



Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2016/0030

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0588051
Dated: 13 January 2016

Appellant: Peter Askey

Respondent: The Information Commissioner

Heard at: Chester Civil Justice Centre

Date of Hearing: 21 June 2016

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and Malcolm Clarke

Tribunal Members

Date of Decision: 5 July 2016

Attendances:

For the Appellant: in person

For the Respondent: no attendance

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 13 January 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings, Mr Askey, explained to the tribunal that he has operated a boatyard in Chester for about six years. He is in dispute with the local council (Cheshire West and Chester, “the Council”) about planning issues relating to a site adjacent to his yard. He wishes to prevent the building of a number of residential units on that site. He stated that the original boundary wall to the site was within a Conservation Area and was demolished in 2007.. He hopes to demonstrate that the demolition was unlawful and on the basis of that require the Council (which now owns the land on which the wall stood and which is now used as a footpath) to rebuild the wall. He described the issue of the wall as being “part of a much bigger problem with Chester’s planning department”. He has been in contact with the Council about this since 2012 and has sought the support of MPs, the Local Government Ombudsman and others. He considers that the planning department of the Council is responsible for a “heritage crime” of demolishing a listed building without permission as the liability for the listed wall now lies with the planning department since the Council now owns the site of the wall. He has attempted to interest the police in prosecuting an offence, but when they are presented with a piece of paper (the listed building consent at the heart of this case) they lose interest.

2. On 1 July 2015 Mr Askey contacted the Council:-

“Under the Freedom of Information Act, please could you provide me with the following information:

Council employees have informed me that Listed Building Consent 03/0052/LBC gave permission for part of a listed boundary wall on Upper Camden Road, Chester to be demolished (copy available on CQ&C website). It is noted that in the “Officer Report” for 03/0052/LBC it states “Having regard to the earlier consent, approval is recommended”. (copy available on CW&C website). The earlier consent is 96/00364/LBC in which it states “the repair repointing and replacement of brickwork including the boundary wall, gates and piers” (copy available on CW&C website).

Where exactly in 03/0052/LBC does it state part of this listed boundary wall can be destroyed?”

3. The report for 03/0052/LBC is a four page report to the Council’s planning board in May 2003 recommending the Council give consent to a proposal for “refurbishment of vacant waterside building at Taylors Boatyard to form office space, new extension and new one way access off Upper Cambrian Road, creating 33 car parking spaces.” The document summarises the conditions of consent, describes the site, lists relevant planning history, responses to consultation and representations, relevant planning policies. Under “other issues” it states:-

“consent has previously been given (96/00353/CAC), and remains extant, to demolish a number of buildings on the larger site including those to be removed to allow the construction of the planned car park.”

4. The listed building consent 03/00052/LBC is a three page document granting consent for the works and making it subject to conditions which are beginning the work within five years, submitting detailed drawings, samples of building materials, details of external lighting and a schedule of works in relation to the building for approval and requiring the work to be carried out in accordance with a list of site plans.
5. In its response of 2 July 2015 the Council explained that it was dealing with the request under the Environmental Information Regulations and stated:-

“Your email does not contain a request but a question and refers to information that you already have. The question has I understand also been answered previously during the planning and complaints process.

Your request is respectfully declined.

The Council considers that your request is not a request as defined by the legislation.”

6. On the same day he requested an internal review, the same day the Council responded upholding its decision and including the text of a detailed explanation of its position sent to Mr Askey on 26 July 2013 as a response to his earlier formal complaint. That response discussed and described the significance of various documents noting that he had been shown various plans whose significance and relevance he disputed. The response concluded (bundle page 58):-

“You were shown documents relating to 03/00052/LBC, the plans of which appear to show an identical boundary wall scheme to that approved in 1997 and which make reference to “reconstructed wall”. It was explained to you that the plan referred to was date stamped the 28th September 2006, which was after the grant of 03/00052/LBC on 21st May 2003. However based on the documents available, it would seem highly likely that the demolition of the whole frontage wall was allowed by the grant of 03/00052/LBC. You were also advised that there were no conditions placed on the consent that required the retention of any parts of the boundary wall, or even a condition requiring its reconstruction. You did not accept this response.

You were advised that the full list of approved documents in condition 6 of 03/00052/LBC had not come to light but that copies were being obtained to confirm the position. You suggested speaking to CTP and you were advised that this would form part of the investigation.

There was clearly not going to be any agreement over the status of the boundary wall and you remained of the opinion that the works didn't have consent and that the council had failed to act to protect the wall and require its reinstatement. You advised that this was your required outcome.”

7. Mr Askey complained to the Respondent in these proceedings, the Information Commissioner (“ICO”) who investigated. During the course of the investigation Mr Askey stated that he wished to request a number of drawings and approvals relating to file references 03/00052/LBC and 96/00364/LBC (email, bundle page 70, decision notice paragraph 9). The ICO advised him that the scope of the request was defined by the original request, Mr Askey disagreed. The ICO stated (decision notice paragraph 10):-

“The Commissioner would like to make it clear that in his view the scope of this request does not extend to all of the information the council may have used to make its decision. It extends only to the issue of whether the council held any recorded information within the file 03/0052/LBC that stated that part of the listed wall could be destroyed.”

8. The ICO then noted the council's initial response and explanation (decision notice paragraph 11) and continued:-

“it is worth exploring the background complaint as this is relevant to the question of whether the information requested was held by the council.”

9. The ICO then reviewed the complaint history (paragraphs 12 -16) concluding on the balance of probabilities the Council did not hold the *“specific recorded information requested”*. The ICO then found that the Council had not provided a valid refusal notice under the EIR within 20 days.
10. In his grounds of appeal Mr Askey confirmed *“I fully agree with the Commissioner that “the requested information was not in fact held””*. He sought confirmation from the Commissioner that *“there is no information in Listed building consent 03/00052/LBC that allows part of the listed wall on Upper Cambrian Road, Chester to be destroyed?”*. He argued that the Council had known for years that the information did not exist but had suppressed the requested information. The Information Commissioner should not have used the *“balance of probabilities”* in his decision since there was no dispute as to the extent of the recorded information.
11. During the course of the hearing Mr Askey criticised the Council for not answering the question he had asked. He considered that the planning department had not followed its own processes. He believed that there should have been a demolition plan but one does not exist. He stated: *“I know the answer I have been given 3/00052/LBC is not the permission to pull down the wall”*. He felt that he was entitled to all the associated plans related to the site and it was clear that the Council was withholding information. He stated that he had appealed for three reasons:- because he did not understand the Information Commissioner’s use of the *“burden of proof”*, he felt that the decision notice was based on *“nonsense”* from the Council and unrelated documents, he had been given wrong information and the proper information had been blocked.
12. In his response to the appeal the ICO maintained his position. He noted that the requested information was not held, he had seen no evidence of obstruction of investigation or concealment of information. In determining whether information was held the balance of probabilities was the correct test and had been correctly decided on the evidence
13. The ribunal was satisfied that this appeal was fundamentally misconceived. Although couched as a request for information the reality is that it was a request to the Council

to interpret a document that Mr Askey already had and where he already knew, due to a long running dispute, that he and the Council differed as to that interpretation. The initial response of the Council was correct. The request was in reality an attempt to continue a dispute in another forum. On the face of the request it was for interpretation of a specific document – the listed building consent and that interpretation had repeatedly been given.

14. Mr Askey told the Tribunal that he thought the ICO in stating that no information was held had by that decision in effect reached a conclusion on whether a criminal act in relation to a listed building i.e. unauthorised demolition, had occurred. It is clear that the ICO had reached no such conclusion and it would have been outside his powers to do so, as it is for the Tribunal to consider such a matter.
15. The ICO in his report attempted to assist Mr Askey by exploring the background documents. While this was well-intentioned it was unnecessary and counter-productive since it repeated an exercise which the Council had already conducted of explaining the document in the light of other documents not within the scope of the request. The ICO very properly confirmed to Mr Askey that if he wished to see further documents he should make a further request (although from the documents before the Tribunal it was clear to the Tribunal that he had already had access to many further documents relating to the planning history of the site).
16. There are no valid grounds of appeal put forward by Mr Askey and this appeal must fail.
17. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 5 July 2016