



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER070943**

Appeal Reference: EA/2019/0125

**Heard at Cambridge
On 14 August 2019**

Deliberations 24 October 2019

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ANNE CHAFER & NIGEL WATSON

Between

CLIVE HALL

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THERFIELD REGULATION TRUST

Second Respondent

Appearances:-

Appellant: In person

Respondent: did not appear

DECISION

1. This case related to a request for information under the Environmental Information Regulations which related to an abortive proposal to facilitate building on land that had been designated as common land by exchanging some of that land for other land which had previously not been common land.
2. Following the hearing the tribunal, on 17 August, gave directions to the parties and the public authority concerned to enable it to clarify legal issues which were fundamental to the jurisdiction of the tribunal in resolving this appeal. The first was whether or not the request for information was directed to a public authority within the meaning of the Environmental Information Regulations. The Commons Regulation (Therfield) Provisional Order Confirmation Act 1888 created the Conservators of Therfield Heath and Greens with responsibility for enforcing and upholding rights of common on certain lands in Hertfordshire. On Mayday 1979 the Church Commissioners transferred common land to the Conservators then in office who on the same date executed a deed of trust creating the Therfield Regulation Trust to own and manage the land. This is a registered charity and the trust deed contains provisions for the appointment of new trustees and the automatic removal of any trustee who ceases to be a Conservator.
3. The request was made under the heading:- "EIR 2004 Request of the Trustees of Therfield Regulation Trust" and addressed to email address "clerk conservators therfield". The Appellant, who has recently been elected a Conservator has declined to accept that by being elected he has become a trustee. In response to the directions he submitted lengthy arguments as well as copies of advice obtained by the Trust at various times which touches on this issue. He concluded that there are two bodies.
4. In response to the directions the public body took advice from solicitors which it has submitted to the tribunal. The analysis concludes that there is one legal entity which is both the statutory body responsible for the public functions of the Conservators and also the trustees owning the relevant land. This is confirmed by the view of the Charity Commission set out in a letter of 8 November 2002:-

"the land was settled on charitable trusts in 1979. The trust deed is the governing document of the Trust and it sets out the purposes of the Trust and how it is to be administered. [clause 2 is recited]. The Act that is referred to is the Commons Regulation (Therfield) Provisional Order Confirmation Act 1888. The important point regarding the relationship between the 1888 Act and the 1979 trust deed is that the purposes and activities mentioned in the 1888 Act are only acceptable for the Trust to the extent that they are exclusively charitable. With regard to the other provisions of the 1888 Act, it is the Commission's view that there is no conflict with the 1979 deed or the wider responsibilities of the trustees."

5. Having considered all the material the tribunal is satisfied that there is only one organisation which has special powers (the making of by-laws) given to it by statute and is subject to EIR. In the alternative, that the Appellant is correct, then the corollary would appear to be that his request to the Trustees as a separate body was a request to a body not subject to EIR.
6. The second issue is whether or not the information requested, on a proper construction of the request in its context, is environmental information within regulation 2(1)(a-e).
7. The request for information was submitted on 21 May 2018 a few days after a planning inspector had ruled against an application by the Trustees to exchange land into the area of the common land and remove some land from its protected status as a common to allow it to be sold for development. The request was in the following form:-

“Dear Trustees,

[1] since 2005 you and your predecessors have worked on a project to sell with planning permission a piece of the common south of Sun Hill and near Briary Lane. In your most recent accounts you grouped the expenditure with a heading “Briary Lane costs.”

[2] It is my opinion that the plan to develop this part of the common is a measure that effects the environment. I wish to undertake a financial analysis of this environmental measure and am seeking the information you hold to make this possible.

[3] Under EIR 2004 I request all information about the income and expenditure the Trust has received or made in relation to the plan. This should include but not be limited to all the information about the costs of the deregistration, planning permission and all other elements of the project including the costs of consultants, lawyers and experts, including when these costs were incurred.”

8. The tribunal raised the issue with the parties of whether, given that the planning inspector had ruled against the proposal, impact on the environment was *likely* and second given that the IC had distinguished between the purpose of the request being to carry out the analysis (paragraph 2) and the information requested, being financial, the information requested was environmental information within the EIR.
9. In responding to this issue the Trust stated:-

“the Trust accepts that the information requested by the Appellant (but only as interpreted by the Information Commissioner in her Decision Notice issued on 15 March 2019) was environmental information albeit distantly so. For the avoidance of

doubt, the Trust does not accept the wider interpretation which the Appellant has sought to place on his request in this appeal."

10. The IC submitted in the light of the authorities discussed in the directions that the issues were the identification of measure likely to affect the environment and whether the specific requested information is "on" that particular measure. The IC concluded that the land swap was a measure likely to affect the environment and the information requested was "on" that measure.
11. Neither the Trust nor the IC considered the question of whether the refusal of the land swap proposal affected the likelihood of the measure affecting the environment.
12. In the light of the responses to the directions the tribunal has concluded that it is appropriate to conclude that it has jurisdiction and accordingly to consider the appeal.
13. Having initially declined to provide the information the Clerk to the Conservators of Therfield Health and Greens replied to the Appellant on 26 July 2018;-

"...in order to comply, we have reconsidered your request for information afresh, and provide our response below.

...

In your email dated 21 May, you asked the Trustees for:-

"all information about the income and expenditure the Trust has received or made in relation to the plan. This should include but not be limited to all the information about the costs of the deregistration, planning permission and all other elements of the project including the costs of consultants, lawyers and experts, including when these costs were incurred."

....

To date there has been no income from the deregistration plan.

With regard to expenditure, the total sums spent in each of our accounting years in relation to the deregistration plan are as follows:

....

The expenditure for the year ending 31 December 2016 is publicly available information and can be found in our accounts published on the Charity Commission website. These are subject to an independent examiner's report. Our accounts for the year ending 31 December 2017 are not yet finalised. The figures above shown in relation to 2017 and 2018 are taken from our internal management accounts....

We do not feel obliged to provide any further breakdown of these sums. The sums in question are recorded, as I have said, in our management accounts and we consider these sums, being the sums recorded in our own accounts documents, are the information you are entitled to under EIR.

We consider that we have now answered your request for information as much as we can, and consider the matter closed..."

14. The Appellant was dissatisfied and complained to the IC. The IC investigated and served an Information Notice on the Trust dated 26 February 2019. The decision notice was issued on 15 March 2019 and set out the third paragraph of the request letter as being the request for information. It contained a confidential annex requiring the Trust to provide certain further information.

The six grounds of appeal - the second ground

15. The Appellant did not consider that he had received all the information within the scope of his request and in his notice of appeal dated 10 April formulated six grounds of appeal. In considering this appeal it is appropriate to consider first the second ground of appeal which was that the scope of the request had not been properly appraised by the IC. The Appellant argued that the second paragraph of the letter, "*It is my opinion that the plan to develop this part of the common is a measure that effects the environment. I wish to undertake a financial analysis of this environmental measure and am seeking the information you hold to make this possible*" was the kernel of the request for information rather than the third paragraph of the request which had been the focus of the IC's decision.

16. The IC resisted the appeal and addressed the question of the scope of the request for information (Reply paragraphs 33-36):-

"33 The Commissioner considers that public authorities must interpret information requests objectively and must avoid reading into the request any meanings that are not clear from the wording.

34. Had the request been limited to paragraph 2, it would have been reasonable for the public authority to consider that the request was canvassed in terms that were too broad to comply with and would have been expected to seek clarification as to what this meant (and will also need to issue a refusal notice under regulation 12(4)(c) EIR).

35 The Commissioner does not consider that the Trust could have reasonably been expected to read into paragraph 2 that the Appellant was requesting the further information referenced in ground 2 of the grounds of appeal.

36 The Commissioner considers that, on an objective reading of the request, it was reasonable or the Trust to have read paragraph 2 of the request in light of paragraph 3 of the request and therefore consider that paragraph 3 contained the information requested to meet the overall purpose of the request in paragraph 2."

17. In responding to the IC's reply the Appellant rejected this argument and endorsed the IC's statement on accepting his complaint:-

“The focus of my investigation will be to determine whether you have been provided with all the information to which you are entitled under the EIR”

He commented that:-

“This must include considering if the public authority correctly interpreted the request.”

18. The request for information was in three numbered paragraphs. This sets out the factual background which sets the context of request:-

- the plan to build on some land (which to the knowledge of both requester and public authority but which was not apparent on the face of the request) had been refused by the planning inspector, and
- the purpose of the request – his expressed intention to *“carry out a financial analysis of this environmental measure”*.

19. It seems to the tribunal that these two aspects of the request frame and define its scope. The IC was correct in stating that the request had to be interpreted as a whole, otherwise the form of the request where the second paragraph refers to *“the information you hold”* would be too wide and would need to be clarified to make it manageable.

20. The third paragraph requests *“all information about the income and expenditure the Trust has received or made in relation to the plan”* and goes on to specify the sorts of expenditure which should be included in the disclosure of information. It is important to recognise that the request is about money – for the financial information needed to carry out a financial analysis of the building programme. The Appellant in his request emphasised the need for the different categories of costs to be included and he was concerned that every possible category of cost was disclosed. However it is essential to recognise that the request was made after a lengthy inquiry by a planning inspector (that the Appellant had attended and participated in – exercising his Aarhus rights) had reported. The Appellant was therefore aware of the relevant environmental impacts which had been examined in the inquiry, what the public would not be aware of was the costs of the exercise to the Trust. This is the purpose of the request, which the Appellant freely acknowledged to the tribunal had been drafted in a way to mirror the wording of the definition of environmental information to try and ensure that it was treated as a request within EIR. However the wording of the request and the repeated emphasis on possible categories of cost indicates that financial information was what was sought: *“This should include but not be limited to all the information about the costs of the deregistration, planning permission and all other elements of the project including the costs of consultants, lawyers and experts, including when these costs were incurred”*.

21. The IC in her decision notice properly concluded that paragraph 3 which lists the areas of expenditure, - the administrative charges of various public bodies and the professional fees incurred in developing and presenting the plan. - contained the list of the areas of expenditure needed to respond to the request. She concluded that if the disclosed information dealt with those areas of expenditure then the request had been complied with.
22. It is also clear that the public authority in its response interpreted the request in a reasonable way. It pointed out that it had received no income since the plan had not at that stage gone forward and indeed has not since. It disclosed the information it held about its expenditure on an annual basis paralleling the production of its accounts. It correctly identified that the request was seeking to find out the cost of what had been done, it is difficult to see that its response to the request was not a proper response to a request for financial information about an abortive project which had not at that stage caused any impact on the environment whatsoever. The IC was correct to conclude that the request needed to be considered as a whole in order to limit the request to reasonable bounds, however the IC erred in not considering the request as a whole in its context of obtaining the financial information necessary to carry out an environmental analysis. The details of every individual payment was not necessary to achieve that; merely the aggregate expenditure.
23. It seems to the tribunal that the interpretation that the public authority adopted in its internal review response of 26 July 2018 was an interpretation it was entitled to make.
24. The effect of the Appellant's complaint to the IC was that the IC probed and sought further information from the public authority and encouraged and then ordered its disclosure to the Appellant. The IC started the investigation by a letter dated 14 September 2018 which recounted the history of the first statement by the Trust that it was not subject to FOIA and then a further communication (quoted above). It then stated that the Appellant believed that the Trust held more detailed information on the income and expenditure and went on to ask detailed questions about how the trust had searched for information and in what form the information was held. It went on the state:-

"In summary you are required to provide a thorough response to the above questions in order to comply with your statutory obligations".
25. The letter did not however ask how the Trust had interpreted the request nor did it indicate how the IC interpreted the request. On 19 October the Trust supplied a spreadsheet giving the dates of payments together with copies of a number of invoices.
26. A telephone attendance note prepared by the IC's officer on 29th October 2018 records the contents of a discussion with the Appellant. The Appellant was

concerned about inconsistencies in the information he had been supplied and while he accepted that at the date of the request “such a payment may not have been invoiced by the time of his request, but argued that his request was for all information “relating to” and that therefore it would capture any record of commitment to spend that amount. We discussed briefly whether such information would fall within the scope of the request, whether one would expect, ie whether it is a natural interpretation of a request, for information on expenditure invoices and accounts etc to capture all information on decisions to spend that money. We also touched on the responsibility of an applicant to accurately phrase requests. He expressed the view that it was difficult for the lay person to understand how best to phrase a request, some time they found themselves being penalised by asking for specific documents, other times they were penalised for making more generalised requests which were refused as voluminous”. Here it is clear that the IC’s officer was starting to become aware of the problems caused by the failure to address the primary question of how the request should be interpreted.

27. However the IC did not, even in the decision notice clarify the actual scope of the request – rather it side-stepped the question stating that the issue is *whether it has now provided the complainant with all the information captured by the request that it is obliged to*”. An appropriate first step is to objectively consider the meaning of the request and whether the Trust had correctly and objectively determined the meaning of the request. If the IC concluded that the Trust had not come to a proper interpretation of the request she could then inform the Trust of what, in the IC’s view, was the correct interpretation the Trust should adopt. The omission of this analysis has, because of the uncertainty generated, created a significant burden on the Trust, the Appellant and the IC.
28. The tribunal is therefore satisfied that the proper interpretation of the scope of the request is more narrow than the interpretation which the IC has implicitly adopted in the decision and explicitly adopted in her response to the appeal. The interpretation argued for by the Appellant is unsustainable on the grounds adopted by the IC. The disclosure of information by the Trust during the earlier stages properly met the request. The disclosure of the narratives of the various invoices which have subsequently been provided was the disclosure of information which was not, on a proper analysis, within the scope of the request.

The other grounds of appeal advanced by the Appellant

29. The Appellant advanced five other grounds of appeal against the IC’s decision notice. These may be addressed briefly.
30. The first ground was that in failing to supply him with the confidential annex the IC failed to comply with her obligations. The IC correctly pointed out that since the Trust could have appealed against any disclosure ordered by the IC, to specify the information to be disclosed in the open decision notice would have been to prejudice the rights of the Trust. The Trust complied with the

decision notice and the IC subsequently supplied the confidential annex to the Appellant. The point is without substance.

31. The other grounds of appeal are predicated on the Appellant's over-encompassing interpretation of the meaning of his request and must fall away in the light of the decision as to the proper interpretation of the scope of the request. The other grounds were:-

- that the IC should have ordered the disclosure of the information which she had concluded attracted legal privilege (the tribunal was satisfied that the material was not in any event within scope of the request)
- that the IC was wrong to conclude that no further information was held since there were working accounts for 2017 there ought to have been working accounts for the earlier part of 2018. Since the request was made in May 2018 it is clear that no such working accounts for the recently begun calendar year would exist.
- That the IC was wrong in concluding that money refunded to the Trust for costs not incurred should be classified as income. The IC argued that income was properly viewed as sums generated by the Trust's activities rather than repayment to it of money for charges not incurred. The tribunal is satisfied that the IC's interpretation of income and expenditure is correct and, in the context of the request relating to an abortive project, it is unreasonable to suggest that such repayment is income.
- The IC should not have permitted the withholding of the narrative parts of the invoices for legal advice it received from its lawyers or the withholding of communications from its solicitors in relation to the covering of costs of the other party to the land transaction. The IC maintained that the upholding of the principle of legal privilege outweighed the public interest in disclosing the information. While for the reasons stated above the tribunal does not accept this material is within scope, the tribunal agrees with the IC that the public interest in uphold legal privilege clearly outweighs what is objectively a negligible public interest in disclosure.

Conclusion

32. The tribunal is therefore satisfied that this appeal is misconceived and the appeal is dismissed.

Signed Hughes
Judge of the First-tier Tribunal
Date: 3 January 2020
Promulgation date: 9 January 2020