



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

Appeal Reference: EA/2019/0090V

Date of hearing: 22 October 2020

Between
Before
Judge Stephen Cragg Q.C.

Raffaele Redi

Appellant

and

**The Information Commissioner
Royal Borough of Kensington and Chelsea**

Respondents

The Appellant represented himself

The Commissioner was not represented

RBKC was represented by Peter Lockley

DECISION AND REASONS

DECISION

1. The appeal is allowed but no further action is required.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 143, together with additional open documents in a supplementary bundle with 61 pages.

BACKGROUND

5. The Appellant requested information regarding rehousing statistics following the fire at Grenfell Tower from the Royal Borough of Kensington and Chelsea ("RBKC").
6. On 20 December 2017, the Appellant requested information as follows:-

"How many properties have been secured/acquired so far to rehouse people affected by the Grenfell fire, their respective value, location, square footage, the number of bedrooms and mortgage/borrowing rate. The total amount of money spent so far to rehouse people affected by the fire, specifying all the entries."
7. For ease of reference the Commissioner broke down the request as follows, and I think it is useful to keep this description:-
 - (a) How many properties have been secured/acquired so far to rehouse people affected by the Grenfell fire?

- (b) What is the value of the properties secured/acquired?
- (c) What is the location of the properties secured/acquired?
- (d) What is the square footage of the properties secured/acquired?
- (e) How many bedrooms in the properties secured/acquired?
- (f) What is the mortgage or borrowing rate for the properties secured/acquired?

8. RBKC did not respond fully to the request, which the Appellant then referred to the Commissioner. Following the Commissioner's intervention, on 10 May 2018 RBKC provided information about 179 properties for which it owned the leasehold or freehold. In relation to those 179 properties, the number of bedrooms was recorded along with the average purchase price and the average square footage as well as the London borough in which they were located. RBKC said that it did not hold information falling within part (f) of the request for these properties.
9. RBKC did not provide information in relation to 128 additional properties, which have become known, in this case, as the 'remaining properties'. These are properties which RBKC told the Commissioner were 'secured through other registered providers or directly from developers with whom the council already had contractual arrangements', implying that there would be different information held about them and/or different factors to take into account when considering disclosure.
10. However, the Commissioner, in respect of these remaining properties directed that RBKC must disclose the following information: (i) the location of those properties by identifying which London Boroughs they are located in; (ii) the number of bedrooms in those properties; and (iii) the square footage of those properties. This information has been disclosed to the Appellant, other than the square footage of some of the properties which RBKC says it does not hold.

11. The Commissioner also considered whether RBKC was correct when it said that it did not hold information about the value of the remaining properties or the mortgage/borrowing rate in general across all the properties. The Commissioner accepted RBKC's account that the nature of the arrangements with providers/developers meant that it would not hold this information, and/or it had no apparent business need to hold it, and there was no duty on RBKC to seek or create the information. To this extent the Commissioner rejected the Appellant's complaint.

THE APPEAL AND SUBSEQUENT EVENTS

12. This result led to the appeal by the Appellant in which he argued that (i) 'another person' held the information on behalf of RBKC for the purposes of s3 FOIA; or (ii) that the information on value could be easily retrieved by RBKC; and (iii) that RBKC had a duty to publish details of all land and building assets under the local government transparency code. He also said that there was a general public interest in disclosure.

13. The Commissioner asked for RBKC to be joined to this appeal (which was done) to answer questions as to whether it did in fact hold further information requested, despite the Commissioner's decision that it did not.

14. A directions hearing was listed before me on 20 February 2020 as RBKC had failed to engage with the appeal. RBKC did not bring any documentation to give to the Appellant and informed the Tribunal that tables of the information were still being prepared, and more time was requested. RBKC confirmed that there was, indeed, further information held, although exemptions under FOIA may be relied upon in relation to

some of the material. Further directions were made for production of the tables and further submissions from the parties. When these were filed, the following was the position of RBKC:-

- (a) Of the initial 179 properties about which information was disclosed, RBKC stated that it did not hold information about the 'mortgage/borrowing rate'.
- (b) In relation to the 'remaining properties' RBKC accepted that it held information on some of these, in addition to the information directed to be disclosed by the Commissioner. However, RBKC stated that it does not hold information about the 'mortgage/borrowing rate' in relation to the remaining properties.
- (c) In relation to the remaining properties, RBKC produced tables of the information it did, in fact, hold at the time of the request on 20 December 2017.
- (d) The information listed in the tables has been disclosed to the Appellant on 12 March 2020, and RBKC has not relied on any exemptions to withhold the information it does hold.

15. RBKC's response explains as follows:-

14. RBKC does not hold information about mortgage borrowing rates on the Remaining Properties - if the Appellant still seeks this information.

15. RBKC does hold information about the value of some of the Remaining Properties. It apologises that this was not previously made clear to the Appellant or Commissioner. It had previously been RBKC's intention to withhold this information because of the potential for disclosure to prejudice commercial interests. However, given the passage of time, this factor is of less concern and RBKC is content to disclose this information

16. RBKC has prepared three tables setting out all of the information it holds within the scope of the Request in relation to the Remaining Properties.

16. The tables set out the details of:-

- (a) Property in SW10 which was an approved housing development where RBKC retained the freehold, and where the value is relevant to compensation paid to the developer when Grenfell survivors were placed in 31 units there;
- (b) Property in W14 where RBKC had nomination rights to a development of 68 affordable housing units: RBKC says it was not necessary for it to have information about the value or square footage of the properties to exercise its nomination rights.
- (c) Twenty-one other properties where the arrangement is similar to the W14 properties and details of value and square footage are not held.

17. RBKC explains that the discrepancy in numbers (120 as opposed to the original 128 listed as the 'remaining properties') has arisen because of the difficulty to pinpoint the information held in December 2017 when the request was made - RBKC believes that the figures now provided are accurate.

18. The Appellant's response was as follows:-

- (a) RBKC's submissions were 'rejected'.
- (b) As RBKC did not respond with the further information until 12 March 2020, the Appellant is entitled to 'all the updated figures to this date'.

(c) RBKC does hold information about the value of each of the remaining properties, and not just some of them.

19. The Commissioner's position was as follows:-

(a) RBKC's acceptance that further information was held is noted, but no further action is required as the information has now been disclosed.

(b) The issue in the appeal is the extent to which RBKC held further information at the time of the request (December 2017): and if the Appellant wants updated figures he should make a further request

THE HEARING

20. At the hearing the Appellant clarified that he was not pursuing information about the mortgage or borrowing rate for the properties secured/acquired, and is primarily interested in the figures relating to value.

21. He submitted that he was entitled to have the information as it stood in March 2020 when RBKC disclosed its final version of the information held, and not what was held in December 2017 when the request was first made.

22. He said that the information was easily available through, for example, a Land Registry search, or that the information was being held for RBKC by the developers/providers. He emphasised the overriding public interest

in transparency in relation to something as important as the actions of RBKC in the aftermath of the Grenfell fire.

23. For RBKC, Mr Lockley submitted that RBKC had now disclosed all the information it had. There was no business or other reason to hold the information about value in relation to the properties where RBKC simply had nomination rights. S(1)4 of FOIA meant that the relevant time for considering the information held by RBKC was, at the latest, the statutory date when RBKC should have responded to the request in 2017. FOIA did not require RBKC to seek information from the housing providers or to obtain information from other sources if it did not hold it already. This was a case where the public interest had no relevance if RBKC did not, in fact, hold any further information.

DISCUSSION

24. The majority of section 1 FOIA is worth setting out in this case:-

1. – General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of [sections 2, 9, 12](#) and [14](#).

(3) ...

(4) The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is

to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "*the duty to confirm or deny*".

25. Section 3(2) FOIA states that:-

(2) For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

26. Section 10(1) FOIA states:-

10. – Time for compliance with request.

(1) Subject to subsections (2) and (3), a public authority must comply with [section 1\(1\)](#) promptly and in any event not later than the twentieth working day following the date of receipt.

27. In my view, s1(4) FOIA, when read with s10(1) FOIA, means that the relevant date for a public authority to consider whether it holds information or not is, at the latest, 20 working days after the request is received. S1(4) FOIA contains a discretionary extension to the usual date to be applied (the date the request is received), to allow a public authority to take into account any amendments or deletions that would have happened in the normal course of events prior to the time that the information 'is to be communicated'. That time is set out in compulsory time limits in s10(1) FOIA as indicated above.

28. That approach is also the approach taken by the Commissioner in her guidance on '*Determining whether information is held*' at paragraph 39:

39. Generally the starting point when determining whether information is held is to consider what was held at the time of the request. However, the Commissioner acknowledges that, in reality, it is seldom possible to deal with requests on the day that they are received. Section 1(4) enables public authorities to consider the information held at the point it actually starts to deal with the request, providing that is within the statutory time for compliance.

29. I can understand the Appellant's sense of grievance in a case such as this where it has taken over two years for RBKC to fully set out the information that it held at the time of the request. But in my view the statutory provisions are clear. As the Commissioner says, if the Appellant wants updated figures from RBKC, then the simplest way to achieve this is to make a new request (albeit that I can accept that the Appellant may feel disillusioned with the whole process).

30. Information which is held by a housing provider or developer for its own purposes is not information which is held by the public authority, or held by another person on its behalf, for the purposes of s3(2) FOIA. It is held for the purposes of the housing provider or the developer, whatever they may be. There is no obligation under FOIA for a public authority to seek out information that it does not hold, from another source. Nor does FOIA require a public authority to make searches for information it does not hold. RBKC is not obliged to make enquiries of third parties or to create information for the purposes of this request.

31. The Commissioner and now this Tribunal must apply the civil standard of proof in deciding whether RBKC holds the information requested which has not been disclosed. RBKC's main explanation for why it does not hold the information is that it does not have a business reason for holding the information. That was presented initially to the Commissioner

as to why it did not hold information on value for properties where it did not have a leasehold or freehold on the properties concerned. On the balance of probabilities, the Commissioner accepted that explanation. It has transpired however that RBKC did not fully explain the position, and it has now disclosed further information about the value of 31 additional properties. It is understandable that the Appellant does not accept that this is the true position, especially given the delays caused by RBKC and the difficulty that both the Commissioner and the Tribunal have had in getting RBKC in engaging with the process.

32. But doing the best I can, and accepting that RBKC has now made an effort to provide the Tribunal with fuller information, I can understand why and how RBKC now says it holds the information about the value of the SW10 properties, given its clear financial involvement with the developer in providing compensation when placing Grenfell survivors at the properties, where such compensation is linked to the value of the property.

33. Equally, I can see the rationale for not holding information on value for the other properties in W14 and elsewhere in circumstances where the role of RBKC is simply to nominate tenants to a housing provider. I can understand why RBKC does not need to hold any information about value of the properties to do that.

34. RBKC has explained that it does not hold information about the mortgage/borrowing rate for any of the properties. I can understand why this is the case, and the Appellant does not now pursue this information in this appeal.

35. RBKC has not provided information about the square footage of some of the properties. I cannot think of a reason why this information would not

be disclosed where such information about most of the properties has now been made available to the Appellant.

36. Therefore, although the history of this case suggests that there might be more information available that has not been disclosed, on the balance of probabilities and for the reasons set out above, I find that there is no further information within the scope of this request which is held by RBKC.

37. Lastly, I will address the public interest point made by the Appellant. Transparency is clearly important when the subject matter of any FOIA request relates to something like the Grenfell Tower disaster. RBKC has not acted in the spirit of that public interest in transparency in taking so long to provide the information requested. However, now I have found that it is likely that there is no further information held, the public interest in disclosure becomes irrelevant. However much it is in the public interest for RBKC to make full disclosure in respect of a FOIA request, it cannot disclose any more information than it actually has been found to hold.

CONCLUSION

38. To the extent that the Commissioner found that further information on value within the scope of the request was not held, this appeal is upheld and a decision notice substituted which finds that further information on value was held in relation to some of the remaining properties. No further action is required now that that information has been disclosed, and the Tribunal has found, on the balance of probabilities, that nothing further within the scope of the request is held by RBKC.

Stephen Cragg QC

Judge of the First Tier Tribunal

26 October 2020

Date Promulgated: 30 October 2020

