



**Tribunals Service**  
Information Tribunal

**Appeal Number: EA/2006/0072**

**Environmental Information Regulations 2004**

**Heard in Leicester.**

**Decision Promulgated: 31 August 2007**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Chris Ryan**

**And**

**LAY MEMBERS**

**Andrew Whetnall**

**David Wilkinson**

**Between**

- (1) LINDA BROMLEY**
- (2) WILHELMINA LOWE**
- (3) JOHN COOMBS**
- (4) ROBERT LEWIS**

**And**

**INFORMATION COMMISSIONER**

**Respondent**

**And**

**THE ENVIRONMENT AGENCY**

**Additional Party**

**Representation:**

**For the Appellants:**

**In person**

**For the Respondent:**

**Jane Collier**

**For the Additional Party:**

**Holly Stout**

## **Decision**

**The Tribunal dismisses the appeal save to the extent that it finds, on admission, that the public authority did not respond to the Appellants' request for information within the statutory time limit and failed to disclose certain categories of document, which came to light in the course of this Appeal. Accordingly the following decision notice is issued in place of the decision notice dated 21 August 2006**

**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)  
ENVIRONMENTAL INFORMATION REGULATIONS 2004**

**SUBSTITUTED DECISION NOTICE**

**Dated 31 August 2007**

**Name of Public authority:       The Environment Agency**  
**Address of Public authority:   Riversmeet House**  
**Newtown Industrial Estate**  
**Northway Lane**  
**Tewkesbury**  
**Gloucestershire**  
**BL20 8JG**

**Name of Complainant:         Mrs Linda Bromley**

The Decision Notice of the Information Commissioner dated 21 August 2006 shall be substituted as follows:

The original Decision Notice shall stand but records, in addition, that:

1. the Public Authority did not comply with the Complainant's request within 20 working days, as required by section 10 of the Freedom of Information Act 2000; and
2. the Public Authority had not disclosed certain categories of information, which it subsequently located and conceded should have been disclosed. The information in question is that scheduled to the Public Authority's Reply dated 19 February 2007.

However, in the circumstances of the case no further action is required to be taken.

Dated this 31<sup>st</sup> day of August 2007

Chris Ryan

Deputy Chairman

## Reasons for Decision

### Background

1. The Appellants are residents of an area of Warwick close to the River Avon. They have evidence to suggest that at one stage in the 1960s planning permission for the development of this area was made conditional on the construction of a concrete flood defence between the proposed development and the river. By the time that the Appellants' houses came to be built no such structure was in existence. However there is, between the housing and the river, a strip of raised ground that forms an informal flood defence, by which we mean a structure that is not owned or maintained by the Environment Agency. Determining its exact status is not relevant to this Appeal and we will refer to it throughout this decision simply as "the informal flood defence".
2. The Appellants observed that when a small development was built near their houses in 2002 part of the raised ground at one end of the informal flood defence was levelled by a bulldozer. They believe that this also lowered the height of the ground above river level and materially reduced the protection of their houses from flooding, a matter that causes them grave concern because the River Avon burst its banks in 1998 and was seen by them to have come close to flowing over the informal flood defence. They have been active since in assembling evidence about the whole history of the area, including actions taken from time to time by the Environment Agency and the local authority, including relevant planning decisions. This Appeal arises from their attempts to obtain information on the issue from the Environment Agency and their complaint that it has not provided them with the information to which they are entitled.

### The request for information

3. On 30th of March 2005 a representative for the Appellants wrote to the Environment Agency in the following terms:

*"we should like to give notice under the Freedom of Information Act that we wish to look at any files you may have at any of your offices relating to the area of [street name] in Warwick or [location] in Warwick, specifically in connection with our flood bank.*

*The files should go back some considerable time-at least to 1963-4 when discussions took place with Lloyds the builders, the Electricity Board, British Railways and Warwick Borough Council. The Environment Agency were also involved in giving their opinion when a planning application was undertaken in 1998.*

*Any material that you may have in any connection with the issue of our flood bank would be of interest to us..."*

On 30 April 2005 the Appellants' representative raised a further request in the following terms:

*"I am told by Severn Trent Water that the old files that they had were passed on to the National Rivers Authority in 1989 when the water industry was privatised. These were then passed on to yourselves when the National Rivers Authority ceased operating and so should be amongst the files which you are in the process of collating. We are particularly anxious to see them"*

4. It is now accepted that the Environment Agency did not respond to the original request within the period of 20 working days as required by the Environment Information Regulations 2004 ("EIR") regulation 6.(2)(a), although it did contact the Appellants around the time of the deadline to invite them to a meeting in order to show them what information had been assembled and to explore the request further. We heard a certain amount of evidence about this meeting, as well as a later one in August 2005, and about the nature and source of information provided at the time. The evidence was of very limited relevance to the issues we have to decide but it did demonstrate that the Appellants formed a view at that time that the Environment Agency was either not committed to recovering relevant material, or was incapable of doing so. We have seen no evidence to support those suspicions but they appear to have undermined the relationship between the parties at the time and to have made it more difficult to resolve the differences that arose between them. However, it is fair to say that one or two mistakes and mishaps that occurred within the Environment Agency during the course of the matter did not help in convincing the Appellants that the various searches were conducted with appropriate rigour and competence.
5. The first meeting took place on 23 May 2005 and at the end of it the Appellants left a handwritten letter listing nine categories of document which they considered were missing from the information that had been disclosed to them. In the course of subsequent communications between the parties an additional paper enforcement file came to light. This file was checked and additional searches carried out but no further relevant documents were disclosed at that time.

#### Complaint to the information Commissioner

6. On 2 October 2005 the Appellants lodged a complaint with the Information Commissioner over the way in which their request had been handled. One of the issues raised was that the Environment Agency had wrongly applied the personal data exemption contained in EIR regulation 13. That remained an issue at the start of this Appeal

but was withdrawn during the course of the pre-hearing review for this Appeal in January 2007 . The central issue at the time was whether the Environment Agency had failed to conduct an adequate search. It was said by the Appellants that the Environment Agency in fact held information which it had not disclosed to them and was therefore in breach of EIR regulation 5(1) ("... a public authority that holds environmental information shall make it available on request"). A supplementary issue considered by the Information Commissioner at that time (but not pursued on appeal) was whether the Environment Agency had destroyed information that should have been retained.

7. In a Decision Notice dated 21 August 2006 the Information Commissioner concluded that, although he had sympathy for the Appellants' difficulties, he was satisfied that the Environment Agency did not hold any information beyond what had been provided.

### Appeal to the Tribunal

8. On 17 September 2006 the Appellant launched an Appeal to this Tribunal. The Grounds of Appeal, in the form of a letter of that date, stated as background that the Appellants intended to "take legal steps to have our flood-bank reinstated". It expressed the view that the possibility of litigation had caused the Environment Agency to be "reticent in disclosing their files" and added "the information which we know is contained in these files - and which we have not seen - is crucial evidence which we need to be successful in our proceedings". One of the features of this Appeal has been that the Appellants, while frequently expressing their belief that the information they seek is held somewhere within the Environment Agency, have not been able to produce evidence with which they could challenge the statements from various members of the Environment Agency staff to the effect that no such documents exist or can be traced. We recognise that those requesting information are likely to be at some relative disadvantage when challenging a public authority's statements about its files and searches for documents, as they are not able to inspect for themselves. This difficulty, and differences between the Appellants' expectations and what appear to be the actual information retained by the Environment Agency, are at the heart of this case. The Appellants' well-organised and determined quest has led to some additional information covered by the original request coming to light and has caused the Environment Agency to locate and disclose other information, which it says did not fall within the scope of the request, but which was provided to the Appellants as a gesture of goodwill.
9. By a Directions Order dated 15 January 2007 the Tribunal ordered that the Environment Agency be joined as a party to the Appeal. As the central plank of the Appellants' case was the credibility and competence of those members of the Environment Agency staff who had been involved in the management of its records, and the conduct of the searches carried out in response to the original request, an order

was also made for the Appeal to be determined at a hearing. This took place on 7 and 8 June 2007 and 17 July 2007. The Appellants conducted their own case. They did so with courtesy and commonsense and displayed the same well-organised determination that had been evident in all their investigations about the informal flood defence. However, it has to be said that the resources used by all parties to the Appeal in preparing for, and participating in, a full three-day hearing involving the cross-examination of 10 witnesses has been disproportionate. This has cast doubt on the wisdom of the original direction for a hearing as opposed to a paper determination. Despite the fact that a paper determination may not have satisfied the Appellants' wish to test the answers they had previously received from the Environment Agency, a simpler means may have to be sought for the disposal of Appeals of this nature in the future.

10. The powers of the tribunal on an Appeal are set out in section 58 of the Freedom of Information Act 2000. It applies to environmental information Appeals as a result of EIR regulation 18. Section 58 provides:

*"(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."*

We must therefore consider whether the Information Commissioner's decision that the Environment Agency did not hold any information covered by the original request, beyond that already provided, was correct. In the process we may review any finding of fact on which his decision was based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities.

11. In the course of preparing the Appeal the Environment Agency discovered a number of documents that had not been disclosed in response to the original request. These were scheduled to its Reply dated 19 February 2007.

It is accepted that the Decision Notice cannot therefore stand in its current form and that we will have to issue a substituted decision notice. It is also accepted that the Appellants now have all the information that has been located and the Information Commissioner and the Environment Agency invite us to conclude that we should not direct any further searches to be made. The Appellants consider that the discovery of further documents at a relatively late stage demonstrates that the original search had not been conducted with the

required skill or rigour and that, as gaps in the information remain, we should order further searches to be carried out.

12. Shortly before the hearing of the Appeal the Appellant were asked to produce a list of those categories of document which they considered the Environment Agency had still failed to disclose. The list ran to 14 categories. Counsel for the Environment Agency suggested that it was possible to extract from some of the Appellants' more generalised comments a small number of additional categories. We tried throughout the hearing to concentrate the parties' arguments on those categories but found that, both during the hearing and in the Appellants' written final submissions; we were presented with a number of arguments that did not relate to them, or to any matter which we have jurisdiction to consider. The Appellants are convinced that they have been badly served by the Environment Agency, which in their view has failed to take seriously their demand for an improved or reinstated flood defence and has wrongly concluded that the ground levels in the vicinity are such that the bulldozing of the raised ground did not increase flood risk. They say that this is in contradiction to earlier statements on the point. It has been difficult at times to contain the debate within the only issue which the tribunal is authorised to investigate, namely the Environment Agency's disclosure obligations in respect of information falling within the scope of the original request. In particular, we have resisted the Appellant's suggestion that we should base our decision on matters such as the seniority of the individuals who conducted relevant searches, the adequacy of the freedom of information training they had received or the archiving and document destruction procedures adopted by the Environment Agency in the past. We may only consider, in light of the evidence placed before us, whether the scope, quality, thoroughness and results of those searches entitles us to conclude that the Environment Agency does not hold further information falling within the scope of the original request.
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.

14. Against that background we will deal with each category of document in turn. We hope that we are able to do justice to the Appellants' arguments in each case. However, the response to our request that their closing written submissions should include a résumé of their arguments in respect of each identified category of material was a 26 page statement which appears to us to make no coherent attempt to relate the arguments to the categorisation identified earlier. It is therefore difficult for us to be sure that we have picked up on all the points they wished us to consider.
15. Documents from the 1960s. The Appellants are particularly interested in any papers relating to planning decisions from this period. These would, in their view, have been among the papers of the then Severn River Board, passing through various reorganisations to the Severn Trent Water Authority and from 1989 (when some of the flood defence and regulatory functions of the former regional water boards were separated from what were to become the privatised water and sewerage undertakings) transferred to the National Rivers Authority ("NRA"), and then in 1996 to the Environment Agency. Given the elapse of four decades and the number of reorganisations it is perhaps not surprising that the Environment Agency was not able to trace any significant material from this time in either the paper or microfiche records which it inherited from its predecessor bodies. The only documents that were made available to the Appellants turned out to be ones that had been passed to the Environment Agency by the Appellants during an earlier planning Appeal. We draw no inference against the Environment Agency from this fact or the fact that it appeared to be unaware of the source at the time of disclosure. We are satisfied, on the basis of the evidence we received, in particular from Mr Foulds, who at the relevant time was a Development Control Technical Specialist employed by the Environment Agency, and who supervised the original search in the Development Control Department, as well as the evidence of Miss Clink, who co-ordinated the searches, that an appropriately rigorous and focused search was made and that no other documents or information from this period were or are likely to be uncovered. Although the Appellants remained convinced that not all of the information from this period can have been destroyed, we are conscious of the pressures on public authorities to keep their archived information holdings within manageable limits and find it entirely plausible that documents that would be approximately forty years old would have been destroyed at some point, especially as they may not have been seen as relating to a structure built or maintained by the Environment Agency. The Appellants' conviction on this issue, and the understandable importance of the informal flood defence from their

point of view, is not enough to persuade us that the documents must still exist, particularly in the absence of any evidence presented to us which might have undermined what we were told by the Environment Agency's witnesses. Accordingly we conclude that, on the balance of probabilities, the Environment Agency no longer holds any information falling within this part of the Appellant's request.

16. Documents previously held by Severn Trent Water Authority or the National Rivers Authority. There may be a degree of overlap between this category and the previous one. We heard evidence from Mr Foulds that he had found no record of the destruction by NRA of any documents which it had inherited from Severn Trent and neither had he found any record of such material being transferred from the NRA to the Environment Agency. The Appellants have suggested that the relevant information must have been retained because it related to a "live" flood defence. However, the Environment Agency has consistently said that, although it took account of the existence of the informal flood defence when advising the local planning authority on the flood risk to any proposed new development in the vicinity, it did not own or take responsibility for it, or regard it as an official flood defence structure. Whether or not the Appellants accept that the Environment Agency was entitled to adopt this position, it explains why the Environment Agency would not have given a high priority to the retention of information about the informal flood defence. We find that its explanation for the absence of documents falling within this category is entirely credible and, in the absence of any evidence pointing in any other direction, we accept that on the balance of probabilities, the Environment Agency does not hold any. We should add that we heard evidence about certain purges or clear outs of the agency's archives from time to time and accept that the documents falling within this category, the previous one and possibly others may have been destroyed during the course of such entirely legitimate reorganisations. The most recent purge took place in 2006 and we received evidence, which we believe, that steps were taken to ensure that no documents were destroyed in the process which might have fallen within the scope of the original request.
17. Warwick Gauge Measurements. The Warwick Gauge measures the height and flow of the River Avon a short distance upriver from the area where the Appellants live. We do not believe that records derived from it fall within the terms of the original request. We reach that conclusion on the basis of both the language of the request and the fact that it was not raised by the Appellant's during their meetings with the Environment Agency in either May or August 2005, or in the list of information they requested in the letter left with the Environment Agency at the end of the May meeting. In the event, the records were made available to the Appellant in May 2007, but on the basis that the disclosure did not mean that the Environment Agency conceded that they should have been disclosed in response to the original request.

18. Notebook entries regarding site visits by Mr Foulds and Mr Jones of the Environment Agency. It is common ground that both Mr Foulds and Mr Jones of the Environment Agency's staff visited the location of the informal flood defence. The Appellants were particularly interested in any notes made by Mr Jones because they believed that they would have formed the basis for subsequent decisions by the Environment Agency and they suspected that Mr Jones had been prevailed upon by his colleagues in the course of the August 2005 meeting to change his mind about the significance, in flood defence terms, of the raised ground. Both Mr Jones and Mr Foulds gave evidence before us. We were told that notes on site visits were not necessarily made, or retained after any action arising from the visit had been taken. Our role is not to assess the quality of the Environment Agency's administration but to determine the straightforward issue summarised in paragraph 12 above. In the event Mr Jones, under cross examination, firmly rebuffed the suggestion that he had changed his position during the August meeting and provided a cogent explanation for what he had said, which appears to have aroused the Appellant's suspicions. We accordingly accept the Environment Agency's evidence that no documents of this nature existed at the date when the original request was made.
19. Report of a Mr D. Ricketts. The bundle of papers prepared for the purposes of the Appeal included a handwritten note dated August 2003 referring to a site visit. The Appellants believed that there should have been a more formal report disclosed but we have concluded, on the basis of the evidence we received from Mr Perry, the Environment Agency's Area Flood Risk Manager for Lower Severn, who had checked the position with Mr Ricketts, that no further documentation exists.
20. Outflow hatch. One of the Appellants' concerns was that a sewage outflow hatch located within the informal flood bank did not appear to function properly and there was a consequent risk of river water passing back through it and causing flooding. We received evidence from Mr Foulds to the effect that a feature of this kind was not the responsibility of the Environment Agency and that it would not therefore hold any information about it. Although the Appellants evidently feel concerned that neither their local council, sewerage undertaker nor the Environment Agency is taking responsibility for a mechanism whose suspected malfunctioning may create a flood risk, they were not able to produce any evidence to set against the Environment Agency's clear statement on the point. We accordingly find that the Environment Agency does not hold any information on this matter.
21. Avon Power Station file. Upstream of the location of the informal flood defence, and to the north of a railway line embankment which it connects to, is an area of land which was formerly occupied by a power station. The area has since been redeveloped. The Appellants consider that any information held by the Environment Agency in

relation to flood risk associated with this area of land fell within the scope of their original request. We remind ourselves of the terms of the request - "... any files... relating to the area of [street name] in Warwick or [location] in Warwick, specifically in connection with our flood bank". We do not believe that this covers the power station site or that it should have led the Environment Agency to consider extending the search to this area. It was not raised as an issue during the meetings in 2005 at which the scope of the request might have been clarified and the Appellants have themselves conceded that it was only when it was drawn to their attention in the course of preparing for the hearing of this Appeal that they were alerted to the existence of a file on the subject. The Appellants drew attention to the fact that the original request included a certain amount of information on what the Appellants expected might be included in the files they were seeking and that they had included a reference in this respect to discussions as far back as 1963-4 with, among others, "the Electricity Board". It was suggested to us that, as both the power station and the land on which the Appellants' houses were built was owned by the Electricity Board at one time, this reference was sufficient to bring the power station site within the scope of the original request. We do not think that it does.

22. Archive box in National Capital Program Management Services in Solihull. After the original request was made, an Environment Agency employee called Emma Rushforth searched for information about "the flood bank referred to or the area in general". She reported that she could not find anything but did refer to an Initial Feasibility Report for a flood alleviation scheme that had been proposed for the general area following flooding that had occurred in 1998. The report was not produced for the Appellants at the time but Mr Perry informed us that he subsequently obtained a copy of the report from a paper file held in archive by the Environment Agency's National Capital Program Management Services in Solihull. He concluded that it did not contain any information relevant to the area where the Appellants live. This attempt by the Environment Agency to go further than it was strictly obliged to in order to try to assist the Appellants simply led to the suggestion from them that they should be allowed to view the whole of the archive. We have no hesitation in concluding that this falls outside the scope of the original request. We have been informed that a new request for information has been made in respect of the archive and therefore say no more on the subject at this stage.
23. Correspondence with Bromford Carinthia. The Appellants have evidence that during the 1990s an organisation called Bromford Carinthia considered developing an area of land on or near the informal flood defence. In the end it withdrew from the project, possibly because the cost of flood defence structures required by the local authority as a condition for the grant of planning permission was regarded as excessive. The Appellants are understandably keen to uncover as much evidence as possible on what they clearly suspect was a more rigorous approach to flood risk than was demonstrated

when another organisation was subsequently allowed to build on the same land. The evidence of the Environment Agency on this point is that its searches brought to light just two letters and that it would not expect more information to be available. It said that this is because its role is simply to provide advice to local planning authorities on flood risk issues affecting individual proposed developments. The bulk of information behind a planning decision will therefore be held by the local planning authority and not the Environment Agency. The Appellants believe that the conversations that took place with the planning authority in the course of the consultation process should have generated a significant body of documentation. However we were also told by Mr Foulds, Mrs Mann and Mr Jones (all employees of the Environment Agency) that in the course of their work they did not generally make or retain on file written records of such conversations. The Appellants' continue to believe that important decisions about the conditions to be attached to Bromford Carinthia's planning permission could not have been taken without a substantial body of material having been created and retained on the Environment Agency's files. The sworn testimony of the Environment Agency's officers provides an entirely credible explanation as to why this should not have been the case and why only a few letters on the subject came to light as a result of its search in response to the original request. We accordingly find that on the balance of probabilities the Environment Agency does not hold any further information falling within this category.

24. Electronically scanned documents. In the course of his evidence Mr Perry made a general statement to the effect that his department of the Environment Agency retain records going back for decades, which had been electronically scanned onto CDs. He went on to say, in the following sentence of his witness statement, that the department nevertheless tried to throw away files fairly quickly if they were not particularly contentious. The Appellants concentrated on the first statement, and not the second, and sought to use it as the basis for an allegation that either the relevant material was available in CD storage, and had not been accessed, or that the evidence it was interested in had been archived away in a manner which precluded ready access. This reflected a misunderstanding of what Mr Perry had said and possibly of the relative ease of accessing data held on CDs. The Appellants produced no evidence to undermine the Environment Agency's assurance that it had searched the likely sources of information, including information stored on electronic media, and believed that it had disclosed all the relevant information that it had retained. We accept that evidence.
25. Discussions and decisions made in relaxing the requirement for a flood defence. The Appellants strongly suspect that at some stage the Environment Agency relaxed its approach to the conditions to be imposed on planning applications, with the result that permission was given for the development affecting the informal flood defence. They expect there to be extensive documentation recording the decision-

making process. The evidence of the Environment Agency was that, if it had changed its advice, it would not record why it had done so. It makes all its decisions on the basis of the data available to it at the time. If the data has changed since the matter was last considered (because, for example, improved ground survey techniques have produced more accurate information on ground or water levels) then the advice might well also change. But it would not generate documents justifying or explaining why the previously held view had been superseded. We accept the evidence of Mr Foulds on this issue and do not believe that, in the light of that evidence, the Appellants produced any evidence or arguments that should cause us to doubt it. We accept that the Environment Agency has disclosed all the information it has on the point.

26. Environment agency file SP295652. The Appellants believe that they were not provided with all relevant material retained on this Development Control file. However, we received clear evidence from Mr Foulds that he had arranged for a colleague to check the file and to extract relevant material for disclosure to the Appellants. We have no reason to disbelieve that evidence, which was not seriously challenged, and we accept that the Environment Agency has carried out its obligations in this respect.

27. Information supporting a January 2007 response on consultation. Almost two years after the date of the original request the Environment Agency wrote to Warwick District Council in response to a request for advice on an application to release conditions attached to an earlier planning permission. The Appellants noted that the letter referred to a "private flood defence" and believed that this might be evidence of a decision to downgrade the level of protection afforded to the informal flood defence. They therefore relied on the letter as evidence that the Environment Agency's files did contain evidence of decisions intended to relax the flood defence requirements, as they had always suspected. This is not strictly a separate category of information, therefore, but was relied on in support of the Appellant's case in respect of the category of information discussed in paragraph 25 above. The point does not help the Appellants as evidence was given to us by Miss Catrin Jones, one of the Environment Agency's Planning Liaison Officers, that the basis of the letter in question was, not material available from the Environment Agency's files, but a topographical survey provided by the person who had submitted the original planning application. The words quoted are in any event consistent with the Environment Agency's evidence to the effect that the structure at issue is not a flood defence for which it bears responsibility. It is regarded as a feature which may serve to retain water that reaches a height beyond that regarded as the required minimum protection and which should, if possible, be retained and should not be breached unnecessarily. As we have indicated earlier we find this a further convincing explanation for the relatively small amount of information about it on the Environment Agency's files.

28. Single file relating to the flood defence in the area. The Appellant's case relied in part on their view that the Environment Agency's filing system was not structured in a way that they would have recommended. One of their specific criticisms was that the information they requested would have been much easier to recover if all of the Environment Agency's materials relating to the area in question had been assembled into a single file, even if duplicated in other files maintained by the Environment Agency's various departments. The Appellant suggested that if a public authority maintained filing systems that were, in their view, complex and inadequate it should take a more liberal approach to information requests and not rely on the fact that searching was time-consuming as a reason for not disclosing information. These are not issues that we are entitled to adjudicate upon and we do not feel qualified, in any event, to tell a complex national organisation discharging statutory responsibilities how it should operate record-keeping systems in support of its functions. We do not believe that the design of the filing system has any bearing on the evidence of the various members of the Environment Agency's staff, which satisfied us that each of them had made a serious and reasonably well-organised and correctly-focused attempt to find any information held within the organisation that fell within the scope of the original request.
29. 1998 report. The Appellants' investigations brought to light correspondence between third parties referring to a report published by the Environment Agency in June 1998. They believe that the context in which the reference appeared suggested that the report should have formed an integral part of the Environment Agency's papers concerning the flood defence of their area. The Environment Agency informed us that a report had been prepared at around that time into the flooding that had occurred at Easter 1998. It was the report of the Independent Inquiry into Easter 1998 Floods or the "Bye Report" It was reviewed by the Environment Agency as part of its preparations for this hearing and Mr Perry reported in his evidence that, although there were a few reference in it to Warwick as a whole, including some to a road that passes through the area in which the Appellants live, it contained nothing of relevance to that area itself. No alternative suggestion was made as to the identity of the document referred to and we accept Mr Perry's evidence, which we think demonstrates that the Bye Report did not fall within the scope of the original request.
30. Documents from Severn Trent Regional Flood Defence Committee. Mr Perry gave evidence to the effect that the committee considers high-level matters and not individual flood defence structures. He therefore thought it extremely unlikely that matters relating to the informal flood defence would have ever come before the Committee. For that reason the Committee's records were not reviewed as part of the search carried out in response to the original request. As part of the Environment Agency's preparation for this Appeal Mr Perry

arranged for a check to be made of the papers for the committee meetings held shortly after April 1998. He reported that no relevant material appeared among the agenda papers for the meetings that took place in May, July or October of that year. We are satisfied that the Environment Agency carried out its obligations under the EIR in respect of this category of material identified by the Appellants.

Conclusions on the facts.

31. We heard evidence from several members of the Environment Agency's staff about the time and effort expended on the searches carried out to date. More convincing than the bald statistics of time spent was the clear impression we obtained from each of the witnesses that, contrary to the Appellants' suspicions, they were anxious to help the Appellants and to track down and disclose the information for which the Appellants asked and/or that was thought might assist their investigations. We were satisfied that the instances of information being wrongly withheld (for example certain material held on Planning Liaison Department files ) resulted from the sort of mistake that can understandably occur in a search across numerous sources. We were particularly impressed by the care with which many elements of the original search were revisited in the course of preparing for the hearing of this Appeal in order to double check that nothing had been missed. We have no difficulty in concluding, on the basis of both these general factors and the specific points made in relation to each category mentioned in paragraphs 15 to 30 above that on the balance of probabilities no further relevant information is held by the Environment Agency.
  
32. The Environment Agency argued that, even if we had found that it was to be regarded as holding further information falling within the terms of the original request, it was entitled to rely on the exemption provided by EIR regulation 12(4)(b). This entitles a public authority to refuse to disclose information to the extent that the request for information is manifestly unreasonable. In the present case the Environment Agency did not treat the request as being manifestly unreasonable when it first received it. Nor did it conclude, in the course of searching for information falling within its scope, that either the quantity of material coming to light or the further avenues of inquiry requiring to be pursued, rendered the original request manifestly unreasonable. However, it was argued before us that it would be manifestly unreasonable for the Environment Agency to be required to carry out any further searches and we should conclude that the original request had therefore become manifestly unreasonable. It is not necessary for us to decide this issue, given the findings of fact we have made and, in the absence of substantial legal argument in opposition to those put forward by the Environment agency, and substantially supported by the Information Commissioner, we do not think that it is appropriate for us to do so.



33. We accordingly decide that no direction requires to be given to the Environment Agency to carry out further searches but that a substituted decision notice should be published, in the form set out above to record that the request was not responded to within the time limit imposed and that the Decision Notice was wrong in concluding that all information had been disclosed at that time.

Chris Ryan  
Deputy Chairman

Date 31<sup>st</sup> August 2007