



Case Reference: EA-2023-0212
Neutral Citation Number: [2023] UKFTT 987 (GRC)

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

Heard: On the papers
Heard on: 14 November 2023
Decision given on: 27 November 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER DAVE SIVERS

Between

JOHN AND TONY RUBINO

Appellants

and

(1) THE INFORMATION COMMISSIONER
(2) HERTFORD HEATH PARISH COUNCIL

Respondents

Decision: The appeal is allowed.

Substituted Decision Notice for IC-185572-H0G9

Organisation: Hertford Heath Parish Council
Complainants: John and Tony Rubino

The Substitute Decision

- (1) The tribunal is not satisfied that the public authority carried out adequate searches in order to locate the requested information.

- (2) The tribunal requires the public authority to take the following steps to ensure compliance with the legislation:
- a. The public authority shall undertake a further search for the requested information having regard to the tribunal's reasons below, which should include, but is not limited to, asking the following parties/individuals to make a reasonable search for and provide any information in scope of the request which they held on behalf of the public authority at the date of the request:
 - i. AECOM
 - ii. Bob Frost
 - iii. Paul Wolstencroft
 - iv. Locality
 - v. Govresources Ltd
 - b. The public authority shall give a fresh response to the appellants' request for information which will be subject to the rights given under section 50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.
- (3) The public authority must take these steps within 35 calendar days of the date on which the Commissioner sends them notification of this decision in accordance with the Direction below.
- (4) Failure to comply with this decision may result in the tribunal making written certification of this fact pursuant to section 61 of the Act and may be dealt with as a contempt of court.

Directions

1. The Information Commissioner is directed to send a copy of this decision to Hertford Heath Parish Council within 28 days of its promulgation or an unsuccessful outcome to any appeal that is made.

REASONS

Introduction

1. This is an appeal by John and Tony Rubino against the Commissioner's decision notice IC-185572-H0G9 of 17 March 2023 which held that Hertford Heath Parish Council ('the Council') had disclosed any information that they held within the scope of the request made under the Environmental Information Regulations 2004 ('EIR'). The Commissioner held that the Council and breached regulation 5(2) and 11(4) EIR. The Council was not required to take any steps.

Factual background

2. The Council carried out a pre-submission consultation in relation to its draft neighbourhood plan between October and December 2020. The appellants are of the view that the second respondent has not carried out its neighbourhood plan process in an open and transparent manner. The appellants assert that their site was excluded from the process with no justified or reasonable explanation for such. The appellants assert that it became apparent that the second respondent had failed to carry out its duty to prepare a Strategic

Environmental Assessment (SEA) to inform the preparation of the neighbourhood plan and this was done retrospectively and not in full.

3. At the date of the request the Council was carrying out a SEA of its proposals for the neighbourhood plan. The appellants sought clarity as to the instructions of the second respondent provided to its appointed consultants, by way of the request, to understand the way in which its site was being treated by the second respondent.
4. The request which is the subject of this appeal has already been the subject of a decision notice issued by the Commissioner on 14 June 2022 (IC-133998-Y2J0) which required the Council to issue a fresh response.

Request

5. Eversheds Sutherland (International) LLP made the following request to the Council on behalf of John and Tony Rubino on 13 July 2021:

“1. Background to the request

1.1 The Council carried out a pre-submission consultation in respect of its draft neighbourhood plan between October and December 2020, known as Regulation 14 consultation.

1.2 The Council is currently in the process of carrying out Strategic Environmental Assessment (“SEA”) of its proposals for the neighbourhood plan.

2. Description of information requested

2.1 The applicant wishes to be provided with a copy of the following material:

2.1.1 a copy of the Scoping Opinion prepared by or for the Council in respect of the SEA;

2.1.2 a copy of the instructions provided to AECOM by the Council in respect of the Scoping Opinion and SEA process, including a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representative of the Council and AECOM; and

2.1.3 a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representatives of the Council and any other third party in respect of the Scoping Opinion and SEA process.”

6. On 14 June 2022 the Commissioner issued a decision notice in which he concluded that the Council had not conducted adequate searches. The Council was required to issue a fresh response.
7. A fresh response to the request was sent by the Council on 18 July 2022, after a decision notice issued on 14 June 2022.

8. In that letter the Council stated:
 - 8.1. The Council did not hold a copy of the Scoping Opinion. The Scoping Opinion was the same as the Scoping Report and it was on the Hertford Heath Neighbourhood Plan website.
 - 8.2. All emails about the scope and process had been supplied.
 - 8.3. Any redacted information was personal information of persons not related to the request withheld under regulation 12(3) and 13 EIR.
9. The appellants referred the matter to the Commissioner on 27 July 2022. During the Commissioner's investigation the Council released further information to the appellants.
10. The appellants maintained that the following information within the scope of the request had not been provided:
 - 10.1. The first draft of the SEA report attached to the email of 1 July 2021
 - 10.2. The documents contained within the Dropbox link within the email dated 14 April 202
 - 10.3. Correspondence from the Council to East Herts District Council regarding permission for a focused SEA

Decision Notice

11. In a decision notice dated 1 April 2022 the Commissioner decided that the Council wrongly dealt with the matter under FOIA and was in breach of regulation 5(1) and 14(1) EIR.
12. The Commissioner decided that the information redacted as third-party data did not fall within the scope of the request, and it was therefore not necessary to consider the application of regulation 13.
13. In relation to the three outstanding sets of information:
 - 13.1. **The first draft of the SEA report attached to the email of 1 July 2021**

The Council had confirmed that the SEA report attached to the email of 1 July 2021 was the full and final version that is already in the public domain. The Commissioner noted that the appellants had accessed the published SEA report; therefore, the Commissioner did not require the parish council to take any steps.
 - 13.2. **The documents contained within the Dropbox link within the email dated 14 April 202**

The Council confirmed that the link to the drop box is no longer accessible. The drop box was set up solely for the purpose of transferring information to AECOM, and no longer exists. Therefore, it states that this information is not held.
 - 13.3. **Correspondence from the Council to East Herts District Council regarding permission for a focused SEA**

The Council advised that it held no recorded information relevant to the third bullet point. It said that it would not have had an exchange with East Herts Council in terms of the need for permission for a focussed SEA, as such

permissions were not required, and were therefore not sought. The parish council has confirmed that East Herts Council has to provide the parish council with an SEA Determination, and that this has been published.

14. The Commissioner was satisfied that the Council had taken proportionate steps to locate and provide the information which it held or was held on its behalf. The Commissioner decided that, on the balance of probabilities, the Council had now provided the information that it held that was relevant to the request.
15. As the Council failed to provide all the relevant information within 20 working days of the receipt of the request, the Commissioner found a breach of regulation 5(2) of the EIR.
16. As the Council failed to carry out an internal review within the statutory 40 working days, the Commissioner also found a breach of regulation 11(4) of the EIR.

Notice of appeal

17. The notice of appeal notes that the Council have confirmed that the statement in the decision notice that ‘the SEA report attached to the email of 1 July 2021 was the full and final version that is already in the public domain’ is incorrect. The Council have since provided the original version of the SEA report.
18. The ground of appeal is that the Commissioner was wrong to conclude on the balance of probabilities that the Council did not hold the documents contained within the Dropbox link.
19. The instructions and documents which were made available via the link must first have been uploaded by the Council and then downloaded and stored by AECOM. Even if the Council has lost the information, it is likely that AECOM still hold it.

The Commissioner’s response

20. As the Council has disclosed further information within the scope of parts 2.1.1 and 2.1.3 of the request, the Commissioner concedes that on the balance of probabilities further information was held by the Council.
21. In relation to the Dropbox information, the Commissioner submits that the Council liaised with its consultant Govresources Ltd to ascertain whether the information contained within the Dropbox link had been retained. Govresources Ltd confirmed that the Dropbox platform was used as a temporary means to transfer the information to AECOM and no longer exists. Noting **Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190**, the Commissioner submits that he was entitled to make his decision based upon what was actually retained by Govresources Ltd rather than what could be argued should have been retained. Govresources Ltd has subsequently again confirmed that they are unable to provide any further information on this.
22. It is now clear to the Commissioner that whilst the Council liaised with Govresources Ltd it had not liaised with AECOM as part of the searches it conducted. The Council have since contacted AECOM and they have not engaged with the request. The Commissioner

accepts that if AECOM accessed, downloaded, retained and can identify the documents originating from the Dropbox link it would be held on behalf of the Council.

23. The Commissioner submits that if AECOM either did not download the information contained in the link or has not retained the information in a way which would identify it as having been provided within this specific link, it will be problematic in establishing what information is held by the Council or either third party contractor on behalf of the Council which originated from this temporary Dropbox link.
24. The Commissioner submits that the contents of the Dropbox link may not fall within the scope of 2.1.2 of the request. The 14 April 2021 email refers to, “the examples I mentioned in our telephone call and the documents put together for the Reg 14 consultation by the landowner’s agent for the site we have chosen to allocate”. Further it would appear the information contained in the link was preliminary information if AECOM wished to “make a start” ahead of provision of the information on the site assessment process which was to follow once complete the following Monday.
25. For the reasons given above, the Commissioner’s view is that even if AECOM had been consulted within the Council’s searches, this would have been very unlikely to have located any further information falling within the scope of 2.1.2 of the request.

Appellants’ reply to the Commissioner dated 16 May 2023

26. The appellants submit that information held by AECOM on behalf of the Council would be within the EIR.
27. It is submitted that the evidence from Govresources Ltd simply confirms that the Council’s consultant cannot provide more information on the Dropbox link and deleted it. It does not comment on whether the information placed into the folder was still held.
28. The appellants have evidence that despite the confirmation given by the Council to the Commissioner, AECOM has not been asked for the information requested (see appendix 1 to the reply).
29. The appellants submit that it should have been obvious to the Commissioner that the information requested is very likely to be held by both Govresources and the AECOM (on behalf of the Council) and that this would have been revealed by the most basic of enquiries:
 - 29.1. AECOM is a well-respected multi-disciplinary global company; it is entirely implausible to believe that instructions pertaining to a professional instruction sent by Govt resources were not downloaded and electronically filed to refer back to during drafting. Neither has actually denied that the information is still held; only that the Dropbox link has been deleted.
 - 29.2. The information provided by Dropbox links pertains to the preparation of a Strategic Environmental Assessment (SEA) for an emerging Neighbourhood Plan. This is a public process and the information provided is part of the evidence base for the plan, with the expectation that it will be fully available for public inspection. As such, this information will continue to be needed as the draft neighbourhood plan progresses and is examined. The original copies of the

information would not therefore have been deleted by Govresources Ltd and are highly likely to have been retained. If they had been deleted, this would be a professional failing on the part of Govresources Ltd.

- 29.3. It is clear from the email exchange dated 14 April 2021 that the information provided within the Dropbox links was to be used by AECOM in their preparation of the SEA. As the SEA was subsequently drafted and a finalised version issued, it is clear that the information was used to inform the drafting of the document.
30. It is submitted that although the documents contained within the Dropbox links were not identified within the body of the email, the documents downloaded will be identifiable from the date the documents were downloaded (which is easily determined and searchable on any computer filing system) which would be around the date of the email containing the link and will have been saved to the relevant matter file as is standard practice.
31. The appellants submit that even to the extent there is any confusion about which documents were within which Dropbox link (which is disputed), any information held by AECOM relating to this matter is likely to fall within the scope of the request, since their instruction specifically related to the SEA and scoping process and therefore such documentation should already have been provided.
32. The SEA report was subsequently completed. The appellants submit that this was only possible if AECOM downloaded not only the information comprised in the Dropbox link referred to in the email of 14 April 2021 but also the subsequent file transfer promised by Govresources the following Monday, neither of which have been provided to the appellants.
33. In relation to the suggestion that the information falls outside the scope of the request, the email references the Regulation 14 process, which relates to public consultation on the pre-submission neighbourhood plan. It is submitted that this material is highly relevant to the Scoping Opinion and SEA process since it provides information on site selection which is a key aspect of the SEA process. Indeed, since AECOM's instruction related to these matters, there would have been no reason for Govt resources to send them such information if it were not relevant to the instruction.

Response of the Second Respondent dated 24 July 2023

34. The second respondent provided a short response in which it stated:

“We have to the best of our ability, exhausted all avenues and have provided the information that we hold and have no further information to disclose.”

Appellants' reply to the Second Respondent dated 16 August 2023

35. The appellants understand that in preparing its response to the appeal, the Council has had full sight of the arguments being led by both the appellants and the Information Commissioner, together with the evidence submitted in support of such arguments. Such evidence includes the e-mails from Locality, appended to the appellants' Response to the Information Commissioner dated 16 May 2023 and which confirms that (1) neither Locality nor AECOM were contacted by the Council with a request to release information

relevant to the Strategic Environmental Assessment (“SEA”) process and (2) both Locality and AECOM do hold information relevant to the SEA, including the material contained within the Dropbox link referenced in an e-mail dated 14 April 2021 (Appendix B of the Information Commissioner’s Response).

36. It is submitted that the Council’s response to the appeal implies that the Council has now contacted:
 - 36.1. all third parties which it instructed in respect of the SEA process, including AECOM and Govresources Ltd, seeking a copy of the material contained within the Dropbox link; and
 - 36.2. Locality, given its written confirmation that it has also retained relevant information.
37. However, the Council has not provided any evidence of having done so.
38. The appellants submit that the Council has entirely failed to engage with the case being put by the appellants. The appellants do not accept that the Council has ‘exhausted all avenues’ in respect of obtaining the relevant information.
39. The Council has not provided any evidence of having contacted AECOM. It has also subsequently been confirmed by Locality, an instructing party to AECOM, that both AECOM and Locality do retain relevant information and that no request for such was received by either Locality or AECOM from the Council.
40. It is the appellants’ position that the Council has failed to demonstrate that it has sought this information and therefore does not consider that it can be concluded that the Council has ‘exhausted all avenues’ in respect of obtaining the relevant information, nor that the Council has ‘no further information to disclose’.

Appellants’ further submissions dated 6 October 2023

Redactions

41. The Hearing Bundle contains an e-mail from Govresources Ltd to the second respondent dated 8 February 2021 at page D105. The appellants submit that it is unclear why this was not originally released to the appellants in response to the Freedom of Information/Environmental Information request, given that it is within the scope of such request.
42. That email has been redacted for reasons which are unclear to the appellants. The appellants have been able to identify this difference in redaction due to having previously had sight of this specific piece of correspondence in a lesser redacted form. However, given the reason for this redaction is unclear, the appellants are concerned that there may be redactions of other documents which ought properly not to be redacted, but which the appellants would not be able to identify in the absence of the original material.

Statements of the Second Respondent

43. The appellants do not accept a statement of fact included in an email in the bundle at pages D86-B87. The appellants considers that the statement is a deliberate attempt to smear the

character of the appellants so as to support any future defence of vexatiousness/manifest unreasonableness in respect of a second Freedom of Information/Environmental Information request.

Purpose of the FIOA request

44. It is submitted that the request was made with the intention of obtaining the paperwork associated with the SEA process undertaken by the second respondent because of the failure of the second respondent to carry out its neighbourhood plan process in an open and transparent manner. The appellants' site was excluded from the process with no justified or reasonable explanation for such. It then became apparent that the second respondent had failed to carry out its duty to prepare an SEA to inform the preparation of the neighbourhood plan and this was done retrospectively and not in full. The appellants therefore sought clarity as to the instructions of the second respondent provided to its appointed consultants, by way of the request, to understand the way in which its site was being treated by the second respondent.

Second Respondent's final submissions dated 24 October 2023

Redactions

45. The second respondent has no objection to the removal of the redactions to the document at p D101-105 of the bundle.

Statements of the Second Respondent/Purpose of the FIOA request

46. The allegations that the second respondent is effectively abusing the tribunal process are denied. The appellants are raising speculative concerns about how the second respondent may decide to defend itself in future legal proceedings. This can be of no concern to this tribunal, which is only concerned with determining the matters subject of the appeal.

Appellants' further submissions by email dated 26 October, 2, 6 and 10 November 2023

47. It is noted that the majority of the submissions made by the appellants within the documentation submitted as part of the appeal, the Response of the appellants to the second respondent of 16 August 2023 and its Further Submissions of 6 October 2023, remain uncontested by the second respondent. Most notably, the second respondent has failed to engage entirely with the appellants' case led in respect of the second respondent not having exhausted all avenues in seeking to obtain the relevant information.

48. The appellants note that the correspondence at D105 has been fully unredacted as opposed to partially unredacted, which includes a paragraph the appellants has not previously had sight of. This reiterates its view, as set out within its submissions made to the tribunal but supported by even this small release of information, that:

48.1. the redactions of the limited information released by the second respondent may not be appropriate and the appellants asks that the tribunal consider whether the extent of redactions ought properly to be reconsidered;

48.2. it remains unclear as to whether the material that has been released has been provided in full (for example, the correspondence at D105 abruptly ends and it is unclear as to whether this was the entirety of the e-mail);

- 48.3. the second respondent continues to refuse to release information which it holds within the scope of the FOI/EIR request, without providing any explanation as to why such should not be released; and
- 48.4. it remains unclear why some of the limited information that has been released by the second respondent was provided so much later in the process, rather than in response to the FOI/EIR request.
49. The appellants summarise the differences between the two versions of the SEA report and noted that the e-mail from Govresources Ltd to AECOM (both consultants appointed by the second respondent) dated 23 July 2021 (see page D233 of the Hearing Bundle), it states:
- “We would like the report to show what actually has the potential to be included in the NP as a Non-designated Heritage Asset. I am just checking back with the team because I think some of the items, although we have found more information on them, do not exist now.”
50. It is submitted that this implies that there would have been further exchanges as to the extent of features to be included, but no such material has been released to the appellants.
51. The appellants provided a copy of the Terms of Reference of the Steering Group. The appellants noted that the reference to ‘Paul’ in the now unredacted correspondence at page D104 of the Hearing Bundle is believed to be a reference to Paul Wolstencroft, who was a member of the Steering Group and therefore would hold information on behalf of the Parish Council within the scope of the original FOI/EIR request. Further, the appellants noted that the reference to ‘Bob’ in the correspondence at the same page of the Hearing Bundle is believed to be a reference to Bob Frost, who is the Chairman of the Steering Group and therefore will likely also hold information on behalf of the Parish Council within the scope of the original FOI/EIR request.
52. The appellants submit that they have demonstrated in that the Parish Council has not sought information held on its behalf by various appointed consultants which sits within the scope of the original FOI/EIR request. Whilst reference has been made to some of those specific appointed consultants (e.g. Govresources Ltd, Locality and AECOM), the appellants consider that the Steering Group also falls within this category.

Legal framework

53. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The Task of the Tribunal

54. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

55. The issue we have to determine is whether or not the Council held further information within scope of the request on the balance of probabilities.

Evidence and submissions

56. We have read an open bundle of documents. We also took account of the additional submissions set out above and the following additional documents:

- 56.1. The terms of reference of the Hertford Heath Steering Group.
- 56.2. The SEA (version 5.0)

Discussion and Conclusions

Matters outside our remit

57. Some of the submissions of both the appellants and the second respondents dealt with matters that are outside the scope of this appeal. We have not dealt with those matters in this decision.

Redactions/incomplete emails

58. Although not raised in the grounds of appeal, the appellants have subsequently raised the question of the appropriateness of redactions made to various emails in their submissions dated 6 October 2023. All the redactions to which the appellants objected have now been unredacted. Given that the matter was not raised in the grounds of appeal and is no longer in issue we do not deal with the issue of redactions.

59. Having reviewed the documents in the bundle and on the basis of the assurances from the Council we accept that p D105 does not contain an incomplete email.

Is further information held?

60. A public authority should conduct an appropriate and reasonable search for information. This should include, as a minimum, searching in the places where it is reasonable to expect that the public authority would find the information, if it existed.

61. Where work relevant to the subject matter of a request has been carried out on behalf of the public authority by consultants, or by, for example, a steering group it is reasonable to expect that those parties might hold information within the scope of the request on behalf of the public authority.

62. In this appeal, the Council had initially misunderstood the scope of EIR, and had not appreciated that it extended to information held by another person on behalf of the public authority.

63. The appellants submit that the Council has not undertaken an adequate search for documents which were transferred by Jacqueline Veater at Govresources Ltd to AECOM and Robert Frost via a Dropbox link in an email dated 14 April 2021. This email reads:

“Bob and I are compiling all the information we can on the Site Assessment Process and I will be able to send you a Dropbox link to all our documents on Monday, if this

is acceptable. We have quite a lot put together now but I think it would be easier if the information was complete to the best of our knowledge before I send the link.

If you want to start and would benefit from the examples I mentioned in our telephone call and the documents put together for the Reg 14 consultation by the landowners agent for the site we have chosen to allocate, these are in the attached link:

<https://www.dropbox.com/sh/dxynd46ur2aemuz/AAAfXIvqQOhvjDRKdgR6XWyCa?dl=0>

64. We accept that the Dropbox folder has been deleted and the link is no longer available. However, we also find that it is likely that AECOM will have downloaded and saved the documents from the Dropbox folder. It also appears likely from the email that further documents were sent via Dropbox the Monday after (19 April 2021) and those documents, if sent, are likely to have been downloaded and saved by AECOM. This is because they had been sent those documents for the purposes of drafting the SEA, and it a Dropbox file is only available for a limited period.
65. In support of our finding that the documents are likely to have been downloaded and saved we note the email from AECOM to the appellants dated 15 May 2023 which states:

“AECOM retain relevant information. However, I suggest you direct your queries directly to the parish council, and if they request, we can provide them with the relevant information we have retained if they do not hold it already.”
66. In our view, given that the text of the email dated 14 April 2021 such information, if held, would at least potentially fall within the scope of the request. The email refers to ‘compiling all the information we can on the Site Assessment Process’ which would be sent the next Monday. The email states:

“If you want to start and would benefit from the example I mentioned in our telephone call and the documents put together for the Reg 14 consultation by the landowners agent for the stie we have chosen to allocate.”
67. This information appears to have been sent to AECOM so it can start reading the information relevant to the SEA process, and therefore appears that those documents would fall within the scope of the request, such that it would be reasonable to include them in a search. Whether or not they are actually in scope can be determined if and when those documents have been located.
68. On those grounds we conclude that a reasonable search would have included asking AECOM to carry out a reasonable search for:
 - 68.1. Any documents sent to them by Dropbox link by email from Govresources Ltd/the Council on 14 April 2021 and on or about 19 April 2021, and
 - 68.2. Any documents that they had received from Govresources Ltd/the Council on or about 14 and 19 April 2021, and

- 68.3. any other information within the scope of the request that they held on behalf of the Council at the date of the request.¹
69. There is no direct evidence before us that the Council have asked AECOM for this information. The Commissioner records in his response that the Council had made the Commissioner aware that it had contacted AECOM following its earlier email dated 11 April 2023 and explained AECOM had not engaged with the Council regarding the request. We do not have evidence of this in the bundle.
70. The appellants emailed Locality and AECOM on 4 May 2023 as follows (p A53):
- “We have been informed by the ICO that on 11 April 2023, The Hertford Heath Parish Council wrote to you asking for you to provide them with a copy of all communications and correspondence (including any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between you and Govt Resources Ltd/ Steering Group/Bob Frost/Hertford Heath Parish Council members, in respect of the production of the scoping report and the SEA, and that you have not engaged with the Council regarding the request.
- Can you please confirm whether you have received an email request from the Parish Council regarding the above and whether you have responded.”
71. We note that this email is slightly inaccurate in that the Commissioner does not state that the enquiry was made on 11 April 2023, nor that it was in writing, nor the specific terms of the enquiry. Even so, in our view, Locality’s response that neither AECOM nor Locality ‘have received such a request for information’ does suggest that reasonable enquiries have not been made of AECOM/Locality.
72. The appellants then email Locality as follows on 10 May 2023:
- “Would you kindly ask Aecom to confirm whether the information/instructions which were supplied to them by the Hertford Heath Parish Council, Steering Group/ Gov Resources Ltd either directly, emailed or transferred via Dropbox link have been filed, retained and are still accessible by Aecom, in relation to the production of the Hertford Heath NHP scoping and SEA process.”
73. Locality’s response is that set out above at paragraph 65 above.
74. On the basis of the above, we conclude that the Council have not made adequate enquiries of AECOM and have therefore failed to carry out an adequate search for information within the scope of the request held on the Council’s behalf.
75. Similarly, whilst the evidence shows that Govresources Ltd no longer have access to the Dropbox link or Dropbox folder it is not clear to us if they have been asked by the Council

¹ a copy of the instructions provided to AECOM by the Council in respect of the Scoping Opinion and SEA process, including a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representative of the Council and AECOM; and a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representatives of the Council and any other third party in respect of the Scoping Opinion and SEA process.

if they have retained and held, at the relevant time, any information on behalf of the Council within the scope of the request.

76. In our view a reasonable search would have included asking Govresources Ltd to carry out a reasonable search for:

- 76.1. Any documents sent by Govresources Ltd to AECOM via Dropbox link or otherwise on 14 April 2021 and on or about 19 April 2021, and
- 76.2. Any documents sent by Govresources Ltd to AECOM on or about 14 and 19 April 2021, and
- 76.3. any other information within the scope of the request that they held on behalf of the Council at the date of the request.²

77. Whilst the first question may already have been asked, it does not appear that the latter two questions have. On the basis of the above, we conclude that the Council have not made adequate enquiries of Govresources Ltd and have therefore failed to carry out an adequate search for information within the scope of the request held on the Council's behalf.

78. Finally the appellants have drawn the tribunal's attention to an email dated 11 February 2021 which states that Paul Wolstencroft, a member of the Steering Group, has been 'collating all the information'. On that basis the appellants assert that he is likely to hold information. The appellants submit that the Chairman of the Steering Group will likely also hold information on behalf of the Parish Council within the scope of the request.

79. It is not clear to us whether these individuals have been asked whether they hold information, but we accept that an adequate search would include asking those individuals to carry out a reasonable search for any information within the scope of the request that they hold on behalf of the Council.

80. We deal with one additional small point. In their submissions dated 6 November 2023 the appellants refer to an email dated 23 July 2021 that suggests that further discussions would have taken place as to the extent of features to be included in the Neighbourhood Plan, which have not been released to the appellants. It appears to the tribunal that that information is likely to have come into existence after the request and would not fall within the scope of the request.

81. In conclusion we find that the failure to ask AECOM, or other parties who were likely to hold information on behalf of the Council was evidence of an inadequate search.

82. We conclude that there was evidence of an inadequate search by the public authority which the Commissioner should have considered before deciding not to make further investigation. In the circumstances of this case we have decided that he was not entitled to accept the word of the public authority without further inquiry.

83. Thus, adopting the same test as the tribunal did in Bromley, the Commissioner fell into error in accepting the assertion of the public authority, on the basis of which he decided on

² a copy of the instructions provided to AECOM by the Council in respect of the Scoping Opinion and SEA process, including a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representative of the Council and AECOM; and a copy of all communications and correspondence (including but not limited to any records of such communications such as meeting notes, diary entries, telephone notes, reports, e-mails, notes and memos) between any representatives of the Council and any other third party in respect of the Scoping Opinion and SEA process.

the balance of probabilities that it was more likely than not that the Council did not hold more information within the scope of the request.

84. We make it clear that we are not deciding that the Council does hold more information within the scope of the request but that in this case there was insufficient evidence to support the conclusion that it was more likely than not that the Council did not hold more information.

85. For all these reasons we have decided that the Information Commissioner's Decision Notice was not in accordance with the law and the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised differently. Accordingly this appeal is allowed and the tribunal's decision above is substituted for that of the Commissioner.

86. For the reasons set out above, the appeal is allowed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 23 November 2023