



NCN: [2024] UKFTT 42 (GRC)

Case Reference: EA/2023/0097

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

Heard by: determination on the papers

**Heard on: 13 November 2023
Decision given on: 16 January
Promulgated on: 19 January 2024**

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER PIETER DE WAAL**

Between

FRANK BOLAND

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appellant	Frank Boland.
Commissioner:	The Information Commissioner.
Decision Notice:	The Decision Notice of the Information Commissioner dated 25 January 2023, reference IC-165176-K4D7.
EIRs:	The Environmental Information Regulations 2004.
FOIA:	The Freedom of Information Act 2000.

Request: The request for information made to the Environment Agency by the Appellant dated 27 August 2021, more particularly described in paragraph 8.

Requested Information: The information which was requested by way of the Request.

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Request.
3. References in this decision to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This was an appeal against the Decision Notice, which (in summary) held that the Environment Agency could rely on regulation 12(5)(a) of the EIRs (national security or public safety) in order to withhold some of the Requested Information. The Decision Notice did not require the Environment Agency to take any steps.

Mode of Hearing

5. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
6. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

7. The background to the appeal is as follows.

The Request

8. On 27 August 2021, the Appellant made a request to the Environment Agency for information in the following terms, in respect of the Mill Leese Flood Storage Area:

"I am therefore formally requesting that you forward to me:

- a. The section 12 and Section 10 reports by the Supervising and Inspection Engineers mentioned on page 2 of the handout you provided at the 10 August on-site meeting;*
- b. Operational instruction 362_09 The Safe Management of Trees;*
- c. Mill Leese Embankment Tree PSRA, proposed works and ecological assessment summary;*
- d. Bat Tree and Activity Survey Report. Corylus, 3 February 2021.*

...I would also like replies to the following questions:

- e. On how many occasions, and on what dates, during the operation of the Flood Storage Area*

has the water level over-topped the spillway tower?

f. On how many occasions, and on what dates, has the spillway tower or culvert become blocked by debris, or otherwise malfunctioned, allowing water levels to rise beyond the top of the spillway tower and what levels above the top of the spillway tower were recorded on each occasion?

g. On how many occasions, and on what dates, has the water level in the Flood Storage Area risen above the level of the bank of the Mill Leese stream at the trash screen but below the level of the top of the spillway tower and what water levels were recorded on each occasion?

For all of the above questions I would like information to cover the periods under both Shepway District Council and Environment Agency management."

The reply

9. The Environment Agency responded on 1 October 2021. It provided the information it held within the scope of elements 'b', 'c' and 'd' of the Request, but stated that it needed additional time to deal with the remaining elements.
10. On 29 November 2021, the Environment Agency issued a further response. It provided information within the scope of elements 'e', 'f' and 'g' of the Request. In respect of element 'a' of the Request, the Environment Agency provided redacted versions of the reports and relied on regulation 12(5)(a) of the EIRs (national security or public safety) to withhold the redacted information. It upheld this position following an internal review.
11. The Appellant contacted the Commissioner on 9 April 2022 to complain about the Environment Agency's response to the Request. He was unhappy that the two reports, sought by element 'a' of the Request, had not been provided in full.

The Decision Notice

12. The Commissioner decided, by way of the Decision Notice, that the Environment Agency had correctly engaged regulation 12(5)(a) of the EIRs and that the balance of the public interest favoured maintaining that exception.
13. The Decision Notice also recorded that, as the Environment Agency had not disclosed information and issued its refusal notice within 20 working days, as required (respectively) by regulations 5(2) and 14(2) of the EIRs, it had breached those regulations. However, the Decision Notice did not require the Environment Agency to take any further steps.

The appeal

14. Regulation 18 of the EIRs provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIRs, subject to certain modifications.
15. The appeal was therefore an appeal against the Decision Notice pursuant to the EIRs, in accordance with section 57 of FOIA as applied by regulation 18 of the EIRs.
16. The Appellant's grounds of appeal did not dispute the redaction of personal data in the information which the Environment Agency provided in response to the Request,

but were focussed on the application of regulation 12(5)(a) of the EIRs. The Appellant's grounds of appeal included various points in support of his view that the redactions of the relevant parts of the Requested Information should not have been made pursuant to that regulation.

17. The Appellant also claimed that the Commissioner failed properly to discharge his responsibilities in considering whether the Environment Agency was acting reasonably in refusing to disclose the relevant Requested Information. The Appellant's grounds of appeal set out various points in respect of his concerns about the manner in which the Commissioner had conducted his investigation into the Appellant's complaint and in respect of the Commissioner's associated reasoning in the Decision Notice.
18. We do not consider it necessary to set out further details of the Appellant's grounds of appeal, nor any other pleadings of the parties, for reasons we explain further below.
19. The Environment Agency was previously a second respondent to the appeal, but was removed as a party pursuant to Case Management Directions of the Tribunal dated 14 August 2023.
20. During the course of the proceedings (and prior to being removed as a party), the Environment Agency, having considered its position further, elected to provide the Appellant with all of the Requested Information (save for some redactions of personal data, which the Appellant did not dispute).
21. Notwithstanding such disclosure of the Requested Information, the Appellant did not agree to a consent order which would dispose of the proceedings, nor did he wish to withdraw his appeal. The Appellant stated, in correspondence with the Tribunal and the other parties, that part of his appeal (namely, the issues which we referred to in paragraph 17) remained valid. The Appellant's view was that the disclosure of the Requested Information did not change his position on how the Commissioner had discharged his responsibilities and he wanted the appeal to proceed (at least insofar as the Commissioner was concerned). The Appellant stated:

"One might also suggest that the Environment Agency's change of heart ought to make it easier to reach a decision on whether the Information Commissioner acted properly. To reiterate, the outcome I seek from this appeal is for the Information Commissioner to be instructed to review the way in which my appeal dated 21 February¹ was handled and rectify deficiencies: this might very well require a revision of guidance to caseworkers on how to approach appeals."

The Tribunal's powers and role

22. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIRs), 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

¹ This was the date of the Appellant's notice of appeal to the Tribunal (not the date of the Appellant's complaint to the Commissioner regarding the Environment Agency's response to the Request).

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."

23. In summary, therefore, the Tribunal's remit for the purposes of the appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently.

Discussion and conclusions

24. As we have noted:

- a. prior to the date of the hearing, the Environment Agency provided the Appellant with all of the Requested Information (save for some redactions of personal data, which the Appellant did not dispute); and
- b. the Appellant wished the appeal to address his claims regarding the conduct of the Commissioner, including whether the Commissioner properly discharged his responsibilities.

25. As the Requested Information which was the subject of the appeal has been disclosed to the Appellant, there was no issue before us which needed to be determined with regard to the subject matter of the Decision Notice (namely, whether or not the Environment Agency could lawfully withhold any Requested Information under the EIRs).

26. The scope of the Tribunal's jurisdiction is as set out in paragraph 22 (and summarised in paragraph 23) and, in essence, relates to the lawfulness of the Decision Notice. For the reasons given in paragraph 25, there was nothing for us to determine with regard to the Decision Notice.

27. As the Tribunal's role and powers are limited to the matters outlined in paragraphs 22 and paragraph 23, the Tribunal has no jurisdiction to determine matters relating to the conduct of the Commissioner or how he handled any investigation in respect of a complaint made to him.

28. For the preceding reasons, there is no relevant issue for us to decide. It follows that we must therefore dismiss the appeal.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 16 January 2024