



Neutral citation number: [2023] UKFTT 691 (GRC)

Case Reference: EA/2023/0227

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard: by determination on the papers

**Heard on: 24 August 2023
Decision given on: 31 August 2023**

Before

TRIBUNAL JUDGE FOSS

Between

ADAM ABUWARDA

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

RULING ON STRIKE-OUT APPLICATION

The application for strike out is granted.

REASONS

The Decision Notice

1. The Information Commissioner (“the Commissioner”) published a Decision Notice dated 30 March 2023 which found that the Environment Agency (“EA”) did not hold any information within scope of the request by the Appellant for a copy of the EA risk assessment of tree removal works carried out in 2020 on land in which the Appellant had an interest.

The Appeal

2. The Appellant filed a Notice of Appeal dated 24 April 2023. His grounds of appeal primarily concerned (1) an allegation that the Information Commissioner had not questioned the EA regarding statements made by the EA relating to the mitigation of risks through the use of standard methods and equipment or what the risks were in relation to the risk assessment, and (2) a request as to the basis of evidence on which the Information Commissioner considered that the EA had actually completed a risk assessment prior to the tree removal works.

The Commissioner's Response

3. On 19 July 2023, the Information Commissioner, in filing his Response to the appeal, applied for a strike out of the Notice of Appeal under rule 8(2)(a) of the Tribunal's Rules on the basis that the outcome sought by the Appellant was outside the scope of the Tribunal's jurisdiction; specifically, that the Appellant's complaint related to the conduct of the Information Commissioner's investigation and not the Decision Notice itself, and the conduct of the EA in its risk assessment.

The Appellant's Reply

4. On 1 August 2023, the Appellant made submissions in reply to the strike out application. He submitted that he was simplifying the outcome he was seeking, namely a decision as to whether the Information Commissioner was correct to conclude in his Decision Notice that no information was held by the EA, and that the EA had complied with its duty under s5(1) EIR. It is nonetheless clear from his submissions in response that he is still questioning the adequacy of the Information Commissioner's investigation, and the conduct of the EA in its risk assessments. He asks:

"I do not believe the Information Commissioner has asked the EA the correct questions in determining whether they had the information or not. Most importantly, I believe he should have asked them for their organisation's legal Policy on Risk Assessments, ie, when they should be done, what are the different types of risk assessment involved in field works, etc. There have been historical cases whereby EA staff have died as a result of falling trees, therefore it would have been helpful for the Information Commissioner to question the EA as to what legal processes their staff follow to mitigate risk, not only for their staff but for members of the public. The explanation given to the Information Commissioner by the EA sounded as if they made up the risk assessment procedure as they went along, as opposed to following a set of guidelines. I feel the Information Commissioner could have had the opportunity to further ask the EA to elaborate on their answers to his questions, for example, what were the 'red flag' risks in relation to the dynamic risk assessment?"

Discussion and Conclusion

5. By his Decision Notice, the Information Commissioner set out the explanation provided to him by the EA: there are two risk assessment stages, a pre-work risk

assessment and a dynamic risk assessment which is carried out on site. The EA had been unable to find the former, its filing system having been updated since the pre-work risk assessment, and certain material lost during that update, and concluded that the risk assessment was likely to have been lost. As for the dynamic risk assessment, that is, according to the EA, a “mental process” undertaken on site, and consequent documentation would only have ensued if risks were flagged as red. To the extent that any risks had been flagged as read, it was possible that documentation had not been filed due to staff members not attending the office because of Covid restrictions, and the retention schedule for risk assessments is 3 years. The Information Commissioner accepted the EA’s explanation and concluded that, on the balance of probabilities, the EA did not, at the time of the request, hold information within the scope of the request (regulation 12(4)(a) of the EIR).

6. By his Decision Notice, the Information Commissioner additionally noted that in its refusal notice in the current case, the EA could have explained the two separate risk assessments, the nature of the documentation that is likely to be created by those risk assessments, and how they were stored. Although the Information Commissioner noted the constraints faced during the pandemic, he considered that the EA had failed to put in place a system that ensured the appropriate recording of information, and recommended specific improvement steps.
7. I accept that the Information Commissioner was entitled to accept the responses of the EA. On the material before me, there is no basis on which to consider that the Information Commissioner has been misled by the EA. The Appellant has not identified that the Information Commissioner’s Decision Notice is not in accordance with the law or that he ought to have exercised any relevant discretion differently. In spite of the Appellant’s purported simplification of his appeal, it is clear that its real thrust is to explore the policies and conduct of the EA in its risk assessments, particularly as pertains to the subject matter of his appeal. Pursuant to section 58(1) FOIA, the Tribunal does not have jurisdiction to review such matters, and accordingly strikes out the appeal.

Signed: *Penrose Foss*

Date: 24 August 2023