



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/0152

**Heard without a hearing
On 30 November 2016 and following the
Upper Tier decision to set aside and remit
to the First Tier Tribunal, at an oral
hearing on 4 September 2018**

Promulgation Date 24/09/2018

Before

**MELANIE CARTER
JUDGE**

**HENRY FITZHUGH
NIGEL WATSON
TRIBUNAL MEMBERS**

Between

FRANK ELLIS

and

INFORMATION COMMISSIONER

and

RYEDALE DISTRICT COUNCIL

Appellant

Respondent

Second Respondent

DECISION AND REASONS

1. This is an appeal under the Freedom of Information Act 2000 (“FOIA”) by Dr Frank Ellis against the decision of the Information Commissioner (“the Commissioner”) set out in the Decision Notice of 12 May 2016, concerning a request for information to Ryedale District Council (“the Council”). The Tribunal has decided, for the reasons set out below, to uphold the appeal insofar as the first limb of the request for information is concerned and to refuse the appeal for the purposes of the second limb of the request.
2. This appeal relates to a request for information made by Dr Ellis, the Appellant to the Council on 5 January 2016. It is not in dispute that whether or not information should have been disclosed should be dealt with under the Environmental Information Regulations (“EIR2”), rather than the FOIA.
3. Dr Ellis’ request for information related to planning permission given by the Council for the development of housing in the village of Ampleforth. In particular, the request concerned the arrangements for foul and surface water drainage from the development site. The Appellant wrote on 5 January 2016 asking for the following information:

*“A pipe runs from the....development....across land adjacent to the site en route to a water course. The pipe is designed to remove waste surface water (rain). I require the name of the landowner(s) under whose land the pipe has been laid. For the avoidance of doubt I require the name/identity of the landowner(s) at the time [the Council] issued written approval to the developer authorising the start of the development, as stipulated in the Schedule of Conditions for Appeal APP/Y2736/A/13/2197/Paragraph 16 **[the first limb of the request]**”*

“No development shall take place until full details of foul and surface water drainage and a programme for implementation have been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved details”.

*I also require a copy of the letter of email sent to....by [the Council] in which [the Council] issues its approval, as stipulated in Paragraph 16 above, so that development can begin **[the second limb of the request]**”*

4. The Council refused the request on the basis that the information was not held. The Appellant complained to the Commissioner who in turn rejected the complaint. The Appellant then appealed to this Tribunal on the basis that the information was held and that as such the Decision Notice (“DN”) was not in accordance with law. The issue before the Tribunal is to decide on the balance of probabilities whether or not the Council did hold the requested information.

Background to this appeal

5. This appeal was first considered by this Tribunal at a paper hearing on 30 November 2016. The appeal was upheld but subsequently set aside by the Upper Tier Tribunal on the basis that the Tribunal had made an error of law in overlooking and therefore not considering or determining the second limb of the request for information. It was remitted to the Tribunal to decide the appeal in that regard, but on the direction that it was to make the same findings in relation to the first limb, as it had at the first hearing of this appeal. Thus, the first section of this decision sets out the main findings of the Tribunal on that first occasion.

First limb of the request

6. There had been two previous requests under FOIA, the refusals for which the Appellant had not pursued. Those two requests are strictly not part of this

appeal, but form part of the factual backdrop to the issues before the Tribunal. Also relevant was a later FOIA request in May 2016 as the information disclosed further to that request was relevant as to the Council's knowledge of the legal ownership of the land during 2015.

7. It was apparent from the Appellant's submissions and evidence that the Council had been corresponding with the person which the Council believed to be the owner of the relevant plot of land as late as November 2015. This aspect had not been considered by the Commissioner in the DN, referring there only to 'historic information' (that is information indicating ownership of the land held by the Council) dating back to between 2008-2011.
8. In light of the later evidence apparently held by the Council indicating knowledge of ownership as late as November 2015, the Tribunal directed the Commissioner to expand upon its arguments and to address this specific evidential point. The refusal of the request for information as to ownership was January 2016 (just two months later). The Tribunal stated in the Directions that:

"Also relevant were the letters and email evidence adduced by Dr Ellis between 2014-2015, which Dr Ellis argued went to prove that the Council had been incorrect in asserting the information requested as to ownership of the land was not held.

5. The Tribunal has issued the following directions requiring the ICO to now assist in the analysis of whether:

a. The commissioner had been correct to accept the word of the Council, given the evidence in the bundle which Dr Ellis asserted indicated a knowledge of the ownership of the land post-dating 2011 (the latest of which may have been November 2015); "

9. The Commissioner failed, in its response to the Directions, to deal with this point, despite the clear and careful directions from the Tribunal. The Commissioner stated as follows:

“The Commissioner understands that, at various points in the past, the Council did hold information about the ownership of ‘site 160’. As set out at [DN para 22], the Commissioner considered whether or not the fact that the Council had known about the site ownership in the past meant that the Council also knew who owned the site at the relevant time set out in the request (ie: at the time the Council issued written approval to the developer).

It was established that the relevant written approval was issued on 1 February 2016 (ie after the date of the January 2016 request). Having probed the matter with the Council, the Commissioner accepted that it did not have current ownership information, and noted that it had no business need to know such information (ie for the discharge of conditions). This led to the Commissioner’s finding that the information was not held.

Accordingly, the Commissioner does not consider that the factual background was in this case determinative for the request that she considered. Given the precise terms of the request at issue, which refers to the ‘name/identity of the landowner(s) at the [specific] time [the Council] issued written approval to the developer’ rather than, for instance, more generally, the Commissioner stands by her interpretation of the request, and her DB. Accordingly, whilst it would have been open to the Council to give details of any historic information it held, It was not a failing under FOIA for it not to do so”.

10. The Tribunal accepted, first that the Council was not under any legal duty further to any planning function to hold up to date information as to legal ownership of land. In particular, planning officers on the explanation of the Council, did not need to concern themselves with land ownership and easements relating to offsite drains serving a development.
11. That did not however mean that it did not, as a matter of fact (rather than further to a duty) hold information as to ownership of land. The Tribunal accepted there would come a point when the Council would no longer have

reasonable confidence the information was correct. However, it would be a question of fact and degree as to when that information became so old that it could not reliably be said to meet a request for information, in effect, as to current ownership. In these circumstances, the Tribunal would have accepted that just because it knew, historically, the name of the legal owner of the relevant plot of land, it could not respond with any accuracy to a request asking for current ownership. In this case however, it was clear that the Council had, certainly as late as April 2015 and perhaps as late as November 2015 (just two months previously) relied upon its own information to write out to the legal owner and/or to refer others to the name of the legal owner. The Council would only have done so if it still believed that the named individual was still the current owner just two months before, it was then claimed that this information was no longer valid. The Commissioner and the Council were given an opportunity to respond to this point in the Directions, but failed to do so.

12. It appears from the Council's letter that officers are (understandably) incensed at the Appellant's allegation that officers are lying to him. The Council's letter references the case of Paul Gadd v The Information Commissioner EA/2014/0211 and a quote with regard to "unfounded assaults on the integrity of members of the staff". That case however was with regard to whether a request was 'manifestly unreasonable' or in FOIA terms, a request was vexatious. This case concerns a straightforward analysis, on the evidence, and to the balance of probabilities, whether the information requested was held by the Council at the date of request.

13. Given the existence of the correspondence in this regard as late as November 2015 the Tribunal considers that it is more likely than not that the information as to the legal ownership of site 160 was held, as at the date of the request in January 2016. This is specifically not a finding that the Council officers had been lying, rather that the approach of the Commissioner, given the information that the Tribunal has found was held at the relevant time, was ill-conceived and not in accordance with law.

14. The Tribunal acknowledges that its findings when it first met to decide this appeal did not clearly address the fact that the first limb of the request was linked to the date of approval further to Condition 16. It will be seen from below that the Tribunal has now found that no approval was given in accordance with Condition 16, that is prior to the date of the request for information. The only correspondence between the Council and the developer in relation to the relevant development, discharging the Condition, is the letter of 1 February 2016 which post-dates the letter of request. The only way then, in the Tribunal's view, to harmonise the reasoning in relation to the first limb of the request, which we are required by the Upper Tier to maintain, and the second limb of the request, set out below, is to proceed on the basis that the relevant date for testing whether the land ownership is held is indeed the date of the request. In practical terms this makes sense. There is nothing before the Tribunal to indicate that the Council's information as to ownership of the plot of land under which the pipe lies as at 5 January 2016 is any different to that which they held on 1 February 2016, when Condition 16 was discharged. Hopefully this will, insofar as it is information as to the ownership of the land under which the pipe actually lies and as at the date of the discharge of conditions (the nearest thing thing to approval), provide the information the Appellant seeks.

15. In light of the above paragraphs, and in accordance with the direction of the Upper Tier Tribunal, this Tribunal upholds the appeal in relation to the first limb of the request and finds that the Decision Notice is not, in that respect, in accordance with law. The DN is hereby amended to order that the name/identity of the landowner as at the date of the request be disclosed to the Appellant. This should be disclosed within 28 days of this decision.

The Second Limb of the Request

16. The remainder of this decision concerns the second limb of the request which was regrettably overlooked by the Tribunal at its first consideration of this appeal. The Tribunal is grateful to Dr Ellis and the Council for their careful

and helpful submissions. The Information Commissioner neither provided submissions nor attended the hearing.

17. The Tribunal was of the view that, the DN, although not specifically addressing the second limb of the request, could only make sense on the basis the Commissioner's conclusion was that information was not held. Thus, the issue before the Tribunal was whether it accepted, on the balance of probabilities, that no letter or email granting approval to Condition 16 was held.

Summary of the evidence before the Tribunal

18. Mr Gary Housden, the Head of Planning at the Council gave evidence by way of a witness statement and attended the Tribunal to give oral evidence. In the witness statement, Mr Housden stated the following:

“On 10 December 2013, an agent acting for Barratt Homes Yorkshire (East) and David Wilson Homes lodged an application to discharge the conditions – LPA Ref 13/001414/COND.....6,7,8,9,10,15,16,17,18 and 21. I approved this application to discharge all the conditions by letter dated 1 February 2016.

.....

As a result of [ongoing dialogue re Travel Plan condition], I was aware that the agents for the developer were aware of the Yorkshire Water consultation responses. I was aware that Yorkshire Water share their response with applicants so the developer would have been aware at the same time that the Council was that the details regarding drainage were acceptable in terms of their technical detail.....

The only correspondence with the development relating to Condition 16 is my letter of 1 February 2016 addressed to [the developer]. There is no other formal correspondence with the developer.

.....

The point made by the Appellant.....is that by 1 February 2016 building on the site had already begun and Condition 16 appears to suggest that approval needs to be given before building can start. The Appellant is correct in identifying a technical breach of Condition 16.”

19. The witness emphasised in his oral evidence that as far as the Council was concerned this had been a minor breach. Yorkshire Water had indicated in its letter dated..... its view that the technical detail vis drainage was acceptable. Insofar as the development had commenced before approval had been given, the Council would not have taken the view that this was the kind of breach that would warrant enforcement action (eg: calling for a stop notice which were rare, reserved for serious breaches and gave rise to rights to compensation). Mr Housden further explained that the reason the Council had not issued any

kind of approval prior to 1 February 2016 and despite having received technical advice from Yorkshire Water, was that the application to discharge conditions in December 2013 had been for all of the conditions and as such, the Council was of the view that it needed to give one response to the application, when all had been completed. The Travel Plan condition, involving as it did the County Council, had delayed matters as this had not been signed off until December 2015.

20. The Council provided the letter from Yorkshire Water dated.....and the letter to the developer dated 1 February 2016 stating that all conditions had been discharged. Finally, it was not in dispute that the development on the site had started in late summer 2014.

The Appellant's submissions

21. The Appellant does not accept that the letter dated 1 February 2016 is the approval required by Condition 16 and that no approval was given by the Council to the developer in discharge of Condition 16 prior to the commencement of the works in late summer 2014. In essence, his submission is that this is not plausible and that the Council are, in effect, not to be believed. This is on account of:

- a) the Council's handling of this particular request (and alleged change of position, as the matter has gone along, namely first, whether the February 2016 letter was approval in accordance with Condition 16 or alternatively a discharge of conditions and second, the late admission of there having been any breach of Condition 16);
- b) the fact that the supposed reason for delay in the discharge of conditions, the Travel Plan condition, was not credible as nothing to do with Condition 16;
- c) the lack of plausibility that the Council would not have recorded any telephone conversations regarding this development (which Mr

Housden said arose from the Travel Plan delays) and that there had been no further correspondence in the 2 year period between the application for discharge of conditions and the letter of February 2016;

- d) the lack of plausibility that a developer would have left it 2 years before requiring a discharge on a condition which was to be fulfilled before commencing works and also that the developer would have indeed started building without securing approval to Condition 16 (it not being credible he argued that the Council could not have signed off individual conditions rather than waiting until all had been fulfilled before doing so).

22. The Appellant further argued that the 2015 Order could not have required the procedure followed as this came into force after the application for discharge of conditions had been made in 2013.

23. Finally, the Appellant raised arguments with regard to the seriousness of any breach of Condition 16, the fact that agreement from Yorkshire Water had only been an agreement in principle to the drainage proposals and that the likely reason that the Council was not disclosing its approval was that this likely contained other unspecified matters the Council did not want disclosed.

The Council's submissions

24. The Council's representative, Mr Winship the Council Solicitor, made the following submissions:

- a) The Council denied that there was any relevant correspondence held other than the 1 February 2016 letter, which represented the discharge of conditions. This post-dated the request for information such that its position of not holding any information further to the second limb of request was, as a matter of fact and law, correct.

- b) The Council refuted that there was anything beyond a technical breach which in light of Yorkshire Water's indication, was truly minor and not unheard of in the planning field (this being further to Mr Housden's evidence that developers will, in certain circumstances, commence building such as this where there is a condition that is in effect signed off by the technical consultee and there is a delay in the overall discharge of conditions; moreover, the proposals as to drainage were now discharged).
- c) The Appellant had misunderstood the Council's role in this matter: that is, high level planning engagement such that it was not in effect monitoring the ground level developments nor was it obliged to report anything to the Planning Inspectorate, which had completed its function in relation to this site.
- d) Finally, that the 2015 Order was a consolidation and in effect re-enactment of the earlier procedure that did apply to the 2013 application for discharge, namely the 1995 Order...

Analysis

- 25. The Tribunal accepted Mr Housden's evidence that there had been no written approval further to Condition 16 before the letter of request by Dr Ellis. As such, the Council had been correct to refuse the second limb of the request on the basis that no information had been held.
- 26. The Tribunal accepted that this was wholly credible on the basis that it was not implausible that the Council felt it was appropriate to wait to give one discharge to all the conditions at the same time given the application had also covered all the conditions. As such, the fact that the delayed Travel Plan condition was unrelated to Condition 16 was not material. The Tribunal further accepted as plausible that the developer, and indeed the Council, might not have been too concerned at the breach of Condition 16 on the basis that it had seen the letter from Yorkshire Water, who were after all the technical advisers to the Council on these matters. The Tribunal could see no reason not to accept as credible

that there were no recorded notes of the telephone conversations between Mr Housden and the developer given the explanation that the matters under discussion were not particularly significant and the context of the thousands of conditions related to development that the Council's Planning Department had to deal with annually.

27. Whilst the Council could arguably have been clearer in its explanations to Dr Ellis, ultimately it did not matter for these purposes whether the February 2016 letter was an 'approval' or simply a discharge of conditions. That letter post-dated the request and in any event, could not amount to approval before the development had commenced which was by agreement in late summer 2014. How the Council had handled that particular issue in communications with Dr Ellis was more a reflection in the breakdown in the relationship between the parties than anything else.

28. In all the circumstances, the Tribunal was satisfied that the Council did not hold any information further to the second limb of the request as at the date of 5 January 2016. The Council had confirmed that it had not given approval before the development had begun and that there had, as a result, been "a technical breach" of Condition 16. It was not for this Tribunal to determine the seriousness or otherwise of the breach, merely to find on the balance of probabilities whether or not there was information head further to the request. The Commissioner had been correct in accepting the Council's finding on this second limb of the request, that there was no relevant information held.

Conclusion

29. In light of the above reasoning and as noted in paragraph 15, the Tribunal upholds the appeal in relation to the first limb of the request and finds that the DN is not, in that respect, in accordance with law. The DN is hereby amended to order that the name/identity of the landowner as at the date of the request be disclosed to the Appellant. This should be disclosed within 28 days of this decision.

30. The appeal insofar as it relates to the second limb of request, for the above reasons, is not upheld.

Signed

Judge of the First-tier Tribunal

Date: 21.09.2018