:-

*"Beal Homes are trying to move the whole site towards adoption and a pre adoption inspection with Beal Homes took place on the 28/6/17 and together with the usual site remedial works, eg damaged kerbs, weed removal, etc., it was also highlighted that the vehicle access to plots 40 – 42 was incorrectly constructed to the S38 highway specification. Hence in order to proceed with the whole site adoption, it was requested that this area was reconstructed to the correct specification and layout as per the S38 attached drawing and sometime after the meeting Beal Homes started works on site.*

*The lamp column 1.6 o/s Plot 41 is now correctly located in the S38 adoptable area, as indicated on the S38 drawing, for which the area outside Plots 38 – 43 the adoptable highway boundary depths from the cway kerb line varies, as shown on the S38 layout.*

*Unfortunately, there was some time delay before final works could resume on site, which resulted in another pre adoption inspection on the 4/10/18 – see attached remedial listing. After these remedial works have been completed satisfactory, it is still intended that LCC adopt the site as soon as possible after completion, regardless of any outstanding issues relating to private land behind the LCC adoptable boundary. The emphasis is always placed on the developer to move a S38 development towards adoption, to which they are in control of finances and timeframes to fully complete a*

*site to a satisfactory standard and to that extent, LCC generally wait to be inform of any upcoming works."*

4. Mrs Owen picked up on this point when she requested an internal review of the response on 9 December 2018 (seeking copies of plans etc):-

*"useful to see the original defect / repair list arising from the first pre-inspection meeting of 28.06.17. Could I obtain a copy of this please?"*

5. On 4 January 2019 the Council replied to the various issues she had raised on internal review and with respect to the 28 June 2017 meeting explained that:-

*"The original inspection dated the 28/6/17; the developer unfortunately didn't provide a remedial list, therefore this information is not held by Lincolnshire County Council."*

6. On 4 February 2019 she wrote requesting information:-

*"I would like a copy of the remedial actions list arising from LCC Highways (Road Adoption) Inspection Meeting between Beal Homes and LCC in June 2017. This relates to the whole of the new estate on which the Hawks Road sits, in Whelton Lincoln. The remedial works list would be a list of what LCC identified to be wrong at the time of inspection, and what would need correcting in order for Road Adoption processes to proceed.*

*Under the previous FOI disclosure, I have been provided with a follow up remedial works list of a subsequent inspection meeting occurring in Oct 18, however I am still missing the remedial list from the initial inspection in June 2017.*

*I was told in the last FOI that the builder a list (as he did at the Oct 18 meeting) so that I couldn't have one! However, it would be LCC asking Beal Homes to do works (not the other way round) so I think LCC must have provided the builder with a list of remedial works that needed doing, in order for road adoption to proceed. This is what I would like to see please*

*If there are any available maps or drawings to illustrate what was wrong and what needed doing, and also with regard to the general Road Adoption Process on this estate, these would be helpful please.*

*I would also like to know the current status of Road Adoption and if any works are still outstanding to be completed to enable this. Also when it is envisaged LCC will fully take over responsibilities on this estate.""*

7. In its reply of 22 February the Council reiterated:-

*No list was generated by Lincolnshire County Council; therefore Lincolnshire County Council does not hold this information.*

8. There was further correspondence with the Council culminating in emails on 14 and 15 July. On 14 July 2019 Mrs Owen sent a complaint to the Information Commissioner.-

*"I would like the ICO to require LCC to provide proper and full disclosures to my FOI, SAR and EIR requests, particularly including details of what the builder was instructed to 'make right' at my home (and on my estate), in order to meet Highways requirements. LCC MUST know this information as they are the Highways agency involved with ensuring new build works meet Highways requirements, and I believe that I am entitled to this information under the above request legislation. Furthermore, this information is needed for a pending legal case with the builder. I would like any exemptions and redactions to be properly made known to me, with the relevant legislative reasoning. I would like the ICO to take punitive action against LCC for repeatedly breaching legal requirements, and protocol in these matters. Thereby, hopefully preventing other customers from experiencing the same time wasting, distress, and unfair treatment as I have. I would also like LCC to be thoroughly reminded of their duties in these matters. I would also like proper explanation and apology from LCC, as to why (and how) my requests have been handled so poorly, unprofessionally (and illegally) over this 8 month time period. Despite promises over recent months that I will get this, I have had no customer complaint response to this from LCC."*

9. On the same date she notified the Council of this, as a result of this communication the Council wrote to her on 15 July:-

*"Whilst the Council believes that it has now provided you with all the information it holds, or confirmation in writing where it does not hold information, I would still like an opportunity to resolve your complaint. Therefore, if you would particularise what recorded information you believe is outstanding in relation to your request, I will explore to see if any documentation has not been provided as part of the process."*

10. She replied the same day:-

*"I have 'particularised' this MANY, MANY times now to LCC, including in the mail sent to the ICO yesterday - as well as in FOIs, SAR's and EIRs!  
I therefore don't think it is appropriate to ask me to do this again!  
Fundamentally, I do not believe that LCC have 'no documented record' of what was wrong, AND what THEY asked Beal to do in June 2017, to 'make right' and thereby enable road adoption'. The information I require would pertain, not only to my property, but to ANY necessary works on the estate which were required by LCC at that time, to enable road adoption. I should also like to know what works are STILL outstanding to enable road adoption, and when this is likely to occur. This has ALL been asked for before, in various legislative requests (FOI, SAR, EIR) but never disclosed. I believe I am entitled to this information under the legislation. I should also like to receive LCC's comments about Acis' surveyor's findings that the road outside my home (the road proposed for adoption) has been constructed 'too wide', according to plans.  
It is a nonsense that LCC would have 'NO RECORD' of what was defined as being 'wrong' at the site meeting in June 2017, when these works (by the specification of LCC) HAVE to be done, in order to progress Road Adoption via LCC! Also when the*

ONLY way that road adoption can progress is for LCC to revisit and sign these works off as completed!

Pending any further response from LCC, I shall wait to hear from the ICO about all of this. However, I would also like you to please note the other service complaints that I mention in my email copied to you yesterday. Obviously the ICO will not be interested in dealing with service complaints, so I would like to hope that someone at LCC will.

Thanks

Nadine"

11. On 10 January 2020 the Council wrote to Mrs Owen in an attempt to answer outstanding issues she had raised about her information requests in the order she had set out an email of 30 November 2019 under 11 headings. These included:-

- **1 *The status of the road adoption.*** The Council explained the process and confirmed Beal Homes have not replied back to indicate any time frames of site completeness for adoption purposes.
- **2 *Any recorded information identifying defects to the highway that has been communicated by LCC to Beal Homes since November 2016. I asked for data on ALL defects LCC identified on the estate, not just those limited to the 'highway' (eg I understand that LCC cover paths, lampposts, verges etc etc, as well as roads/highway). Please can you ensure that it is not just the 'road' data that is provided?***  
[Name redacted] completed his 2nd inspection on 4th October 2018. Please see Appendix EIR 2 which provides details of identified defects.  
Please also refer to Appendix EIR 1 and my comments under point 10 below.
- **Any communication between LCC, Beal Homes, ACIS and any other 3<sup>rd</sup> party concerning you and your property or the site in general**  
*We do not hold correspondence with any other 3rd party concerning you or your property, or this site in general. However, communications between LCC and Beals Homes which may also fall within the scope of this point are included elsewhere in order to avoid duplication.*
- **10 *A list of works identified by LCC in June 2017 - This information is not held.***
- **11 *A response to a request for "A full and complete SAR (everything held up to 22.11.19)" which comprised nine appendices and included the comment "As has already been outlined in response to other points, you will find much of this information included within the appendices already listed."***
- **13 *Any recorded information which suggests the road (Highway) outside your property was constructed too wide.***

*Whilst no recorded information is held, [name redacted] (Development Management Officer) has confirmed he is not aware of any discrepancy in road width.*

12. The Information Commissioner wrote to Mrs Owen on 30 January 2020. The letter set out various requests from Mrs Owen to the Council and the extent of the various responses of the Council, stating that *"The Council also advised the complainant that her questions under her first and second requests are substantially similar and have been answered and information has been provided."* The Information Commissioner confirmed the scope of the investigation by reference to the communication from Mrs Owen to the Council of 15 July:-

*"The scope of the case*

*The focus of my investigation will be to determine whether Lincolnshire County Council has handled your request in accordance with the EIR. Specifically, I will look at whether the Council holds the information described in your email of 15 July 2019."*

13. The Information Commissioner set out the terms of this e-mail:

*"I do not believe that LCC have 'no record of what was wrong, and what they asked Beal to do in June 2017, to 'make right' and thereby enable road adoption'."*

*The information I require would pertain, not only to my property, but to any necessary works on the estate which required LCC at that time, to enable road adoption. What works are still outstanding and when this is likely to occur?"*

14. While Mrs Owen has sought information from the Council both through Subject Access Requests (SARs which relate to her personal information) and requests for information under the Freedom of Information Act (FOIA) and the Environmental Information Regulations (EIR) these are distinct responsibilities for the Information Commissioner. Appeals to this tribunal arise from the Commissioner's FOIA/EIR responsibilities rather than her role under data protection legislation. While Mrs Owen is unhappy about the responses of the Council on various matters the scope of this tribunal is to consider the issue raised by the Commissioner's investigation; i.e. whether or not there was a record held by the Council of the meeting in June 2017.

15. The Information Commissioner wrote to the Council in similar terms and sought explanations about how it had handled the information requests. On 11 May 2020 the Council responded.

*"1 What searches were carried out for information falling within the scope of the complainant's requests and why would these searches have been likely to retrieve any relevant information?"*

*When the original requests and internal reviews were dealt with the Council outsourced this service but has subsequently brought this service back inhouse. However, the process for dealing with information requests has stayed substantively similar; it is the Customer Information service's (CIS) responsibility to ensure that requests are sent to all relevant service areas within the Council.*

*The service areas are then responsible for ensuring that full searches are carried out and that all relevant officers are consulted. Upon receipt of the information requested or an explanation of why the information is not held, the CIS then draft the response to the requestor including consideration of whether any exemption / exception is engaged, and they also consider the application of the public interest test (if appropriate). This would be in conjunction with the service area / relevant officer and, if required, with a legal advisor.*

*In this case, [name redacted] who is the Development Management Officer at the Council, who is the officer responsible for dealing with the relevant development, confirmed that the requested information is not held, and never has been held by the Council.*

*[name redacted] confirmed that he visited the site with the contractor working on behalf of Beal Homes for the 1st pre-maintenance inspection on 28th June 2017.*

*[name redacted] met with the Contracts Manager (who was employed by the contractor working on behalf of Beal Homes) and pointed out the remedial actions that were required by the Council. It is accepted that hand written notes were made by the Contracts Manager, but these were not subsequently received by [name redacted]*

*The contractor is expected to take notes and then produce a report / schedule of works to be completed and this would then usually be sent to the Council for approval. In this case, this did not happen as the contractor ceased working for Beal Homes.*

2. If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

*[name redacted] as the officer responsible for the relevant development, identified that the information was not held either locally on his laptop or on email, as a subsequent inspection took place some considerable time later once Beal Homes had employed a new contractor."*

16. In her decision notice the Information Commissioner explained that the information was environmental information and fell to be considered under EIR, under Regulation 5(1) the council had a duty to make the information it held available on request and the issue for her to determine, on the balance of probabilities, was whether the requested information was held by the Council. She considered the explanations given by the Council for the material not being held that (as explained by the Council's response of 11 May, and noting

the information provided to Ms Owen by the Council letter of 10 January, (decision- notice 23-35) and concluded:-

*"36 The Commissioner has considered the representations made to her by the Council in respect of this complaint. The Commissioner finds those representations to be credible and in the absence of any evidence to the contrary, on the balance of probability, the Commissioner accepts that the Council does not hold the information which the complainant has asked for.*

*37. The Commissioner's decision is that the Council has complied by Regulation 5(1) of the EIR by informing the complainant that it does not hold the information specified in her email of 15 July 2019."*

17. Ms Owen's grounds of appeal are approximately 15,000 words which forcibly express her dissatisfaction with the Council and the Information Commissioner's dealing with her complaint about the Council.

18. She considers that much of the material she has submitted has been ignored and the Information Commissioner in her:-

*"... decision, dated 09.06.20, focuses only on whether LCC hold information which was recorded by the builder during a June 17 meeting. This, as indicated in points 1-3 of the 'Decision'.*

*As above, I don't think this is the only issue, failure, or information/data, that is relevant for consideration/discussion in this Decision. And, in any case, this was not the information that was requested from LCC in relation to this meeting."*

19. The matters she wished to explore included: *Motive for not LCC withholding or not proactively chasing the June 17 meeting data (bundle page A28) and Why Is it important for the Decision to comment on ALL Failures that have occurred (bundle page A30)*

20. The appeal was resisted by the Information Commissioner who summarised her stance as:-

*The Appellant's grounds seek to incorporate various matters that are outside the scope of the Commissioner's Decision Notice into this appeal. The Commissioner's investigation and resulting Decision Notice only concerned the requested defect / remedial works list with regard to the June 2017 site visit. The additional matters raised by the Appellant are not within the scope of the Decision Notice, and therefore are not within the Tribunal's jurisdiction to consider. The only question for the Tribunal to determine is whether the Commissioner's findings set out in the Decision Notice in respect the request for the defect / remedial works list are in accordance with the law.*

*The Commissioner would however observe that the Appellant submitted a large volume of correspondence, the majority of which being contained in email chains which*



*have been separated in the hearing bundle for the Tribunal's benefit. It was therefore reasonable and proportionate for the Commissioner to proceed on the basis of the emphasised ground of complaint in the submitted complaint form, and the scope of the investigation set out in the email of 30 January 2020.*

21. She drew attention to the Council's letter of 20 January summarising all the information and SAR requests it had received and sending/resending all the information it could find. She invited Ms Owen, should there be any outstanding information she felt that she should have received to complain but to *specify the precise outstanding information sought in two pages only.*
22. In considering whether notes of the June 2017 meeting were held the Commissioner submitted that Ms Owen had not submitted any evidence to show that the Council did hold the information and considered that the Council's explanation of why it did not hold the information to be credible. She therefore relied on her findings in the decision notice.

### Consideration

23. Ms Owen is deeply concerned about the delays around the adoption of the road outside her house which have gone on for several years. She has made multiple requests for information whether under FOIA, or EIR or her SAR right to information about her. While she has spent considerable time and energy in making these requests, and the Council has devoted considerable officer effort to responding to them; it seems to the tribunal that all this effort has done very little to advance the solution which Ms Owen is seeking, the adoption of the road. The Council in good faith has worked strenuously to meet each of her requests, it has been transparent and helpful in its responses; but objectively it has been a waste of resources.
24. It is important for Ms Owen to understand what this case is about. She has sought to raise many issues about the Council and the Information Commissioner. However, the Information Commissioner has a restricted remit, it cannot look at the Council generally. Furthermore, while it is the regulator for both data protection issues and for FOIA/EIR these are distinct roles, in this case the Commissioner was concerned with investigating a complaint relating to FOIA/EIR and not how the Council has handled Ms Owen's subject access requests. Where there is a request for information, rights of access to a piece of information will either be under FOIA or under EIR depending on whether or not it is environmental information. Information relating to planning and road construction is on analysis usually environmental information, and if so, is dealt with under the EIR even if not exclusively environmental. Where the issue is whether information is held or not it makes little practical difference which regime applies.

25. When the Commissioner receives a complaint about FOIA/EIR she determines the scope of her investigation in the light of the complaint submitted to her. Although Ms Owen is irate with the Commissioner it is clear that the Commissioner has separated out issues which she can investigate from those which she cannot. The formulation of the scope of the inquiry derives from the complaint form submitted to the Commissioner and the email exchanges with the Council in which she explicitly stated what she was concerned about. It may also be noted that other complaints were investigated at the same time.
26. The scope of the inquiry sets the boundaries for the decision notice. The role of the tribunal is to determine whether or not the Information Commissioner as a matter of law came to the correct conclusion in that inquiry on the basis of the facts which the tribunal can establish.
27. Ms Owen has expressed doubt about whether or not the Council is telling the truth. Her case is based largely on strong convictions on what documentation she believes the Council ought to have held, what the Council "must know" or "must have done", what they ought to have been able to produce by way of written records or should have given by way of instructions to other parties. When the Council finds no such records, she is ready to assume that lies have been told, calls on the ICO to explore motives and to comment on ALL failures. She calls on the ICO to take punitive action against the Council for "repeatedly breaching legal requirements and protocols" and asks that they be "thoroughly reminded of their duties". She also demands a proper explanation and apology from LCC. (See above and particularly paras 10 and 19). In responding to the Commissioner (paragraph 15 above) the Council gave a circumstantial account of why the information was not held. The tribunal finds the account entirely credible and has no reason to doubt it. Nor do we see that it would have been appropriate for the Commissioner to pursue the analysis of motive and legality leading to a comprehensive reprimand that the Appellant called for. The Council has been thorough in its searches for recorded information, and candid where handwritten notes may have been made that could not be found in its files, electronic records or other locations such as staff laptops. This is not ideal but does not amount to the comprehensive failure or falsehood that is alleged. The Appellant did not help her case by declining the invitation to produce a concise two-page list of any outstanding information sought, with the effect that her case rested on somewhat nebulous and unsubstantiated claims of illegality and bad faith.
28. A further matter is worthy of comment. An inspection to examine what remediation work was necessary was carried out in June 2017; a Council officer was part of that inspection. A further inspection was carried out on 4 October 2018, again a Council officer took part and on 7 December 2018, in response to her request of 7 November 2018, the Council provided her with the remedial list. It provided it again as an attachment to the January 2020 correspondence. Since she has had a copy of the list detailing the works which

need to be done (up to date as at 4 October 2018) it is difficult to see what value attaches to the list prepared 15 months earlier.

29. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 2 December 2020