



Neutral Citation Number:

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

Appeal No: EA/2017/ 0060

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50637767
Dated: 20 March 2017

Appellant: Bryan and Ruth Haines

Respondent: The Information Commissioner

Heard on the papers: Fleetbank House

Date of Hearing: 22 August 2017

Before

Chris Hughes

Judge

Pieter De Waal and Andrew Whetnall

Tribunal Members

Date of Decision: 22 October 2017

Subject matter:

Freedom of Information Act 2000

Cases:

Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC), (28 January 2013),

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 20 March 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellants applied to Malvern District Council (“the Council”) for a certificate of lawful existing use (CLE) with respect to land opposite their property in March 2015. Local residents commented and their views were placed on the Council’s website along with the application. The Appellants objected to the contents of certain comments by a resident and the email was replaced by a redacted version. In July 2015 a draft report recommending approval of the certificate was prepared, however it was not decided and on 28 August the Appellants’ representative withdrew their application.
2. The Appellants complained about how the application had been handled. Following a meeting with the chief executive of the Council on 2 October 2015 in which they expressed their concerns, the chief executive agreed that the Council’s lawyers would take an independent view of the material submitted in favour of the application. It was agreed that the Council’s lawyers would review the evidence. Following this further consideration the lawyers concluded that there had been insufficient evidence to justify a CLE. Following further exchanges the chief executive informed them that they had a right to refer their concern to the Local Government Ombudsman (“LGO”).
3. On 31 January 2016 the Appellants complained against the chief executive Jack Hegarty (“JH”). The leader of the Council was consulted and the Council’s Monitoring Officer (who had very recently come into post). He conducted a review of the issues and on 16 March 2016 issued a ten page report with a short two page chronology covering the contacts between the Appellants and the Council over the progress of the CLE and subsequent complaints. He concluded that JH’s handling of the matter was entirely reasonable. He wrote:-

“6.4 There has been no wrongdoing by JH or any other Council officer. JH advised you correctly that there was no role for the Council’s Standards Committee in this

matter. Similarly, there is no role for the Appointments Disciplinary and Investigations committee.

6.5 If you are not satisfied with this response, you are welcome to refer to the Local Government Ombudsman PO Box 4771...”

4. On 20 March 2016 the Appellants complained against the development control officer, JH and the Monitoring Officer. They also asked their local councillor to put their complaint before the Council’s Standards Committee. On 22 March the Council notified the Appellants that it had concluded that they were unreasonable complainants, this meant that they had exhausted the complaints procedure and there would be restrictions on how the Council dealt with their correspondence in future.

5. On 23 March the Appellants asked:-

“Could you please advise on what date the Council agreed a Policy Document containing details of “unreasonable complainant behaviour” and provide a copy of the Council Minute approving such a Policy and a copy of the Policy itself please?

We note that today’s Council website now refers to “our Unreasonable Complaints Procedure” but ask when this was agreed as a Policy by Council.”

6. On 24 March the Appellants asked:-

“Could we ask you please to treat our email of the 23 March 2016 as a Freedom of Information request please. Can you please add to this request the following:

(1) A copy of the Council’s Code of Conduct for Employees referred to in Article 12.06.

(2) Copies of the six letters in response to the Council’s letter of 16 April 2015 referring to our Certificate application [redacted reference number] as we requested in our email to Planning Services 1 September 2015 and in accordance with the relevant Planning Practice Guide paragraph 6,

(3) A list of the documents provided to the author of the review document dated 23 October 2015 by the Development Control Manager from our planning site history file please and upon which we have been assured the review document was based.

Our email of 4 October 2015 to the Chief Executive refers as does our Consultants of 2 October 2015.

7. After a delay the Council refused the requests on the basis that they were vexatious.
8. In parallel with the request for information the Appellants were pursuing a complaint to the LGO. This covered how the Council had handled the publication of material arising in the public consultation about the CLE, how the Council had handled the Appellants' concerns about this, and the multiple complaints against the Monitoring Officer and a complaint against the Leader of the Council for failing to pursue their complaint against the Monitoring Officer as they wished. He found no fault in respect of the issues the Appellants had complained about.
9. The Appellants complained to the Information Commissioner (the "ICO"). The Council explained that the requests (decision notice paragraph 18):-

"represent unreasonable persistence by the complainants, and an unwillingness to accept the outcome of their previous application and complaint. Whilst the substantive matter remains of importance to the [Appellants], the requests do not serve a clear public interest that would justify the use of resources that compliance would require."
10. The Appellants argued that the information requests were needed to secure information for their complaint to the LGO and they were entitled to the "six letters of response".
11. Following an investigation the ICO concluded that the requests related "inherently to a private interest that is being pursued by the [Appellants]", that the LGO could obtain any necessary information from the Council and exercise whatever right of access there was to the "six letters", but that the ICO was concerned with FOIA. It recognised the burden on the Council imposed by the need to respond to the Appellants' application and subsequent complaint. The issues had been comprehensively addressed by the Council and the Appellants had the right to refer the matter to the LGO. The ICO concluded that s14(1) was properly applied.
12. The Appellants submitted detailed grounds of appeal to the effect that the Council had failed to comply with its own policies on complaints handling, that Officer Codes of Conduct and Council Complaints procedures should be freely and readily available to the public, especially where their existence is indicated in Council papers and

proceedings, that the wrong policies and papers seem to have been provided to the LGO, and that information including the six letters requested was needed to support an appeal to the Planning Inspectorate. They attach their correspondence with the LGO in which they maintain that the LGO has itself disregarded its own policies and procedures in failing to examine their service complaint about the Council in a way which takes account of declared procedures. They object to the “unfounded allegation” that they are “unreasonable complainants” and maintain that Council Policies have not been correctly followed. They maintain that the failure of the ICO to address the individual elements of their information request demonstrates that the vexatiousness tests in s14 have been applied to the requester, and not, as required, to the requests. They say that there would be no burden in supplying what should be readily available information. They say that any member of the public is entitled to know what standards are expected of employees in dealing with matters for the public. They say that they “are surprised that the ICO has not concluded as we have that Policies and Standards at Malvern Hills District Council are in fact a moveable feast applied and disregarded at will.”

13. In response the Information Commissioner argued that she had not placed weight on the Council’s conclusion that the Appellants were unreasonable, it had been a statement of the background facts. It was a fact that the Council had extensively considered the issues, and it was no part of the Commissioner’s role to consider whether the Council had made a correct decision. There was no substantive difference between seeking the information “for” the LGO and that it was “relevant to” the LGO. The Commissioner had properly considered her own guidance, had considered the requests and not the requesters, had properly considered the value of the requests in the context of the course of dealings between the Applicants and the Council, and had properly considered the material provided by the Appellants in coming to her conclusion.

Consideration

14. The task for the tribunal is to consider the appeal in accordance with s58 FOIA:-

“58 Determination of appeals.

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

15. The key guidance to the tribunal in how it should carry out this task in relation to the question of whether a request is vexatious is the decision in *Dransfield* made by the Upper Tribunal which was upheld by the Court of Appeal. It is necessary to examine the requests in their context and consider the objective value of the requests, whether complying with the requests would cause an unjustified level of burden, disruption irritation and distress to the public authority and its staff, and the motivation for the requests.
16. The context, set out above at paragraphs 1-4, clearly demonstrates that the requests arise out of and are framed by the Applicants’ dispute with the Council over a planning matter. When they failed to achieve what they wanted, they complained against the Chief Executive. When an exhaustive and impartial review carried out by the Monitoring Officer did not uphold their view and indicated that the correct way to pursue any existing concerns was to approach the LGO, they complained to the Council against the Monitoring Officer, the Chief Executive and a planning officer. Unsurprisingly at that point the Council, with a proper view to protecting its staff and resources from wasteful activity in responding to groundless complaints, decided to drastically curtail its responses to the Appellants by treating them as unreasonable complainants.
17. It is clear that their information request related to their continuing dissatisfaction over a planning matter. They had applied to the Council to recognise a change of use of land. A planning officer had recommended that the change of use should be recognised, and it was mistakenly stated on the Council's website that this recommendation had been accepted. However, senior planning officers were not bound by and had not agreed with the recommendation, nor had it been before

Members. The considered view of officers was that there was insufficient evidence to establish the change of use. The Appellant's agent had withdrawn the application before a determination had been made, so no determination was in fact made. The Appellants complained to the Chief Executive about the process, and in particular the weight that they assumed had been given to a representation from a member of the public questioning statements made about the use of the land. This had been challenge as defamatory, and had eventually been withdrawn.

18. In response to complaints made to the Chief Executive and after a meeting with the Appellants, the Council's Monitoring Officer was asked to review the matters they had raised. The legal department was twice asked to advise on the merits of their case, addressing the papers considered by officers, the representations they had made and the case law they cited. It is clear that the Council made mistakes for which they apologised. These included the incorrect information on the website that the application had been approved, and the initial publication in full of a representation subsequently republished with redactions and eventually withdrawn. The Appellants' view was that no account should have been taken of this representation and that evidence in signed submissions supporting their Application should have carried the decision in their favour. The considered opinion of senior planning officers, supported on review by the legal department and by the Monitoring Officer was that there was insufficient evidence to justify recognition of a change of use. Through the Monitoring Officer's detailed letter the Appellants had received comprehensive and considered responses to their complaints about process as well as the officers' considered view on the merits of their application. They had received an itemised and specific rejection of their complaints about the Chief Executive. They claimed that they had not asked for a review and that the withdrawal of their application had been conditional pending consideration of their complaints, a position the Monitoring Officer gave grounds for rejecting. They expected that a second stage of the complaints process would involve consideration by the Council's Standards or Disciplinary and Investigations Committee, but were told by the Chief Executive that these Committees had no role. Dissatisfied with these responses they alleged bias against them and alleged concealment and maladministration in breach of codes of conduct and national standards. Their position developed into allegations of serious misconduct against the Chief Executive, the Monitoring Officer, the Leader of the

Council and elaborate arguments that both Council and the LGO had failed to follow specific procedural requirements for dealing with complaints. In effect they sought to elevate the particular procedural considerations underlying their initial complaints into a matter of personal incompetence, maladministration, bias, concealment of evidence, bad faith and abuse or neglect of prescribed procedures for dealing with complaints and extended these allegations to each of the Departments and most of the individuals who had a role in considering their case. Their information requests for copies of codes, copies of policies on dealing with persistent complaints, and copies of representations received in support of their planning case were judged by the Council to be a continuation of dispute on matters already exhaustively examined and explained, and this was the basis on which they were to be treated as unreasonable complainants and s14 FOIA was said to be engaged by their information requests. Their complaint of maladministration leading to injustice was not upheld by the LGO, although the Ombudsman ruled that the policy behind and right to review of their treatment as unreasonable complainants should have been more fully explained.

19. The sixteen attachments submitted with the grounds of appeal are intended to set out the detailed background and claims about the necessary framework for dealing with complaints in accordance with Council policies. However these claims only work if it can be shown that there was serious bias or maladministration in officers' treatment of their case. Although it is not for us to rule one way or the other on the merits of their planning case and officers' detailed assessment of it, we are persuaded by the thoroughness and fairness of the Monitoring Officer's detailed response to their complaints that they had received a fair and reasoned response to every substantial point they had raised. Mistakes had been made and apologised for but there had been no lack of professionalism and we detect no concealment tending to support their claims of bias, maladministration, bad faith and a 'take it or leave it' approach to standards. Had their application not been withdrawn, it would no doubt have gone on to a formal determination. But we see no basis on which they should have succeeded in diverting it towards the part of the Council's constitutional arrangements for dealing with serious misconduct. They were fully able to make their representations to the Leader of the Council and other Members and no doubt the constitutional points they made will have been given the attention they merited. But there does not appear to have been a constitutional right to have matters considered by the Committees they

preferred. We are encouraged in this view by the LGO's conclusions on the same issues. Nor are we persuaded that the six letters requested are needed to support an appeal to the Planning Inspectorate. On the face of it there is substance in the Monitoring Officer's comment that as their application was withdrawn there is no determination to be appealed against. If we are wrong about this and the Planning Inspectorate accept an appeal, the Inspectorate will be able to secure such documentary evidence as they need to consider.

20. It is clear that the purpose they were pursuing was an entirely private purpose with no public benefit. There is no reasonable ground for thinking that the information sought would be of any value to anyone. The complaint to the LGO which they launched was fully considered by the LGO without the Appellants supplying the information requested and was resolved on the basis that it was not upheld.
21. It is clear also that by this stage their overall approach was suspicion and hostility towards the Council and its staff in their pursuit of their declared private objective. This approach had already consumed a considerable amount of time to no avail. The attempt to use FOIA was an inappropriate use of the rights given by the legislation.
22. The Commissioner in her decision notice properly analysed the issues and came to a robust conclusion. The grounds of appeal advanced by the Appellants lack substance. There was no value in the information sought, the ICO had properly applied the law and guidance given the context of the dispute between the Appellants and the Council, and the Appellants' suggestion that the Commissioner should have upheld the complaint on the grounds that the Council should have taken further steps before relying on s14 is ill-founded. The ICO's guidance on the possibility of alternative approaches is set out at paragraphs 103-108 of the ICO's document *Dealing with vexatious requests (section 14)*. This concludes with:-

"108. Similarly, if the authority believes it has already reached the stage where it has gone as far as it can to accommodate the requester, and those efforts have been to no avail, then there would seem to be little value in attempting any further conciliation."
23. The Council had exhaustively tried to resolve the Appellants' concerns. It was entirely justified in relying on s14(1). The ICO's decision was clearly correct and this appeal is without merit and is dismissed.
24. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 22 October 2017