



Appeal number: EA/2016/0156

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

CHRISTOPHER LASPER

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent
Second
Respondent**

UNITED UTILITIES WATER LIMITED

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at Carlisle Magistrates Court on 2 November 2016

The Appellant appeared in person

The First Respondent did not appear

**The Second Respondent was represented by Robin Hopkins of Counsel, instructed by the
Legal Department, United Utilities Water Limited**

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DECISION

The appeal is allowed.

No steps are required to be taken by the Second Respondent.

Reasons

Background to Appeal

1. The Appellant made a request to the Second Respondent (“UUWL”) for information relating to the transfer to it of Manchester Corporation’s waterworks undertaking at Lake Thirlmere. His request was later refined to refer specifically to a statutory Scheme dated 31 August 1989.
2. UUWL confirmed pursuant to regulation 12 (4) (a) of the Environmental Information Regulations 2004 (“EIRs”) that it did not hold the requested information.
3. The First Respondent (“IC”) issued Decision Notice FER0593272 on 9 June 2016, upholding UUWL’s confirmation.
4. The parties’ positions have evolved over the duration of the case and the factual background has altered fundamentally since the Decision Notice was issued. I describe the stance of each party below.

The Parties’ Positions

5. The Appellant requested “...all environmental information relating to the above transfer(s) including (without prejudice to the generality of the foregoing) copies of any relevant order or scheme made under either of the Water Acts 1973 or 1989” (page 56 of the Hearing Bundle).
6. There was initially some confusion between the Appellant and UUWL about precisely what information the Appellant was requesting. It was only after the IC became involved that the request was refined and responded to formally.
7. The refined request is described at paragraph 9 of the Decision Notice as follows: “During the course of the Commissioner’s investigation the complainant clarified that it was a scheme dated 31 August 1989 relating to the transfer which is the subject of the request which he wanted to obtain and considers is held by United Utilities”. This is apparently a reference to a letter from the Appellant to the IC dated 11 August 2015 which was in the following terms (page 60 of the Hearing Bundle):

“As is indicated in my enclosed request, the transfer to UU of the Corporation’s waterworks undertaking at Lake Thirlmere appears to have rested on orders/schemes under the two above Water Acts. I want to see those orders/schemes to confirm that UU are bound by section 62 of the 1879 Act. Plainly, UU will be intimately familiar with those orders/schemes – they are essential to UU’s title to CL 413 (and to other land at Lake Thirlmere)”.

8. During the IC's investigation, UUWL asserted that the Scheme requested by the Appellant did not exist. The Appellant informed the IC by e mail dated 5 March 2016 (page 105 of the Hearing Bundle) that the Scheme had been referred to in litigation to which UUWL was a party, so it must exist.
9. The IC does not seem to have regarded this information as significant and the IC's Decision Notice was issued on the basis of the IC's acceptance of UUWL's submission that the undertaking in question had been transferred to it by operation of the primary legislation and that, as it had not been necessary to make a Scheme to transfer the waterworks undertaking, none had been made. The IC concluded at paragraph 25 of the Decision Notice that the requested information did not exist, and so UUWL had been right to say that the Scheme was not held by it for the purposes of the EIRs.
10. The Appellant's Notice of Appeal dated 21 June 2016 asserted that the Scheme did exist because s.4 of the Water Act 1989 required a Scheme to be made and to be approved by the Secretary of State. He re-asserted that the Scheme must have been made because it had been referred to in open court in litigation to which the UUWL was a party¹. The courts' judgments in that litigation are reported at [2012] EWHC 232 (Ch) (first instance), [2013] EWCA Civ 40 (appeal to the Court of Appeal), and [2014] UKSC 40 (appeal to the Supreme Court). In these circumstances he submitted that the IC's conclusion that the Scheme did not exist was erroneous and that it was more likely than not that UUWL held a copy of the Scheme.
11. The Appellant's Notice of Appeal asked the Tribunal to issue a substituted Decision Notice requiring UUWL to provide him with "*a copy either of the scheme itself of 31 August 1989 or of an authoritative copy thereof*".
12. The IC's response to the appeal, dated 28 July 2016, accepted that the Scheme existed and submitted that the material question for the Tribunal to determine in this appeal was whether UUWL holds a copy of it. The IC invited the Tribunal to join UUWL as a party to the appeal in order to assist the Tribunal with this question of fact. The IC also submitted that, as the Appellant now had obtained the Scheme from another source, the appeal was academic and ought to be withdrawn.
13. The Appellant replied that the copy of the Scheme he had by now obtained (from the Environment Agency, successor to the National Rivers Authority) was 100 pages long but that Lady Justice Arden had referred to the Scheme in the Court of Appeal's judgment (paragraph 39) as being "over 150 pages". He therefore wished to pursue his appeal as he was not satisfied that the document he had obtained from the Environment Agency was the same document as the one he considered must be held by UUWL.
14. UUWL's Response dated 11 September 2016 confirmed that it too now accepted that the Scheme existed. It had provided the Appellant with two copies, but neither of them was the sealed copy. The first copy (which UUWL had identified as

¹ *The Manchester Ship Canal Limited v United Utilities Water plc.*

being in its possession after the date of the Decision Notice) was referred to as Version A. This was thought to be a working draft copy. Having contacted the solicitors who had acted for it in the litigation, it had now been provided with another copy ("Version B") which it said was apparently the same document as Version A, and was also unsealed. Version B was said by UUWL to be the version that had been placed before the Court in the litigation referred to by the Appellant.

15. UUWL submitted to the Tribunal that it does not hold a copy of the final sealed Scheme, and so asked the Tribunal to confirm the Decision Notice to the effect that the information requested was not held. UUWL made clear that, if it could find a copy of the sealed Scheme it would disclose it to the Appellant. However, it had searched the records of its Legal and Property Departments and could not find it. In the alternative, UUWL asked the Tribunal to issue a substituted Decision Notice correcting the basis for finding that the information requested was not held.

16. The Appellant's Reply dated 24 September 2016 asserted that UUWL had failed to reply fully to the Tribunal's case management directions², had failed to address the question of the difference in length between the two documents it had provided to him and the document referred to by the Court of Appeal, had incorrectly assumed that he had applied only for a sealed version of the Scheme, and had erroneously concluded that Versions A and B are the same. He asked the Tribunal to require the attendance of a representative of the solicitor's firm to give oral evidence at the hearing of this appeal³.

17. In argument before the Tribunal, the Appellant reiterated that he had not asked for the sealed Scheme. He referred the Tribunal to the terms of his original request. The Appellant submitted that the evidence before the Tribunal consisting of e mail communications between UUWL and its external legal advisers (see [22] and [23] below) could not safely be relied upon because of the discrepancy between the length of the two versions of the Scheme he had seen and the 150 page document referred to in the judgment of the Court of Appeal. He asked the Tribunal to infer that there is another, 150 page version of the Scheme in existence, which must be different in content to Versions A and B, and that UUWL or its external solicitors must have it.

18. He submitted that the contemporaneous correspondence about the Scheme (obtained from the Environment Agency and included at page 164 of the Hearing Bundle) referred to "one sealed copy being enclosed, and other sealed copies going to other parties", so he inferred there must be three sealed copies of the Scheme in existence.

19. He submitted that the terms of his original information request necessarily included the 150 page document referred to by the Court of Appeal. However, as the Tribunal had no evidence before it which proved that a search had been undertaken for that specific 150 page document, it could not conclude that the 150 page document was not held.

² Issued on 19 August 2016 and directing the Second Respondent to answer certain questions.

³ This application was refused.

20. Mr Hopkins, on behalf of UUWL, apologised for the error which had led his client initially to assert that the Scheme did not exist. He submitted that the question for the Tribunal was whether the Decision Notice was correct, rather than whether the reasons given for its conclusions were correct. He asked the Tribunal to dismiss the appeal and confirm the Decision Notice, because the answer to the Appellant's request was the same now as it had been before the discovery of Versions A and B, namely that UUWL does not hold a copy of the sealed Scheme. He submitted that all reasonable efforts to locate a copy of the sealed Scheme had been made and that neither the UUWL nor solicitors acting on its behalf held a copy of the sealed Scheme at the time of the request.

Evidence

21. The Appellant informed the Tribunal and other parties by e mail in July 2016 that he had obtained a copy of a Scheme approved by the Secretary of State and sealed on 31 August 1989. Extracts from it were included in the hearing bundle. He also provided the Tribunal with extracts of statutory materials and the relevant passage of Arden LJ's judgment.

22. UUWL provided the Tribunal with copies of Versions A and B which had been disclosed to the Appellant. It also submitted evidence to the Tribunal in the form of an e-mail correspondence between its own staff and both the solicitors and junior counsel who had acted for it in the litigation referred to by the Appellant. This showed that Version B had been sent to UUWL by the external solicitors in August 2016, with a covering e-mail stating "*we don't have a copy of the original or sealed version on file*".

23. UUWL's in-house solicitor had then asked the external solicitors by e mail dated 28 October 2016 whether they held any copies of the Scheme other than Version B, whether it was Version B which had been before the Court of Appeal, and if so whether there had been any issue taken by the Court about the parties' reliance on Version B. The e mail correspondence shows that the external solicitors then raised a query with the junior counsel who had appeared in all three courts (confirmed by the Law Reports). He replied that "*..the version of the TS you sent me a moment ago appears to be the same as the one we put in front of the Supreme Court and CA. I do not recall there ever being an issue over competing versions of the TS*".

The Law

24. The question for the Tribunal under regulation 12 (4) (a) of the Environmental Information Regulations 2004 is whether the public authority held the requested information on the date it was requested.

25. Regulation 3 (2) defines information "held" by a public authority as information (a) "*..in the authority's possession and has been produced or received by the authority; or (b) ...held by another person on behalf of the authority*".

26. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, applied by regulation 18 EIRs, as follows:

“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.

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

27. I note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Discussion

28. UUWL understood the Appellant’s request to be a request for a copy of the sealed Scheme only. When it informed the Appellant and the IC that it did not hold the requested information, it had not yet located Version A and had (wrongly) interpreted the statutory provisions to mean that no Scheme had been made. However, after it had located and disclosed to the Appellant Versions A and B, it continued to maintain that the requested information was not held for the purposes of the EIRs because it had not located a copy of the sealed Scheme, despite having undertaken all reasonable enquiries. (Presumably, if it had considered the information request to have been for any copy of the Scheme in its possession, including an unsealed copy, it would have submitted that the relevant information had already been provided).

29. The original request was not, of course, current by the date of the Decision Notice because of the refinement referred to at [7] above. I note that in neither the initial request nor the refinement was the “sealed Scheme” specified as being the subject-matter of the request. Neither did the Information Commissioner make a distinction between the sealed and unsealed versions of the Scheme. However, I can quite understand why UUWL made an assumption that the Appellant required the sealed version, because the refined request described an order or scheme which had been effective to transfer property. Later, the Appellant’s Notice of Appeal referred to “the scheme itself or an authoritative copy thereof” thus reinforcing this impression.

30. The Appellant’s submissions as they developed at the hearing were that whilst he had not initially asked for the sealed Scheme in terms, subsequent events had brought it within the scope of his request. He argued forcefully that (a) it would be extraordinary if a public authority did not hold a copy of such an important document

and (b) that there must be another version of the Scheme in existence because of the discrepancy between the versions he has seen and Lady Justice Arden's description of the sealed Scheme.

31. The Appellant contends that there must be another version of the Scheme, being the longer document referred to by the Court of Appeal. His case to this effect rests on an inference from surrounding circumstances and he places no direct evidence before me. Although UUWL does place direct evidence before me, the Appellant contends that it (the e mails from UUWL's external lawyers) cannot be relied upon as evidence of the facts stated. He asks me to find that UUWL has not demonstrated that it has searched for the specific 150 page Scheme referred to by the Court of Appeal and that in those circumstances it is more likely than not that a 150 page version of the Scheme is held on UUWL's behalf by its external lawyers.

Conclusion

32. The Tribunal is entitled to review the evidential basis for the Decision Notice under appeal and, having done so, I make a formal finding of fact that a Scheme sealed on 31 August 1989 exists (this is no longer disputed). It follows that the Decision Notice was erroneous in its conclusion to the contrary. It seems to me that it would be unjust to dismiss this appeal when there is such a fatal flaw in the Decision Notice. I have therefore concluded that this appeal must succeed because the Decision Notice is erroneous.

33. The information request which formed the basis for the Decision Notice was the one made by the Appellant on 11 August 2015. As noted above, the operative request was somewhat imprecisely described in the Decision Notice, perhaps because the IC had accepted that the Scheme did not exist and so the nuances of a sealed or unsealed version were not thought to be relevant. This has led to some confusion in these proceedings. Whilst I accept the Appellant's submission that his refined request did not precisely refer to the sealed Scheme, I have concluded that it was reasonable for UUWL to have understood the request to be for the sealed Scheme because of the terms in which it was described. This makes it logical for UUWL to continue to argue that it does not hold the information requested.

34. On the basis of the evidence before me, I now conclude as follows. I am satisfied on the balance of probabilities that UUWL does not itself hold a sealed copy of the Scheme. I reach that conclusion by accepting on the balance of probabilities the evidence of UUWL that it conducted all relevant searches (described on pages 155 to 157 of the Hearing Bundle and its Response) and that Version A was the only copy held internally. I am not persuaded by the Appellant's argument that it is improbable that such an important document as a sealed Scheme would not be held in UUWL's internal records.

35. I am also satisfied on the balance of probabilities by the evidence contained in an e-mail from counsel, that Version B was the document placed before the Courts in the litigation. I note that this evidence was provided to the Tribunal by a person who was familiar with the litigation and owes a professional duty to his client (and to the

Tribunal) to provide accurate information. I find it reliable. In those circumstances I am not persuaded by the Appellant's argument that yet another version of the Scheme must exist so that further searches must be undertaken for it. In the face of counsel's evidence to the contrary, I am not satisfied that Lady Justice Arden was referring to a different document from Version B in her judgment, despite her reference to a longer document. There must be another explanation for the apparent discrepancy as to the length of the Scheme before her, but I do not know what it is.

36. On the basis of these findings of fact I conclude that Versions A and B were the only documents held by UUWL or on its behalf at the date of the Appellant's request. As these were both unsealed copies, and as I have found that UUWL reasonably interpreted the Appellant's request to be for a sealed copy of the Scheme, I conclude that the information requested was not held.

37. I reach the final position that the Decision Notice issued was in error, so that this appeal is allowed. UUWL is not required to take any further steps as it has provided the Appellant with the only versions of the Scheme available to it and does not hold any other version. In these circumstances I do not consider it necessary to issue a substitute Decision Notice.

Alison McKenna

Principal Judge

Date: 21 November 2016

Date Promulgated: 22 November 2016