



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

Appeal Reference: EA/2017/0250

**Decided without a hearing
On 9 May 2018**

Before

JUDGE ANTHONY SNELSON

Between

MR & MRS C WALKER

Appellants

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is dismissed.

REASONS

Background

1. The Appellants are residents of Belper, in Derbyshire. They have, over a significant period, entered into lengthy correspondence with the Derbyshire County Council ('the council') on the subject of land drainage in their vicinity.

2. On 4 January 2017 the Appellants presented to the Council a request for information to do with a flood risk assessment and its bearing upon a particular local planning application.
3. On 6 January 2017 the council responded, supplying certain information.
4. Dissatisfied, the Appellants pursued a complaint that their questions had not been answered adequately or at all. A review followed, which was completed on 24 March 2017, the council maintaining that it had responded to the requests but adding some further clarification.
5. In the meantime, on 27 January 2017, the Appellants had complained to the Respondent ('the Commissioner'), alleging that the council had failed to provide the information requested.
6. By a decision notice dated 4 October 2017 the Commissioner concluded that the council did not hold the information sought and that it was in breach of its statutory obligations for failing to declare that fact.
7. By a notice of appeal dated 23 October 2017, the Appellants challenged the Commissioner's adjudication.
8. The appeal is before me for consideration on paper, both parties being content for it to be determined without a hearing.

The applicable law

9. The information sought by the Appellants falls within the scope of the Environmental Information Regulations 2004 ('EIR'). By reg 2(1) 'environmental information' comprises "any information in written, visual, aural, electronic or any other material form" on a wide range of subjects including "(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites ..."
10. Reg 5(1) enacts a general duty on public authorities holding environmental information to make it available on request.
11. Exceptions to the duty are covered by reg 12 which, so far as material, provides:
 - (1) Subject to ... A public authority may refuse to disclose environmental information requested if -
 - (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received ...

12. In *Bromley and Information Commissioner-v-Environment Agency* EA/2006/0072, the Information Tribunal held that any question under reg 12(1) and (4)(a) is to be decided on a balance of probabilities, adding:

Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.

13. The appeal is brought pursuant to the Freedom of Information Act 2000, s57, as modified by EIR reg 18. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal consider -

- (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.

The request, the response and the review

14. The Appellants' request of for January 2017 was in these terms:

**DCC¹ FLOOD RISK MANAGEMENT TEAM RECOMMENDATIONS -
OBJECTION**

REASONS AND KEY CONCERNS

1. No site specific Flood Risk Assessment has been provided with this particular application nor has any drainage strategy been proposed, therefore the Derbyshire County Council Flood Risk Management Team recommends an objection to the proposed development.

The FRM Team Consultee to AVBC [Amber Valley Borough Council] Case Officer 'Following receipt and review [of] the submitted Flood Risk Assessment, I [name] can confirm the Flood Risk Management Team has no further comment to make.'

WE REQUEST With regard to FRM team comments at point 1: Please supply where has the evidence (to support Consultee response) been taken from in the submitted

¹ Derbyshire County Council

Flood Risk Assessment by Planning Design? Page number and specific sections to be named.

REASONS AND KEY CONCERNS

2. Furthermore the County Council are aware of flooding within close proximity of the proposed site boundary and this should be considered in detail by the applicant.

WE REQUEST With regard to FRM team comments at point 2: Please supply where has the evidence (to support Consultee response) been taken from in the submitted Flood Risk Assessment by Planning Design? The FRM Team requirement be considered (sic) in detail by the applicant. Page number and specific sections to be named.

15. The council's response of 6 January 2017 was in these terms:

I have been informed by [name] that the information in sections: 2 (page 3), 7 (page 13) and 8 (page 14) in the submitted FRA were used to help form the Flood Risk Management team's response.

16. The review completed on 24 March 2017 resulted in the council confirming to the Appellants that (in its view) it had answered the questions posed and that its response of 6 January had been intended to address the two parts of their request compendiously since the replies to each were identical.

The Commissioner's inquiry and conclusions

17. The Commissioner ascertained through exchanges with the council that the response of 6 January had been constructed in reliance upon the pooled recollections of their risk management officers, there being no relevant documentary records. It was noted that, unfortunately, the response was not accompanied by an explanation (a) that it stood as an answer to both questions; (b) that it was the product of recollections only; and (c) that there was no relevant documentary record. The Commissioner inquired about the search for documentation which had been put into effect pursuant to the Appellants' request and was assured (with detail) that the search had been comprehensive and that no material of relevance had been deleted or destroyed. The council also explained to the Commissioner that it had not been the local planning authority for the purposes of the application with which the Appellants were concerned, as that was the responsibility of Amber Valley Borough Council. The (county) council was involved only to the extent of being consulted about the application. In these circumstances, there was no good reason for the council to create or hold any documentation relevant to the Appellants' request.

18. The Commissioner concluded, on a balance of probabilities, that the information requested by the Appellants did not exist and that accordingly the council was not in breach of its obligations by 'failing' to disclose it. The decision notice did, however, find that the council breached EIR (regs 14(2))

and 14(3)(a)) by omitting to state that it did not hold the information requested and that it relied on the exception under EIR, reg 12(4)(a).

Analysis and conclusions

19. It is quite plain to me that the appeal must fail. In the first place, I should say that the Appellants' request seems to me to have been misconceived. The freedom of information legislation provides for the right, in specified circumstances, to be supplied with *recorded* information. What the Appellants seek here is not recorded information but an explanation as to why the council responded to the consultation as it did. That may be a request for information, but it does not appear to me to be a request within the scope of the applicable legislation.
20. I must, however, deal with the appeal before me, regardless of whether or not it is pursued as a result of a misunderstanding of the law. Here I begin by reminding myself that the Commissioner arrived at a straightforward finding of fact, namely that the council did not (and does not) have the information requested. My function is to review that finding. Having done so, I can see no reason to doubt its correctness. I have two main reasons. First, despite the obvious mistrust of the Appellants², I see no reason to doubt the truthfulness of the representatives of the council as to the absence of any relevant recorded information. If there was any documentary record linking their response in the consultation to the risk assessment, one would have thought that it would only have benefited them to disclose it. Second, the absence of any recorded information on the topics raised is entirely credible, given that the council was not a decision-maker, but merely a consultee, since the planning application was the responsibility of Amber Valley Borough Council. Indeed, as the Commissioner noted, the Appellants themselves stated at one point in a telephone conversation that they had not expected there to be any information of the kind sought by their second request.
21. I am asked, on the strength of a paper consideration only, to set aside a finding by the Commissioner which resulted from a detailed inquiry extending over a significant period and involving careful review of all relevant circumstances and evidence. If the rival cases of the parties were evenly balanced I would not easily be persuaded to take that course. Given that, for the reasons summarised above, I am satisfied that the Commissioner's case is inherently much the more plausible, dismissal of the appeal becomes the inevitable outcome.³
22. In arriving at my decision, I have given careful consideration to the numerous points made by the Appellants, particularly in their grounds of appeal and in

² This mistrust found expression in (among other things) the theory that the council's initial delivery of a single answer to two questions pointed to an intention to deceive, which strikes me as simply fanciful.

³ To state the obvious, the public interest test under EIR reg 12(1)(b) can only be determined against the Appellants where, as here, the Tribunal finds that the requested information does not exist.

the document of 8 January 2018 responding to the Commissioner's Response of 7 December 2017. It is, of course, no criticism of the Appellants that they have no legal background or training. That said, I have found in their arguments much that (while no doubt of great importance to them) is for present purposes beside the point and nothing that can withstand the simple logic of the Commissioner's case.

Signed *A.M. Snelson*

Judge of the First-tier Tribunal

Date: *4 June 2018*