



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

**Appeal Reference: EA/2017/0193**

**Decided without a hearing  
On 30/1/2018**

**Before**

**JUDGE KAREN BOOTH**

**TRIBUNAL MEMBERS  
MS ROSALIND TATAM AND DR HENRY FITZHUGH**

**Between**

**VINCENT JOHN HEDGES**

**and**

**THE INFORMATION COMMISSIONER**

Appellant

Respondent

## DECISION OF THE FIRST-TIER TRIBUNAL

1. The appeal is allowed in part. For the reasons set out below, the Tribunal substitutes the following decision notice in place of the Respondent's decision notice dated 16/8/2017.

### SUBSTITUTE DECISION NOTICE

Public authority: Suffolk County Council  
Complainant: Mr John Hedges

#### The substitute decision

For the reasons set out in the Tribunal's Decision below, the public authority did not deal with the Complainant's request for information dated 18/12/2016 in accordance with the Environmental Information Regulations 2004 ("EIRs") because the public authority (a) provided its response outside the statutory 20 working day time limit; and (b) treated some of the representations made by the Complainant on 6/2/2017 in relation to that response as a new request for information, when they should have been treated as a request for reconsideration in accordance with regulation 11 of the EIRs.

Notwithstanding this, the public authority is not required to take any steps as the Tribunal agrees that, on the balance of probabilities, the public authority does not hold relevant information further to that already provided.

### REASONS

#### *Background to the appeal*

2. The Appellant made an information request to Suffolk County Council ("SCC") on 18/12/2016. He was requesting information relating to communications between SCC, Waveney District Council ("WDC") and Adnams plc about three planning applications relating to proposed works at the Swan Hotel in Victoria Street, Southwold.
3. SCC is the relevant highways authority, WDC is the relevant planning authority and Adnams plc was the planning applicant. WDC and Suffolk Coastal District Council work in partnership and have shared services arrangements. The Appellant owns property in Victoria Street and represents other residents of Victoria Street who oppose the planning application. He had particular concerns about the road safety issues connected with the proposed new access arrangements. The planning application became the subject of a judicial review application made by the Appellant in February 2017.
4. The Appellant's request was sent to SCC by email on 18/12/2016 (we noted that the Respondent's decision notice incorrectly refers to the request being dated 8/12/2016) and was worded as follows:

*"I would like to see the following information in connection with Suffolk Highways consultation ref: SCC Ref: 570\CON\3761\16 and earlier related consultations:*

*1. Details of communications and meetings between any of the following parties: [third party company] (the applicant) or its agents, Suffolk County Council (the highways authority) and Waveney District Council (the planning authority), in respect of the Victoria St. access, its dimensions and visibility splays in connection with planning applications: DC/15/1016/FUL, DC/16/2587/FUL and DC /16/3381/FUL and agreement reached to justify the sub-standard access specification deemed acceptable for DC/16/3381/FUL.*

*2. Details of the road safety risk assessment carried out for the first consultation in respect access specification for DC/16/3381/FUL in relation to the traffic speeds and the forecast increase in traffic for Victoria St, and those parts of the conservation area affected by the diverted traffic flows.*

*3. Details of the road safety risk assessment carried out in relation to the Swan carriage archway and the impact of the forecast 17% reduction of vehicle movements resulting from the Swan refurbishment scheme DC/16/2587/FUL and DC/16/3381/FUL.*

*4. Details (by reference to email correspondence or otherwise) of the further consultation request from Waveney District council and steps taken to provide a response in relation to DC/16/3381/FUL and (a) the applicant's Traffic Report and (b) my critique of it in the form of Comments on Traffic Tech Note."*

5. On 26/1/2017, SCC posted two CDs containing relevant information to the Appellant and explained that some information had been redacted on the basis that it was personal data. Those redactions are not in issue in this appeal.
6. On 6/2/17 the Appellant contacted SCC to say that he was dissatisfied with the response. He: (a) identified two areas where he considered the response to be incomplete and he also queried the entire redaction of one particular email; and (b) pointed out that his request for information relating to the road safety risk assessments had not been addressed at all.

SCC treated (a) as a new request for information and they conducted an internal review in relation to (b).

7. On 7/3/2017, SCC informed the appellant of the outcome of their internal review; that is, that there were no road safety risk assessments in connection with the relevant planning applications and that they did not hold an unredacted copy of the email referred to above (that email was subsequently discovered to be a "corrupted copy" of a photograph taken by the Appellant -

an “uncorrupted version” was subsequently located and provided to the Appellant on 22/3/2017). They responded to his “new” request for information and informed him that they did not hold any further relevant information (the date of that response was not clear to us).

8. On 9/3/2017, the Appellant applied to the Respondent for a decision as to whether his request for information had been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000. On 16/8/2017, the Respondent decided that SCC had provided its response outside the 20 working day time limit but had otherwise dealt with the request in accordance with the Environmental Information Regulations 2004 (having decided, on the balance of probabilities, that SCC did not hold any further information falling within the scope of the request).

#### *The appeal grounds*

9. The Appellant’s grounds of appeal can be summarised as follows:
  - The Respondent’s interpretation of the request for information (as a request for external communications only between the two Councils and Adnams) was unjustifiably narrow.
  - The Respondent had incorrectly limited the scope of the request to information held at the time of the Respondent’s decision, rather than at the time of the request (this, however, was clearly misconceived – see paragraph 48 of the decision notice).
  - Within the information provided there was clear evidence of two relevant emails having been sent by Adnams management to SCC, which had not been provided to the Appellant.
  - The Appellant’s request for sight of those emails should not have been treated as a new request.
  - Querying why the Respondent was satisfied that the missing emails had been deleted properly in accordance with SCC’s best practice.

The outcome sought by the Appellant was a revision of the Respondent’s decision in order to: record that SCC had failed to respond adequately to the Appellant’s request for information; record that SCC had deliberately destroyed, altered or hid requested information; and to include some comments on the adequacy or otherwise of SCC’s data management policy relating to the retention/detention of emails.

10. Both parties had consented to the matter being determined without a hearing and, after considering the bundle of evidence, we were satisfied that we could properly determine the issues without a hearing.

### *The law*

11. The information that was requested clearly fell within the definition of “environmental information” within the meaning of the Environmental Information Regulations 2004 (“the EIRs”). It is that disclosure regime, therefore, that applies to this appeal.
12. The key provisions of the EIRs in relation to this appeal are: regulation 5 (duty to make available environmental information on request); regulation 11 (representations and reconsideration); and regulation 18 (enforcement and appeals provisions, which applies (with modifications) the enforcement and appeals provisions of the Freedom of information Act 2000 (“FOIA”) to the EIRs regime).
13. The provisions relating to the determination of EIR (and FOIA) appeals are set out in section 58 of FOIA. In relation to this appeal, it was our task to decide whether the Respondent’s decision notice dated 16/8/2017 was in accordance with the law. If it was not, we were required to allow the appeal or substitute such other notice as could have been served by the Respondent. If we decided otherwise, we were required to dismiss the appeal. We are empowered to review any finding of fact on which a decision notice is based.

### *The relevant issues*

14. The issues we had to decide were as follows:
  - What information potentially fell within the scope of the Appellant’s request for information?
  - Whether SCC dealt with the request for information in accordance with the EIRs; and
  - Whether SCC held further relevant information at the time of the request that it had unlawfully failed to disclose?

The issue that we did not and could not decide was whether, as alleged by the Appellant, SCC had deliberately destroyed information to prevent it from being disclosed. Under regulation 19 of the EIRs, it is an offence for a person to destroy etc. any record held by a public authority to which a request for information has been made, with the intention of preventing its disclosure. That is not a matter that falls within our jurisdiction.

### *The evidence*

15. The evidence before us was the paper evidence contained in the bundle of evidence (from pages 1 to 355 and the Appellant’s supplementary submission dated 30/12/2017).

### *The scope of the request*

16. Our understanding of the scope of paragraph 1 of the request was that it was intended to catch information relating to communications/meetings about the specified subject matter, which had taken place between (a) SCC and Adnams;

(b) WDC and Adnams (if held by SCC); SCC and WDC; and SCC, WDC and Adnams.

17. Given the inclusion of the words “.. between any of the following parties” (my emphasis), it did not in our view catch purely internal communications etc. between officers of SCC. In our judgement, that was the only way in which the request could be objectively read.
18. Some of the additional information sought by the Appellant in his email dated 6/2/2017 to SCC (page 195 of the bundle) did, therefore, in our view fall within the scope of paragraph 1 of the original request. Given our conclusion below about the origins of the Adnams “footers”, this included some of the information referred to in bullet 1 (i.e. any correspondence that emanated from Adnams) and all of the information in bullet 3. The information referred to in bullet 2 would have fallen within the scope of the original request to the extent that it included any correspondence between the parties referred to above (other than purely internal correspondence within SCC relating to the site meeting on 17/5/2016).

*Was the request for information dealt with in accordance with the EIRs?*

19. It follows from paragraphs 16-18 above that SCC was in breach of the EIRs by treating all of the first part of the Appellant’s email of 6/2/2017 as a new request for information. They should instead have reconsidered their original response in accordance with regulation 11 of the EIRs.
20. The fact that SCC provided its response to the original request for information outside the 20 working day deadline specified in regulation 5(2) of the EIRs was not in issue.

*Did SCC hold further relevant information at the time of the request that it had unlawfully failed to disclose?*

*Information allegedly missing from File 16*

21. File 16 (pages 26-32 of the bundle of evidence) is one of the files of information that SCC provided to the Appellant. It is comprised of copies of email correspondence passing primarily between personnel in the Development Management division of SCC and Adnams architect, Simon Merrett, during the period 25/4/16 to 16/5/16 inclusive. The emails are about the proposed access details relating to the Swan Hotel.
22. On page 27 of the bundle is a copy of an email dated 13/5/2016 which was sent by Deborah Cadman, the Chief Executive Officer of SCC, to Geoff Dobson, the Director of Resource Management at SCC. The words that appear in the subject heading of her emails are: “Fwd: Swan Hotel, Southwold - Road.” Ms Cadman’s name does not appear on any of the earlier emails in that file, either as a recipient or as a copyee. On page 32 of the bundle is a copy of part of an email from Karen Hester, Chief Operating Officer of Adnams. The only part of

the email that appears is what the Appellant refers to as the "footer"; that is, Ms Hester's signature block, some corporate information about Adnams and some standard disclaimer wording. It is not apparent when that email was sent nor to whom, nor when that information was deleted.

*The events of 30/11/2016*

23. The Appellant asserts that at 08:00 on 30/11/2016, having formed the view that site work had commenced at the Swan Hotel before the discharge of planning conditions, he took a photograph of the site and sent it to his own tablet device. At 09:30 on the same day, he sent an email (a copy of which is at page 36 of the bundle of evidence) with a copy of the photograph to relevant officers in WDC and East Suffolk District Council. That email is from now on referred to as "EM301116". He then sent the same photograph, with a short email message (a copy of which is at page 269 of the bundle) to Andy Wood of Adnams plc. He denies sending EM301116 to anyone at SCC.

*Information allegedly missing from File 26*

24. File 26 (pages 34-39 of the bundle of evidence) is another file of information that SCC provided to the Appellant. File 26 includes (at page 35 of the bundle) a copy of an email dated 2/12/2016 and sent at 14:04 from Zoe Crosby, Executive Assistant to Ms Cadman, to Sue Roper of SCC. The words that appear in the subject heading of that email are "FW: DC/16/3381/FUL:" and the email refers to "the email below" (on page 36), which is a forwarded email and is clearly EM301116 and the photograph to which that email refers.

On page 39 of file 26 is a copy of part of an email from Adnams. Again, only the "footer" of the email appears but this time the details of the individual Adnams sender do not appear. Again, it is not apparent when the email was sent nor to whom, nor when that information was deleted.

*Our findings of fact in relation to the missing information from Files 16 and 26*

25. We made the following findings of fact:

- Email correspondence was sent by or on behalf of Karen Hester, Chief Operating Officer of Adnams, to Deborah Cadman, Chief Executive Officer of SCC, or one of her team in May 2016 and it was that correspondence that triggered Deborah Cadman's email of 13/5/2016 to Geoff Dobson.
- The Appellant did not at any time send EM301116 or the photograph to which it refers to SCC.
- Someone from Adnams forwarded EM301116 and the photograph to which it refers by email to Deborah Cadman or one of her team at some point after 09:30 on 30/11/2016 and before 14:04 on 2/12/2016. It was that email correspondence that triggered Zoe Crosby's email of 2/12/2016 to Sue Roper.

- The missing parts of the Adnams emails referred to above were no longer held by SCC when the Appellant's request for information was received by SCC on 18/12/2016.

26. The evidence before us supported the Appellant's account about to whom he sent EM301116 and the photograph. It was clear that the Respondent had in fact confused the email addresses of officers in SCC with those in WDC and Sussex Coastal District Council. In our judgement, there is no other reasonable explanation than as described above for the appearance of the Adnams' "footers" in Files 16 and 26.

27. The EIRs do not impose an obligation on a public authority to *keep* information (although a public authority is under a duty to comply with the Code of practice issued under section 46 of FOIA and must keep information where there is a legal requirement to do so). As a matter of law, the duties imposed by the EIRs only apply to information held at the time that a request for information is received.

28. Despite the failure of SCC to respond to the request for information within the statutory deadline, SCC had provided a substantial amount of information following the Appellant's original request and had, in our judgement, approached the task in a professional and diligent manner.

29. After reviewing the correspondence at pages 249, 275, 332, 345 and 352 of the bundle of evidence and the note at 355 of the bundle, we were satisfied that the Respondent properly and thoroughly investigated the adequacy of the search conducted by SCC. We were also satisfied from the responses of SCC at pages 290, 341, 349 and 354 of the bundle that they had carried out a reasonable search and that the scope of their search and the search terms used were appropriate and sufficient to capture any further relevant information that was held at the time of the request. It was, in our view, plausible that the missing parts of the emails in question had been deleted prior to the receipt of the Appellant's request. The Respondent applied the correct legal test when deciding the issue on the balance of probabilities and we agreed with the Respondent's conclusion in that respect.

#### *Our decision*

30. The Respondent's decision notice should also have stated that SCC was in breach of the EIRs by treating the information referred to in the bullet points within the Appellant's email dated 6/2/2017 to SCC (other than information contained in purely internal correspondence between officers of SCC) as a new request for information, rather than a request for reconsideration under regulation 11. It was otherwise in accordance with the law. The appeal is, therefore, allowed to that extent and the Tribunal substitutes the decision notice set out in paragraph 1 above in place of the Respondent's decision notice dated 16/8/2017.



Date Promulgated:  
26 February 2018

**Karen Booth**

**Judge of the First-tier Tribunal**  
**Date: 25 February 2018**

