



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

Appeal Reference: EA/2017/0256

**Decided without a hearing
On 14 May 2018**

**Before
KAREN BOOTH
JUDGE**

**ROSALIND TATAM and DAVE SIVERS
TRIBUNAL MEMBERS**

Between

RUSSELL MURRAY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

LANCASHIRE COUNTY COUNCIL

Second Respondent

Decided on the papers on 14 May 2018 at Field House, London

DECISION AND REASONS

1. The decision notice issued by the Respondent on 19 September 2017 (reference: FER0652960) is in accordance with the law and the appeal is dismissed.

Background to appeal

2. This appeal relates to an application made to the Second Respondent, Lancashire County Council (“LCC”), for the extinguishment of part of footpath no. 5, Wilpshire, Blackburn. As an affected property owner, the Appellant has an interest in that application.

The request for information

3. On 16/8/2016, the Appellant made a request to LCC for information relating to that application. The request was made in the following terms:

“Re: Footpath No 5, Wilpshire, Blackburn

1. *[not relevant]*

2. Extinguishment:

I understand that an application for the extinguishment of the footpath has been submitted. As a property owner on the footpath, please would you kindly provide me with:

(a) a copy of all application documents along with a copy of all related communications received by and sent out by Lancashire County Council.

(b) The name of the LCC officer in charge of the application and the progress of the application.”

4. The Appellant made a related request for information on 26/8/16, which is the subject of a linked, but separate, appeal (appeal ref: EA/2017/0257 and ICO ref. FER0652996) and which we also decided on the papers on 14/5/2018.
5. LCC sent a preliminary response on 25/8/16 followed by a further response on 14/9/16. They correctly treated the request as a request for information under the Environmental Information Regulations 2004 (“EIRs”). With the latter, they provided a copy of the application and 3 pictures that accompanied the application. They redacted the name of the applicant in reliance on regulation 13 (personal data) of the EIRs. They withheld the other information that they held in reliance on regulation 12(4)(d) (material still in the course of completion/unfinished documents/incomplete data).
6. The Appellant responded on 15/9/16 requesting a copy of the land registry plan referred to in the application and also asking the Council to revisit their decision on regulation 12(4)(d). The Council responded by providing the applicant with copies of its access to information policy and complaints procedure guidance documents.

The complaint to the Information Commissioner

7. The Appellant made a complaint to the Respondent on 28/10/16 about LCC's handling of his request. He provided evidence which indicated to him that LCC held additional information that they had not disclosed (an extract from the Minutes of a Wiltshire Parish Council meeting on 29/6/16, which indicated that letters of support for the extinguishment application had been sent to LCC).
8. Following the submission of that complaint, LCC provided (on 16/1/17) a further response to the Appellant. They advised him that they were no longer relying on regulation 12(4)(d). They provided him with a copy of the plan he had requested (which they described as an old railway plan rather than a land registry plan). They provided him with a CD containing the other records held by LCC that fell within the scope of the request (all of which had been provided previously). The name of the applicant and the names of the relevant LCC officers were redacted from the copy correspondence provided in reliance on regulation 13. Related information was also provided on CD by LCC to the Appellant on 26/5/17 and 14/8/17 (pages 88 and 90 of the bundle) and after the issue of the Respondent's decision notice (page 113).
9. The Appellant was not satisfied with the response. He objected to the delay in providing the information held, the legibility of some of the information disclosed and the redaction of names. He objected to the failure to provide the name of the relevant "Paths Officer". He disputed the assertion that no further relevant information was held.
10. The issues raised by the Appellant were investigated by the Respondent's allocated case worker. On completion of the investigation, the Respondent issued her decision notice dated 19/9/17 (Ref: FER0652960). She decided as follows:
 - on the balance of probabilities, LCC had provided all the information that it holds to the Appellant;
 - it was incorrect to apply regulation 13 of the EIRs to the name of the applicant, although it was correct to apply it to the names of the relevant LCC officers;
 - LCC had failed to comply with the requirements of regulation 5(2) of the EIRs because it did not provide the information held to the Appellant within the 20-working day time limit;
 - LCC should take certain specified steps within 35 days; that is, to disclose to the Appellant unredacted copies of the information containing the applicant's name.

The appeal to this Tribunal

11. On 28/10/17 the Appellant appealed to this Tribunal against the Respondent's decision notice. His original grounds of appeal are set out on pages 21-23 of the bundle of evidence (summarised on page 20 as an "Appeal against [the Respondent's] conclusion that [LCC] has provided all information requested on

the balance of probabilities”) and his desired outcome (page 32) was for LCC to provide the information requested. The Respondent submitted a detailed response to the appeal on 27/11/17 (page 96). LCC submitted a very brief response, agreeing with the Respondent’s decision (page 131).

The Appellant submitted further responses, the last of which was his (substituted) detailed final written submission of 3/5/18. This was the focus of our attention as this was his “last word” on the matter and drew together his previous arguments. It is clear from paragraph 0.07 of that document that his sole ground of appeal was against the Respondent’s decision that, on the balance of probabilities, LCC had provided all of the information that it held to the Appellant. That submission covered both this appeal and the appeal relating to the linked decision notice referred to above. It was sometimes difficult to separate the arguments relating to the two appeals (although there was some overlap). But, as we understood it, the Appellant’s main assertions/points in support of his appeal ground in this case were as follows:

- LCC’s initial reliance on regulation 12(4)(d) was a deliberate tactic to delay providing the information requested. It was a means to ensure that the Appellant did not receive “inconvenient information that could be used at a review, regulatory committee or suchlike, for the information in question may affect the Authority’s preferred outcome.” (paragraph 0.18). That tactic is central to the balance of probabilities argument as it indicates a lack of willingness to comply with the EIRs and a lack of reliability and integrity (paragraphs 0.09 and 3.06).
- The Respondent never received confirmation from LCC that LCC was no longer relying on regulation 12(4)(d). The Respondent did not share the outcome of its investigation into the initial reliance on that regulation with the Appellant.
- The Respondent took LCC’s assurances that they held no further information at face value “without adding compelling facts to the scales of her balance” (paragraph 3.05).
- The Parish Council Minutes (and their subsequent detailed correction) are a particularly reliable record and indicate, on the balance of probabilities, that further information was held.
- Small differences – a sentence or part of a paragraph – between copies of apparently the same document issued on different occasions also indicates a lack of thoroughness on the part of LCC.

12. At several junctures in that submission, the Appellant requested confirmation that the additional evidence he submitted with it (and previously) had been added to the bundle. I can confirm that we considered all of the evidence submitted to the Tribunals Service by the Appellant.

13. All three parties had elected to have the appeal decided on the papers rather than attended an oral hearing. After considering the evidence before us, we

agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

Our task and the issue we had to decide

14. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (1) 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.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

15. The issue we had to decide was whether the Respondent had correctly concluded that no further relevant information was held.

16. In her decision notice and submission, the Respondent correctly explained that the case law relating to the issue of whether information is held by a public authority has firmly established that the test to be applied by the Respondent is whether, at the time of the request and on the balance of probabilities, the authority held information that fell within its scope. On a complaint by an applicant, the Respondent will investigate the adequacy of the search made by the public authority. Where the issue of whether information is held comes before the Tribunal, it is our task to review the Respondent's conclusions and we must also decide the issue on the balance of probabilities. We cannot demand certainty. We will need to be satisfied that the public authority has carried out a reasonable search (i.e. a search that has been conducted intelligently and reasonably). An exhaustive search conducted in unlikely places is not required. We need to consider all relevant factors, including the scope of the search and the rigour and efficiency with which it was conducted.

17. We did not need to consider the redaction of the names of the LCC officers from the records provided (in reliance on regulation 13) as the Appellant had not challenged that part of the Respondent's decision. We did not need to consider the failure by LCC to comply with the time limit specified in regulation 5(2) as that was not in issue.

18. As regards LCC's initial reliance on regulation 12(4)(d), it was not within our remit to consider the Appellant's unsubstantiated allegations that LCC had

cited that exemption with the deliberate intention of delaying the provision of relevant information. Accordingly, we did not accept that the initial reliance on regulation 12(4)(d) indicated a lack of willingness to comply with their legal obligations under the EIRs.

19. A public authority is entitled to withdraw its reliance on an exemption whilst a complaint is being considered by the Respondent (and may also cite exemptions that it had not previously relied upon). LCC informed the Appellant on 16/1/17 why they initially relied on regulation 12(4)(d) and that they were no longer relying on that exemption (see page 209 of the bundle of evidence). The Respondent was clearly aware of this by 17/3/17, when the case officer wrote to inform LCC that they had accepted the case for investigation (see page 241 of the bundle – second paragraph). In view of this, there was no need for, or obligation on, the Respondent to investigate the initial reliance on regulation 12(4)(d). This was not an issue, therefore that we needed to consider further.

Our decision and reasons

20. On the remaining issue of whether further information was held, we agreed with the Respondent's conclusion that, on the balance of probabilities, it was not.
21. We noted the detailed questions that had been raised by the Respondent with LCC (see page 244 and 245 of the bundle) and LCC's detailed reply (pages 265 to 271 – in particular under the heading "Is further information held", from page 268). We noted in particular LCC's explanation that the public rights of way (electronic) files are arranged by path reference and that a search of that folder and its subsidiaries could reasonably be expected to find all relevant information. We considered that explanation to be logical and credible. The Respondent subsequently put further queries to LCC, who responded on 20/12/17 (page 366).
22. On the evidence before us, we were satisfied that LCC had conducted a reasonable search of the records where the information would be likely to be located and that the Respondent had properly investigated the adequacy of the search. Whilst the Parish Council Minutes referred to above clearly state that relevant letters were sent to LCC, those letters have not been found in the relevant electronic files. We accepted (on the balance of probabilities) that, for reasons that are not clear, they were either not sent to LCC as stated or were sent but not held by LCC at the relevant time.

It has been accepted by all parties that LCC failed to comply with the EIRs time limits. It did not follow from this that their searches for information were inadequate.

23. We noted (from page 343 of the bundle) that the Appellant had previously complained to the Local Government Ombudsman about other matters of concern involving LCC's public rights of way team and, in 2016, was awarded compensation. In our judgement, this would be likely to have led to increased care and caution on the part of LCC when searching for requested information and supports our conclusion based on the balance of probabilities.

Conclusion

24. In paragraph 82 of the background section of her decision notice dated 19/9/17, the Respondent also noted that LCC had failed to comply with regulation 11(4) and (5) (representations and reconsideration) of the EIRs. This is not an issue that was raised in the appeal and no additional steps needed to be taken to rectify this. The decision notice is in accordance with the law and the appeal is dismissed.

Date Promulgated: 31st July 2018

Signed: Karen Booth

Judge of the First-tier Tribunal

Date: 30th July 2018