



Neutral citation number: [2023] UKFTT 593 (GRC)

Case Reference: EA/2022/0159

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

Heard on GRC - CVP

Heard on: 30 June 2023.

Decision given on: 7 July 2023.

Before:

**Tribunal Judge: Brian Kennedy KC
Tribunal Member: Naomi Matthews
Tribunal Member: Kate Grimley Evans**

Between:

DAVID NORRIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: David Norris as a Litigant in Person.

For the Respondent: Gemma Garvey in written Response dated 12 July 2022.

Decision: The appeal is Dismissed

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as modified by regulation 18 of the Environmental Information Regulations 2004 (SI 2004/3391) (“EIR”), against his decision notice of 26 May 2022 Ref. IC-93214-Q3H9 (“the DN”) which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The Appellant requested information from Great Wyrley Parish Council (“the Council”) about a historic land transfer. Great Wyrley had previously provided the complainant with some information and stated that no further information was held. Further, Great Wyrley drew the Commissioner’s attention to information it had obtained from a neighbouring parish council, but stated that, in its view, it was not required to consider this for disclosure. The Commissioner’s decision is that the requested information is “environmental” and has considered the complaint under the EIR. Having considered the information provided to Great Wyrley by the neighbouring parish council, he has determined that this should have been considered for disclosure, and Great Wyrley is therefore in breach of regulation 5(1) of the EIR. He is satisfied that, beyond this, on the balance of probabilities, Great Wyrley does not hold any further information. The Commissioner required Great Wyrley to consider whether the information can be disclosed and issue an appropriate response under EIR.
- [3] The Commissioner maintains the position set out in the DN. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology

- [4]** The Appellant wrote to the Council on 30 October 2020 and requested information in the following terms:

"As you now know the situation of adverse possession of the drive, which has not been concluded... The adverse possession is the road which is next to [redacted] Garage... I am entitled for all legal documentation, names of the people and councillors involved and any paperwork which is involved."

- [5]** On 3 November 2020 the Council responded in the following terms:

"In reply to your letter dated 30th October, it is my understanding, after consultation with the parish clerk, that all relevant documentation relating to the adverse possession of the area of road alongside [redacted] Garage was forwarded to you on the occasion of your original request, should you require copies of these this could be arranged at a later date. As you will appreciate as of Thursday 5th November in line with Government guidelines the office at the Community Centre will need to close..."

- [6]** On 2 December 2020, the Appellant clarified his request as follows:

"In reply to your email on 3rd November 2020. I would like to request all legal documents again. As stated in my email 30th October 2020. I am looking for all transactions between the council and the clerk [name redacted] and the owner of [redacted] Garage from 2003 and legal documents. You do not need to send me the minutes of the meeting from June 2003 or indenture of 1896."

- [7]** On 14 December 2020, the Council responded and stated: "My understanding is you are in possession of all relevant information and there is no further evidence of any written communication between [redacted names]."

- [8]** After some further correspondence, the Appellant formally requested an internal review on 31 March 2021.

- [9]** On 10 May 2021, the Appellant received a letter from Southern Staffordshire Shared Legal Services (South Staffordshire District Council being the principal local authority

for the relevant location). Regarding the land transfer, it stated this was "a private law matter" between the parties, and not a matter for the Parish Council. It also stated that the Appellant's requests would no longer be responded to, because they were an "unreasonable call on parish council resources".

[10] On 23 February 2021 the Appellant complained to the Commissioner about the way his request for information had been handled. This was prior to receiving the internal review. The Commissioner accepted the case for substantive investigation on 2 June 2021 once the internal review had been provided. The Appellant did not wish to receive any information he had already been provided with but considers that the Council holds further information falling within the scope of his request which had not been provided to him.

[11] The Commissioner considered that the scope of the investigation was to establish whether the Council held any further information falling within the scope of the request which had not previously been provided to the Appellant.

[12] Legal Framework:

A public authority that holds environmental information is required to make it available on request (reg. 5(1) EIR). "Environmental Information" is defined in Reg 2(1) EIR as;

" - any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.

(b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a):

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the

elements and factors referred to in (a) and b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).”

Regulation 12(4)(a) EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.

When determining whether or not information is held the Commissioner and Tribunal applies the normal civil standard of proof, on the balance of probabilities. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) held that in determining a dispute as to whether information is 'held' at [13]:

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. 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."

The Tribunal has repeatedly confirmed that the relevant test is whether the information is held on the balance of probabilities: see, for example, *Malcolm v Information Commissioner EA/2008/0072* at [24]; *Dudley v Information Commissioner EA/2008/008* at [31], and *Councillor Jeremy Clyne v the Information Commissioner and London Borough of Lambeth EA/2011/0190* at [21]-[22]).

In *Oates v IC and Architects Registration Board EA/2011/0138* at [11] the Tribunal recognised that:

"As a general principle, the IC was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full-scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester."

Whilst the above cases related to the FOIA the considerations are nonetheless equally applicable to the EIR.

Commissioner's Decision Notice:

- [13] The Commissioner considered the scope of the complaint in relation to the request for information. On foot of this, he decided that the Council did hold some further information falling within the scope of the request [DN 51] and ordered the Council to take steps to issue a fresh response in relation to this information [D 3]. Other than the information identified at paragraph 51 of the DN, the Commissioner decided that on the

balance of probabilities, no further information was held falling within the scope of the request.

Grounds of Appeal:

- [14] The Appellant argues that the Clerk has withheld information from the Commissioner regarding the involvement of the Council and has not been transparent in relation to the same.

The Commissioner's Response:

- [15] The Commissioner resists the appeal. The Commissioner relies upon the DN and findings therein. The Commissioner referenced *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) and its applicability to the case at hand. Further, it was submitted, without any contrary reasoning as to why the Appellant remains of the view that further information is held by the Council, the Commissioner maintains he was correct in accepting, that on the balance of probabilities, the public authority does not hold any further information. The Commissioner invited the Tribunal to strike out this appeal.

Witness Statement of Mr J Matthews dated 18th July 2022

- [16] Mr J Matthews provided written witness evidence to the Tribunal about an adverse possession in Cheslyn Hay, Staffordshire. Mr Matthews provided the circumstances surrounding this adverse possession and his contentions in relation to the planning permission.

Witness Statement of Mrs T Norris dated 18th July 2022

- [17] Mrs T Norris provided written witness evidence to the Tribunal stating that she attended the Great Wyrley Parish Council meeting on 2nd December 2015. She argued that the Clerk had information on file regarding [Redacted] Garage and the adverse possession as stated in the minutes of the meeting on the same date.

Appellant's Reply:

[18] The Appellant stated that the Clerk made a fundamental mistake. The Appellant was displeased that the party was not ordered to comply. The Appellant requires fairness in this instance. Further, he stated that the Clerk is manipulating this appeal and has not allowed the Commissioner to have sight of the information held.

The Appeal:

[19] At the Hearing of this appeal Mr Norris in evidence gave his account of his dealings with the Council, the Public Authority concerned. Mrs Norris and Mr Matthews also gave accounts of their experience with the Council and on wider on the issues in question. All three indicated their immense frustration and disappointment at the lack of co-operation of the Council and others in providing any relevant information about the issues they had raised through their request. They all are convinced there is some form of cover up and some malfeasance or scam, (referred to at one stage as the "Coffin Parcel",) to hide the facts of what they perceive to be a plot of deception in relation to land adjoining the property which the Appellant (and his wife Mrs Norris) bought from the Council circa: 1990.

[20] The Appellant produced copy photo shots of some documents none of which appeared to provide material support for their assertions of untruthfulness, on the part of Council or the existence of any specific documents held by the Council at the time of the request. Their principle and new evidence (which had not been before the Respondent at the time of the Commissioners' investigation), in support of their concerns was minutes of a meeting of the Council, which referred to documents relevant to the subject matter and therefore they argued within the scope of the request. Further the Appellant and his witnesses argued that a Councillor and the incumbent clerk at the Council confirmed they had seen relevant documents.

[21] Mr Norris had some minutes of the Parish Council which came to light after the Information Commissioner had issued the DN. The Tribunal accepted that these minutes were evidence that some type of information within the scope of Mr Norris' request may have been in the possession of the Parish Council at the time the minutes

were written. However, it was not clear what that information might have been or what form it took. At least some may have been information which was just in the heads of the councillors and not recorded.

[22] The issue for the Tribunal is whether on the balance of probabilities the Council held information at the time of the request which went beyond the information already covered by the Information Commissioner's direction in the DN.

[23] The Council maintain that they hold no further information. The clerk who told the Commissioner that there was nothing further is the same clerk who writes the minutes. The Commissioner reached the conclusion that there was no information held by the Council within the scope of the request except that identified in paragraph 51 of the DN. Whilst Mr Norris was able to provide some limited evidence that additional information may have existed in the past, he produced no evidence to indicate that the information was held at the date of the request.

[24] Whilst the Tribunal understands the Appellants' view that the Council should hold relevant information beyond that identified in the DN, it is not the role of the Tribunal to determine what the Council ought to hold or to assess the quality of their record keeping. It may be that information held at one point in time is not held at another point in time.

[25] The Tribunal are unable to identify with any clarity, or at all, what documents or other information in a material form are alleged to be in existence and held by the Council at the time of the request or during the Respondents investigation that would make a difference to the DN or establish that there was any error of Law in the DN.

[26] The Tribunal explained to the Appellant that there may be ways in which their concerns could be explored, and they should take advice on that from qualified sources. We explained why it appeared to us, even at this stage with such additional evidence as they had found, or been told about by others, that there was insufficient evidence before us to prove that on the balance of probabilities the Council held further material information at the time of the request.

Conclusion:

[27] On the evidence before us and for all the reasons set out above, we are satisfied that the Respondent applied the proper test and came to the correct decision as clearly set out in the impugned DN - i.e., at the time of the request, on the balance of probabilities, Great Wyrley Parish Council held no further information than had been previously disclosed or otherwise identified during the Respondents' investigation. Accordingly, and not without sympathy to the Appellants' plight, we must dismiss the appeal.

Brian Kennedy KC

3 July 2023.