Neutral citation number: [2024] UKFTT 00318 (GRC)

Case Reference: EA/2022/0449

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing

On: 15 April 2024
Decision given on: 19 April 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER DAN PALMER-DUNK
TRIBUNAL MEMBER PAUL TAYLOR

Between

SUZANNE SULLIVAN

Appellant

and

(1) INFORMATION COMMISSIONER
(2) LONDON BOROUGH OF ISLINGTON

Respondents

Decision: The appeal is Allowed.

Substituted Decision Notice:

1. The Council should have dealt with the Appellant's request for information under the Environmental Information Regulations 2004 ("EIR).

2. On the balance of probabilities, the Council did hold further information within the scope of the Appellant's request.

3. The Council is to conduct a further search for all information which is within scope of the Appellant's request. The Council must then provide a fresh response and disclose all further information that they find under EIR unless it is withheld under a valid exception to disclosure. This is to include but not be limited to:

    a. All information which relates to the period before discussions began about the lease of the bin shed.
    b. All emails or other correspondence with Councillor Troy Gallager and with any other Councillors relating to the use of and/or lease of the bin shed.

c. All emails, correspondence and other communications relating to the use of and/or lease of the bin shed.

4. The Council is to conduct this new search and provide any new information to the Appellant, or confirmation that no further information has been found, within **42 days** of when this decision is sent to the parties. If any information has been withheld under an exception, the Council must at the same time provide an explanation in a refusal notice in accordance with Regulation 14 EIR.

Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 21 November 2022 (IC-179315-D0R2, the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about a bin shed/lumber store on Finsbury Estate requested from Islington Council (the "Council").

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 26 May 2022, the Appellant wrote to the Council and requested the following information (the "Request"):

"I would like ALL information relating to the Bin shed/lumber store on Finsbury estate EC1. The change of use, the renting of this store to a private business tenant, any planning permission applications and agreements for alteration or change of use, considerations or approvals. How this tenant was found, the contract with the tenant, rent charged, and the permitted use of this space."

4. The Request relates to a bin shed for a particular estate, which the Appellant says was leased to a private business without consultation with the affected residents.

5. The Council responded on 28 June 2022. It provided an explanation but no documents. The Appellant requested an internal review. The Council responded on 26 July 2022, and said it withheld the contractual arrangements between the leaseholder and the Council under section 43 of the Freedom of Information Act 2000 ("FOIA").

6. The Appellant complained to the Commissioner on 4 July 2022. During the Commissioner's investigation, the Council disclosed a redacted copy of the lease. It withheld the identity of the leaseholder and the rent agreed under section 40 FOIA (personal data). The Council also said that EIR rather than FOIA was the applicable legal regime. The Commissioner decided that section 40 FOIA had been applied correctly to the withheld information.

The Appeal and Responses

7. The Appellant appealed on 19 December 2022. Her grounds of appeal are that not all information has been provided. She raised the following points:

a. The Council has claimed the bin shed was not in use for 10 years but have provided no documentation to support this.
b. The Council has provided no records of action taken by Councillor Troy Gallagher, and she wants to see the council records of what action he took.
c. The Council has provided no documentation around the planning application or discussions with the planning department.
d. The Council has not provided documents to show what action they took to terminate the lease and the discussion of compensation.

8. The Commissioner's response maintains that the Decision Notice was correct to uphold the Council's reliance on section 40 FOIA. The Commissioner notes the Appellant believes more information may be held, but FOIA only deals with information that is actually held by public authorities not what the Appellant wishes the Council holds. The Commissioner also notes that the Council's refusal notice is comprehensive and explains the situation relating to the bin store in detail, and the Commissioner does not have any reason to doubt the explanation provided by the Council.

9. The Appellant provided a reply by email which complains that the Commissioner has taken the word of the Council rather than the tenants. She says that it "stretches all credibility" that the bin shed has been let and a local councillor has intervened without any documentation showing emails, telephone calls or expressions of interest. The Council has referred to the approach made by a councillor from another ward, but has not provided the requested documentation. She notes that the Council has since rescinded the lease and appears to be paying compensation to the previous tenant, and there is public interest in the transparency of the actions of local councillors and the Council.

10. A Tribunal panel initially met to consider this appeal on 18 July 2023. The panel decided that it required further information and evidence in order to fairly decide the appeal. The Council was joined as a party to the proceedings and directed to answer a number of questions. These questions have been answered by a witness on behalf of the Council, as set out below.

11. The Commissioner has provided written submissions which say that he made an error of law as the Request falls under EIR rather than FOIA.

Applicable law

12. The relevant provisions of EIR are as follows.

2(1) …"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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;

……

5(1) …a public authority that holds environmental information shall make it available on request.

……

5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

……

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

……

12(4) …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.

13. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with regulation 12(4), the information is that held at the time the request is received.

14. A relevant and helpful decision is that of the First-Tier Tribunal in **Bromley v the Information Commissioner and the Environment Agency** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*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*."

Issues and evidence

15. The issues are:
    a. Does EIR or FOIA apply to the Request?
    b. On the balance of probabilities, was further information held at the time of the Request?

16. The Appeal does not challenge the Council's reliance on section 40 FOIA to redact some information in the disclosed lease. Although EIR potentially applies instead of FOIA, this makes no practical difference to the applicable test for withholding of personal data under section 13 EIR. Therefore, we have not considered this issue in our decision.

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:
    a. An agreed bundle of open documents.
    b. The replies and submissions from the parties referred to above
    c. A witness statement on behalf of the Council from Anna Turvey, Customer Solutions Manager within the Homes and Neighbourhoods directorate of the London Borough of Islington

Open Evidence

18. We had a witness statement from Ms Turvey. Her role at the time of the Request was to oversee and respond to information requests on behalf of the Council's Homes and Neighbourhoods directorate. Her statement answers the questions from the previous Tribunal panel as follows.

19. ***Paragraph 2(a): Details of the search conducted for information following Ms Sullivan's request, to include the sources of information searched and the search methodology.*** Ms Turvey explains that she has prior knowledge of the case as there had already been a complaint by the Appellant and enquiries from others. She also contacted Lee Mcdermott, Housing Business Plan Manager, who was responsible for overseeing the leasing of the former bin store. Mr Mcdermott had previously provided background information and context to inform the investigation into the Appellant's formal complaint. He confirmed that there was not any further information held as the lease had completed some 18 months earlier and the tenant had been in possession of the property since that time. Ms Turvey therefore used the information held in their complaints files to respond to the information request.

20. ***A schedule of all documents and other information located by that search that fell within scope for each document or piece of information, together with which exemption is said to apply (if any).*** Ms Turvey says that the only document located was the "Bin lease agreement" dated 18 November 2020, which has now been disclosed in redacted form.

21. ***Confirmation that the search included correspondence held by the Council that was sent or received by a councillor.*** Ms Turvey says that the searches did not include a search of correspondence held by the Council that was sent or received by a Councillor.

22. ***Its position on whether the applicable regime is the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.*** The Council's current position is that EIR is the applicable regime.

23. ***Any further evidence or written submissions upon which the council wishes to rely when the Tribunal re-convenes to decide the appeal.*** Ms Turvey explains that a related information request was later made by a journalist and the Council provided Councillor Troy Gallagher's name.

Discussion and Conclusions

24. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

Does EIR or FOIA apply to the Request?

25. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR. It is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. The definition was explained by the Court of Justice of the European Union in Case C-316/01 ***Glawischnig v Bundesminister fur soziale Sicherheit und Generationen*** [2003] All ER (D) 145 as follows: "*The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2(a) of Direction 90/3134 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."*

26. Both the Commissioner and the Council say that EIR should have been applied to the Request. We agree. The issue relates to the lease of a bin shed and potential change of use of that shed. This relates to use of land and plans/activities affecting that land, and so affects elements of the environment under the definition in Regulation 2(1) EIR.

On the balance of probabilities, was further information held at the time of the Request?

27. We find that on the balance of probabilities further information was held by the Council at the time of the Request, which should have been disclosed under EIR (subject to any applicable exceptions). We deal in turn with the points made by the Appellant in her appeal and reply.

28. ***The Council has claimed the bin shed was not in use for 10 years but have provided no documentation to support this.*** Ms Turvey's witness statement confirms that the search for information was limited to the file of information used to respond to the Appellant's earlier complaint, with a check with Mr Mcdermott for any new information. The Tribunal does not believe that this search would be sufficient to obtain all information within the scope of the Request. We note that the Request was not limited in time and was not limited to the issue of the lease of the bin shed – the Appellant said, "*I would like ALL information relating to the Bin shed/lumber store on Finsbury estate EC1"*. It does not appear that there has been a search of email or other records relating to what was happening with the bin shed before the proposals for the lease, including

during the period when the Council says it was not being used. This was not addressed in the Council's response to the Commissioner (page D49 in the bundle), and they were not specifically asked about emails or other correspondence during the investigation. It appears to the Tribunal that the Council has interpreted the Request too narrowly. The Commissioner made the point during his investigation that the Appellant has requested "all" information and the Request was not limited to the information she had listed (page D45 in the bundle), but this was not addressed in the Decision Notice.

29. ***The Council has provided no records of action taken by Councillor Troy Gallagher, and she wants to see the council records of what action he took.*** Ms Turvey confirms in her statement that no search was conducted for correspondence held by the Council that was sent or received by a Councillor. We note that the Exhibit to Ms Turvey's statement is a press report in which Mr Gallagher confirms that he found out the name of the officer to speak to on the Council on behalf of the tenant. This is likely to have involved correspondence with the Council. There may also have been correspondence with other councillors about the lease of the bin shed.

30. ***The Council has provided no documentation around the planning application or discussions with the planning department.*** The Council's response to the Request states clearly that to date no planning application had been submitted. We accept that, at the time of the Request, there had not been a planning application. The Council is only required to disclose information that it held at the time of the Request.

31. ***The Council has not provided documents to show what action they took to terminate the lease and the discussion of compensation.*** Again, these events happened after the date of the Request and so the Council is not required to disclose this information in response to this Request.

32. ***It stretches all credibility that the bin shed has been let and a local councillor has intervened without any documentation showing emails, telephone calls or expressions of interest.*** We agree that it seems very unlikely there are no emails or other documents relating to the period before the lease was granted to the tenant. The Council's original response to the Request says that it was "…*approached to find space to support a local business. The bin shed was one of two spaces identified by the tenant and the Area Housing Office confirmed that the space was surplus to requirements*". As a minimum this shows that there was an approach by the tenant and confirmation from the Area Housing Office. Unless this was all conducted by telephone with no records made, there will be recorded information within the scope of the Request. The response goes on to say, "*The contact details for the enquirer and the space were supplied to the council's corporate landlord team who assessed the space and what the market rent was, drew up a standard council lease and leased the space*". Only the lease itself has been disclosed, not the communications beforehand with the corporate landlord team, or the assessment of the space and market rent. Again, it appears that the Request has been interpreted too narrowly and the Council has not searched for emails or other communications within the scope of the Request.

33. For the above reasons we find that, on the balance of probabilities, the Council did hold further information within the scope of the Request. The Council is to conduct a further search for information which is not limited to the information held in their complaints files. The Council must then disclose all further information that they find under EIR. If new information is found, the Council can withhold any information that is covered by a valid exception to disclosure. This search for information is to include but not be limited to:

a. All information which relates to the period before discussions began about the lease of the bin shed.
b. All emails or other correspondence with Councillor Troy Gallager and with any other Councillors relating to the use of and/or lease of the bin shed.
c. All emails, correspondence and other communications relating to the use of and/or lease of the bin shed.

34. The Commissioner's decision was not in accordance with the law. We uphold the appeal and issue the Substitute Decision Notice set out at the start of this decision.

Signed Judge Hazel Oliver Date: 18 April 2024