



Neutral citation number: [2023] UKFTT 777 (GRC)

Case Reference: EA/2022/0238

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

Heard by: determination on the papers

Heard on: 13 April 2023

Decision given on: 25 September 2023

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER KATE GRIMLEY EVANS
TRIBUNAL MEMBER DAVE SIVERS**

Between

JAMES PACKHAM

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) NORWICH CITY COUNCIL**

Respondents

Decision: The appeal is Allowed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0238, set out below, is substituted for the Commissioner's Decision Notice reference IC-144775-N0F5 dated 23 August 2022 with regard to the request for information made to Norwich City Council by James Packham dated 25 August 2021.

Substituted Decision Notice

1. Norwich City Council breached regulation 11(4) of the EIR on the basis that it did not provide its internal review decision within the statutory timeframe. No further steps are required in respect of this breach.

2. Norwich City Council breached regulation 9 of the EIR by failing to provide the Appellant with reasonable advice and assistance in connection with the request for information. No further steps are required in respect of this breach.
3. Norwich City Council must reconsider its analysis of the request for information in light of the Tribunal's Decision in case reference EA/2022/0238 and must make a fresh response to the request for information.
4. Unless the duty to confirm or deny does not arise in accordance with any applicable provision of the Environmental Information Regulations 2004, the fresh response must confirm if further information is held within the scope of the request and either disclose it (subject to any applicable redactions of personal data pursuant to regulation 13 of the Environmental Information Regulations 2004) or claim any relevant exemptions to disclosure.
5. Norwich City Council must issue the fresh response within 35 days after the date on which this decision is promulgated.
6. The fresh response will be subject to the rights given under section 50 of the Freedom of Information Act 2000, as applied by regulation 18 of the Environmental Information Regulations 2004, to make a new complaint to the Information Commissioner.
7. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

| | |
|------------------------|---|
| Commissioner: | The Information Commissioner. |
| Council: | Norwich City Council. |
| Decision Notice: | The Decision Notice of the Information Commissioner dated 23 August 2022, reference IC-144775-N0F5. |
| EIR: | The Environmental Information Regulations 2004. |
| Project: | The project relating to the extension of the Norwich Parks Tennis programme, as referred to in the Request. |
| Request: | The request for information made by the Appellant dated 25 August 2021, as referred to in paragraph 9. |
| Requested Information: | The information which was requested by way of the Request. |

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Request and the date of the Appellant's subsequent complaint to the Commissioner.
3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This is an appeal against the Decision Notice, which (in summary) determined that, on the balance of probabilities, the Council held no further relevant information within the scope of the Request beyond information which had already been provided to the Appellant. The Commissioner also concluded in the Decision Notice that the Council had breached regulation 11(4) of the EIR as it did not provide its internal review decision within the statutory timeframe. The Decision Notice did not require the Council to take any steps.
5. We consider that it is important to stress what is outside of the scope of the appeal. The appeal does not relate to the Council's compliance with any legal requirements in respect of the Project or any associated matters. The appeal is also not about the merits of the Project, nor the conduct of the Council or any individuals working for the Council in connection with the Project. The Tribunal has no power to determine those issues and nothing we say should be interpreted as an expression of opinion on any of those issues. The remit of the Tribunal is limited to that set out in section 58 of FOIA (as applied pursuant to regulation 18 of the EIR), having regard to the applicable law, as we explain below.

Mode of Hearing

6. The parties consented to the appeal being determined by the Tribunal on the papers.
7. The Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

8. The background to the appeal is as follows.

The Request

9. On 25 August 2021, the Appellant contacted the Council requesting information in the following terms:

"On 12th January 2017 an email was sent from [a Council employee - name redacted] – to Nelson Ward councillors cc [two other Councillors - names redacted]. This email informed Nelson Ward councillors that the Council were considering extending the Norwich Parks Tennis programme to Heigham Park. The Council submitted their first planning application for 3 all-weather courts 2 months later on 16th March 2017. How was the decision taken to

proceed with the Planning Application, who made the decision and where is the decision recorded?”.

The Council's reply and subsequent review

10. The Council responded on 21 September 2021. It disclosed some information which it considered to be within the scope of the Request. The Council stated that the decision to proceed with the Project was taken at a meeting of the Council on 21 February 2017, and that the planning application would have followed on from that decision. It also stated that the decision was taken by full Council and was recorded in the minutes of that meeting, and provided a link to the Council's website where the minutes from the meeting could be found.
11. The Appellant contacted the Council by email on 28 September 2021 stating that he was not satisfied with the Council's response, and requesting an internal review. The Appellant elaborated on and clarified on aspects of the Request and asked the Council to direct him to any other relevant documents which would answer the questions he raised in the Request.
12. Following an internal review, the Council wrote to the complainant on 3 December 2021. The Council provided a link to one further document which it also considered to be within the scope of the Request, and explained that it should be read together with the document for which the link was provided in the initial response in order to answer the questions set out in the Request. The Council also acknowledged that the Request should have been handled by it under the EIR rather than under FOIA.
13. The Appellant contacted the Commissioner on 7 December 2021 to complain about the Council's response to the Request. The Appellant stated that he believed that the Council held more information than it sent in response to the Request and that he did not consider that the information which the Council had provided in its responses answered the specific questions set out in the Request.

The Decision Notice

14. The Commissioner considered that the scope of his investigation was to determine, on the balance of probabilities, if the Council had disclosed all information which it held within the scope of the Request.
15. The Commissioner decided, by way of the Decision Notice, that, on the balance of probabilities, the Council held no further relevant information within the scope of the Request, beyond the information which it had already disclosed to the Appellant. The Decision Notice set out the Commissioner's reasons for reaching that determination (and we refer to the material points in connection with the Commissioner's response to the appeal, below).

The appeal

16. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIR, subject to certain modifications.

17. The Decision Notice was given in response to the Appellant's complaint to the Commissioner relating to the Council's response to the Request, made under section 50 of FOIA as applied by regulation 18 of the EIR. This was an appeal against the Decision Notice made by the Appellant pursuant to the EIR, in accordance with section 57 of FOIA as applied by regulation 18 of the EIR.

Grounds of appeal

18. In his grounds of appeal, the Appellant provided some background information regarding the planning application referred to in the Request. He referred to his concerns regarding the Council being both applicant and approving authority in the planning matter and he considered that local views had been overlooked, citing instances where he stated the Council had not responded to residents' complaints and concerns.
19. The Appellant considered that the information which the Council had provided in its responses did not answer the specific questions set out in the Request. He also disputed the Commissioner's reliance on the 'balance of probability', setting out his reasons with reference to specific points made in the Decision Notice.
20. The material points made by the Appellant were (in summary) as follows:
 - a. the Request sought information regarding decision-making leading up to the Council's planning application; it was seeking to understand how the decision was taken to go to planning in the first instance;
 - b. there was limited reference to the Project in the Agenda Document Pack dated 21 Feb 2017, so the Appellant did not have information regarding how the pros and cons of the Project were evaluated by the Council and a course of action initiated regarding proceeding to the planning stage;
 - c. it was difficult to understand and give credence to the idea that a course of action by the Council (the taking of the Project to planning involving an expenditure of over £400,000) could happen without a record of how that decision was taken other than a single line item in a table of proposed expenditure; and
 - d. if any documents existed which referred to a planned or assumed extension of Norwich Parks Tennis, either before or after February 2017, then such documents would throw light on the decision-making process and should be made available pursuant to the Request.
21. In conclusion, the Appellant considered that it seemed unlikely that no documentary trail existed which explained a Project expenditure of over £400,000 of Council funds, where the Project was well-known to be locally important and sensitive, explaining that such documents could exist "*outside of the strict confines of 'normal' planning documents*".
22. The Appellant attached to his notice of appeal a document entitled "Heigham Park - Review of Administration and Consultation principles" which was written by Counsel at 39 Essex Chambers and which provided views on issues relating to the Council's actions in connection with the Project.

The Commissioner's response

23. In his response to the appeal, the Commissioner generally relied on the reasons given in the Decision Notice in support of his view that the appeal should be dismissed.
24. The material points made by the Commissioner were (in summary) as follows:
 - a. he was correct to approach the issue of whether or not the Council held more information within the scope of the Request by applying the normal civil standard of proof in law (namely, the balance of probabilities);
 - b. he was satisfied that the Council had taken an appropriate and proportionate approach to establishing if it held any further information within the scope of the Request, by reviewing all documents relating to the Heigham Park Tennis Courts planning application and considering if any of those documents related to the decision-making behind proceeding with the application, and by consulting all relevant officers within the authority who had knowledge of the works at Heigham Park Tennis Courts;
 - c. the Council was correct not to disclose the further documents identified by the Council which did not relate to the decision-making (as these therefore fell outside of the scope of the Request);
 - d. whilst the Appellant was seeking answers to specific questions set out in the Request, the EIR only required the Council to provide information which it already held in recorded form; the Council was not required to 'create' new information in order to respond to the Request; and
 - e. from the information disclosed by the Council, the Appellant could deduce the answers to his questions in the Request.
25. In conclusion, the Commissioner considered that the Council had appropriately considered the terms of the Request and had reached an objective reading of its scope. The Commissioner's view was that the Council had provided all relevant information in respect to the Request and that it was correct not to release any further information "*which did not relate to the decision-making in particular*" as these fell outside of the scope of the Request.
26. The Commissioner noted the concerns raised by the Appellant regarding the adequacy of the Council's community engagement practices in respect of the Project (which were the focus of the document written by 39 Essex Chambers which was submitted by the Appellant). However, he maintained his view that his analysis and approach taken in respect of the Request, as outlined above, was correct.

The Second Respondent's response

27. The Council agreed with, and adopted, the main submissions made by the Commissioner in his response to the appeal, including in respect of the 'balance of probability' test.
28. The other material points made by the Council were (in summary) as follows:

- a. the Council had understood question 1 of the Request (“*How was the decision taken to proceed with the Planning Application?*”) to be about documents relating to the decision-making process for the funding proposal (namely, the decision to “proceed”), because the planning application was contingent on funding approval by ‘Full Council’;
 - b. the Council had provided the necessary information in that regard and therefore considered that a wider search for documents was not necessary;
 - c. the Council had also provided information to the Appellant showing which person had approved the submission of planning permission documents (namely, the Council’s Parks and Open Spaces Manager); and
 - d. whilst the Council’s minutes provided to the Appellant do not explain why the Project was taken to planning, they were still within the scope of the Request but if the Appellant had further questions then he could have made a further request for information under the EIR.
29. In its response, the Council stated that it did hold various documents which shaped the process of the proposal relating to the Project, including documents relating to the consultation process, but that these documents “*were not within the scope of the specific questions asked in the Information Request*”. It also stated that the scope of the documents provided to the Appellant may have been different had the Request been framed in a different way. The Council further commented that the information being sought by the Appellant through the appeal went outside the scope of the Request and the Appellant was at liberty to have followed up with a further request for information.
30. The Council also, in its response:
- a. denied the various allegations which had been made by the Appellant in his notice of appeal relating to the conduct and competency of the Council in connection with the Project;
 - b. provided some information relating to the Project, including the options which were considered and why;
 - c. provided some information regarding the consultation process relevant to the Project; and
 - d. stated that it had not seen the document written by 39 Essex Chambers which was submitted by the Appellant and therefore was unable to respond to it.

The Appellant’s reply

31. The Appellant submitted a reply to the Council’s response only. Whilst we acknowledge all of the specific points made by the Appellant in his reply, in summary:
- a. the Appellant provided some further comments on the Project and the associated background;
 - b. the Appellant provided some further comments in respect of the Request and the information which was being sought and why he felt that the Council’s response

to the Request was inadequate; and

- c. the Appellant provided some information which he stated was evidence that the Council had seen a copy of the document from 39 Essex Chambers.

Further submissions

32. The Council provided to the Tribunal some further (“final”) submissions in connection with the appeal and the Appellant submitted further submissions in reply to those. The latter were provided two days after the deadline specified by the Tribunal’s case management directions, but we concluded that it would be in the interests of justice to permit their inclusion, particularly with this being an appeal which was to be determined without a hearing and mindful that the Appellant was not legally represented. However, the Appellant’s further submissions did not affect our conclusions in any event.
33. The Council’s further submissions set out further comments on the Council’s interpretation of the Request, stating that the Request sought specific information on the Council’s decision-making process at the time and explaining what information had been provided in response to that and why (including with regard to information relating to the funding approval for the Project, which the Council stated was inextricably linked with that, as planning permission was contingent on funding approval). The Council reiterated that it undertook a reasonable search for information and provided the Appellant with copies of all the information held in response to the Request.
34. The Council commented that it did not dispute the Appellant’s evidence of having being sent the document from 39 Essex Chambers. However, the Council did not consider that this document was relevant to the Request (or to the appeal).
35. The Council further denied certain points made by the Appellant in his reply regarding the Council’s activities in connection with the Project. In respect of certain points made by the Appellant in his reply relating to what information was being sought by the Request, the Council’s position was that this was additional information which was outside of the scope of the Request, but that it remained open to the Appellant to submit a further request for information.
36. The Appellant’s further submissions set out the Appellant’s comments on why he considered that the Council held further information within the scope of the Request and that the further points he had made were not requests for additional information but rather clarifying what was within the scope of the Request. He also stated that he had provided the document from 39 Essex Chambers in connection with the appeal because it provided important context and it informed the “balance of probability” argument in the appeal.

The Tribunal’s powers and role

37. The powers of the Tribunal in determining the appeal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIR), as follows:

“(1) If on an appeal under section 57 the Tribunal considers –

(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."

38. For the purposes of the appeal, therefore, the Tribunal's remit is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

The law

The relevant statutory framework

39. As a general principle, requests for environmental information held by a public authority are usually to be dealt with under the EIR rather than FOIA. Section 39(1) of FOIA provides:

"Information is exempt information if the public authority holding it –

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations."

40. The term 'environmental information' is defined in regulation 2(1) of the EIR as follows:

"...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);”

41. Regulation 5(1) of the EIR provides individuals with a general right of access to environmental information held by public authorities. It provides:

“...a public authority that holds environmental information shall make it available on request.”

42. Accordingly, under regulation 5(1) of the EIR, a person who has made a request to a public authority (such as the Council) for environmental information is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIR, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) of the EIR (that is, the wording immediately preceding the extract quoted above) provides:

“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...”

43. It is therefore important to note that regulation 5(1) of the EIR does not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in that regulation is subject to certain other provisions of the EIR. Part 3 of the EIR, referred to above, contains various exceptions to the duty to disclose environmental information which has been requested. Within Part 3 of the EIR, regulations 12 and 13 are applicable for the purposes of the appeal.

44. Regulation 12(4)(a) covers the position where a public authority does not hold the information which is requested, at the time of the request. So far as is relevant, regulation 12(4) of the EIR provides:

“...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...”

45. So far as is relevant, regulation 11 of the EIR provides:

“(1) ...an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(4) A public authority shall notify the applicant of its decision... as soon as possible and no later than 40 working days after the date of receipt of the representations.”

Relevant case law

Environmental information

46. We turn first to case law regarding the definition of ‘environmental information’ set out in regulation 2(1) of the EIR.
47. It is well established that ‘environmental information’ is to be given a broad meaning in accordance with the purpose of the underlying European Council Directive which the EIR implement (Directive 2004/4/EC). The broad scope of the definition was explained by the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister für soziale Sicherheit und Generationen*¹.
48. In the case of *Department for Business, Energy and Industrial Strategy v The Information Commissioner and Alex Henney*², the Court of Appeal confirmed the appropriateness of a broad approach to defining environmental information, which may include information that is not directly connected to a measure. It also established that the definition of ‘environmental information’ in the EIR should be construed purposively, but that this will also be dependent on the specific facts in any given case.

Whether information is held by a public authority

49. We turn now to case law relating to the question of whether information is held by a public authority for the purposes of the EIR. It is important to note that, notwithstanding regulation 5(1) of the EIR, it is not the role of either the Commissioner or the Tribunal to determine conclusively (or, in other words, with certainty) whether or not information is actually held by a public authority for the purposes of that regulation.
50. In the case of *Bromley v Information Commissioner & the Environment Agency*, the First-tier Tribunal (in a case relating to whether information was held by a public authority for the purposes of FOIA) held that: “*the test to be applied [by the Commissioner and the Tribunal] was not certainty but the balance of probabilities*”.³ In simple terms, the ‘balance of probabilities’ means that something is more likely than not to be the case. The decision in the *Bromley* case is not binding on this Tribunal, but we note that this test has become established and a similar approach has been taken in numerous Tribunal decisions since. We see no reason to depart from that view.
51. Accordingly, in determining whether or not information is held on the balance of probabilities, a decision will be reached based on an assessment of the adequacy of the public authority’s search for the information and any other reasons explaining why the information is not held.

Evidence

52. The Tribunal read and took account of an open bundle of evidence and pleadings. The Tribunal also read and took account of further submissions (referred to in paragraph

¹ [2003] All ER (D) 145

² [2017] EWCA Civ 8444

³ EA/2006/0072, paragraph 13

32) which were provided separately by the Council and the Appellant.

Discussion and conclusions

Outline of relevant issues

53. The fundamental issue which we needed to determine in the appeal was whether or not the Commissioner was correct to decide, by way of the Decision Notice, that on the balance of probabilities, the Council held no further relevant information relating to the Request.
54. As we have noted, the Decision Notice also concluded that the Council was in breach of regulation 11(4) of the EIR, as it did not provide its internal review decision within the statutory timeframe. We also address this point below, notwithstanding that it was not disputed by any parties (including the Council).

Analysis and discussion; application of the law

Application of the EIR

55. We first briefly address the issue of the application of the EIR (as opposed to FOIA) in respect of the Request, notwithstanding that the Appellant did not challenge the application of the EIR in connection with the Decision Notice. We cover this for completeness, given that the Council's initial response to the Request was issued pursuant to FOIA rather than the EIR.
56. We consider that the Council (in its response to the Request following its internal review) and the Commissioner were correct to determine that the EIR applied in respect of the Requested Information. The Requested Information fundamentally related to records connected with planning permission and decisions taken in connection with the planning permission. Accordingly, we consider that it falls within limb (c) of the definition of 'environmental information' in regulation 2(1) of the EIR – namely, "*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*". It is evident that the issue of planning permission itself, of course, relates to information 'on' the environment for the purposes of the definition of 'environmental information' in regulation 2(1) of the EIR. Likewise, other records relating to the planning permission and the Project are associated with that and, accordingly, we are satisfied that all of the Requested Information falls within the scope of the EIR.

Information not held

57. As we have noted:
 - a. regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information which is requested to the extent that it does not hold that information when an applicant's request is received; and
 - b. in accordance with the test in the case of *Bromley*, where the Commissioner or the Tribunal is faced with a dispute regarding whether information is held by a public authority, the test to be applied is the balance of probabilities.

58. The starting point, however, is to ascertain what was actually requested in a request for information – or, in other words, what was within the scope of the request.
59. In our view, the Request was clearly seeking information relating to the wider planning process relating to the Project, leading up to the point at which a decision was taken to proceed with the planning application, including records relating to any analysis of applicable considerations at relevant stages of that process and how (including on what basis) that decision was reached. The Request may not have used the word ‘why’ the decision was taken (but rather ‘how’) but we consider it is clear what was intended.
60. We consider that the Council took a very narrow view of what was covered by the Request, rather than objectively assessing what the Request was actually asking for. Essentially, we believe that the Council worked on the basis of an erroneous ‘assumption’ as to what the Appellant was seeking, based on its own narrow interpretation of the Request, and responded accordingly. Moreover, the Council had a duty under regulation 9 of the EIR to provide reasonable advice and assistance to the Appellant in connection with the Request.
61. If anything, it could perhaps be said that the Request was written in terms which were too broad and, if so, it may have been appropriate for the Council (pursuant to its duties under regulation 9 of the EIR) to seek to ascertain the exact scope of the Request. What is clear, though, as we have stated, is that the Appellant was seeking information relating to the planning process and (amongst anything else which may be relevant) the records of any debate or consultation relating to the decision to proceed to planning permission (“*how was the decision taken?*”), as well as records relating to the decision-making itself (“*who made the decision and where is the decision recorded?*”). Also, as the Appellant pointed out in his reply to the Council’s response to the appeal, the question of ‘who’ could also be relevant to the wider background regarding ‘how’ the decision was taken.
62. We do not accept the position of the Commissioner and the Council that the Request was properly responded to by the Council providing the limited information which it did. This is because that response was, as we have noted, based on the Council’s overly-narrow interpretation of the Request and without seeking to clarify the scope of the Request with the Appellant. Likewise, we do not agree, as argued by the Commissioner, that the Council was correct not to disclose the further documents identified by the Council “*which did not relate to the decision-making in particular*”. It was evident from the Request that it was seeking more than that. As we have noted, we think this is clear from the last part of the wording in the Request on its own, but the additional background wording of the Request which preceded the specific questions in it provided some context which made the purpose of the Request even more clear. Moreover, the Appellant did, of course, provide some clarification as to what he was seeking in his email to the Council dated 28 September 2021, asking for an internal review of its response to the Request. In that email, the Appellant stated:

“If I have missed something please quote the passage in the minutes which does answer my FOI request. If you cannot do this and there is in fact some other documentation that answers my questions please supply that document or documents and, to save time, reference the specific text which does answer the questions.”

63. The Council stated in its response to the appeal and in its final submissions that the Appellant could make another request for information if he required anything further. The Appellant had, though, already made it clear what he was asking for and, as quoted above, sought guidance from the Council regarding any other information which would be within the scope of the Request. Whilst the Appellant's request for guidance was framed with specific reference to potentially relevant documents, it should have been clear to the Council that the Appellant was demonstrating that he may not know which information the Council may hold which would be relevant to the Request. It should also have been clear to the Council that the Appellant was seeking broader information regarding how the decision was reached, which would extend to information regarding 'why' the decision was reached. As accepted by the Council in its response to the appeal, the Council's minutes provided to the Appellant do not explain why the Project was taken to planning. Even if the Appellant had not requested any guidance, the Council was nevertheless under a duty under regulation 9 of the EIR to provide reasonable advice and assistance to the Appellant in connection with the Request.
64. We recognise that the Council, as a result of its internal review, did provide other information to the Appellant in response to the Request, but it did not otherwise address the issues raised by the Appellant. We consider that there were two aspects to this - the specific questions raised by the Appellant in the Request and the clarification/guidance sought by the Appellant in his request for a review of the Council's response. As noted, we think that the scope of the Request was sufficiently clear in its own right - but even if the Council was unsure about what was being requested then it should have sought to clarify this with the Appellant. At the point of the Appellant's request for a review, it should have been even more evident to the Council what the Appellant was seeking by way of the Request and, again, even if the Council was unsure at that point it should have sought to clarify this - particularly when the Appellant himself was specifically asking for assistance in respect of the Request. We also observe that the Council provided some background explanatory information in the course of the appeal, which it did not provide to the Appellant in connection with its handling of the Request and which may have been helpful to the Appellant.
65. For the above reasons, we therefore find that the Council was in breach of its duty to provide reasonable advice and assistance pursuant to regulation 9 of the EIR.
66. As a result of the Council's narrow view of the Request, it determined (as stated in its response to the appeal) that "*a wider search for documents was not necessary*". Given that, it is self-evident that insufficient searches were undertaken for other information which could fall within the scope of the Request. Indeed, the Council stated in its response to the appeal that it "*holds various documents which shaped the process of the proposal, including documents relating to the consultation process*". For the reasons given, we consider that such records fall within the scope of the Request.
67. It follows from the above that we consider, on the balance of probabilities, that further information is held by the Council which falls within the scope of the Request.
68. We would also briefly note that we did not consider the document from 39 Essex Chambers to be material in the context of the appeal. This is because, whilst it may

identify actions which the Council ought to have taken in connection with the Project (but, to be clear, we form no view on this either way), the appeal is not about the responsibilities or conduct of the Council in respect of the Project. We appreciate that that document may have some relevance to the records which the Council may potentially hold relating to the Project, but the material issue in the appeal was the scope of the Request itself.

Regulation 11(4) of the EIR

69. As we have noted, regulation 11(4) of the EIR requires, in summary, a public authority to provide its internal review decision within 40 working days after the date of receipt a request for that review.
70. The Appellant notified the Council of his requirement for an internal review on 28 September 2021 and the Council responded on 3 December 2021. Accordingly, the Council did not comply with regulation 11(4) of the EIR as it did not provide its internal review decision within the statutory timeframe.

Final conclusions

71. For all of the reasons we have given, we conclude as follows.
72. We find that the Commissioner was correct in deciding, by way of the Decision Notice, that the Council was in breach of regulation 11(4) of the EIR on the basis that it did not provide its internal review decision within the statutory timeframe. However, we find that the Commissioner erred in the exercise of his discretion and/or the Decision Notice involved an error of law in concluding that, on the balance of probabilities, no further information was held by the Council within the scope of the Request.
73. We also find that the Council breached regulation 9 of the EIR by failing to provide the Appellant with reasonable advice and assistance in connection with the Request.
74. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 22 September 2023

(Amended under the slip rule – 26 September 2023)