



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

Appeal Reference: EA/2020/0201P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 25 January 2021**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Rosalind Tatam
Mr Gareth Jones

Between

Vivianne Mitchell

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 435 and additional documents.

THE REQUEST AND RESPONSE

4. The case concerns a request for information from the Appellant to the Borough Council of Wellingborough ("the Council") in relation to the safety of a 3G rubber crumb football pitch.
5. On 15 July 2019, the Appellant wrote to the Council and requested information in the following terms:-

"Please answer these questions, some which I have asked previously.

1. What are the names of the chemicals that will be sprayed on the pitch to prevent MRSA from vomit, blood, sweat and urine?
2. What chemicals will be sprayed on the pitch as fire retardants?
3. What chemicals will be sprayed on the pitch to prevent weeds growing?
4. What measures are you going to put in place to stop the wind blowing the invisible, airborne carbon black nanoparticles in the rubber crumb over and into Redwell Primary School and the neighbouring houses? Planting tall evergreen trees around the perimeter will help to stop some of these carbon black nanoparticles.
5. Will you be timing the maintenance of the pitch (spraying of chemicals and the redistributing of the rubber crumb) to avoid further spreading of the invisible, airborne carbon black

nanoparticles into the Redwell Primary School grounds while the children are in attendance?

6. How will you prevent the granules from polluting the Redwell Leisure Centre and surrounding areas?

7. What will you do when you won't be able to top-up the rubber crumb infill should the proposed ECHA ban go ahead in two years time?

8. Have the FF, the FA, Slatter or Murfitts informed you of the proposed ECHA ban? If they haven't, please ask them what will happen with the pitch in the future.

9. How will you prevent the increase in tyre dust air pollution from the 20,000 ground up tyres affecting the 630 children at Redwell Primary School, especially relevant for children who have asthma?

10. How will you prevent this dust from harming the children at the preschool in Redwell Leisure Centre?

11. How are you going to stop the stench of the rubber crumb, especially during the increasingly higher temperatures of summer, from affecting the children at Redwell Primary School and the nearby residents?

12. Will you pay for the antibiotics needed for footballers who scrape their legs and arms on the rubber crumb with the dust directly entering their wounds, to help stop them getting MRSA?

13. Are you going to post health warning signs alongside the pitch?

14. Are you going to warn players that they should limit their time spent on 3G rubber crumb pitches?

15. Will you test the pitch regularly for chemical levels and publish the results?

16. How will the Council safely dispose of the pitch when it reaches its end of use? I have previously sent information on how rubber crumb artificial pitches causes environmental and marine pollution.

17. Why won't the Council use some of its considerable reserves to pay for a safer infill? These reserves will be swallowed up by the new unitary council so wouldn't it be better to use some of it to provide a safer infill for the pitch?

18. Why was [named person] recommendation for a safer infill not implemented?"

6. The Council responded on 12 August 2019. It stated that it did not hold the requested information. Following an internal review the Council wrote to the Appellant on 18 September 2019. It upheld its original position, confirming that it did not hold the requested information. The Appellant contacted the Commissioner on 30 October 2019. In

communication with the Commissioner the Council accepted that the case engaged the Environmental Information Regulations 2004 (EIR).

THE LAW

7. Public authorities are under a general duty under the EIR to disclose environmental information (as defined in regulation 2(1) EIR) where it is requested:

Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

8. However, s12(4)(a) EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.

THE DECISION NOTICE AND APPEAL

9. The Commissioner explained in her decision notice dated 5 May 2020 that the Appellant is concerned about the health and environmental issues caused by the materials used in the construction of the 3G rubber crumb artificial football pitches, and that the Appellant had sent the Council

various official documents, hoping that it would reconsider using the toxic and dangerous materials.

10. The Commissioner set out the results of her communications with the Council on this issue as follows:-

18. The Council has explained that it does not hold the requested information and that it has exhausted its duty by seeking the information from other sources linked to the project.

19. It explained that before construction of the pitch began, it worked with specialist consultants to determine what the most suitable material to use would be. It added that all necessary tests were reviewed by the Council prior to construction and full compliance with all requirements has been confirmed.

20. ...

21...

22. The Council explained that it has completed searches electronically and reviewed the documentation it holds on the construction and maintenance of the 3G pitch. It advised that it has also asked the Football Foundation and contractors for responses to assist with answering the request.

23. It went on to explain that it has also undertaken searches on individual email accounts and networked resources but has not been able to locate any further information in relation to the request.

24. The Council also explained to the Commissioner that no information had been deleted, due to its retention policy.

25. The Council advised that the pitch has been constructed in compliance with the Football Foundation's requirements, and checked by their approved quality surveyors. It also added that it will follow any guidance received from specialist consultants and organisations throughout the life of the facility.

26. The Council has also added that since the construction of the pitch, a maintenance manual has been provided. This was provided in February 2020, after the complainant's original request.

27. The Commissioner notes that in the Council's response to the complainant when it amended its position on 12 March 2020, it

provided a copy of the maintenance manual, along with an answer to one of the complainant's questions; "3. What chemicals will be sprayed on the pitch to prevent weeds growing?". It confirmed which chemical, and how it would be used, following all current Control of Substances Hazardous to Health Regulations.

11. The Commissioner noted that it was entirely reasonable for the Appellant to expect that information would be held. However, she also took into account the explanation from the Council about the searches it had made and that the Council had contacted other organisations to assist with responding to the request. The Commissioner concluded that:-

34.....on the balance of probabilities, the Council does not hold the requested information for the purposes of Regulation 12(4)(a) of the EIR.

35. Technically, Regulation 12(4)(a) of the EIR is subject to the public interest test. However, the Commissioner considers this is an unnecessary exercise where she has found that a public authority did not hold the requested information at the time of the request.

12. The Appellant's appeal is dated 14 June 2020. She questions the finding that the Council does not hold the information. The following passages from the appeal highlight her main point in the appeal that the Council does, or should, have the information:-

I don't understand why they say that they don't hold the requested information. Over time, I had emailed the Council the links to various documents including Environment Agency reports, ECHA, the Groundsmanship FAQs, Sport England, FIFA and RIVM, highlighting relevant sections. I would have thought that most of these documents would have been available to and read by Council officers as part of their research and decision-making process for the pitch before they saw them in my emails to them.

They say in their replies that they do not have the information and that they are following the guidelines. The Groundsmanship FAQs are the guidelines. And they had quoted the Groundsmanship

FAQs in their email to all the councillors before the planning committee meeting, asking for their support as the FA would not fund alternative infills and that they would not get the funding unless the Council used rubber crumb infill. (I have this email.) So, obviously, they did have the information that they say they did not have. And, it was from this email with information about the Groundsmanship FAQs that started my research into these pitches.

“No information had been deleted, due to its retention policy”? This doesn't make any sense to me. The Council had read my emails and my comments on their planning portal. This was obvious as, during the Planning Committee Meeting, the Leader of the Council referred to a particular point in his questioning of their Sports Development Manager at Northamptonshire Sport.

I have many emails to and from the Council including acknowledgement emails for my many comments on the planning portal. Unfortunately, the Council deleted everyone's comments on the planning portal, then the portal itself and set up another portal without a single comment.

13. In relation to outcome the Appellant says as follows:-

Public Health England and Sport England have worked together to produce the health guidance document for a reason, to protect the health of people playing and coaching on these pitches. I would like the Council to post these health guidance information notices alongside the football boot notice posted by the Redwell 3G pitch so that these players and coaches can be informed how to keep healthy and as safe as possible when playing on this pitch. I don't think that anyone should be risking their life to play football.

14. The Commissioner's response to the appeal comments that:-

The Appellant appears to argue that the Council should hold the requested information in order to comply with the guidance contained on the use of such pitches including guidance from Environment Agency reports, ECHA, the Groundsmanship FAQs, Sport England, FIFA and RIVM, copies of which the Appellant says she emailed to the Council. The Appellant argues that as the

Council informed her that they are following the guidelines, they must hold information within the scope of her request.

15. The Commissioner notes that the Council had confirmed that it had provided all the relevant information it held to the Appellant in the form of the maintenance manual which had been provided to the Appellant. As noted above, this was provided in February 2020, after receiving the Appellant's original request.

16. The Commissioner's response refers to some case law. Thus in *Linda Bromley and Information Commissioner v Environment Agency* EA/2006/0072 ('Bromley') at paragraph 13 it is said:

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.... However, [the Environment Agency] it argued ...that the test to be applied was not certainty but the balance of probabilities. ...**We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted.** Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."
(emphasis added by this Tribunal).

DISCUSSION

17. In this case the Tribunal has spent some time examining the Council's response, dated 12 March 2020, to the Commissioner's questions (dated 13

February 2020) about the searches carried out. The response from the Council was relied upon by the Commissioner when preparing the decision notice.

18. First of all, in response to a question as to what searches the Council had carried out, the Council said that:-

Officers have searched the information the council holds electronically and reviewed the documentation it holds on the construction and maintenance of the 3G pitch. In addition to this we have asked the Football Foundation and contractors for responses to assist in considering the request.

19. The Tribunal is concerned about the generality of this reply. It is noted that there is no detail here as to which electronic documentation is held or where it is to be found, and no detail as to which contractors have been approached or what they were asked to do or to look for.

20. The Commissioner was clearly looking for further detail when she then asked 'Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations'. The Council's response was as follows:-

The information on the 3G pitch is held electronically and we have undertaken searches of e-mails and electronic files to identify any information. In addition to this we have asked the Football Foundation and contractors for responses to assist in considering the request; they have confirmed that have nothing to add to the FAQs and information already provided.

21. The Tribunal is concerned that this really provides no more detail than the answer to the first question, even though the Council was asked to 'describe thoroughly any searches'. The response also provides no detail of 'staff consultations' as requested and then simply repeats the answer to the previous question. Nothing is said at all about any paper records (although, in relation to the Commissioner's question about manual or electronic records, the Council

replied 'Electronic records' - which could indicate the Council believed no paper records within scope were held).

22. The Commissioner then asked for details as to which search terms were used in electronic searches 'and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails'. The response was made by the Council that searches were undertaken on individual e-mail accounts and networked resources. No detail was provided as to which individuals were subject to the search, nor in which departments they were based. No detail was provided as to which networked resources were searched. The Council said that officers do not use personal computers, but did not refer to laptops as requested by the Commissioner.
23. The Council said that the 'terms used for searches include 3G, maintenance, construction, Football Foundation, Football Association, S C Slatters, rubber crumb and ECHA'. It did not say whether this was an exhaustive list or not. We also note that in relation to some of the requests from the Appellant these search terms were unlikely to have been all that would have been necessary. For example, to capture information for item 6 in the list of requests, it seems to us that the word 'granules' would have been needed, and for items 9 and 10 in the list of requests the term 'tyre dust', may have been an appropriate search term.
24. The Council states that no information relating to this request has been deleted or destroyed, but does not explain the position in relation to the planning portal raised by the Appellant in her appeal (and neither does the Commissioner deal with this in her response to the appeal). The Council does not explain whether the information that was held on the planning portal is also held elsewhere. Is it the Council's case that the information referred to by

the Appellant is no longer held (and if so when and how was it deleted), or is it the case that this information is not thought to be within the scope of the request?

25. The answer given to the Commissioner by the Council about how long records of 'this type' are held and when they are deleted says, in general terms, that there is '... a records management policy that advises that general retention guidelines are "7 years for tenders from conclusion of the contract; unless under seal, when the period is 13 years. Many documents do not need to be retained for 7 years, and very few documents must be kept permanently".'
26. The problem with this answer is that it does not address at all what is meant by record of 'this type', and so it is impossible to know whether the information requested by the Appellant is covered or not. The requested information could come both in the traditional definition of 'records', such as the outcome of the planning application, but also from other 'records' such as management minutes, emails, telephone notes, etc. and the retention period for these is not covered by the Council in this answer.
27. In reply to the question 'Is there a business purpose for which the requested information should be held? If so, what is this purpose?' the Council has replied that there is 'no business purpose; all information has been provided to the council by contractors'. We do not understand at all what this response means and it has not been explored further by the Commissioner.
28. The Commissioner asked the Council whether it had given appropriate advice and assistance to the Appellant in line with the duty contained at regulation 9 EIR. The response of the Council was as follows:-

The council has provided the applicant information on the Football Foundation specifications and FAQ's regarding the construction of this pitch. Information on the construction and maintenance of similar pitches

is available on the internet and the appropriate links have previously been provided to the applicant. As part of the revisited request under EIR, further information has been provided in the form of a maintenance manual which confirms that the management and maintenance is brushing, infill and repair as necessary.

29. The Council does not say whether it held the maintenance manual at the time of the request and whether this should, in fact, have been provided earlier.

30. The Council concluded as follows:-

I would like to add that before construction of the pitch, the Borough Council of Wellingborough worked both with specialist consultants and the Football Foundation in order to determine what the most suitable material to use would be. Information on this was provided as part of the planning process and planning permission was granted with further consideration of the materials agreed as part of the condition discharge process. The pitch has been constructed in compliance with Football Foundations requirements (identified in their FAQ's previously provided) and checked by their approved quality surveyors. The council will continue to follow any guidance received from specialist consultants and organisations throughout the lifetime of this facility.

31. We note that in its letter to the Council on 13 February 2020, the Commissioner tells the Council that:-

The Commissioner will therefore challenge responses and assertions made which fail to satisfactorily address our questions and require a more detailed explanation. The Tribunal has also demonstrated that it is very critical of public authorities who fail to respond adequately to our enquiries. We therefore expect a public authority where appropriate to provide full details of their searches to support its conclusions.

32. However, in our view the Commissioner has not carried through on this assertion of its approach, and has allowed the Council to provide unsatisfactory responses and then has not followed up when this has happened. The Commissioner is correct when she says that the Tribunal is 'very critical of public authorities who fail to respond adequately' to the Commissioner's enquiries.

33. The Commissioner herself cited the case law in *Bromley* that 'the rigour and efficiency with which the search was ... conducted' was a factor to take into account when deciding whether a public authority held the information, along with 'the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light'. The Commissioner also said in the decision notice that she :-

'28...considers that it was entirely reasonable for the complainant to expect the Council to hold information about the maintenance of the pitch and of any health or environmental issues that it may pose'.

34. In this situation it is hard for us to understand why the Commissioner did not followed up the vague and general answers given by the Council, and why she has accepted so easily that the Council holds no further information within the scope of the request. We would have expected at least another round of correspondence between the Commissioner and the Council, rather than the Commissioner simply repeating the unsatisfactory responses (and accepting them) in the decision notice.

35. On that basis, when we consider the answers relied upon by the Commissioner in the decision notice we find it impossible for us to be satisfied on the balance of probabilities that the Council does not hold further information sought by the Appellant in this case.

36. We do not know if, in fact, the Council does hold further information, but we have indicated why the searches carried out and the answers provided are not sufficient for us to conclude whether it does or not.

37. It seems to us that it is now for the Council to consider again what is an extant request for information from the Appellant, and to give her a further response

on the issue. A copy of this decision should be provided to the Council by the Commissioner. If that response does not satisfy the Appellant then she will be able to make a fresh complaint to the Commissioner who will be able to consider again whether on the balance of probabilities, further information is held, and request more appropriate searches if that is necessary.

38. We would end by saying that in this case the list of questions and requests sent to the Council by the Appellant was not specifically sent as a request under the FOIA or the EIR. Indeed some of the Appellant's questions, for example, asked what the Council intended to do in the future about various matters.
39. We also note that the Appellant also stated that she would be happy to meet with the Council to discuss some of the concerns she had raised.
40. Although some of the points raised were appropriate for FOIA/EIR, it does seem to us, from a common sense point of view, that a lot of time could have been saved by meeting with the Appellant to go through her list with her.
41. Finally, we note that the Council would appear now to have given a response, at least, to the Appellant in relation to her queries 1-3 in the penultimate paragraph of the letter of 12 March 2020. It also seems that the Council has responded 'No' to the queries 13-14 in the internal review of 18 September 2019, and in the same letter explained that 'the council's Planning Committee agreed a condition and this was discharged as part of the planning process' in response to queries 17 and 18. But all these answers suggest that there may be information which have enabled the Council to provide these responses which may be within the scope of the requests.
42. For the reasons set out above this appeal is allowed and a decision notice is substituted to the effect that the Council has not shown on the balance of probabilities that it does not hold the information requested.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 19 February 2021.

Promulgated: 23 February 2021.

Amended pursuant to rule 40 1 March 2021