IN THE FIRST-TIER TRIBUNAL Case No. **Appeal No. EA/2014/0314**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50538970

Dated 10th December 2014

BETWEEN Mr Dennis Tilley Appellant

And

The Information Commissioner Respondent

Determined at a paper hearing at Telford Magistrates Court on 28th April 2015

Date of Decision 9th July 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Mike Jones

Subject matter: EIRs r 12(4)(b) manifestly unreasonable

Case law: *Craven v Information Commmissioner2012 UKUT 442AAC*

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50538970 dated 10th December 2014 which held that the London Borough of

Waltham Forest (the Council) had correctly applied r12(4)(b) of the Environmental Information Regulations.

2. *The National Parks and Access to the Countryside Act 1949* required surveying authorities to draft, publicise, consult and publish a Definitive Map and Statement of all the Public Rights of Way for which they were responsible. In 1953 a Definitive Map setting out the rights of way of part of the area that is now The London Borough of Waltham Forest was created falling under the responsibility of Essex County Council, the rest of the area did not appear on a definitive map as it is believed that it was exempt as Urban land being part of Leyton and Chingford[1]. The London Borough of Waltham Forest (the Council) was formed in 1965 as a merger of Leyton, Walthamstow and Chingford Councils.

3. *The Countryside and Rights of Way Act 2000* required a register of applications, consolidation of definitive maps and statements and a rights of way improvement plan to be published not later than 5 years after the commencement of the Act. In 2006/7 the Council commissioned a report from Atkins Highways and Transportation into the Public Rights of Way. This reviewed all the documentation held by the Council which was produced into a schedule and concluded that the statutory obligations were not being met, as no Definitive Map and statement of the whole area existed. (Various drafts and reviews had taken place since 1953 but none had been completed or adopted and as such were not legally binding).

4. Since then a definitive Map and Statement has been produced dated 18th April 2008 for the whole area which includes the routes identified in the 1953 schedule. This is available for public inspection. Another updated Definitive Map and Statement was prepared in 2010 with an additional 119 routes that had been identified as requiring addition to the map. However due to objections from several residents it had to be referred to the Secretary of State.

[1] P24 bundle -Atkins Report

Information Request

5. The Appellant wrote to the Council on 10th December 2013 asking for: "*the definitive map of public footpaths of all the borough together with all the relevant information that backs up that map.*"

6. The Council responded the same day stating that they were not viewing this as a FOIA request and inviting the Appellant to make an appointment with the relevant Officer to view the map. The Appellant responded on 10th December 2013 stating that he wanted the case considered under FOIA and that he wanted "*all the additional information that went to make up this map from applicants and consultants employed by the Council that part might not be considered all for the public record*". In response to a further invitation to view the map the Appellant requested on 12th December 2013

"I want to see the following and make copies if necessary :

i) The definitive maps for the public footpaths for all the borough.
ii) The definitive statements for all these public footpaths that accompanied these maps,
iii) The register including all its parts of applications made for definitive map changes, including those applications made and not determined regardless of when the application was received, all as required by the law".

7. The Appellant was supplied paperwork associated with the work carried out by consultants to produce the Definitive Map and statement 2008 and an appointment was made for the Appellant to view the Definitive Map, Statement of public rights of way and the Register of Applications to modify the Definitive Map and Statement.

8. The Appellant complained to the Council on 12th January 2014 in particular he was concerned that he was only shown the definitive map from 2008 and that the

register only had 2 entries. In an accompanying attachment of the same date he set out further information he would have expected to see[2] from applicants and consultants that he had not been provided with which he argued were within scope.

9. This was treated as an application for an internal review by the Council, who upheld the original decision and did not provide any of the information listed by the Appellant as set out above[3].

Complaint to the Commissioner

10. The Appellant complained to the Commissioner on 23rd April 2014 who conducted an investigation. Although the Appellant raised concerns about the accuracy of the information he had been supplied with and argued that this information should be publicly available for inspection, the Commissioner considered these to be outside his remit. The Council confirmed that it held additional information which had not been provided to the Appellant, and in light of the Commissioner's indication that these requests fell within EIRs, the Council relied upon r12(4)(b EIRs (as compliance with the request would be manifestly unreasonable on the grounds of cost). The Commissioner upheld the refusal to provide the information on that basis, although he found that the refusal notice was not compliant because:

- Although the Appellant was told in the letter of 24th April 2014[4] that the Council could refuse a request if it took longer than 18 hours to fulfil they did not state which exemption they relied upon,

[2] P87 Bundle
[3] 10th February 2014 p90 Bundle
[4] P58 Bundle

- in dealing with it under FOIA rather than EIRs there was no public interest assessment at that time and
- the Appellant was told that he had been provided with all the information when in fact that was not accurate and not the Council's understanding (as they were simultaneously relying upon the likely time that it would take to comply). The Tribunal observes that it appears that there was confusion between the information held pursuant to EIRs and the Council's view of their statutory obligations to allow public inspection of certain documents.

The Appeal

11. The Appellant appealed on 20th December 2014 on the grounds that:

i. The request was under FOIA not EIRs and should be responded to as such,

ii. He was never notified that his FOIA request was to be considered under EIRs and had no opportunity to make representations to the Commissioner.

iii. The documents are public records and the Council are legally required to disclose them.

iv. The Council have "cherry picked" the information they have chosen to give him in spite of the terms of his request.

v. The Council have indicated that they would charge for environmental information when they are not allowed to.

vi. The request is not manifestly unreasonable and r12(4) is not applicable (especially as the Council has spent large sums of money putting its records in order).

vii. The public interest favours disclosure.

12. The Council did not apply to be joined and are not a party to this appeal.

13. All parties indicated that they were content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of the GRC rules that it can

properly determine the issues without a hearing. A bundle has been provided and all parties have had the opportunity to make submissions in writing.

Scope

Information retained pursuant to other legislation

14. The Appellant argues that much of the information that he is asking for is a public record and should be available for inspection under statute irrespective of his rights under FOIA or EIRs. There is a dispute between the Appellant and the Council as to what the Council's duties are under the applicable legislation. The Appellant traces the obligations back to the *National Parks and Access to the Countryside Act 1949* and maintains that all documentation that the Council were ever required to make available to the public should still be made available to the public as these are historical records and the obligation does not end when a document is replaced by an updated version

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15. Specific issues raised between the parties include (but are not limited to):

- s57(6) *Wildlife and Countryside Act 1981* which is read by the Council as meaning that they are not required to keep a copy of previous definitive maps and statements whereas the Appellant argues that they should (we understand this to be on the basis that he reads the provision as being that they are no longer required to keep multiple copies but are still required to keep a single copy and therefore presumably still required to allow inspection).

- The Council argues that they are not obliged to maintain a register of applications prior to 31st December 2005 relying upon regulation 4 of S.I. No.2461 2005 *(The Public Rights of Way (Register of Applications under section 53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005)* which provides:
  "These Regulations do not apply to any application under section 53(5) of the Act which has been determined by the surveying authority under Schedule 14 to the Act before the relevant date [31st December 2005]"

The Appellant argues that regulation 4 should be read as requiring the register to include applications made but not determined by 31st December 2005.

16. It is not the Tribunal's role to determine whether the Council is in breach of these obligations, our jurisdiction is limited to determining whether the Council has fulfilled its obligations under information legislation (FOIA or EIRs).

17. It is not disputed that more information is held than the Appellant has inspected. Regardless of whether the Council are obliged to permit inspection under other legislation, the 1953 definitive map is held as is the draft review map and schedules from 1971 which it was concluded in the Atkins report was not legally binding. The Appellant has been invited to view this material and chosen not to.

The sufficiency and form of the information

18. The Appellant argues that the accuracy, sufficiency and organisation of the information that is held is inadequate and argues that the Council have not organised the information as they are required to under the legislation. In his email dated 30th April 2014 he states:

The process for these documents is ongoing from the 1940s and one of the most important is the register, which should be in two parts ***when is that document going to be ready****?*

I and the general public can follow all the points from the inception of these documents and the people objecting to the routes and why, if these documents are made ready. ***This should have been done way back and soon as you had maps and schedules?***

I await your answer I am not going to thrash around looking through old files like last time which had wrong dates on them and ***not any conclusive index to what they contained*** *that is why a comprehensive registers are required under the law and to follow the such records provided by you and other councils*"[5]

[5] Emphasis added

19. The Tribunal is satisfied that its jurisdiction must relate to the information that is held rather than the information that should be held. The Tribunal accepts that a factor in determining whether it is appropriate for the Council to rely upon cost will be whether some of the work is of their own making (i.e. an inability to find information because it is wrongly or badly filed due to a poor system of organisation in a context where they are obliged to have a better one).

20. However, on the facts of this case, we are satisfied that this is not material. The request is for "all" material, the Appellant has refused to refine his request and the Council have not included a cost or time spent in sorting or searching for the information to find out whether it is within scope or not. On the evidence before us we are satisfied that the location of the information requested is known and the Council's time in fulfilling the request is calculated purely based on the time taken physically to handle each page.

Charging

21. In their email of 29th April 2014 the Council asked the Appellant to let them know

"which documents identified in the February 2007 Atkins report you would like to see (with the exception of Appendices 5 and 6 (Consultation with the Public) which are not available[6]). For the schedules and correspondence I can send copies by e-mail but if you would like to see maps you will need to make an appointment to visit one of our offices. I can also arrange for you to see the draft orders dated 22nd March which were never confirmed – these would also need to be viewed at one of our offices.

It would be appreciated if you could be specific as to which documents you wish to see and would remind you that the Council can refuse your request if it would take longer than 18 hours of officer time or the Council can charge you for complying with such a request".

[6] This information is being refused on the grounds of cost and not e.g. personal data. Only if the Tribunal ruled that r12(4) were not applicable would it be necessary to consider any specific exemptions that might be applicable to specific parts of the whole.

22. The Appellant's case is that this is the wrongful use of the charging provisions and argues that there is no provision for charging for environmental information.

23. Regulation 8 provides that

"where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available [subject to certain exceptions].

However:

(2) A public authority shall not make any charge for allowing an applicant—

(a)to access any public registers or lists of environmental information held by the public authority; or

(b)to examine the information requested at the place which the public authority makes available for that examination.

24. In this case whilst there is reference to inspection of certain information at the Council's offices, there is also the offer to provide copies of schedules and correspondence. Charging is permitted for the provision of a copy of the information. The Tribunal has not found it necessary to explore the Council's charging schedules and exactly what information it would be applied to, as on the facts of this case, no demand for payment was made, and there is therefore no evidence of wrongful or improper use of the 'charging regulations'. The information has not been provided because it was too expensive in staff time to disclose it, not because the Council required an upfront payment of charges for providing the information.

Procedure before the Commissioner

25. As set out in the Commissioner's decision notice, although the Appellant's request was made under FOIA, it was initially treated as being outside FOIA and no

specific exemption was relied upon although reference was made to a time limit of 18 hours in answering the request. The Tribunal agrees that the refusal notice was deficient as set out by the Commissioner. The Appellant argues that he was not notified of any change and had no opportunity to address the Commissioner on this point. The Tribunal observes that there is no requirement to notify the Appellant prior to making the decision and that on the facts of that case there would be no prejudice to the Appellant as arguably the EIRs are the more favourable regime for the Applicant in that they include:

- a presumption in favour of disclosure and
- a public interest test to be carried out, both of which are absent from FOIA. Similarly the Commissioner relied upon *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* in assessing the burden of the request as he would have done had the case been considered under FOIA.

26. In any event Appeal to the Tribunal provides the remedy, the Appellant has had disclosure of all the information before the Commissioner and is able to make submissions upon the applicability of FOIA. The Tribunal is not bound by the Commissioner's findings of fact or law, the Appeal is a complete rehearing.

Appropriate Regime

27. The Appellant argues that the EIRs are not material because the information requested is historical and amounts to a line on a map, being so old it will no longer impact upon the physical appearance of land, its use or make up or landscape.

28. The Tribunal disagrees, we adopt the reasoning of the Commissioner at paragraphs 21-26 of the Decision notice with which we agree and observe that the object and purpose of definitive maps and their supporting information is to make decisions as to where public footpaths will be and which bits of land will not be so designated. The designation of land as a public footpath affects the volume of use and the frequency of it being walked, or ridden upon or whether there is vehicular

access all of which impact upon the composition of the land and landscape:, its look, pollution, erosion, whether it is being used for agriculture etc. It envisages the likelihood of signposts, fencing and is restrictive as well as permissive in terms of use.

Manifestly unreasonable

29. Regulation 12 provides that

(4) ... a public authority may refuse to disclose information to the extent that—

...

(b)the request for information is manifestly unreasonable;

30. *Craven v Information Commmissioner2012 UKUT 442AAC* is an upper Tribunal case which stated:
"... it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming of course it is also satisfied that the public interest test favours maintaining the exception)."

31. *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* specifies the costs limits applicable under FOIA. We are satisfied that this provides useful guidance for assessing the reasonableness of a request under EIRs. The Regulations provide for an upper limit of £450 which equates to 18 hours of staff time chargeable at the flat rate of £25 for local authorities.

32. In determining whether this exemption is applicable we accept the assessment of cost as set out in the Council's letter to the Commissioner dated 10th November 2014 which estimates a total of over 53 hours and a cost of over £1,300. As set out above we are satisfied that the Council have not included a cost for searching for or assessing the relevance of the information in light of the broad nature of the

information requested and that the time and hence cost of disclosing this information relates to the volume of the information in scope. We also note that this does not include a cost for the costs of materials were this information to be copied.

Public Interest test

33. The exemption is subject to the public interest test as set out in regulation 12(1)(b).

In favour of Disclosure

34. We are satisfied that the following factors should be taken into consideration in favour of disclosure:
    - It is important that the public know that official documents are accurate (e.g. the definitive map).
    - It facilitates public engagement and provides scrutiny, transparency and understanding of why decisions have been made.
    - Correspondence provides understanding of the outcome of an eventual decision and the process that has been followed.
    - EIRs provide a presumption in favour of disclosure - r12(2) EIRs, which we apply in the Appellant's favour. However, we agree with the Commissioner that whilst there is a presumption in favour of disclosure this does not grant the public an entitlement to have access to public records or any other information in all circumstances, it is dependent upon where the balance of the public interest lies. The Appellant argues that failure to disclose is censoring the information available to the public, however, we are satisfied that a decision that the public interest balance favours maintaining the exemption of regulation 12(4)(b) does not involve an authority censoring the information available. It means that the public interest in maintaining the exemption is stronger.

35. The Appellant relies upon the sums of money that the Council has already spent putting its documentation in order. The Tribunal is satisfied that this is not a

factor in favour of the disclosure of a blanket request such as this in light of the additional costs of producing the information which as set out above will not go towards the indexing or better record keeping but will be incurred purely in producing the information as it is currently held.

36. The Appellant argues that the Council should have kept this information as a matter of course in good management of important documents. He argues that there is a public interest that true and accurate public records are kept for public rights of way. However, the Council's case is not that the records have not been kept, rather that a requirement to disclose them (in circumstances when they are not in an easy form to disclose in their entirety) would be manifestly unreasonable on the grounds of cost.

37. The Appellant has not pointed to any wider value in the requested information being available, than the general principles of transparency and scrutiny as set out above. In assessing the weight of those arguments we take into consideration that there is a definitive ma*p that is available for inspection and it is likely that other information is available from other sources e.g. the ordnance survey office both historically and in relation to the up to date position.*

In favour of Withholding

38. *We are satisfied that* the following factors are in favour of upholding the exemption:

- The designated map means that the issues have already been debated and there would have been public participation and scrutiny as part of that process,
- The Appellant has been invited to refine h*i*s request and offered the opportunity to inspect other parts of the information if he specifies which documents he wishes to see.
- The Appellant has been given the Atkins report which lists the documentation that was identified during the 2007 review, we are satisfied that the Appellant has therefore been provided with sufficient information to help him to identify specific documents in order to narrow the focus of his request.

- In light of the costs of full compliance, we are satisfied that this is a more proportionate way that the interests of the Appellant and public transparency can be achieved.

39. The Appellant has argued that by showing him only the 2008 Definitive Map and Schedule at the meeting on 10th January 2014, the Council have cherry picked the information he can see. The Tribunal disagrees with this, the Appellant has been offered the opportunity to specify other documents in which case an appointment will be made to see them, he has however chosen not to engage in that process. Part of his reasoning appears to be that it would take him too long to organise the material into a useful format so that he can follow it, or find what he is looking for however, disclosure under EIR relates to what is held not what should be held and does not create a requirement upon a public authority to create new information. Even if the Tribunal were to order a copy of all the material held be disclosed it would not be entitled to order that it be indexed/summarised or processed in any other way.

40. In addition to the cost of complying with the request the Tribunal has also taken into consideration the fact that there is no full time member of staff dedicated to rights of way. Compliance with the request would divert other staff engaged in highway maintenance. Whilst the Appellant disputes the factual accuracy of the reason for the staffing levels in that he argues that Waltham Forest has 100s of public rights of way which in his view is not "a relatively small network". The Tribunal is satisfied that this is not material to its assessment, the number of public rights of ways is a matter of fact and the assessment of whether (when compared to other public authorities) this is big or small is not material. The issue for the Tribunal is the assertion that other staff members would be diverted from their principle duties which can be assumed to be detrimental to the provision of other services. On the basis of the assessment of time that would be taken in the context of the volume of material in scope we are satisfied that this is a reasonable conclusion and is a factor to be taken in assessing the public interest.

Conclusion

41. For the reasons set out above we refuse the appeal and uphold the decision notice because we are satisfied that the exemption is engaged on the grounds of cost and the public interest is not in favour of disclosure.

42. Our decision is unanimous.

Dated this 9th day of July 2015

Fiona Henderson
Tribunal Judge