



**Appeal Number: EA/2024/0076**

**Neutral Citation Number: [2024] UKFTT 00738 (GRC)**

**First-Tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Between:**

**JAMES MOONEY**

**Appellant:**

**and**

**The INFORMATION COMMISSIONER**

**Respondent:**

**Date and type of Hearing:** On 2 August 2024 a hearing on the papers.

**Panel:** Brian Kennedy KC, Kate Grimley Evans and Stephen Shaw.

**Representation:**

**For the Appellant:** James Mooney, as litigant in person in his grounds of appeal dated 4 March 2024.

**For the Respondent:** Nicolas Martin, Solicitor by way of written submissions in the Response dated 4 April 2024.

**Result:** The appeal is dismissed.

## **REASONS**

### **Introduction:**

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as modified by regulation 18 of the Environmental Information Regulations 2004 (SI 2004/3391) ("EIR"), against the decision of the Information Commissioner ("the Commissioner") contained in the decision notice of 15 February 2024 Ref. IC-254879-J2N0 ("the DN"), which is a matter of public record.
2. Full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the DN. In essence the appeal concerns a request for information from Lincolnshire County Council ("the Council") relating to its Minerals and Waste Local Plan, and the updating of that plan. The Commissioner's decision is that on the balance of probabilities, the Council does not hold information within the scope of the request. Therefore, the Council is entitled to rely on regulation 12(4)(a) of the EIR (information not held) to refuse to comply with the request.
3. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN. The Appellant seeks a paper hearing. The Respondent agrees with this mode of hearing.
4. In the complaint to the Commissioner, the Appellant stated that he considers the Council to hold information within the scope of the request. He stated that the Council owns the land MS29, and as the landowner, it must have been involved in, and agreed to, the decision to include MS29 in the Council's Minerals and Waste Local Plan in 2017.
5. The Appellant also stated that the Council owns the land SG17, and as the landowner, it must have been involved in, and approved, the decision to include the land SG17 in the updated Minerals and Waste Local Plan and therefore the Council, as landowner, must hold information relating to the

decision to include both MS29 and SG17 in the Mineral and Waste Local Plan.

**Background:**

6. In its submissions to the Commissioner, the Council explained that it is the mineral and waste planning authority for Lincolnshire, and is therefore responsible for the production, monitoring, review and updating of a minerals and waste local plan.
7. The Council said that the Lincolnshire Minerals and Waste Local Plan (LMWLP) was created in two parts, with the first part being adopted in June 2016, and the second part being adopted in December 2017. In 2021, the Council authorised the updating of the LMWLP, and said that it is currently still in the process of being updated.
8. The Council maintained that it does not hold any information within the scope of the request. It explained that it has consulted the business manager of the Council's Corporate Property Team, who is responsible for the Council's County farms estate which includes the land referred to in the request. The business manager stated that the role of the Corporate Property Team is to oversee day to day operations of the county farm estate and is not involved in any decisions relating to the LMWLP, as planning matters do not fall within its remit. The business manager therefore confirmed that the Corporate Property Team does not hold any information within the scope of the request.
9. The Council also explained that the Policy Planning Team has undertaken a search for information relating to the LMWLP that falls within the scope of the request. This involved manually reviewing both physical and digital archives. However, no information within the scope of the request was located. The Policy Planning Team also conducted a search of its digital records for information relating to the updating of the LMWLP that falls within the scope of the request. However, no information within the scope of the request was identified.
10. With regards to the updating of the LMWLP, the Council explained that the Council, as landowner, was included in a general consultation on an

issues and options paper and a call for sites exercise in June 2022. However, the Council did not respond to the consultation. Furthermore, the Council explained that the Council as landowner has not been involved in any work relating to the submission of sites for allocation in the updated LMWLP or consulted on such matters.

11. The Council states that as landowner it has not been involved in any decisions or actions relating to the process of updating the LMWLP and therefore, it does not hold any information relating to the updating of the LMWLP that falls within the scope of the request.

### **The Commissioners' Reasoning:**

12. The Commissioner considers it pertinent to note that the request asks for information relating to decisions and action taken by the Council in its position as landowner regarding the LMWLP, and the updating of the LMWLP. He therefore considers that if the Council has made decisions and taken action relating to the LMWLP, or the updating of the LMWLP, information held relating to those decisions and action would not fall within the scope of the request if they were not made by the Council in its position as landowner of MS29 or SG17.

13. Whilst the Commissioner notes that the Council has not been explicit in explaining why it does not hold information relating to decisions and actions taken relating to the LMWLP that fall within the scope of the request, he is satisfied that the searches carried out by the Council were reasonable and would have identified any relevant information, if held.

14. The Commissioner also considers that the Council has carried out reasonable searches for information relating to the updating of the LMWLP that falls within the scope of the request and accepts the Council's reasoning for not holding any relevant information.

15. The Commissioner is therefore satisfied that, on the balance of probabilities, the Council does not hold any information within the scope

of the request. His decision is that the Council is entitled to rely on regulation 12(4)(a) to refuse to comply with the request.

16. As no information within the scope of the request is held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no information to disclose.

### **Grounds of Appeal and the Commissioners' Response:**

17. In essence the Appellant submits that:

(a) The request was not for environmental information and accordingly should have been dealt with under FOIA.

(b) The Council is incorrect to claim that it does not hold information within the scope of the request given its legal obligations as the relevant landowner, and the need for the landowner to give notification of a suitable site.

### **Environmental Information:**

18. The purpose of the Appellant's request is irrelevant to the question of whether the requested information meets the definition of environmental information under the EIR. Whilst the Appellant's motivation for the request relates primarily to matters of public safety the information requested nonetheless relates to the updating of the Plan which is clearly a measure which will affect environmental elements and factors. The information requested therefore meets the definition of, and is, environmental information, and accordingly fell to be considered under the EIR, particularly given that it is the more favourable regime for the disclosure of environmental information given the presumption in favour of disclosure.

### **Whether Information is Held:**

19. The Commissioner argues that the crucial aspect of this matter is the fact that the terms of the request very clearly limited the information within the scope of the request to that which concerned the Council as the landowner.

20. The Commissioner noted that the request that is the subject of the present appeal was submitted on 21 April 2023 which the Commissioner suggests demonstrates that the reference in the request to the Council as "landowner" was a clear and deliberate intention for the request to only capture information that was strictly held by the Council as the landowner, rather than as the mineral and waste planning authority.

21. With that in mind the Commissioner suggests that the Council conducted appropriate searches with relevant staff for such information, including a manual search of the relevant physical and digital records, and also confirmed to the Commissioner that:

*"For the current Updating of the Lincolnshire Minerals and Waste Local Plan, the Council, as Landowner, was included in the general consultation on the Issues and Options Paper and call for sites exercise in June 2022, but no response was received.*

*In respect of sites submitted for allocation in the Updated Minerals and Waste Local Plan, the Council as landowner has not been consulted or involved in any work carried out on this subsequently. The Council as landowner has not been involved in any decisions or actions in the process of the Updating of the Minerals and Waste Local Plan and as a consequence the documents requested cannot be provided as they are not held."*

22. The Council, in its internal review to the Appellant, also explained that:

*"I am satisfied that the Council, as Landowner, has had no input into any details proposed or considered by the Council as the Planning Authority, in the update to the Minerals and Waste Local Plan. Consequently, the Council do not hold any information within scope of your request."*

23. The Commissioner is entitled to accept the responses of a public authority at face value unless there is some reason why the Commissioner ought not do so (for example, evidence that the Commissioner is being misled -

or a motive to withhold information): Oates v Information Commissioner and Architects Registration Board EA/2011/0138 at [11] :

*“As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, whether there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full-scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.”* (Emphasis added). See, also, Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 (at [23])

24. After further material research the Commissioner concluded that it therefore does not appear that the nomination for the site came from the Council as the landowner, and this, the Commissioner argues, is supported by the searches of the Council in respect of its role as the landowner. The Commissioner has not seen any evidence of an intent to withhold the information, and he remains satisfied with the Council’s interpretation of the request, and searches. The Commissioner expands in significant detail on the supporting evidence for his conclusion in his Response dated 4 March 2024 which the Tribunal has carefully noted.

#### **Discussion:**

25. In relation to the FOIA v EIR ground of appeal – [See §17 (a) above] the Tribunal see no relevant argument to support the assertion that this appeal should be under FOIA as opposed to EIR and we have no hesitation in accepting the request was properly dealt with under the EIR.

26. In relation to the argument and submissions that the Council is incorrect to claim that it does not hold information within the scope of the request given its legal obligations as the relevant landowner, and the need for the landowner to give notification of a suitable site. – [See §17 (b) above]. It is clear that the fundamental basis for this assertion by the Appellant, is that as Landowner the Council **MUST** (our emphasis but the Appellants assertion) have information within the scope of the request. The Tribunal

can find no grounds in support of this assertion and on close examination of the reasoning provided do not accept the criticisms made by the Appellant, but we have looked carefully at the Grounds of appeal, the Commissioners Response and investigated afresh our own evaluation of the merits of the appeal and will set out our conclusions below.

### **The Legal Framework:**

27.A Public authority that holds environmental information is required to make it available on request (reg. 5(1) EIR). "Environmental Information" is defined in Reg 2(1) EIR as any information in written, visual, aural, electronic or any other material form on:

(a) "the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;"

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

28.However, 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 (reg12(4)(a)) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information (reg.12(1)(b)).

29. When determining whether or not information is held the Commissioner and Tribunal apply the normal civil standard of proof, on the balance of probabilities. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* held at [13] that in determining a dispute as to whether information is 'held':

*"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including 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 affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."*

30. The Upper Tribunal has confirmed that the relevant test is whether the information is held on the balance of probabilities: see, *Preston v ICO and West Yorkshire Police* [2022] UKUT 344 (AAC) at [29]-[30], which also referred to the Tribunal having consistently applied the balance of probabilities test in cases such as *Malcolm v Information Commissioner EA/2008/0072* at [24]; *Dudley v Information Commissioner EA/2008/008* at

[31], and Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 at [21]-[22]).

31. The Upper Tribunal also noted that, importantly, in Clyne v IC and London Borough of Lambeth the Tribunal held that the *'issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained'*. ([38]). The Tribunal was satisfied that a gap in the public authority's documentary records reflected *'inconsistent and poor administrative practice'* but this did not amount to a breach of FOIA.

32. Whilst the above cases related to FOIA the considerations are nonetheless equally applicable to the EIR.

**The issues:**

33. The request in this matter relates to Lincolnshire County Council's Minerals and Waste Local Plan ('the Plan'). The Plan itself is comprised of a number of Development Plan Documents which together set out a vision and framework for the future development of the county in respect of the working of minerals and waste management in the County up to 2031. The Council resolved to update the Plan on 19 February 2021 and produced a Minerals and Waste Development Scheme to set out the timetable for the preparation of the new plan. The timetable was as follows:

<b>Stage of Plan-production</b>	<b>Target</b>
Consultation on Issues and Options, including a "call for sites" exercise (Regulation 18)	Spring 2022
Consultation on the Preferred Approach (Draft) of the new LMWLP (Regulation 18)	Spring 2023
Publication of the Proposed Submission version of the new LMWLP (Regulation 19)	Spring 2024
Submission to Secretary of State	Summer 2024
Examination hearings	Autumn 2024

Adoption Winter

34. A consultation on the issues and options for updating the Plan took place from 28 June 2022 – 12 August 2022, along with an invitation for interested parties to nominate potential sites for allocation in the updated plan for sand, gravel and limestone aggregate. However, the above timetable was delayed with the next stage, a consultation on the draft preferred approach for the Plan, not being anticipated until 2024. This was on the basis of the large number of comments and site nominations that had been received.

### **The Tribunals Deliberations:**

35. The Tribunal considered the appeal afresh and find as follows:

a) The head of the Legal Department of the Council has said unequivocally in writing in a signed letter that there is no information within the scope of the request. We have no grounds or evidence to suggest that this is wrong, or that any other untoward act or circumstances support the Appellants assertion that there MUST be information within the scope of the request held by the Council.

b) The issue of sale/planning was not finalised and was ultimately subject to full public consultation in 2024 which had not occurred at the time of the refusal of the request. (See A33 OB): - Bottom of page A33: -*"Please see attached e-mail correspondence between the County Council and the site proponent on this matter. It must be emphasised that at this stage all the nominated sites are still being assessed, and the Council is yet to make a formal decision on which sites are to be selected as the most appropriate for provisional allocation in a draft plan setting*

*out the county council's preferred approach. The draft plan when published will be subject to full public consultation, and timetable details can be found on the abovementioned website.*"(our emphasis).

c) See Page A26 OB and § above - "When determining whether or not information is held the Commissioner and Tribunal apply the normal civil standard of proof, on the balance of probabilities. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)*. The Tribunal have ample evidence to support the contention that information within the scope of the request is not held by the Council and no evidence whatsoever to the contrary.

d) The Upper Tribunal has confirmed that the relevant test is whether the information is held on the balance of probabilities: see, *Preston v ICO and West Yorkshire Police [2022] UKUT 344 (AAC)* at [29]-[30], which also referred to the Tribunal having consistently applied the balance of probabilities test in cases such as *Malcolm v Information Commissioner EA/2008/0072* at [24]; *Dudley v Information Commissioner EA/2008/008* at [31], and *Councilor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* at [21]-[22]).

e) The Upper Tribunal also noted that, importantly, in *Clyne v IC and London Borough of Lambeth* the Tribunal held that: - *'the issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained'*. ([38]). The Tribunal was satisfied that a gap in the public authority's documentary records reflected 'inconsistent and poor administrative practice' but this did not amount to a breach of FOIA (See p27 OB).

f) With that in mind the Tribunal accept the Commissioners' submissions that the Council conducted appropriate searches with relevant staff for such information, including a manual search of the relevant physical and digital records, and also as most significantly confirmed to the Commissioner that: - *"For the current Updating of the Lincolnshire Minerals and Waste Local Plan, the Council, as Landowner,*

*was included in the general consultation on the Issues and Options Paper and call for sites exercise in June 2022 but no response was received. In respect of sites submitted for allocation in the Updated Minerals and Waste Local Plan, the Council as landowner has not been consulted or involved in any work carried out on this subsequently. The Council as landowner has not been involved in any decisions or actions in the process of the Updating of the Minerals and Waste Local Plan and as a consequence the documents requested cannot be provided as they are not held."*

g) The Tribunal note and accept that the Council, in its internal review to the Appellant, also explained that: *"I am satisfied that the Council, as Landowner, has had no input into any details proposed or considered by the Council as the Planning Authority, in the update to the Minerals and Waste Local Plan. Consequently, the Council do not hold any information within scope of your request."*

#### **Conclusions:**

36. On careful examination of the evidence and the submissions before us the Tribunal and for the reasons our lined above the Tribunal dismiss the appeal.

37. Consequently, the Tribunal also find that the Appellant has failed to properly demonstrate any material error, either of law or in the exercise of his discretion by the Commissioner, in the DN and we must dismiss this appeal.

**Brian Kennedy KC**

**3 August 2024.**

**Promulgation Date : 20 August 2024**