



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

Case No. EA/2012/0027

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice No: FER0401740**  
**Dated: 5<sup>th</sup> January 2012**

**BETWEEN:**

**Appellant: Mr Keith Starkey**

**Respondent: The Information Commissioner**

**Second Respondent: Governing Body Of The University Of Reading**

**Heard at Field House on 8<sup>th</sup> June 2012**

**Date of decision: 2<sup>nd</sup> July 2012**

**Before:**

**Fiona Henderson (Judge)**

**and**

**Andrew Whetnall and Michael Hake**

**Representation:**

Mr Starkey represented himself

Mr Tom Cross for the Respondent

Mr Damien Welfare for the Second Respondent

**Subject matter:**

EIR r 9 – advice and assistance

**Cases:**

*Birkett v The Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ  
1606

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

**Case No. EA/2012/0027**

**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below and in the confidential annex, the Tribunal refuses the appeal and upholds the Commissioner's decision upon different grounds which are reflected in the reasons set out below.

Signed:

[Signed on original]

**Fiona Henderson**  
Judge

**REASONS FOR DECISION**

Introduction

1. The University of Reading owns a plot of land (Sibly Hall) which currently includes a hall of residence for students and some woodland (Redhatch Copse). The University no longer needs the hall of residence and is seeking to dispose of the land. Wokingham Borough Council has granted planning permission for a housing development on the site.
2. As part of its planning application, the University told the Council that the proposed development would not require the diversion or extinguishment of any public rights of way. Although the public have had access to Redhatch Copse through the grounds of Sibly Hall the University's case is that this is permissive (and provides no right of way). They have deposited plans and statutory declarations pertaining to the site under s31 Highways Act 1980 to prevent a right of way being established. No right of way is shown on the definitive map.

3. It is not disputed that there is a 1977 planning permission which was granted in relation to Lower Earley (which encompasses the site) included a condition that allowed access to certain identifiable groups of residents to Redhatch Copse for the purpose of using the Copse as amenity open space. The University point out that this is not a public right of way because it does not apply to the public but to certain identifiable groups<sup>1</sup>.

The request for information in this appeal

4. Mr Starkey made his original request on 5<sup>th</sup> July 2010. This was amended during a telephone conversation on 23<sup>rd</sup> July 2010<sup>2</sup>. There is no dispute that the information request which was considered by the University and is the subject of this appeal is for:
  - i. *Any report prepared in the last 2 years concerning public rights of way across the ground at Sibly Hall.*
  - ii. *Any minute of the University's Facilities Management Committee (FMC) of any discussion or decision on public rights of way across the grounds of Sibly Hall.*
5. Although the University provided some information outside the scope of the request, extracts 10/18 and 10/29 from the minutes of the FMC meetings held on 27<sup>th</sup> April and 24<sup>th</sup> June 2010 were identified as being potentially relevant. These extracts were said by the University to contain a summary of confidential legal advice between the University and its Solicitors. The request was refused on 13<sup>th</sup> August 2010 relying upon s43(2) FOIA<sup>3</sup>. Following the intervention of the Commissioner (Decision Notice FS50351681) the request was reconsidered under EIR and a further refusal notice issued dated 26<sup>th</sup> April 2011 which relied upon Regulations 12(4)(e)<sup>4</sup>, 12(5)(b)<sup>5</sup> and 12(5)(e)<sup>6</sup>.
6. This refusal was upheld upon the same grounds following internal review.

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<sup>1</sup> Although the plan showing the permitted access has gone missing, it is clear from the wording of the permission that this access is limited to identifiable individuals.

<sup>2</sup> Mr Starkey disputed that he had initiated such a call but this was not material to this decision.

<sup>3</sup> Prejudice to the University's commercial interests

<sup>4</sup> Internal communications

<sup>5</sup> Adversely affect the course of justice in the context of Legal Professional Privilege

<sup>6</sup> Confidentiality of commercial information

### The complaint to the Information Commissioner

7. The Appellant complained to the Commissioner on 25<sup>th</sup> June 2011. In their letter to the Commissioner of 26<sup>th</sup> August the University raised the issue of whether the extracts of the minutes did in fact fall within the remit of the request. Prior to issuing the Decision Notice the Commissioner considered the extracts of the minutes but despite the University's representations on the point, he did not make any decision as to scope.
8. Additionally the Commissioner did not consider whether the reports (referred to in the extracts of the minutes) would fall within limb 1 of the request. In confining his consideration to limb 2 only the Commissioner was relying upon the University's synopsis of their telephone conversation with Mr Starkey on 23<sup>rd</sup> July 2010 as set out in their letter of 21<sup>st</sup> October 2011, which was incomplete insofar as it suggested that the request was now confined to limb 2. The University accept that (as set out in their refusal notice of 13<sup>th</sup> August 2010) both limbs were still in issue.
9. The Commissioner issued Decision Notice FER0401740 which held that regulation 12(4)(e) was engaged and the public interest lay in withholding that information.

### The appeal to the Tribunal

10. The Appellant appealed to the Tribunal on 27<sup>th</sup> January 2012. At the telephone directions hearing on 4<sup>th</sup> April 2012 the Tribunal indicated that it would consider whether the reports fell within scope at the determination of the appeal.

### Scope

11. The Tribunal is satisfied that the request should be read objectively. An information request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. This is clear from s9 EIRs which imports an objective test for providing advice and assistance only where "*it would be reasonable<sup>7</sup> to expect a public authority to do so*". The Appellant's request was plain on its face and asking for information relating to an objectively definable type of information namely: *public rights of way across the grounds of Sibly Hall*.

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<sup>7</sup> Emphasis added

12. The Tribunal reviewed items 3-6a<sup>8</sup> of the closed bundle in the context of limb 1 of the information request and is satisfied that on an objective construction of the information request documents 3-6a are not within scope. Detailed reasons with reference to the withheld documents are set out in the Confidential schedule.

13. Since the matter had been raised before (but not adjudicated upon by) the Commissioner<sup>9</sup>, and because of the nexus between the reports and the minutes, the Tribunal then went on to consider scope in relation to the extracts of the minutes in the context of limb 2 of the information request.

14. In the telephone conversation of 23<sup>rd</sup> July 2010 3 search terms were identified to help with an electronic search of the FMC minutes which were:

- Sibly Hall,
- Rights of way
- Signage.

Extracts 18/10 and 29/10 were the only minutes returned pursuant to the electronic search using those terms. They referred to Sibly Hall and Signage but they did not refer to Rights of Way. Upon further consideration, the University's position was that the minutes need not in fact fall within the remit of EIR simply due to the fact that it referred to 2 out of 3 agreed search terms. The Tribunal has reviewed their contents and is satisfied that their materiality derives from the reports considered in limb 1 and for the same reasons, we are satisfied that they do not fall within scope.

#### Other matters

15. The Tribunal's decision on scope was announced at the hearing. The Appellant was disappointed that it had taken so long for it to be clarified that the documents were not within scope. The Tribunal notes that nowhere in the two decision notices on this case is the issue of scope addressed by the Commissioner, although it appears to have been raised by the University in the context of consideration of the request under FOIA in November 2010 and was again raised explicitly by the University in August 2011. It

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<sup>8</sup> Document 6a was added to the closed bundle during the closed hearing, however, the evidence was that it was included in the material considered when the request was originally responded to.

<sup>9</sup>Consistent with *Birkett v The Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606

does not appear that Mr Starkey was alerted to the fact that the University had raised the issue of scope before the Commissioner.

16. There may have been two sources of misunderstanding when the matter was before the Commissioner: the first over whether limb 1 of the request was still live, the second relating to the fact that source documents reported and discussed at the FMC were not before the Commissioner. The Commissioner argued that the result was the same since having considered the exemption raised, the Commissioner had not ordered disclosure.
17. The Tribunal did not find this argument helpful. The Tribunal's decision having been made upon the preliminary issue of scope, the applicability of the exemptions relied upon or the public interest test included within these exemptions were not considered. We recognise that this is disappointing to Mr Starkey who was expecting to advance arguments as to where the balance of public interest lies. It is clearly unfortunate that Mr Starkey has been left with the impression for so long that material within scope exists when in the Tribunal's judgment this is not the case.
18. The situation was further complicated by the University having different people dealing with each limb of the request without anyone taking an over-view. This led to an inconsistent approach:
  - i. Items 3-6a were identified and reviewed and considered not to fall within scope.
  - ii. The minutes which referenced these documents appear to have been subject to a refusal notice out of an abundance of caution and because they were identified through the appearance of some (but not all) search terms. In this respect the University failed to go back to the terms of the request and appears to have prioritized the search terms over the information request.

In light of the nexus between the 2 types of documents, it is surprising that no consideration appears to have been given to the apparent inconsistency between these approaches.

## **Conclusion**

19. The Tribunal refuses the appeal and upholds the Commissioner's decision but upon different grounds which are reflected in the reasons set out above and in the confidential schedule.

[Signed on original]

**Fiona Henderson**

Judge

Dated this 2<sup>nd</sup> day of July 2012