



Neutral citation number: [2023] UKFTT 01031 (GRC)

Case Reference: EA/2023/0061

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

**Heard by Cloud Video Platform  
Heard on: 16 November 2023  
Decision given on: 21 December 2023**

**Before**

**TRIBUNAL JUDGE HEALD  
TRIBUNAL MEMBER MIRIAM SCOTT  
TRIBUNAL MEMBER KATE GRIMLEY- EVANS**

**Between**

**DAVID BENNETT**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) SANDWELL METROPOLITAN BOROUGH COUNCIL**

Respondents

**Representation:**

The Appellant appeared in person

The 1<sup>st</sup> Respondent was not represented

The 2<sup>nd</sup> Respondent was represented by Mr Leo Davidson of Counsel

**Decision:**

1 The application by the Applicant to adjourn the hearing is refused

2 The Appeal relating to questions 2-5 of the Request is Dismissed

3 The Appeal relating to question 1 of the Request is allowed and the following is Substituted

The scope of question 1 of the Request does not involve a consideration of reg 13 EIR. In so far as this question has now been answered (whether the information is said to be held or not held) no further action is required.

## REASONS

### Introduction

1. This appeal is brought by Mr Bennett. It relates to a Decision Notice dated 4 January 2023 (“the Decision Notice”) issued by the Information Commissioner (“the Commissioner”) and concerns a request for information (“the Request”) made by Mr Bennett to Sandwell Metropolitan Borough Council (“the Council”) pursuant to the Environmental Information Regulations 2004 (“EIR”).
2. For this appeal the Tribunal was provided with an open bundle, a closed bundle and a witness statement from Mr Stewart from the Council. We also had the benefit of hearing directly from Mr Bennett, Counsel and Mr Stewart. The Commissioner was not represented but had submitted a response (“the Commissioner's Response”).
3. At the start of the hearing a preliminary issue was raised by Mr Bennett. He asked for an adjournment of the hearing to enable him to have further time to seek to obtain witness evidence from a number of people. After hearing submissions from Mr Bennett and Counsel there was a short adjournment to consider the application which we refused. A summary of our reasons for this Decision was provided at the hearing. The Reasons follow.

### Application to adjourn

4. The Tribunal has a discretion to adjourn a hearing by rule 5(3)(h) Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“2009 Rules”). In deciding whether to do so we must have regard to the overriding objective to deal with cases fairly and justly. We recognised the need to ensure we took a proportionate and flexible approach and to avoid delay where compatible with the ability to consider the issues properly.
5. In reaching our Decision we took note of the fact that Mr Bennett is a litigant in person and might not always be fully aware of the procedural provisions of the 2009 Rules which he himself points out in his email of the 9 November 2023 (bundle 340).
6. Mr Bennett asked for the adjournment to allow him further time to seek to obtain witness statements from a number of people who work for the Council. Mr Bennett cannot compel the Council to call a witness. As he is entitled to do, he has already approached potential witnesses employed or connected to the Council himself.
7. On 1 November 2023 (bundle 331) the Council wrote to the Tribunal. The issue raised in summary was:-

*“It is noted that the Appellant has not sought, much less obtained, a witness summons under Rule 16. Despite this, the Appellant has been contacting individuals at the Council and*

*demanding that they make themselves available at the hearing to be called as witnesses. This has caused confusion, as this has given the misleading impression that these individuals are required to appear, when in fact as things stand they are not due to appear as witnesses at all..."*

8. I sent this response to the parties:-

*"I have reviewed the letter from the solicitor for the public authority in this case and the bundle including the existing case management directions. I do not consider further directions are appropriate at this stage. I understand that the Appellant and public authority will be at the hearing to present their positions but the Commissioner will not as it will rely on its Response. As regards witness evidence I note that*

- 1. The bundle contains a witness statement from an employee of the public authority*
- 2. On 13th April 2023 Directions were issued dealing with the preparation of a bundle and that the bundle was to include witness statements from anyone whose evidence a party intended to reply on."*

9. On 7 November 2023 Mr Bennett indicated (bundle 338), that he was putting forward a number of people as witnesses. From this list the only person who had submitted a witness statement was Mr Stewart. The others named had not provided statements and were not at the hearing.

10. On the 9 November 2023 the Council (bundle 337) responded as follows:-

*"....I confirm that the only council officer attending the Hearing as a witness will be Matthew Stewart. The other council officers will not be in attendance as they have not provided witness statements and have not been directed to attend the Hearing as a witness. Should Mr Bennett wish to seek further directions from the Tribunal to enable him to provide further witness statements from those officers, the council will of course consider the same...."*

11. The Tribunal's role in the Appeal is to consider whether the Commissioner's Decision Notice is not in accordance with the law or if the Commissioner should have exercised a discretion differently. This application to adjourn and its underlying cause was considered in this context. Mr Bennett told us that he thought the extra witness evidence was necessary because it would support him in what he was able to tell us.

12. Mr Bennett also told us he believed he had evidence that the Council had actively prevented witnesses from helping him. However Mr Bennett could not show us any evidence to support this. Contrary to his position he was directed, by way of an example, to the email exchange between him and the Council on the 5 October 2023 (bundle 314-315) dealing with arrangements for him to meet people at the Council House.

13. Mr Davidson opposed the application on behalf of the Council and referred us, amongst other things, to the existing Directions and the time Mr Bennett had already had to deal with this issue.

14. We noted that:-

- we found no evidence to suggest that the Council has taken steps to prevent people from the Council speaking to Mr Bennett.
- the particular issue about witness evidence had not suddenly arisen at the last minute. It had been aired between the parties for some time. To illustrate this we noted these examples from the bundle:-

- Directions including as regards witness evidence had been given in April 2023 (bundle 88). As regards bundles the wording clearly stated that they should *"Include a written statement from any witness on whose evidence a party relies"*
- On the 15 June 2023 (bundle 281) the Council said *"I note Mr Bennett is calling various witnesses who are Council officers or councillors. I have not canvassed their availability as they are not witnesses that the Council is calling, but can do so if the Tribunal requires"*.
- On 14 August 2023 (bundle 294) Mr Bennett wrote to the Council and again asked about various suggested witnesses as he did on 20 September 2023 (bundle 299)

On 25 September 2023 (bundle 301) the Council said on the subject of witnesses *".....I have also included the non availability for the individuals identified by Mr Bennett..."*

- In this email of the 25 September 2023 the Council added *"Please note that the Council does not propose to call any of the witnesses identified by Mr Bennett..."*
- Mr Bennett asked the Council on the 5 October 2023 (bundle 314) about how he might talk to various council employees *".....I did ask you in my previous email if there was anywhere we could talk to them within the Council Offices. So if you could confirm this it would be helpful"* to which the Council replied on 5 October 2023 (bundle 315)

*"I'm sure that the officers will be able to arrange a meeting room at the Council House that can be used. Please feel free to have the conversation with them when you contact them"*.

- We were not persuaded by Mr Bennett that if an adjournment was granted evidence from these extra witnesses would be forthcoming or even if it was that it would assist the Tribunal with its task of reviewing the outcome of the Decision Notice.

15. Having balanced these issues in the context of the overriding objective we concluded that the hearing should proceed.

### **Background**

16. On 27 October 2021 Mr Bennett wrote (bundle 90) to the Council and made the following request for information. He asked these five things relating to a building control matter:-

1.) *All dates and times of visits to the above build, both actual and "drive by's", plus photo's if any.*

2.) *All reports submitted by the Officers involved and sent to [name 1 redacted], Head of Department and visa versa.*

3.) *All reports between Building Control and the Planning Department and [name 1 redacted], on the above build.*

4.) *All the reports which the Building Owner and his builders had concerning "extensive talks" with the Council, which they stated they had had with you.*

5.) *Finally, the report concerning why the original Case Officer, [name 2 redacted], was replaced by [name 3 redacted], and the reasons behind it.. "[redacted] should be able to help with this, as Head of Department.*

#### **The Council's initial response and reconsideration**

17. On 24 November 2021 the Council responded to questions 1-4 of the Request by asserting the information sought was personal information and thus not to be disclosed by reg 13(2) EIR and responded to question 5 by saying there was no such report. Mr Bennett asked that the Council's position be reviewed internally. The Council did so and replied (bundle 94) saying

*".....To date a total of nine visits have been undertaken by Building Control officers and further ones are planned. The actual inspector's comments about the detail of the visit are a different matter and it is a request to see these comments that have previously been the subject of the FOI.."*

#### **The Complaint**

18. On 10 January 2022 (bundle 106-107) Mr Bennett complained ("the Complaint") to the Commissioner by reg 18 EIR and section 50 Freedom of Information Act 2000 ("FOIA") about the Council's response. He said:-

*I am writing to complain about Sandwell Councils' refusal for an FOI request for Building Control Reports. They say several have been made to site but we know this is not true. In fact only three actual visits were made and the rest were stated as 'drive by's'. Surely they were unable to see around the rear and side of the property. The building owner has caused CONSIDERABLE DAMAGE to our property which may result in Legal Action against Sandwell Council. I would like, to ask you to ask Sandwell Council for these reports. Any redaction of third party names can be done as in previous occasions "*

#### **The Council's Position**

19. Following the Complaint and the involvement of the Commissioner the Council continued to consider the Request. The eventual outcome was that:-

- on question 1, while it had informed Mr Bennett of the number of visits, it would not be able to say more in reliance on reg 13 EIR.
- as regards questions 2-4 the information requested would not be provided because it was not held by the Council (reg 12(4)(a) EIR) and on question 5 the Council maintained its original position that the information was also not held (reg 12(4)(a) EIR).

### **Decision Notice**

20. On 4 January 2023 the Commissioner issued the Decision Notice. It concluded that the Council was entitled to rely on reg 13 EIR for question 1. It also concluded, on the balance of probabilities, that the Council did not hold the information the subject of questions 2-5 of the Request and therefore had correctly applied reg 12(4)(a) EIR.

### **The Appeal**

21. On 27 January 2023 Mr Bennett appealed the Decision Notice to this Tribunal by reg 18 EIR and section 57 FOIA. The outcome sought by Mr Bennett (bundle 13) is:-

*"We need to see that the tribunal is prepared to listen to both sides of the argument and to look at the evidence put before you from our side, instead of Government bodies just listening to another Government body, as we feel the Council have broken and manipulated the Planning Laws. Also we still require the reports concerning Building Control and Planning what we originally asked for in the FOI. This is important because our property which was valued at £[redacted]+ is now of [redacted] value because of Sandwell Council's negligence and not stopping the Building Owner from building an unauthorized Build.*

*To rule in our favour will mean that we believe we have followed every course open to us allowing us to go forward to the next stage, which will be a Judicial Review. "*

22. The grounds of the Appeal included:-

*"1. Building control matters. I refer to Section 6, item 3. I asked for all Building and Planning reports.*

*2. Denied holding information. Council said at Planning Committee anybody was allowed to see them. (John Baker).*

*9. Disagree, refer to video, copy of which I will send on receiving an email address and Case Number.*

*10. Council keeps changing its position when challenged.*

*17. Now there are records to check? Which is it?*

*18. Same answer as above, is there or isn't there information?*

*24. I do not agree with the Commissioners Assessment.*

*25. It is of public interest because the Council made it so on a live video link across Sandwell Borough.*

28. *I disagree with the Council that information is made public by law? It all depends on what the Council want you to see.*

29. *I disagree with this statement because the individuals property affected the adjacent property.*

30. *Whether it reflects disclosure of Data Protection this went out the window at the public forum."*

23. Mr Bennett's Reasons in support were:-

1. *The head of Planning said in a meeting that anyone could view his screen anytime*

2 *The head of Planning refused our elected Councillor viewing such reports, even in his office.*

3 *We believe we have been deliberately misled.*

4 *We do not believe the visits took place.*

5 *No data protection rules broken, all names and etc, could have been redacted as before.*

6 *After saying that information was available, to now saying it is not held. Which is it?*

### **Procedure**

24. On 7 March 2023 Directions were given by which the Council was added as a party.

25. The Council provided a response ("the Council's Response") on 3 April 2023 (bundle 50-58) and the Commissioner's Response is dated 12 April 2023 (bundle 59-68).

26. On 13 April 2023 the parties were given further directions including as regards the preparation of bundles and what they should contain such as any witness statements to be relied upon.

27. Mr Bennett replied on 26 April 2023 ("the Appellant's Reply") (bundle 69-70)

28. A statement was submitted on behalf of the Council by Mr Stewart dated 10 May 2023 (bundle 102-105).

29. Directions were given to allow for the Closed Bundle on 16 June 2023

### **Legal Position**

30. The relevant part of reg 5 EIR provides that:-

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.*

31. Reg 13 EIR provides for personal data not to be disclosed in response to a EIR request. Relevant parts are as follows:-

13.—(1) *To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*

(2) *The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—*

*(i) any of the data protection principles;*

32. Personal Data is defined by references to the Data Protection Act 2018 (“DPA”) as “any information relating to an identified or identifiable living individual (subject to subsection (14)(c))”. Disclosing personal data in response to an EIR request is processing it by section 3(4)(d) DPA.

33. The Data Protection Principles are those set out in Article 5(1) of the UKGDPR, section 34(1) DPA and Section 85 (1) DPA by which personal data shall be (a) *processed lawfully, fairly and in a transparent manner in relation to the data subject.*

34. Reg 12 EIR provides for exceptions to the duty to provide environmental information. The Council relies on reg 12(4)(a) EIR. Relevant parts follow:-

*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.*

*(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;*

### **Role of the Tribunal**

35. The Appeal is by reg 18 EIR and section 57(1) FOIA which provides that:-

*Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.*

36. By section 58 FOIA the Tribunal’s role is to consider whether the Decision Notice is not in accordance with the law or if the Commissioner should have exercised a discretion differently. If the Tribunal determines the Decision Notice was not in accordance with the law or that a discretion should have been exercised differently it can allow the appeal or substitute a different Notice that could have been served by the Commissioner but unless these apply the Tribunal shall dismiss the appeal.



37. An appeal is against the outcome of a Decision Notice rather than how it was reached or the way in which the reasons are expressed. (*William Stevenson -v- Information Commissioner EA/2015/0117*).

### **Change of position**

38. The Appellant referred us to the Council's change of position during the process. At the hearing he told us that he found the changes suspicious.

39. A public authority changing its position in answer to an EIR request might give rise to suspicions but the fact of changes to the approach alone is not by itself suspicious. Mr Bennett did not point to anything other than the fact of the changes.

40. The Council in the Council's Response says:-

*"6. Upon receiving correspondence from the ICO in relation to their investigation into Mr Bennett's complaint, the Council revisited its response to the request under EIR and confirmed the final position..."*

41. In Mr Davidson's submission there was nothing suspicious about the circumstances of the changes in this case.

42. The EIR itself allows for representations to be made to a public authority to reconsider their position and following a complaint to the Commissioner it will regularly be the case that with dialogue, guidance and further consideration the parties might review their positions.

43. We noted the Court of Appeal decision in *Birkett -v- DEFRA [2011] EWCA Civ 1606* as authority for the proposition that a public authority can rely on changes made late on in the process.

44. We concluded that this was not an issue in the Appeal.

### **Appeal- question 1**

45. The Appellant's first request for information dealt with in the Decision Notice was that he asked to be told:-

*1.) All dates and times of visits to the above build, both actual and "drive by's", plus photo's if any.*

46. The Council (bundle 94) provided the number of visits it said had been undertaken by building control officers. Mr Bennett, at the hearing, confirmed he had been provided with this information. He also said he knew the dates of the visits but it appeared to be the case that this information had been communicated to him outside the EIR process.

47. Apart from the number of visits (which we note was not directly part of the Request) the Council concluded it could not provide the other information on the basis of the provisions of reg 13 EIR.

48. The Commissioner in its Decision Notice (bundle 5) supported the position of the Council and said

*"9.....With respect to the information in scope of part 1 of the request, notwithstanding that it provided information regarding the number of visits to the property by Building Control, it confirmed its application of regulation 13 to the information it holds that falls within the scope of the request"*

*30 The Commissioner has not formally considered the Council's application of regulation 13 of the EIR to the withheld information. However he is mindful that it relates to a particular address namely the address specified in the request. To the extent that the withheld information constitutes personal data, he considers that disclosure would breach the data protection principles and would not be within the expectations of the individual(s) concerned. It would therefore be exempt from disclosure."*

49. The Council's Response on the 1<sup>st</sup> question (Bundle 51-52) in summary is that

*"The only information located, and subsequently withheld under Regulation 13, personal information, by the relevant department within the scope of this request consists of the Building Consultancy Inspection Comments.*

50. We note Mr Bennett in question 1 had not asked for the Building Consultancy Inspection Comments or document. In our view, and as can be seen in the various documents in the Appeal, it appears to us that the Council and Commissioner and then Mr Bennett became and remained focused on how reg 13 EIR applied to the Building Consultancy Inspection Comments document rather than the scope of the Request itself.

51. The Council's Response continued:-

*No photos are held and there are no records of "drive by's" (which in fact would not be expected to be recorded as the works were to the rear of the property and therefore not visible by this method).*

52. Thus by this point in the process in answer to the Request Mr Bennett had not been told the date and time of visits but had been told:-

- the number of visits (which he had not asked for)
- that there were no drive by visits
- that there were no photos

53. The Appellant's Reply says

*After reading this I am somewhat surprised that they feel the case should be dismissed, on the grounds of "Probability", that the reports do not exist. With respect to the Commissioner and the Tribunal I thought the Law dealt with "Facts" not "Probabilities". I would therefore like to submit the following:-*

1.) On camera and in the minutes, the Head of Planning and Building consultancy admitted he was looking at Reports, Visits and Drive By's, and stated that he would be more than happy for people to see these.

2.) When an Elected Member of the Council (Ellen Fenton) asked to see them, in his office he refused her access to them. She was also not briefed by the previous councillor about this problem.

3.) When I asked via an FOI request I was refused because of EIR Data Protection.

4.) When the Commissioners became involved, the Council did a complete turn around, by saying that Documents had never been held. (Which I found "Remarkable" to say the least).

5.) The reason I say this, is because for most of the Planning Committee attending that night, it was their very first Meeting. Then combine that with the Head of Planning and Building Consultancy saying that he has got all the "Reports" in front of him and dates of visits. Also what he didn't say to the Committee was that they lost 22 photographs supplied by us showing every aspect of the build. In all "Probability" this lead the Committee to pass Retrospective Planning on this build for a fourth time, without any prior knowledge of the situation.

As I said previously, with respect, I strongly believe this case should NOT be dismissed on the Commissioners "Probabilities". It should be judged and based on the actual "facts" stated above. We believed from the start that there had not been any visits because we asked several times for Building Control and other Senior Members of the Council and also a Member of Parliament to attend site. We did not receive an explanation from anybody, either by phone call, letter or visit. So that starts the alarm bells ringing and very loud, how can you inspect a property on a "Drive By" how do you inspect Drainage and Sewerage pipes laid in the back garden and the damage to the side of the adjacent property which can only be seen from that side "absolute nonsense". Surely without the correct inspections how do the Council know it is safe and conforms to the Councils LABC "Local Authority Building Consultancy Practices I believe it does not. There are SADEOS 9, on design copies attached. Therefore I will be sending a copy of the Video of the Committee Meeting, Item 6, and Minutes relating to said Meeting, item 53/21. I shall then follow up with some reports relating to Sandwell MBC, concerning several Building Applications, as well as some FOI supplied by Sandwell MBC. There will also be photographs of how Sandwell Councils' negligence towards another Rate Payers property has affected the adjoining building and the condition it has been left in. It was worth [redacted] and has now been reduced to [redacted] following a Desk Top Report on behalf of our Insurance Company. All of this information will be sent to all parties by 10th May 2023. At this point, for information, the building owner is being dealt with via a different course of action under the Party Wall Act 1996.

54. Mr Stewart, a chartered building surveyor at the Council provided a witness statement. (bundle 102-105). By reference to the scope of the Request his evidence was useful as follows:-

*"Details confirming the number of "actual" visits made to the property by the building consultancy service have been shared with Mr Bennett. I can confirm that I have thoroughly checked our systems and that there were no "drive by" visits undertaken to the property. The works were undertaken at the rear of the property and therefore there would be no merit in undertaking a drive-by visit. It is worth noting that, in the normal course of business, a drive-by visit would only be undertaken if there perhaps had been a report of illegal work being*

*undertaken on the property. Drive-by visits are generally an unusual occurrence. I can confirm that I have thoroughly checked our systems and there were no photographs taken of the property during the course of any visits by inspectors. ...”*

55. Mr Stewart also gave evidence at the hearing. We found him to be a straightforward and careful witness seeking to do his best to answer Mr Bennett's questions and assist the Tribunal with questions we asked. While he repeated and expanded a little on the content of his statement we were not provided with any materially different or additional evidence that would help us in our review of the Commissioner's Decision Notice on this point.

### **The Closed Bundle**

56. A closed bundle had been provided in accordance with rule 14(6) 2009 Rules. We considered the content of the closed bundle in the absence of the Appellant but in the presence of Counsel for the Council. It contained one document. The document was in the form of a file note of visits by the Council to a property regarding building regulation matters. It is headed Building Consultancy Inspection Comments. It is this document that the Council concluded could not be released due to the obligations of reg 13 EIR. The document does contain some Personal Data but that in our view falls outside the scope of Mr Bennett's first request for information.
57. A gist of the closed part of the hearing has been prepared and is being provided to Mr Davidson and Mr Bennett.
58. When the open hearing recommenced we once again established that Mr Bennett knew the number of visits but not the dates from the EIR process. Based on what we had seen in the closed bundle we therefore asked Mr Davidson to take instructions on whether the Council would be prepared also to answer Mr Bennett's request to know the dates of visits and we adjourned for this purpose. The Council agreed and during the hearing sent a letter to Mr Bennett with this information. He confirmed to us he had received it.
59. By this point in answer to the request for “*All dates and times of visits to the above build, both actual and "drive by's", plus photo's if any*” Mr Bennett had been given the Council's answers in writing on the dates. He had also read Mr Stewart's statement and heard him confirm his evidence that there were no drive by visits and no photos.

### **Appeal - questions 2-5**

60. As regards questions 2-5 of the Request the Council's answer was that the information could not be provided because it did not exist. Mr Bennett believes the information he requested should exist and does exist.
61. From the Decision Notice it can be seen that the Commissioner considered the question of whether or not the information did exist on the balance of probabilities. The Decision Notice states:-

*“For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities”*

62. The Decision Notice goes on to say-

*“In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination”*

63. The Commissioner states he reviewed what he had been told by both Mr Bennett and the Council. The Commissioner accepts that in such cases it is seldom possible to prove nothing is held with absolute certainty and their role is to reach a judgment on the balance of probabilities.

64. The Commissioner reports that the Council told him that all Building Control records had been checked and re-checked but that no other such reports would be expected to be seen in this sort of case and that therefore the absence of other information is unsurprising. The Council also, it was reported, was able to confirm it did not hold the information asked for in question 2-5 of the Request by way of checks on the system and asking officers of the Council directly.

65. The Commissioner stated that it was not his role in this case to consider whether or not the Council should have the information, only if they did and concluded:

*“23...the Commissioner has found no evidence which would indicate that any information is held by the Council that is relevant to those parts [2-5] of his request.*

*24 As a result the Commissioner has decided that, on the balance of probabilities, there is no recorded information held by the Council that falls within the scope of parts 2-5 of the request*

*26 The Commissioner is therefore satisfied that the Council has complied with the requirements of regulation 14(4)(a) of the EIR”*

66. The Commissioner's Response refers to the Decision Notice and then says:-

*26. Furthermore, based on the Council's assurances, the Commissioner remains satisfied that the Council has carried out a reasonable search and he remains satisfied that, on the balance of probabilities, no information is held within scope of parts two- five of the request.*

*31. The Commissioner understands that the Appellant is disappointed in the way the Council has handled his complaint, however, neither the Commissioner nor the Tribunal are able to adjudicate on the way the Council handles such matters. Instead, the sole question for the Tribunal in this appeal is a simple one: was the Commissioner correct to conclude that at the time of the Appellant's request, the Council did not, on the balance of probabilities, hold any information falling within the scope of parts two – five of the Appellants' information request. The Commissioner maintains that he was correct to conclude this.*

67. The Council refers to requests 2-4 and 5. (see 53-54 of the Bundle) as follows:

*Request 2 - This information is not held. Mr Baker did not receive or send any Building Control reports.*

*Request 3 - This information is not held. There were no reports between Mr Baker and the stated departments.*

*Request 4 - This information is not held. There are no reports held regarding extensive talks with the Council, or indeed any talks at all (beyond the information falling within Request 1, addressed above).*

*14. As such, having confirmed that the information is not held by way of checks on the system as well as direct enquiries with officers involved, the correct exemption for points 2, 3 and 4 is under Regulation 12(4)(a) and the Council applied that exemption accordingly to those requests, which was upheld by the Commissioner in his Decision Notice.*

68. As regards request 5 the Council's Response says

*"...the Council confirms that this information is not held, as was clearly explained in its original response to the request, and therefore Regulation 12(4)(a) applies. The original case officer was a relatively new officer and as the matter became complex (objections being made etc.) a more senior officer took over handling of the matter. This would be normal practice and there is no report as to this, nor would it be expected that there would be one. This has all been made clear to the requester already".*

69. Included in the Appellant's Reply he says:-

*After reading this I am somewhat surprised that they feel the case should be dismissed, on the grounds of "Probability", that the reports do not exist. With respect to the Commissioner and the Tribunal I thought the Law dealt with "Facts" not "Probabilities". I would therefore like to submit the following:-*

*1.) On camera and in the minutes, the Head of Planning and Building consultancy admitted he was looking at Reports, Visits and Drive By's, and stated that he would be more than happy for people to see these.*

*2) When an Elected Member of the Council (Ellen Fenton) asked to see them, in his office he refused her access to them. She was also not briefed by the previous councillor about this problem*

*5.) The reason I say this, is because for most of the Planning Committee attending that night, it was their very first Meeting. Then combine that with the Head of Planning and Building Consultancy saying that he has got all the "Reports" in front of him and dates of visits. Also what he didn't say to the Committee was that they lost 22 photographs supplied by us showing every aspect of the build. In all "Probability" this lead the Committee to pass Retrospective Planning on this build for a fourth time, without any prior knowledge of the situation.*

*As I said previously, with respect, I strongly believe this case should NOT be dismissed on the Commissioners "Probabilities". It should be judged and based on the actual "facts" stated above. We believed from the start that there had not been any visits because we asked several times for Building Control and other Senior Members of the Council and also a Member of Parliament to attend site. We did not receive an explanation from anybody, either by phone call, letter or visit. So that starts the alarm bells ringing and very loud, how can you inspect a property on a "Drive By" how do you inspect Drainage and Sewerage pipes laid in the back*

*garden and the damage to the side of the adjacent property which can only be seen from that side "absolute nonsense". Surely without the correct inspections how do the Council know it is safe and conforms to the Councils LABC " Local Authority Building Consultancy Practices I believe it does not. There are SADEOS 9, on design copies attached. Therefore I will be sending a copy of the Video of the Committee Meeting, Item 6, and Minutes relating to said Meeting, item 53/21. I shall then follow up with some reports relating to Sandwell MBC, concerning several Building Applications, as well as some FOI supplied by Sandwell MBC. There will also be photographs of how Sandwell Councils' negligence towards another Rate Payers property has affected the adjoining building and the condition it has been left in. It was worth £250,000 - £270,000 and has now been reduced to zero following a Desk Top Report on behalf of our Insurance Company. All of this information will be sent to all parties by 10th May 2023. At this point, for information, the building owner is being dealt with via a different course of action under the Party Wall Act 1996.*

70. Mr Stewart in his witness statement sets out his evidence as to the existence of the information requested. On items 2-4 he says at 11 (bundle 104)

*"...There are no additional reports with respect to building regulations, in line with the requests made by Mr Bennett. I confirm that all our information is held on computer on the IDOX system. The only other place that information could be held would be emails but it is usual practice that all relevant emails and photos from surveyors phones etc would be added to the IDOX file. I confirm that my team has checked emails and the computer file for this information, and I am satisfied that we have not produced any reports."*

71. On question 5 of the Request Mr Stewart says:-

*"I confirm that after checking our systems, as set out above, there is no "report" held with respect to a more senior case officer being appointed to this matter. The original case officer was a junior case officer and as the matter became more complex due to the number of complaints which were received, it was appointed to a more senior case officer. I would not expect for there to be a report on the system where there has been a change in case officer as this is not general practice. "*

72. Mr Stewart was asked questions about this aspect at the hearing by Mr Bennett. Again we did not gather any additional or materially different information from this to assist us.

73. In closing Mr Bennett explained his concern about many aspects of the building works including those involving the Council such as planning issues and building control.

74. When asked specifically about the Commissioner's role, in addition to maintaining his view that they did not do enough, Mr Bennett also expressed concern that during the investigation he had not been asked for his view. However he did agree that they had received the Complaint he had sent to them.

### **Balance of Probabilities**

75. In the Decision Notice the Commissioner supported the Council's view that it could not provide the information at questions 2-5 of the Request on the balance of probabilities. Mr Bennett expressed concern with the use of this test. He said:-

*.....I am somewhat surprised that they feel the case should be dismissed, on the grounds of "Probability", that the reports do not exist. With respect to the Commissioner and the Tribunal I thought the Law dealt with "Facts" not "Probabilities"....*

76. *Bromley and others -v-Information Commissioner and the Environment Agency EA/2006/0072* is authority for the proposition that where the public authority relies on reg 12(4)(a) EIR but there is a dispute as to whether the information does or does not exist the Commissioner must seek to resolve the question on the balance of probabilities.

77. We were also referred to *Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190*, and *Oates v Information Commissioner and Architects Registration Board EA/2011/0138* at [11]. In *Oates* the First tier Tribunal upheld the Decision Notice in that case which involved a dispute about whether information was held. The Tribunal decided that:-

*"As a general rule, the IC was, in the Tribunals view entitled to accept the word of the public authority and not to investigate further in circumstances where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession..."*

### **Decision**

78. As regard the first request our conclusion is that the Council was wrong to rely on reg 13 EIR and the Commissioner in its Decision Notice was wrong to support the Council in this regard. Accordingly on this part we find that the Decision Notice is not in accordance with the law and the Commissioner should have exercised a discretion differently.

79. In our view the error arose due to the focus on a Building Consultancy Inspection Comments document (about which reg 13 EIR might well be applicable) rather than the scope of the Request even if assessed widely. We note that during the course of the process, including during the hearing, Mr Bennett was provided with the following information:-

- the date of the visits (but not times)
- that there were no drive by visits
- that there are no photographs

80. We therefore decide that this part of the Appeal should be allowed and to issue a substituted Decision Notice as follows

**The scope of question 1 of the Request does not involve a consideration of reg 13 EIR. In so far as this question has now been answered in correspondence and at**



**the hearing (whether the information is said to be held or not held) no further action is required.**

81. On questions 2-5 of the Request while Mr Bennett believes the information does exist we find from the evidence that the Commissioner appropriately applied itself to the task of trying to conclude whether the information sought in questions 2-5 did exist or not utilising the correct test of the balance of probabilities.
82. This exception is subject to the public interest balancing test that *“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”* To be required to consider the public interest balancing test to decide whether information that is said not to exist should nonetheless be disclosed is self evidently problematic.
83. The Commissioner’s published guidance addresses this point and says *“Most of the exceptions under the Regulations are subject to the public interest test, but we recognise that it can be impossible to do a meaningful public interest test if you don’t hold the information.”*
84. We conclude that in this case it would not be in the public interest for disclosure of the information sought which (on the balance of probabilities) does not exist.
85. Having reviewed the steps the Commissioner actually took and the actions of the Council and having heard from Mr Bennett and Mr Stewart both from his statement and while giving evidence in the hearing and having reviewed the authorities referred to our conclusion is that this part of the Decision Notice is in accordance with the law and we do not think the Commissioner should have exercised a discretion differently.
86. For these reasons we conclude that this part of the Appeal should be dismissed.

Signed Tribunal Judge Heald

Date: 27 November 2023