



Neutral citation number: N/A

Appeal Number: EA/2021/0329

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights Tribunal.**

Heard: On the papers by consent.
On Teams remotely.
On 3 May 2022.
Decision: 5 May 2022.

Tribunal Panel

Judge Brian Kennedy QC
Suzanne Cosgrave
David Cook

Between:

Kevin James Sharrock

Appellant:

And

The Information Commissioner

Respondent:

Representation:

For the Appellant: Kevin James Sharrock as a Litigant in person through written submissions.

For the Respondent: Richard Bailey, Solicitor through written submissions.

Decision: The appeal is dismissed.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), as modified by regulation 18 of the Environmental Information Regulations 2004 (“EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 06 October 2021 (reference IC-67638-S5K3), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to a school crossing patrol which is no longer in place. The Cumbria County Council (“The Council”), initially disclosed some information however the Appellant said that this relates to a different crossing patrol. During the Commissioner’s investigation, the Council found one document which falls within the scope of the complainant’s request for information. The Council argues that no further information is held relating to the specific crossing patrol which the Appellant is referring to.
- [3] The Commissioner maintains the position set out in her DN; namely that, other than the document identified, the Council, on the balance of probabilities, were correct in their application of regulation 12(4)(a) on the grounds that it does not hold any further information which falls within the scope of the complainant’s request for information. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

- [4] On the 22 January 2020 the Appellant wrote to the Council and made the following request:

“It was the criteria, and the factors that were applied, justifying the crossing patrol originally, that I was requesting.

I would also like to see the criteria, and the factors applied a few years later, which came to the conclusion that a zebra crossing, which has the identical criteria, was not justified.”

- [5] The Council responded on 20 April 2020 and informed the Appellant that no information was held in relation to when the patrol began or the criteria used to establish the patrol. The Council confirmed that all information held in respect of the original crossing patrol had been disclosed in response to the earlier request (ref: IG00904). Subsequent to an internal review on 15 June 2020, the Council maintained its position.
- [6] The Appellant complained to the Commissioner about the way in which the request was handled on 15 July 2020. Further, the Appellant provided evidence, in the form of a letter from the Council to the Local Government and Social Care Ombudsman in 2018 which stated:

“Contact has been made with Orian who manage the School Crossing Patrol Service on behalf of Cumbria County Council. They have confirmed that there is a vacancy of a school crossing patrol officer at Victoria Academy School but they have been unable to fill the vacancy since 2016. It has been advised that this situation is not unusual and there are several vacancies across the county generally.”

- [7] The Commissioner approached the Council and found one document which falls within the scope of the complainant’s request for information [§3 DN]. The Council argued that no further information is held relating to the specific crossing patrol.

Following the Commissioner's investigation, she published the DN on the 6 October 2021, stating that she is satisfied that, other than the document identified, the Council, on the balance of probabilities, were correct in their application of regulation 12(4)(a) on the grounds that it does not hold any further information which falls within the scope of the complainant's request for information.

[8] Legal Framework:

Public authorities are under a general duty under the EIR to disclose environmental information (as defined in regulation 2(1) EIR) where it is requested:

Duty to make available environmental information on request

5. - (1) *Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*

(2) *Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.*

(3) *To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.*

(4) *For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.*

.....

However, a public authority may refuse to disclose information (under reg.12(1)(a)) to the extent that it does not hold that information when an applicant's request is received (reg. 12(4)(a)):

Exceptions to the duty to disclose environmental information

12. - (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -*

(a) *an exception to disclosure applies under paragraphs (4) or (5); and*

(b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received; (emphasis added)

.....

Precedent:

The Information Tribunal has previously held that in determining a dispute as to whether information is 'held':

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for

example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

(Linda Bromley and Information Commissioner v Environment Agency EA/2006/0072 ('Bromley') at paragraph 13, emphasis added.)

Following *Bromley*, when determining whether or not information is held the Commissioner and Tribunal should apply the normal civil standard of proof on the balance of probabilities. The Tribunal has repeatedly confirmed that this is the relevant test: see also, for example; *Malcolm v Information Commissioner* EA/2008/0072 paragraph 24, *Dudley v Information Commissioner* EA/2008/008 paragraph 31, and *Councillor Jeremy Clyne v IC and London Borough of Lambeth* EA/2011/0190 ('*Clyne*').

In *Clyne* (at paragraph 23), the Tribunal accepted a submission that the Commissioner was entitled to accept at face value the response of a public authority that the requested information never came into existence, where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession.

Furthermore, the Tribunal in *Clyne* held that the 'issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained. (paragraph 38, emphasis added). The Tribunal was satisfied that a gap in the public authority's documentary records reflected 'inconsistent and poor administrative practice' but that does not amount to a breach of FOIA.

Whilst the *Linda Bromley* and *Clyne* cases related to FOIA the considerations are nonetheless equally applicable to the EIR.

Commissioner's Decision Notice:

[9] The Commissioner investigated the matter and held that the Council, on the balance of probabilities, were correct in their application of regulation 12(4)(a) on the grounds that it does not hold any further information which falls within the scope of the Appellant's request for information. The Commissioner reached her decision on the following grounds:

- a. *"The Council carried out adequate and appropriate searches to locate any information it holds which falls within scope of the request [DN 20-25 & 34];*
- b. *In respect of the Appellant's evidence referred to above at paragraph 10, and following the Commissioner's questions, the Council contacted Orian Solutions who manage the school crossing patrol service. Orian identified that in 2007 the crossing on Devonshire Road was a private crossing funded by Victoria Junior School. The School ceased operating in March 2016 at which point it was replaced by the Academy. [DN 35-36];*
- c. *Having considered the searches and the Council's explanations as to why the requested information is not held, the Commissioner did not consider there to be any specific evidence demonstrating that the Council holds any further information falling within the scope of the request [DN 37-39]."*

Grounds of Appeal

[10] The Appellant's Grounds of Appeal detailed that the Council should have searched its records further back to 2007. The Appellant contended that funding provided by the school for the crossing is irrelevant as the School Crossing Patrol Guidelines state that the crossing patrol is the responsibility of the department for Highways, Traffic and Engineering. Further, the Appellant argued that the Council have been less than truthful in their responses over the last five years.

The Commissioner's Response

[11] The Commissioner upheld her position as outlined in the DN and resisted the appeal. The Commissioner highlighted that there was no evidence of misleading the Commissioner. The Commissioner maintained that she was correct, to

conclude, on the balance of probabilities, that the Council does not hold any further information which falls within the scope of the complainant's request for information.

[12] The Commissioner stated that the test to be applied is, having carried out reasonable searches, whether recorded information was held at the time of the request. The Commissioner reminded the Appellant that neither the Commissioner nor the Tribunal have the jurisdiction to decide whether or not the Council complied with the School Crossing Patrol Guidelines. The Commissioner maintained that she was correct to rely upon the reasoned explanation by the Council as to why the information was not held. The Commissioner argued that the Appellant has not provided any evidence to allow the Tribunal to conclude, on the balance of probabilities, that the Council hold any information within the scope of the Appellant's request which has not already been disclosed.

[13] The Commissioner submitted that the issue before the Tribunal is whether the Commissioner's decision that, on the balance of probabilities, the Council do not hold the requested information is correct in law or whether she should have applied her discretion differently. The Commissioner outlined that she cannot comment on previous responses from the Council where she was not involved. The Commissioner reiterated that the Appellant's concerns in relation to the Council's handling of the crossing patrol are outside the remit of the Commissioner and the Tribunal. The Commissioner consents to the matter being dealt with on the papers and invites the Tribunal to dismiss the appeal.

The Issues:

[14] The Tribunal recognise the Appellant's concerns and acknowledges the onus on disclosure under EIR. However, the Appellant suggests that the Council has been less than truthful in their response over the last five years. This is a serious criticism and one not to be taken lightly. There is no evidence before us to support this suggestion and we would have expected evidence to support such a suggestion.

[15] The Tribunal have considered the 3 grounds of appeal paraphrased thus:

- a) The Council should have searched further back to 2007 [the Appellant is probably referencing 2007 as there is reference to an Orian letter: see A34 of the Open Bundle ("OB"). In the Commissioner's response DN para 12 which refers to there being a privately funded crossing in 2007]
- b) The fact that the crossing was privately funded is/was immaterial as the Council is responsible per School Crossing Patrol guidelines
- c) The Council has been less than truthful

We agree with the Commissioner - in her response (at OB A40 paras 30 -32) wherein she states that there is: *"no reason to believe the Council would mislead or provide false evidence. nor has she seen any evidence to the contrary"*.

We note, and have no reason to doubt, that the Council advised that they had searched *"all paper Traffic Management records"* "back to 2013 (see OB C80/81) and in their response concerning their retention policy (see OB C185) that "these types of traffic management / infrastructure records are kept for 7 years from last action"

This seems a comprehensive response to the completeness of their searching as outlined in their response

The second point made in the Grounds of Appeal about the responsibility for the Crossing lying with the Council seems (put simply) to be a "should have held" argument. It does not prove that the information sought has been held by the Council much less that it is still is. And Next Steps - Paras 35 and 36 of the Commissioner's response (at OB A41) the points in Next Steps are noted but do not require any action by the Tribunal since we agree with the Commissioner's decision and are of the view that there is no need to join the Council as a Respondent in this appeal.

Conclusion:

[16] **The** Appellant's case is centred around additional material being in the possession of the Council that falls within scope of his request that falls to be disclosed but has not been provided to him. It therefore falls to us to consider factors that point towards that position and away from that position.

[17] The factors that the Appellant suggests point towards there being additional material is in effect a circumstantial or logical argument - that there simply "must be" more (our emphasis). We cannot identify any arguments that support this proposition, except that *"the school was funding the crossing in 2007 but the council did not search back that far"* (OB page A16). The remaining arguments made in support of this point are the unsupported allegations that those at the Council are being less than truthful. As stated above there is not any evidence to support that suggestion

[18] The factors that point away from there not being any further information are more compelling. Namely that those at the Council have searched and found nothing further. The searches undertaken have been set out for us (including having been summarised helpfully (at OB Paragraph 22 of page A7) and they seem to be broad enough to capture anything relevant that was held. There is no basis upon which to suggest that these statements as to the nature of the searches and findings made are inaccurate in any way. We are mindful that the measure is not certainty but the burden of proof on the Appellant is to the civil standard required, i.e., on the balance of probabilities – or more likely than not.

[19] The retention schedule used by the Council is important. It is right to say that it is a subtle point: it is not an argument that the retention schedule justified deletion of material that would have been relevant to this request had it not been deleted (and, which is not the Council's position), but, rather, that the retention period set out in the retention schedule undermines the Appellant's argument that there "must" as a matter of logic be additional material of a historic nature that was held and not provided to him.

[20] To summarise, the Appellant's arguments and our findings as follows: (a) that those at the Council are being less than truthful - we find no basis for this assertion; and (b) that there must be material held from 2007 onwards, which ought to have been identified and disclosed and has not been - we find this latter argument, relating to

historical information is undermined by the retention schedule and more generally, on the balance of probabilities, we are persuaded that the Council's assertions that the requested information is not held, is proven to the required standard and their reliance on Regulation 12 (4) (a) EIR justified.

[21] Accordingly for all the above reasons, we find no error of Law in the Commissioner's decision nor in any exercise of her discretion as applied therein and we must dismiss this appeal.

Brian Kennedy QC

5 May 2022.

Promulgation Date: 06 May 2022