



Appeal number: EA/2019/0366P

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

SUZANNE THOMAS

Appellant

- and -

**THE INFORMATION COMMISSIONER
HOMES ENGLAND**

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA

**Determined on the papers, the Tribunal sitting in Chambers
on 9 June 2020**

MODE OF HEARING

1. This determination was conducted by a Judge sitting alone in accordance with paragraph 11(3)(a) (i) of the Chamber's Composition Statement.¹
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules.

¹ <https://www.judiciary.uk/wp-content/uploads/2014/10/amended-grc-feb-2015.pdf>

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 104, plus some “Additional Open Documents” comprising Case Management Directions and the Response filed by Homes England.

4. It also considered a closed bundle, comprising the information described in the Registrar’s Case Management Directions of 3 December 2019, numbered pages 1 to 9.

DECISION

5. The appeal is dismissed.

REASONS

Background to Appeal

6. The Appellant made an information request to Homes England on 14 September 2018, asking for records of its interactions with Bristol City Council concerning the Bristol Arena.

7. Homes England’s substantive response to the information request was on 9 November 2018 and its internal review response was on 11 December 2018.

8. Although Homes England originally claimed certain exemptions under the Freedom of Information Act 2000 (“FOIA”), it states that it later disclosed all the information which it understood to fall within the scope of the Appellant’s request.

9. The Appellant considered that further information was held and complained to the Information Commissioner.

10. The Information Commissioner issued Decision Notice FER0869163 on 23 September 2019, in which she concluded that:

(a) Homes England had disclosed all the relevant information it held, so had complied with s. 1(1) FOIA; and

(b) Homes England had breached the statutory time limit for disclosing the requested information, so had breached s. 10 (1) FOIA. No steps were required to be taken.

11. The Appellant appealed to the Tribunal.

12. Homes England was joined as a party to the appeal.

Evidence

13. None of the parties relied on witness evidence. The open hearing bundle contains the correspondence between the parties. I note in particular the letters sent to the Information Commissioner by Homes England on pages 99 to 104 of the open

bundle, which provide its account of what searches it had conducted and why it concluded that no further information within the scope of the request was held.

14. The closed hearing bundle contains unredacted copies of the redacted information provided to the Appellant.

Submissions to the Tribunal

15. The Appellant's Notice of Appeal dated 6 October 2019 relied on one ground of appeal, namely that Homes England had only disclosed communications *from* Bristol City Council because it took the view that communications *from* Homes England *to* Bristol City Council were outside the scope of her information request and had redacted them. She submits that there is more recorded information within the scope of her request and asks the Tribunal to read it all to judge whether this should be provided.

16. The Information Commissioner's Response dated 5 November 2019 invited the Tribunal to join Homes England to the appeal and to consider its response to the Appellant's grounds of appeal. She reserved her position pending sight of Homes England's submissions, in case there had been a misunderstanding between the parties. However, she has not made any further submissions following receipt of the Response from Homes England.

17. The Information Commissioner's Response states that, during the course of her investigation, she determined that the information request should have been dealt with under the Environmental Information Regulations 2004. Nevertheless, I note here that the Decision Notice is headed "Freedom of Information Act 2000" and its conclusion at paragraph 24 refers only to FOIA. She asks me to note that the Decision Notice has a "FER" rather than a "FS" prefix, but that it is an administrative measure and does not affect the substance of the Decision Notice.

18. I have not seen any detailed analysis as to why FOIA is not the applicable regime in this case. I note that the Information Commissioner has asked the Tribunal to dismiss the appeal and uphold the Decision Notice, which would presumably not be an appropriate submission if the Decision Notice had been issued under the wrong legal framework.

19. It may be that the Information Commissioner's submission should be understood to be that, whichever regime was applicable, the conclusion in the Decision Notice would be the same. This conclusion was that, on the balance of probabilities, no further information was held by Homes England which fell within the scope of the information request. This conclusion had been reached on the basis of the searches made by Homes England and reported to the Information Commissioner during her investigation.

20. Homes England provided a Response to the appeal dated 23 December 2019. It submitted that the Appellant was incorrect in stating that Homes England has redacted information within the scope of the request on the basis that it was *from* Homes England, and that this was demonstrably the case as shown by the unredacted

information disclosed to the Information Commissioner during her investigation. Homes England asks the Tribunal to dismiss the appeal on the basis that it has already complied with its obligation to disclose the information within the scope of the request.

The Law

21. Section 1 (1) (a) FOIA entitles a requester of information to be informed in writing whether a public authority holds the requested information and, if so, to have that information communicated to the requester under s. 1 (1) (b) FOIA².

22. A decision as to whether a public authority holds requested information is to be decided on the balance of probabilities.

23. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, 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.”

24. 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.

25. First-tier Tribunals are bound as a matter of legal precedent by Decisions of the Upper Tribunal but not by Decisions of differently constituted First-tier Tribunals. See *O’Hanlon v Information Commissioner* [2019] UKUT 34 (AAC).³

² <http://www.legislation.gov.uk/ukpga/2000/36/section/1>

³ https://assets.publishing.service.gov.uk/media/5c7fb354e5274a3f8edc00cf/GIA_1680_2018-00.pdf

Conclusion

26. In the light of Homes England's correspondence with the Information Commissioner, its Response and the evidence contained in the closed bundle, I accept its submission that it has not selectively withheld information within the scope of the request, by redaction or otherwise, as submitted by the Appellant. I have considered the unredacted information in the closed bundle and am satisfied that, as previously explained to the Appellant, it has been redacted only where the information is otherwise available in the public domain and/or in order to protect third party personal data. I also accept that other information, potentially within scope, was no longer held after the deletion of the user's email account on their departure from the organisation. For this reason, I must reject the Appellant's sole ground of appeal.

27. The Appellant has provided me with no evidential basis upon which I could conclude on the balance of probabilities that any further information within the scope of the request is held. As she bears the burden of proof, I must conclude that she has not discharged that burden.

28. In the light of these conclusions, I discern no error of law or inappropriate exercise of discretion in the Decision Notice and I now dismiss this appeal.

JUDGE ALISON MCKENNA

DATE: 9 June 2020

CHAMBER PRESIDENT

DATE PROMULGATED: 10 June 2020

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