



Information Tribunal Appeal Number: EA/2014/0268

Information Commissioners Ref: FS50537210

Freedom of Information Act 2000 (FOIA)

Between

SEVIM HUSSEIN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

BEFORE

INFORMATION TRIBUNAL JUDGE

DAVID FARRER Q.C

And

LAY MEMBERS

SUZANNE COSGRAVE AND

ANNE CHAFER

Date of Decision 12/06/2015

Date of Promulgation 18/06/2015

Representation:

The Appellant appeared in person:

The Respondent did not appear but made written submissions

Abbreviations :

SH	The Appellant
The ICO	The Information Commissioner
The DN	The ICO's Decision Notice dated 30 September 2014.
LBH	The London Borough of Hackney
HH	Hackney Homes
FOIA	The Freedom of Information Act, 2000

Decision

The Tribunal finds that the London Borough of Hackney holds one item of requested information, which the Appellant requested, namely -

A copy of a structural report dated on or about 16th. February, 2011 relating to her leasehold property, 37A East Bank, LONDON N16 5QS, but no other information within the scope of the request. To that extent, this appeal is allowed.

It therefore substitutes for the Decision Notice of 30th. September, 2014 a Decision Notice requiring the London Borough of Hackney to provide to the Appellant the information specified above within 28 days of service of this Decision in final form.

Reasons for Decision

The Background

1. The question for the Tribunal is whether LBH held information which SH requested in a series of communications in late 2013 and early 2014.
2. SH has occupied 37A East Bank for many years, first as a tenant of LBH, later as leaseholder. During her residence she has raised a range of problems regarding the condition and maintenance of the premises. She has made a large number of requests for information held or said by her to be held by LBH or by HH, its partner in the maintenance of its residential estate. For the purposes of this appeal HH can be regarded as the agent of LBH, holding information on its behalf and any distinction between them is immaterial.
3. In the period leading up to SH's complaint to the ICO LBH provided her with a substantial body of information in response to those requests. Nevertheless, some confusion arose as to what requests were outstanding and what information she had received. LBH attempted to identify just what issues remained, as did the ICO. Although SH had chosen a "paper" determination of the appeal, it was necessary for the Tribunal to convene a hearing after considering the evidence and written submissions, in order to clarify the substance of her outstanding complaints, hence her appeal. By the conclusion of the hearing it was apparent that the scope of disagreement on the content of the appeal was less extensive than the Tribunal had supposed.

The Request

4. Within the continuing stream of correspondence between SH and HH SH made a number of requests by undated letter received by HH on 18th. December 2013 under FOIA and DPA. A subsequent complaint was made by SH to the ICO, apparently on 4th. April, 2014 (see DN) though it was not included in the bundle prepared for the Tribunal. The ICO treated it as the material request in his response of 1st. May, 2014. SH's complaint was that the material that she was receiving did not satisfy her apparently unchallenged requests.
5. The scope of the ICO's task remained uncertain for some time.,. SH made further requests to HH. By letter of 15th. July, 2014 the ICO dispensed with any requirement for an internal review and indicated the proposed scope of his investigation, covering the request of 18th. December and later requests. In the interests of finality, Ms. Laura Goose stated on behalf of the ICO that this would be the subject matter of her investigation unless SH indicated otherwise. SH re-

sponded promptly with a number of comments and on 17th. July, 2014 Ms. Goose indicated that the investigation would be confined to the topics identified in her letter of 15th. July as modified by SH's responsive points submitted on the same date.

6. The ICO then wrote to LBH requesting its response and received the same from their Information Management officer on 6th. August, 2014 helpfully clarifying, as to each request, whether LBH said that it held or had held the requested information and what it claimed to have disclosed to SH. It acknowledged the finding of further items of requested information, emails, a specification and a damp report. There was an undertaking to remedy the previously illegible drawings provided. It is relevant to note that the response to the question 6 in the table "16th Feb 2011 Structural/damp reports" was "This report is not held. NPS has confirmed that no such report were completed." It also observed, as had the ICO, that the final request for information as to any uncovered major works on SH's property was a new request.
7. SH, having received this further disclosure, sent further comments on this response pasted and dated 12th. August 2014 into a copy of the ICO letter of 15th. July 2014. She stated that information held by LBH was still outstanding. These transactions led to the attachment of Annex A to the DN identifying the information which the ICO treated as the subject matter of the complaint, hence his investigation. Given the number of requests and comments on requests and the difficulty of distinguishing some from others, that was plainly a common sense way of bringing some degree of certainty to the scope of the complaint.
8. We intend no criticism of SH when we say that a multiplicity of wide - ranging, perhaps overlapping requests merging into a single complaint can pose substantial problems for any regulator or tribunal required to take decisions on questions of compliance.
9. The ICO wrote to LBH on 19th. August 2014 making a series of inquiries based on the agreed scope of the request. LBH replied by letter of 10th. September, 2014 from its Information Management Officer. The gist of the reply was that LBH had provided all the information that it believed it held and again restated that no report from NPS existed relevant to request 6. It also explained something of the data retrieval methods used in response to these requests including the use of EAS software and the approaches made to former employees whose personal drives the EAS system could not interrogate.

The Decision Notice

The ICO summarised the history of the matter. He recited the responses of LBH set out in the submitted letters of 6th. August and 10th. September, 2014. He accepted as more likely than not

LBH's contention that it held nothing further within the scope of these rather complex requests. SH appealed.

The grounds of appeal

10. They were not entirely easy to follow but, summarising those material to this appeal, SH asserted that

- The ICO 's decision was wrong.
- Annex A did not include all the outstanding requested information.
- The request said to be a new request was implicitly made when all information relating to 37A East Bank was requested .
- The structural engineer's report referred to in the DN as having been provided to SH was not the requested report on her property dated 16th. February, 2011 but an earlier NPS Group report dated 24th September 2010. relating to a neighbouring property 37B East Bank.
- Drawings and specifications relating to the visit to 37A East Bank on that date were served in illegible form.
- SH had letters and emails she had received from LBH/HH which were within scope but none had been disclosed to her in LBH's packages of information provided by them in fulfilling her request.

These grounds were supported by a substantial number of documents, some of which were said to evidence the existence of requested documents which were held by LBH.

The ICO's Response

12.The ICO summarised, as best he could, the grounds of appeal. He referred to the accepted standard of proof, the balance of probabilities. He argued that SH had failed to identify what information held by LBH had not been supplied. He based his case on the letters from LBH to the ICO of 6th.August 2014 and 10th.September 2014 respectively since he regarded them, together with supporting material provided, as convincing evidence that LBH had conducted thor-

ough searches to the best of its ability and that it was more probable than not that it held no undisclosed information.

13.SH replied, refuting the ICO's findings and repeating that Annex A did not properly reflect the scope of the undisclosed information.

The Hearing

14.SH made oral submissions amplifying her grounds of appeal and her reply. She adduced some further documents which, the Tribunal understands, had been served on the ICO. They included emails and a letter relating to the inspection of 37A on 16th. February, 2011 and specifications, drawings and a report relating to it. She indicated general agreement with the statements made by LBH in its letter of 6th. August, 2014 as to what it had supplied. She drew particular attention to LBH's confusion as to the structural reports on the properties 37B and 37A East Bank and to evidence that an undisclosed report relating to the inspection of 37A on 16th. February, 2011 existed. She insisted that her letter to the ICO dated 12th. August, 2014 with the attached comments on Ms. Goose's list of outstanding complaints as to undelivered information represented further requests going beyond those set out subsequently in Annex A.

Our Reasons

15.We consider that Annex A is a fair reflection of SH's claims in late 2013 and early 2014 as to outstanding disclosable information. Her response of 12th. August, 2014 to LBH's letter and schedule of 6th. August 2014 does not materially expand the categories of requested but undisclosed information. Rather it comments on LBH's performance in providing what was clearly disclosable and adds detail as to categories of information already requested.

16.On the written evidence before us we reject any suggestion that LBH or HH was intent on concealment. The whole tenor of correspondence and internal emails suggests a desire to provide what was wanted, subject to resources and the means available for tracing the requested information. The provision of further information following later searches supports this conclusion.

17. Likewise, the Tribunal finds that thorough searches were made of relevant electronic records, where accessible, including email accounts. The fact that a document was created in 2011 does not necessarily mean that it is retained, whether in hard copy or electronic form, in 2014.

18. The Tribunal agrees with the ICO that the fact that SH holds documents within scope of which no counterparts have been provided by LBH does not demonstrate that LBH has also failed to disclose information which SH does not have. Since the documents concerned are several years old, it is quite possible that LBH did not hold them in December, 2013 or any later date.

19. SH complained that the specifications and drawings supplied which related to the visit of 16th. February, 2011 were illegible. They were evidently printed out from computer records and their supposed illegibility is due to the font size. Whether or not information must be provided in legible form (an issue on which the ICO made submissions), the Tribunal accepts that the specifications were provided in legible form following requests from the ICO. The drawing, as it appears in the documents submitted by SH, is not illegible anyway.

20. We consider that the "new request" (for uncovered major works affecting 37A) was just that. If such information is sought, it should be specified in the request. Blanket requests, susceptible of limitless interpretations and requiring open - ended investigation, are not to be encouraged. In any case, we do not think it more likely than not that such information was held.

21. We accept that there was confusion over a structural report on 37B East Bank based on a visit in September, 2010 (Open Bundle page 70) and a similar document in respect of 37A (SH's property) which was inspected on 16th. February, 2011. SH wanted to see the latter document, if it existed.

22. The ICO's case, confirming LBH's stance, is that no structural report was completed [Open Bundle pages 347/348 refers to them having found a Sovereign damp report which they commit to supply to her] and that the products of the visit of 16th. February, 2011 were simply the drawings and the specifications supplied to SH. In support of that conclusion he points out that,

whilst an internal email of 4th. February, 2011 (before the visit to 37A) asks that a copy of the “final surveyor’s report” be sent to SH, a related email of 28th. March, 2011 (six weeks after the visit) seeks confirmation that “your drawing and specification” may be sent to SH. That is cited as confirmation that those documents were all that was created as a result of the visit.

23.However, other correspondence indicates that a full survey was undertaken and a report was made (a HH email dated 18 January 2011 refers to informing SH that “we need to carry out a full survey 37A East Bank”) A letter dated 20th. April, 2011 from HH’s Housing Manager to SH (Open Bundle page 45) states -

“As you are aware a full inspection was carried out on 16th. February, 2011 in your property and report has been completed”

24. There is evidence that that report must still have been held by LBH when SH requested it, whilst responding to SH’s requests, Jackie Potts, HH’s Head of Customer Support, in an email dated 12th. February, 2014 to colleagues seeking their assistance, identified “*a structural report which Richard Wiles commissioned*” as part of the requested information .That evidently refers to a report arising from the inspection of 16th. February, 2011. The request was referred to Tony Neal of NPS with the inquiry “*Did Richard commission NPS for a survey on this property ?*”

25.Mr. Neal’s reply, in an email of 17th. February, 2014 (Open Bundle page 362), was “*I have given Jacky a copy of the structural report*”.

26.In the Tribunal’s view, these emails show that :

(i) NPS prepared a structural report following the visit of 16th.February, 2011

(ii) It is probable that HH held a copy of that report in and after December, 2013.

(iii) If, for whatever reason, HH did not receive a copy of that report, then for the purposes of FOIA s1 (1). ,it was held by NPS on behalf of HH, which had commissioned NPS to produce it. LBH/HH therefore held the report.

27. Specifications and a drawing do not seem to us to amount to a structural report, of which an example relating to 37B East Bank was exhibited. The Tribunal considers that the ICO erred in his decision as outlined in para 23 of his Decision Notice in regard to the structural survey as the evidence the Tribunal has considered would not support the conclusion that “*on the balance of probabilities the complainant has received all recorded information that falls within the scope of her requests.*”.

28. To that extent only, the Tribunal disagrees with the conclusions of the DN and allows this appeal.

The Appellant raised some matters relating to a breach of confidentiality by HH in supplying information to her relating to a third party, we agree with the ICO that this falls outside the scope of this tribunal’s remit and hence we have not attempted to address that.

29. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge

12th. June, 2015