



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

EA/2011/0101

B E T W E E N:-

SUSAN FRANCES GASKIN

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

Tribunal

Judge Kennedy QC

Suzanne Cosgrave

Michael Jones

Hearing: 9th February 2012.

Decision: 21st February 2012.

Subject matter: Environmental Information Regulations 2004,
regulation 5(1) failing to provide information

DECISION OF THE FIRST-TIER TRIBUNAL:

The appeal is dismissed.

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“Decision Notice”) dated 14 March 2011 (reference FS50312558).
2. The Tribunal Judge and lay members sat to consider this case on the 9th February 2012 and decided it on the papers.

Factual Background to this Appeal:

3. Full details of the background to this appeal, the Appellant’s request made on 9 May 2009 for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here. In brief, the appeal concerns a request made by the Appellant to English Heritage about what consultation had taken place regarding proposed developments in Norwich Cathedral Precinct. English Heritage refused the request on the grounds that there was nothing further held beyond what had already been provided to the Appellant.

The Commissioner’s Decision:

4. The Commissioner served a Decision Notice dated 14 March 2011 in accordance with section 50 FOIA. The Commissioner decided that the request fell to be considered under the Environmental Information Regulations 2004 (the “EIRs”) and that, on a balance of probabilities, English Heritage held no further information other than what had already been disclosed to the Appellant. The Commissioner therefore concluded that no further steps were required to be taken by English Heritage.

The Notice of Appeal:

5. The Appellant appealed by way of a notice of appeal dated 11 April 2011. The grounds of appeal are set out at page 6 of the Notice of Appeal. In addition, the Appellant attached emails dated 11 April 2011 and other documents as supporting documents. This notice of appeal seems to rely on the following grounds as basis for appeal:
 - (i) delay by the Commissioner;
 - (ii) Commissioner has erroneously concluded “all copy is now accessed”;
 - (iii) the Commissioner did not query English Heritage about “anomalies”;
 - (iv) the Commissioner had internal problems; and
 - (v) the Commissioner had two FOI numbers for two parts of the same request;
 - (vi) the Commissioner’s response and or Decision Notice are *Wednesbury* unreasonable.
6. The Appellant also provided further information by email dated 16 April 2011.

Analysis

7. As set out in the Decision Notice at paragraph 11, the scope of this case is confined to whether English Heritage held more information in relation to the “consultation” that had taken place over Norwich Cathedral Close at the point the Appellant’s request was made than had already been provided to the Appellant in response to previous requests.
8. The Commissioner investigated the Appellant’s request and the way in which English Heritage dealt with the request at some great length. The chronology is set out in detail in the Decision Notice at paragraphs 17 to 22.
9. In determining whether a public authority does hold any requested information the Commissioner uses the normal standard of proof, the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the search carried out by the public authority as well as considering, where appropriate, any other

reasons offered by the public authority to explain why the information is not held.

10. The Commissioner concluded, after considering English Heritage's response to his letter of 13 January 2011 that English Heritage had provided the Appellant with all the information it held falling within the scope of her request in response to previous requests. In reaching this conclusion the Commissioner noted the comments provided by the Appellant both by telephone and in writing but did not consider that these provided any further information or detail to enable him to reach a different conclusion. The Commissioner was satisfied that English Heritage has responded to each of the questions asked and explained what it meant by the term "consultation" which had apparently led the Appellant to assume that more information was held than proved to be the case. Whilst this can never be certain, the Commissioner gave his opinion that its response was sufficient to satisfy the balance of probabilities test he had referred to above and that there were no further steps he would ask it to take. Having considered English Heritage's response the Commissioner is therefore satisfied that it does not hold any further information that had not already been supplied to the Appellant.

Tribunal's Decision:

11. The Tribunal agrees with the Commissioner that this request is one which falls to be dealt with under the EIRs
12. The Tribunal finds that both English Heritage and the Commissioner committed a great deal of staff time and resources to considering the Appellant's request. The Tribunal has carefully studied the Commissioner's Decision Notice and can find no fault in the Commissioner's reasoning. In particular, the Tribunal finds the Commissioner correctly applied the balance of probabilities as the appropriate test to be applied in deciding whether English Heritage held any further information in respect of the Appellant's request.

13. The Tribunal has carefully considered all evidence submitted by the Appellant. In respect of the Appellant's grounds of appeal, the Commissioner, in its Response to the notice of appeal, stated:

"...the Appellant has failed to identify, either in the notice of appeal or her subsequent email dated 16 April 2011, any valid grounds of appeal."

14. The Tribunal agrees with the Commissioner's conclusion that the Appellant has failed to identify any valid grounds of appeal.

15. The Tribunal's jurisdiction to determine appeals is drawn from section 58 FOIA. Section 58 provides that:

*(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.

16. In the circumstances of this case, The Tribunal finds that the Commissioner's decision was in accordance with the law and further, that it did not involve any exercise of discretion by the Commissioner. Therefore any question as to whether the Commissioner ought to have exercised his discretion differently does not arise.

17. In the interests of certainty, the Tribunal deals with the specific issues raised by the Appellant.

18. First, in terms of alleged 'delay' by the Commissioner, the Tribunal finds that that the Commissioner in no way caused or contributed to any such alleged 'delay'. On the contrary, the Tribunal finds that the Commissioner and its staff exercised diligence in dealing with the Appellant's request in seeking to clarify

the Appellant's request and in fully and thoroughly investigating whether English Heritage had dealt with the Appellant's request in accordance with the requirements of Part 1 of the FOIA 2000.

19. In addition, in relation to English Heritage, the Tribunal finds that it spent a great deal of time and resources and was also diligent in attending to this request, which itself was confusing at times.
20. In respect of the Appellant's second ground of appeal, namely that the Commissioner "*erroneously concluded 'all copy is now accessed'*", the Tribunal unfortunately has been unable to comprehend exactly what this ground of appeal represents. In any event, the Tribunal finds no error of law in this respect.
21. Thirdly, in respect of the Appellant's contention that the Commissioner did not query English Heritage about "anomalies", the Tribunal finds no basis for this assertion. On the contrary, the Tribunal finds that the Commissioner continually, repeatedly and thoroughly queried English Heritage on all matters pertaining to how it dealt with the Appellant's request.
22. In respect of the Appellant's fourth and fifth grounds of appeal, namely that the Commissioner had internal problems and had two FOI numbers for two parts of the same request, these matters are not within the Tribunal's jurisdiction. In any event, even if they were in the Tribunal's jurisdiction the Tribunal is not persuaded that they in any way amount to or represent an error of law, or a failure by the Commissioner to exercise his discretion, such as would precipitate the Tribunal's exercise of its powers under section 58 of FOIA 2000.
23. In respect of the Appellant's final contention that the Commissioner's response and or Decision Notice is *Wednesbury*¹ unreasonable, the Tribunal does not undertake judicial review however it finds no evidence to support this general

¹ The Appellant did not provide any clarification of her understanding of the applicability of this test to this matter. The Tribunal therefore adopted the following – it is a standard of unreasonableness used in assessing an application for *judicial review* of a public authority's decision. A decision or reasoning is *Wednesbury* unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it.

contention of “unreasonableness” and finds this ground of appeal to be without any substance.

Conclusion

24. In light of the foregoing, the Tribunal dismisses the Appellant’s appeal.

25. The Appellant has the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Brian Kennedy QC

Tribunal Chairman
21st February 2012.