



NCN: [2023] UKFTT 00218 (GRC)

Case Reference: EA/2022/0154

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

Determined on the papers

Decision given on: 27 February 2023

Before

**TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER MS A GASSTON
TRIBUNAL MEMBER MS N MATTHEWS**

Between

GRAHAM GARNER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision:

The appeal is allowed. Decision Notice IC-108355-H1R0 is not in accordance with the law.

Substituted Decision Notice:

Shardlow & Great Wilne Parish Council holds environmental information requested by the Appellant on 1 and 22 April 2001 in the form of:

- (1) minutes of Council Meetings in June, July and August 2019 and May 2020, and a news item from September 2019 about its zero tolerance campaign on overgrown boundaries; and**
- (2) emails between the Council and a contractor containing the contractor's agreement to complete certain pruning work, a quotation for the work, and photographs of the finished work (contained in the Tribunal's closed bundle).**

Shardlow & Great Wilne Parish Council is not required to make the information identified in (1) above available to the Appellant because this information is already publicly available and easily accessible to the Appellant pursuant to Regulation 6(1)(b).

Shardlow & Great Wilne Parish Council is ordered to make the information in (2) above available to the Appellant as soon as possible and no later than 20 working days after the date of promulgation of this Decision (ref. EA/2022/0154).

REASONS

Background and Decision Notice

1. The Appellant made a number of requests for information from Shardlow & Great Wilne Parish Council ('the Council') referring to the Freedom of Information Act 2000 ("FOIA"). The Requests related to pruning work carried out on the Council's instructions in October 2020 to a laurel hedge on the boundary of the Appellant's property. We refer to the requests collectively as "the Requests" and use the numbers FOI 01-FOI 05 to distinguish them, as did the Commissioner.

2. On 1 April 2021, the Appellant requested:

FOI 01 'Written explanation(s) of the SGWPC reason(s) and the Formal documented evidence by the applicable authority of the Lawful Excuse if it exists, under which the SGWPC membership and/or its employee(s) and/or its' individual member(s):

- Wrote to me in the manner of the attached letter on or around May 1st 2020 causing me alarm and prolonged distress'

FOI 02 'Please provide, within the time frame required by the legislation:

- A written description of how my Yew trees on my boundary with London Road and the vegetation at the foot of it but outside my clearly marked and undisputed boundary were brought to the attention of SGWPC membership, its' employee(s) or its' individual members
- Written explanation(s) of the reason(s) under which the SGWPC membership, in November 2020, reported to SDDC and/or DCC, that my Yew trees on my boundary with London Road and the vegetation at the foot of it as overgrown'

FOI 03 'Please provide, within the time frame required by the legislation:

- Formal documented evidence of the Lawful Excuse under which the SGWPC membership and/or SGWPC employee(s) and/or [a named contractor ("the contractor"), name redacted], in February 2021, in my absence, without my consent and knowing that you would not be welcome here: Entered my property and deliberately and severely damaged my laurel trees negatively impacting their intended performance and value by indiscriminately pruning them well beyond and significantly inside my clearly marked and undisputed boundary.'

3. On 20 April 2021, the Appellant requested:

FOI 04

- 'Records of the decision making process that led SGWPC to engage [the contractor] to deliberately damage my trees. Please include emails, letters, text messages, What's-App

messages, records of telephone conversations, records of meetings and any other such records.

- A list of the names of the people that sanctioned authorising the engagement of [the contractor] to deliberately damage my trees’

4. On 22 April 2021, he requested:

FOI 05:

1. ‘A copy of the order(s) placed with [the contractor] engaging them to deliberately damage my trees

2. A written explanation of the benefit(s) to the local community that came as a result of and justify SGWPC spending public funds to engage [the contractor] to deliberately damage my trees.’

5. The Council responded to the Appellant on 29 April 2021 setting out the background to its decision to instruct a contractor to carry out the pruning work. It informed the Appellant that all the requested information was available ‘in the public domain, on the Parish Council website’. The Council invoked its Vexatious Complaints policy, saying that it would no longer communicate with the Appellant other than in writing via Royal Mail.

6. The Appellant complained to the Commissioner. The Commissioner decided that the Environmental Information Regulations 2004 (‘EIR’) applied to the Requests.

7. The Council Clerk informed the Commissioner that it had a statutory duty to keep public areas and access routes in the parish clear. She referred the Commissioner to the Minutes of the Council’s meetings in June, July and August 2019, and in May 2020, where resolutions were made to adopt a ‘zero tolerance’ campaign on the issue of overgrown boundaries and to contact residents about this. Minutes of the Council’s November 2020 meeting noted that outstanding issues had been reported to the County Council as the enforcement body. The Clerk said that all Minutes were available on the Council’s website, together with a news item from September 2019 about the ‘zero tolerance’ campaign. The Clerk said that she had on email a record of a quotation from the contractor, agreement to complete the works, and photographs of the finished works.

8. The Commissioner issued Decision Notice IC-108355-H1R0 on 23 May 2022. The Commissioner found that:

‘For FOI 01, the relevant references to the minutes of the Council’s meetings and decisions were as listed above; the Council held no undisclosed recorded information.

‘For FOI 02, the relevant minutes of its November 2020 meeting were readily accessible to the complainant or had been provided.

‘For FOI 03, FOI 04, FOI 05 the Commissioner found that the Council’s instructions and communications with the contractor had been verbal so that no recorded information was held.’

The Commissioner concluded on the balance of probabilities that the Council did not hold the requested information. Its decision was that the Council had correctly refused to provide information it did not hold and did not need to take further action because the exception in Regulation 12(4)(a) applied (paragraph 2 of the Decision Notice).

9. The Appellant appealed. Much of his grounds of appeal concerned the pruning works, his dispute with the Council about whether a track to the west of his property was a public right

of way, and his reasons for making the Requests. He disputed that the requested information was easily available on the Council's website, saying that the minutes of the Council meetings were not the information which he had requested. He did not believe that there was no written order for the works. The Appellant was unhappy with the way in which the Requests and his complaint had been dealt with and wanted the Council to be 'admonished' for their conduct.

10. In their Response, the Commissioner submitted that the appeal be dismissed in relation to Requests FOI 01 – FOI 04 for the reasons given in the Decision Notice. However, the Commissioner conceded the appeal in relation to Request FOI 05 on the basis that the Council's emails with the contractor who carried out the pruning works were within scope of that Request.
11. The Appellant submitted a 29-page Reply. Much of the Reply concerned the Council's 'zero tolerance' policy, the dispute over the track next to his property and the way in which the pruning work was carried out. He submitted that the Commissioner had misinterpreted the Requests and complained about the way in which his complaint had been dealt with. At page 16, he withdrew Request FOI 04.
12. All parties consented to this matter being dealt with on the papers and the Tribunal decided that it was fair and in the interests of justice to do so.
13. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 187 pages and a small closed bundle containing the emails between the Council and the contractor. A Registrar ordered that the closed bundle should not be disclosed to the Appellant pursuant to Rule 14(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules.

The Law

14. Regulation 2(1) EIR provides that 'environmental information' is any information in 'written, visual, aural, electronic or any other material form' which relates, inter alia, to land and landscape and to measures and activities affecting and designed to protect land and landscape.
15. Regulation 5(1) EIR provides that:

'(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.'
16. Regulation 6(1) EIR provides that:

'(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

 - (a) it is reasonable for it to make the information available in another form or format; or
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.'
17. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that 'it does not hold that information when an applicant's request is received'.
18. Where the Commissioner finds that a public authority is entitled to refuse a request pursuant to Regulation 12(4)(a), the Tribunal must be satisfied on the balance of probabilities that the information is not held. As the Tribunal said in *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072), relevant factors include:

‘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’ [paragraph 13]

Other matters may be relevant, such as the discovery of materials elsewhere which point to the existence of further information within the public authority.

19. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:
 - ‘(1) 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.
 - ‘(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.’
20. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Analysis

21. No party has disputed that this appeal relates to environmental information as defined in Regulation 2(1) EIR.
22. It is not the role of the Tribunal to comment on disputes about rights of way, the Council’s policy on overgrown boundaries nor the pruning work done by the contractor. As noted at paragraph 20 above, the Tribunal also does not undertake a review of the way in which the Commissioner conducted their investigation into the Appellant’s complaint.
23. As explained in paragraph 18 above, the Tribunal’s task in relation to Regulation 12(4)(a) EIR is to decide whether on the balance of probabilities, the Council was holding information relevant to the Requests when they were received. We must take into account the quality of the Council’s initial analysis of the Requests, the scope of the search it carried out, the rigour and efficiency with which the search was conducted, and any other relevant factors.
24. In this context, the Tribunal notes that the Council is a small parish council, one of 31 parish councils in South Derbyshire. Its Clerk spends 10 hours a week on Council business and uses a dedicated Council laptop. The Tribunal accepted that much Council business will be carried out informally and verbally without written records and that, as reported by the Clerk, recordings and notes of meetings are destroyed once Minutes are finalised. We found it reasonable and credible that the clerk would know what information was held by the Council without carrying out rigorous or sophisticated searches (she observed: ‘I have made no further searches to locate any additional information, purely because there is nowhere else to look’). We accepted on the balance of probabilities that information recorded by previous Clerks may not have been handed over to the current Clerk.

25. The Tribunal noted that many of the Requests were for ‘explanations’. The EIR requires public authorities to make available information which they hold in material form. It does not require them to create new information in response to a request nor to provide new explanations for their actions which are not already held.
26. We will address each of the Requests in turn.
27. Request FOI 01 is a request for a ‘written explanation’ and ‘formal documented evidence’ of the Council’s ‘Lawful Excuse’ for writing to the Appellant on 28 May 2020, asking that the access road next to his property be reinstated.
28. To the extent that FOI 01 was a request for an explanation, it is not covered by the EIR. The Tribunal is satisfied on the balance of probabilities that the Minutes of Council meetings are the only ‘evidence’ held by the Council of its reasons for writing to the Appellant. The Minutes are also evidence of the formal resolutions taken by the Council to take such action and as such, evidence of its authority or ‘Lawful Excuse’ to do so. The Tribunal is satisfied on the balance of probabilities that the Council held no other information within scope of FOI 01.
29. The first part of Request FOI 02 is for a ‘written description’ of how the Appellant’s trees were brought to the attention of the Council. Again, the EIR only requires public authorities to provide information which they hold, not to create new explanations or descriptions. The Tribunal was satisfied on the balance of probabilities that the Council did not hold any letters of complaint and that complaints or reports of overgrown boundaries were likely to be made verbally to the Council without records being kept, other than the Minutes of the relevant Council meetings.
30. The second part of Request FOI 02 is a request for a ‘written explanation’ of the reasons for the Council reporting the Appellant’s trees to the District or County Council. Again, the EIR does not require a public authority to provide explanations. The Tribunal was satisfied that the Minutes of the relevant Council meetings constituted the only record of such reasons and on the balance of probabilities that such reports would be made verbally by the Council.
31. The first part of Request FOI 03 is for ‘formal documented evidence’ of the ‘Lawful Excuse’ for the Council or its contractor carrying out the pruning work. The Tribunal was satisfied that the Council Minutes were the only record held by the Council of the resolutions made to carry out the works, and that these constitute the authority for the Council to do so.
32. Request FOI 04 was withdrawn by the Appellant.
33. The first part of Request FOI 05 is a request for a copy of the order placed with the contractor for the pruning work. The Tribunal noted that the Council had told the Commissioner in January 2022 that it had emails containing a quotation from the contractor, agreement to complete the works, and photographs of the finished works. The Tribunal was satisfied that this information was within scope of Request FOI 05, and that the Council held no other information in scope of that Request.
34. The second part of Request FOI 05 is a request for a ‘written explanation’ of the benefits to the local community of the pruning work. The Tribunal was satisfied that the only records held by the Council about this was in its Minutes and the September 2019 news item.

Conclusion

35. The Tribunal therefore concluded on the balance of probabilities that the only information held by the Council which was in scope of FOI 01 – FOI 03 and the second part of FOI 05 was contained in the Minutes of the Council meetings and the September news item.
36. The Tribunal found that this information was “held” by the Council, and therefore the Commissioner was wrong to conclude that Regulation 12(4)(a) applied because no information was held in respect of these Requests.
37. However, the Tribunal found that the information held by the Council was already publicly available and easily accessible to the Appellant in another form or format, on the Council’s website. The same information was available on the website, in the form of Minutes and a news item, rather than in the form of a “written explanation” or “formal evidence” as requested by the Appellant. Therefore, Regulation 6(1) EIR applies and the Council is not required to make the requested information available to the Appellant.
38. The Tribunal noted that in their response to the Requests, the Council had not referred to the Minutes nor explained to the Appellant (as they had subsequently to the Commissioner) where the requested information could be found in specific Minutes. This may have been helpful for the Appellant. However, the relevant Minutes have now been clearly identified to the Appellant in the open bundle and therefore, no further steps are required.
39. The Commissioner conceded the appeal in relation to the first part of FOI 05. The Tribunal agreed that information was held in scope of FOI 05 in the form of the emails containing a quotation from the contractor, agreement to complete the works, and photographs of the finished works, which appear in the closed bundle.
40. The Tribunal noted that the Council had indicated to the Commissioner in February 2022 that it was happy for these emails to be shared with the Appellant (page 185 of the bundle). It had not sought to rely on any other exception or exemption to withhold this information from the Appellant.
41. Decision Notice IC-108355-H1R0 is therefore not in accordance with the law. The appeal is allowed and a new Decision Notice is substituted in the terms set out at the top of this Decision. However the Council is only required to disclose to the Appellant its emails with the contractor from the closed bundle; the only other information held by the Council in respect of the Requests is already publicly available and easily accessible to the Appellant in another form or format.

Signed District Tribunal Judge Goodman

Date: 25/02/2023

Promulgated

Date: 27/02/2023