



# Tribunals Service

Information Tribunal

Appeal Number:

**EA/2006/0089**

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**

Heard at Procession House, London, EC4

Decision Promulgated 29 June 2007

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Andrew Bartlett QC**

**and**

**LAY MEMBERS**

**Michael Hake**

**Marion Saunders**

**Between**

**MRS E J SPURGEON**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**HORSHAM DISTRICT COUNCIL**

**Additional Party**

**Representation:**

**For the Appellant: Miss K Spurgeon**  
**For the Commissioner: Timothy Pitt-Payne**  
**For the Council: Akhlaq Choudhury**

## **Decision**

Our formal decision is that the Tribunal upholds the decision notice dated 20 October 2006 and dismisses the appeal, but this order is subject to the qualifications and conditions explained and set out in paragraphs 88 to 99 below, which provide for the possibility of the matter being referred back to us no later than 16 July 2007 for a further or different order to be made.

## **Reasons for Decision**

### **Introduction**

1. Mrs Spurgeon lives in Horsham in Sussex, in a house which she purchased in 1974. She is concerned about matters which she believes might affect her title to her house and land. In pursuance of that concern she has made a number of requests to Horsham District Council for information. In relation to the requests which form the subject matter of this appeal, the Council has provided some information, but has contended that it does not hold any more than it has provided. Mrs Spurgeon complained to the Information Commissioner, who substantially accepted the Council's position. The question for the Tribunal is whether the Commissioner was right to do so.

### **The requests for information**

2. By two letters dated 11 November 2004 and 18 January 2005 Mrs Spurgeon requested of Horsham District Council five categories of information:

- (1) A request whether the Council could shed any light on a planning condition imposed in about 1956 in relation to a Company of Royal Engineers depot/married quarters that stood on land now occupied by Mrs. Spurgeon's own property.
  - (2) A request for a section 52, section 106 or equivalent agreement, said to be held in deed packet number HUDC 142.
  - (3) A request for two specific letters from "PSA Correspondence – Tolworth Tower HQ".
  - (4) A request for the name of a building regulations officer, and the government body who sent him.
  - (5) A request for building regulations documentation for Mrs. Spurgeon's property, together with information as to whether her property had a section 18 agreement under the 1936 Public Health Act and whether it had been the subject of section 114 of the Water Industry Act 1991.
3. The first letter was sent before the relevant provisions of the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations ("EIR") came into force (1 January 2005), but the second letter formally repeated the requests after that date. We will therefore refer to the request for these five categories as the January 2005 request.
  4. The Council's first substantive response, by letter of 12 January 2005, was that after an extensive research exercise the only information uncovered related to item (4). It enclosed copies of some notes relating to checking of the Building Regulations application and site inspection records, but which did not show the name of the officer involved and which did not relate specifically to Mrs Spurgeon's own property.
  5. Following Mrs Spurgeon's renewed request of 18 January 2005, the Council's further reply on 20 January 2005 was that it did not hold the

information requested in (1)-(3), and that it had already provided all the relevant information which it held in respect of (4) and (5). It advised that information about agreements under the Public Health Act 1936 and the Water Industry Act 1991 should be sought from Southern Water, who were the current sewerage undertaker.

6. There is a preliminary question about the scope of Mrs Spurgeon's requests. In her letter of 11 November 2004 Mrs Spurgeon referred to an earlier letter (27 October 2004), asserted that the information she required should be made available, and stated her understanding that there were more detailed files in existence which were held at the Council's offices at Denne Parade. The Tribunal took the view at an interim stage that her letters could arguably be construed as containing two further requests, in so far as not already included in (1)-(5), for

(6) all Building Regulations information relating to Mrs Spurgeon's own property and to the Tanbridge Place estate,

(7) all the Council's files relating to her property and/or to the estate.

7. The Tribunal's directions order required the Council to disclose, for the purposes of the full hearing, documents within all seven categories, and any other documents relevant to the question what information in those categories was held as at January 2005. The Council did not object to the making of the order.

#### The complaint to the Information Commissioner and further requests

8. On 2 November 2005 Mrs. Spurgeon complained to the Commissioner about the way in which her requests for information had been handled by the Council. From the terms of her complaint it appeared that she wished to obtain all files or documentation on her property, or on the estate as a whole, held by the Council.

9. After complaining to the Commissioner, Mrs Spurgeon made three further information requests to the Council. The first, by letter dated 18 April 2006, referred to what she called a “re-drawn/falsified map” of her house and land, held by the Council; she requested the files holding the map, and other related information as set out in her letter. Her second additional request, made on 6 June 2006, was for deed packet HUDC 142 in its entirety. Her third request, made on 14 June 2006, listed eight specific items, which partly overlapped with those previously requested.
10. These further requests and responses, made some months after Mrs Spurgeon’s complaint to the Commissioner, did not fall within that complaint and, with one exception, they did not form part of the Commissioner’s consideration. The exception was that the Commissioner’s office raised questions about the deed packet, which was in any event made available to Mrs Spurgeon by the Council promptly after 6 June 2006.
11. Subject to certain qualifications not relevant in the present case, the Commissioner’s duty upon receiving a complaint is to investigate whether the original requests were handled correctly. Mrs Spurgeon was not entitled to widen her original requests retrospectively by complaining about wider matters to the Commissioner. Nor was she entitled to bring into his consideration of her complaint the subsequent requests that she made in April and June 2006. The Commissioner may properly look at wider matters, if to do so assists his investigation, but a complainant is only entitled to a decision from the Commissioner in relation to the specific items originally requested. (Subsequent requests can of course be the subject of further complaint to the Commissioner where necessary.)
12. After investigation, the Commissioner concluded that the Council did not hold any information within requests (1)-(5) which had not already been provided. In his Decision Notice dated 20 October 2006 he determined that the Council had complied with its obligations under

FOIA and under the EIR, if applicable, save that the Council had failed to give Mrs Spurgeon the address of Southern Water Authority. The latter was a breach of the Council's duty to provide advice and assistance under FOIA s 16 and/or EIR regulation 9.

13. As regards whether FOIA or EIR applied, paragraph 3 of his Decision Notice stated that the request was "for environmental information", while in paragraph 32 the Commissioner stated that some of the information requested "may fall" within the definition of "environmental information". He further stated that he had considered both sets of provisions.

14. The Commissioner did not require any further action to be taken by the Council.

#### The appeal to the Tribunal

15. Some while before the issue of the formal Decision Notice, an Assistant Complaints Resolution Officer in the Commissioner's Office wrote to Mrs Spurgeon and the Council a long letter dated 12 June 2006. This stated that he was writing to explain in full his assessment of her complaint, set out his conclusion that the Council held no further information within the requests, and stated that Mrs Spurgeon's complaint "*would now be closed*".

16. Unsurprisingly, Mrs Spurgeon took this to be the Commissioner's decision, and commenced an appeal against it in this Tribunal. This was overtaken by the formal Decision Notice issued in October, against which Mrs Spurgeon also appealed. To avoid a sterile jurisdictional argument, the Tribunal disposed of the first appeal summarily by dismissing it, on the basis that the Tribunal would consider the second appeal instead.

17. Mrs Spurgeon's Notice of Appeal, with the documents accompanying it, is very lengthy. Doing our best to précis a large amount of material, we would summarise her principal points from that material as follows:

- (A) The Commissioner mishandled her complaint in a wide variety of respects and did not investigate it properly.
- (B) Various public authorities, including the Ministry of Defence, have told her that the information she requires ought to be held by the Council.
- (C) The existence of the files sought is demonstrated by a letter sent to her on 23 July 2000 by another resident of the Tanbridge Place estate, and by an ICE Contract and Appendix regarding sewer works undertaken in 1997, which were organised and controlled solely by the Council, and for which her late husband paid a contribution of £1,268.51 to a solicitor.
- (D) It was verbally confirmed to her by a Council official, Chris Sepke, when he visited her property, that there is a file of considerable size held at the Denne Parade offices. Other residents and other council officials (in particular, Miss Filbey of the Technical Services Department) have said the same. Another Council official, Frances Waring, had given her the number of a relevant deed packet, HUDC 142.
- (E) The file held at Denne Parade was in constant use by the Council and by other residents of Tanbridge Place estate.
- (F) When she met Mr Prevett of the Council at the Technical Services Department on 30 May 2003, he accessed the file in front of her. From it he produced documentation, copies of which she still has in her possession.
- (G) The file contains a redrawn or falsified map of her property. This constitutes personal data, which has been unlawfully processed without her consent. The falsification involves her property (143) being shown as having a separate sewer, as opposed to being on the system serving numbers 137 to 149 and onwards. At a meeting with Mr Davison (the Council

solicitor) and Mr Prevett on 23 July 2003, all present agreed with Mrs Spurgeon that the plans were contradictory, and Mr Davison promised an urgent investigation. Mr Davison told Mrs Spurgeon's solicitor on the telephone on 14 April 2004 that the Council's engineers had produced the redrawn or falsified map. The solicitor wrote to the Council about this on 15 April 2004 but received no answer.

(H) The Council failed to give proper assistance in her requests for information. Instead, the Council was deliberately withholding information from her, in particular, as to the true ownership of the land on which her property is built. This was illustrated by their failure to tell her, during previous inquiries, that the estate had formerly housed married quarters owned by the Ministry of Defence. It was further illustrated by their failure to send her deed packet HUDC 142 in response to her letter of 11 November 2004.

(I) The Council failed to answer her request about public open spaces in her letter of 18 January 2005.

(J) Sewer adoption agreements under s18 of the Public Health Act 1936 were at the material time only made with local authorities, so that the Council was wrong to refer her to Southern Water. Such agreements would show the true land ownership.

(K) The Council have held a section 40 adoption certificate dated 24 March 1978 since it was completed, but falsely informed her that they held no information. The adoption certificate required explanation, since it was completed more than two years after the section 40 adoption agreement dated 1971. This agreement and certificate are linked to a 7 year resale or lease agreement, a trust of the land on which her



property is built (of which the Ministry of Defence are or were the trustees), and a public open space agreement affecting her land.

(L) The contents of deed packet HUDC 142 were dated 1953, so the deed packets that related to her property, from in or around 1970, must be easily accessible.

(M) In regard to the 1997 sewer works, she has never received any receipt, guarantee, warranty, proof of other contributions paid, copy of the final bill, or any proof of to whom her household's contribution was paid. Her overriding concern is to keep her house deeds and documents in order for the future. She believes the receipt, guarantee and associated documentation are held by the owner of the sewer system or the owner of the land on which her property is built. She might be sued and left bankrupt by any future owners of her property who gain access to the information denied to her by the Council.

18. Specific criticisms about the Commissioner's handling of her complaint included:

Criticism (1) The Commissioner ignored or dismissed the vital evidence referred to above, and did not investigate as he ought to have done. He did not take advantage of the assistance that Mrs Spurgeon was keen to provide to him.

Criticism (2) The Decision Notice failed to deal with the matter of the redrawn or falsified map.

Criticism (3) The Commissioner contacted the Council by telephone and was sent Mrs Spurgeon's personal data. This was after Mrs Spurgeon had on three occasions sent a cheque for a £10 data fee to the Council and had not received her personal data from them. (The cheques were returned to her in January 2005.)

Criticism (4) The Commissioner was unduly slow in investigating her complaint.

Criticism (5) The Commissioner was wrong to interpret her letter of 11 November 2004 as confirming receipt of planning documentation from file HU/579/70, since she had never received any such documentation.

Criticism (6) The Commissioner failed to inform her of her right of appeal to the Tribunal.

### The questions for the Tribunal

19. The Tribunal's task in the present case is to consider under FOIA s 58 whether the Decision Notice was in accordance with the law.<sup>1</sup> For that purpose we are entitled to review any finding of fact on which the Decision Notice was based.

20. We must therefore consider whether, in the light of the much fuller evidence available to us, the Commissioner's conclusions were correct. This involves consideration of whether it is right that the Council gave Mrs Spurgeon appropriate assistance (save in regard to the address of Southern Water), and whether it is right that the Council held no information within categories (1)-(5) which had not already been provided. It also involves consideration of whether categories (6) and (7) were requested under the Act.

21. As we have noted, the Commissioner considered the matter both under the Act and under the EIR. Whether any of the information requested truly fell under the latter regulations is not a point of any practical importance, since in relation to the particular facts of the present case the relevant requirements of the two sets of provisions are identical. In our view the information requested did not fall within the definition in EIR regulation 2 and was therefore not environmental information. We

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<sup>1</sup> The present case is not concerned with any exercise of discretion by the Commissioner, so that no question arises under s 58(1)(b).

have therefore proceeded on the basis that the whole of the requests fell within FOIA alone. This does not affect in any way the substance of our decision. (If we are wrong about this, and the EIR did indeed apply, it makes no practical difference, because in the circumstances of the present case the duties under the EIR are the same as those under FOIA.)

22. In her skeleton argument, Mrs Spurgeon also raised points under the Data Protection Act 1998 and the Human Rights Act 1998. We refer to these where appropriate below. We also allowed Mrs Spurgeon to raise some fresh matters in the course of the hearing, so as to ensure that her concerns were heard.

#### Whether categories (6) and (7) were requested under FOIA

23. At the hearing the Commissioner contended that the scope of the January 2005 request under the Act was limited to categories (1)-(5). We have been persuaded that this contention is correct. While the pre-Act letter of 11 November 2004 referred back to the earlier requests, the post-Act letter of 18 January 2005 effectively repeated only the specific questions raised in the letter of 11 November 2004 and not the whole letter. It follows that the requests under the Act which we must consider are (1)-(5) and not (6)-(7). Categories (6) and (7) were requested before the Act came into force.

24. Mrs Spurgeon retains her ordinary rights to make further requests of the Council, provided that any new requests are not in substance mere repeats of the requests that she has made since 1 January 2005.

#### Evidence

25. We received in evidence from the parties about one thousand pages of documents, comprising principally various files held by the Council, a wide range of material provided by Mrs Spurgeon, the correspondence between Mrs Spurgeon and the Council over the years, and details of the Commissioner's investigation. The Council files were-

- (1) planning and building control file HU/579/70
- (2) deed packet HUDC 142
- (3) Technical Services Department file
- (4) planning files HU/521/72 and HU/305/95
- (5) Environmental Health Department complaint files in relation to the relevant properties
- (6) Environmental Services Directorate file regarding a collapsed drain at another nearby property.

26. We received a detailed statement from Mr Davison, the Solicitor to the Council, which he confirmed on oath in his oral evidence, and about which he was cross-examined. Mr Davison has been with the Council for many years. We found him to be a satisfactory witness, in the sense that he was careful to distinguish between what he actually recalled or knew from his own knowledge, and what he merely inferred or had been told by others within the Council. There were some points on which, because of limited recollection or limited information, he was unable to assist us. We also heard some brief sworn evidence from Mrs Herbert, a solicitor in Mr Davison's department, concerning some matters which were raised in cross-examination and which she was better placed than Mr Davison to answer. We found her also to be a satisfactory witness.

27. Mrs Spurgeon was not legally represented and did not give evidence, but we received detailed written comments from her which contained her account of events, and which drew attention to the significance of many of the documents as understood by her and her daughter, who represented her. Miss Spurgeon presented the appeal fluently, forcefully, and indeed with some eloquence. Based both on the documents and the things said by Miss Spurgeon during the hearing, we found the Spurgeons to be able and articulate. However, and this is

not a matter for any surprise, their knowledge and understanding of the law and practice relating to property and planning matters were in some respects limited. While in the past they had sought legal advice on certain points, some of their conclusions were not justified, because they were drawn from documents which they had misread, did not fully understand, or lacked the knowledge to place within an appropriate legal and factual context.

28. The conclusions which we set out below are our findings based on the evidence which we received and having had the benefit of the submissions made by the parties in their skeleton arguments and orally at the hearing.

#### The criticisms of the Commissioner's conduct

29. In regard to the criticisms made by Mrs Spurgeon about the Commissioner's conduct, which are set out in paragraph 18 above, Criticisms (1) and (2) are subsumed in our consideration of the merits of her appeal, below. We have come to the conclusion that Criticisms (3)-(6) do not assist us in considering the merits, and we briefly deal with them here.

30. Criticism (3) is based on a misunderstanding of the Commissioner's role and duties. The Commissioner is entitled to make inquiries by telephone and to receive information from any public authority or data controller.

31. Criticism (4) relates to delay. It is a matter of public knowledge that the Commissioner's office was under-resourced in 2005-2006, and that the Commissioner has expressed his concerns over this. We are concerned in this case with the merits of the decision, not with how long it took the Commissioner to reach it. At the same time the delay was not helpful. People exercising their information rights should be able to expect a more rapid response. The delay appears to have fed Mrs Spurgeon's concerns. This might have been avoided and should be acknowledged.

32. Criticism (5) is based on another misunderstanding. It is evident to us that what the Commissioner wrote was not intended to say anything different from the passage in Mrs Spurgeon's letter of 11 November 2004 where she wrote: "... *I have already acquired all documentation available on microfiche, held at the Council offices in North Street, under reference HU/579/70*".
33. Criticism (6) arises from the Commissioner's letter of 12 June 2006, which was not a formal Decision Notice, but which nevertheless appeared to constitute the Commissioner's decision on the appeal, since it set out the case officer's conclusions and stated that her case was to be closed. It did not advise her of any right of appeal. We find it difficult to see how the Commissioner could justify that letter within the terms of FOIA section 50(2). The letter did not rely on any of the circumstances set out in s 50(2)(a)-(d). Mrs Spurgeon's concern about this letter is understandable, and it was a source of anxiety to her. However, for the reasons set out at paragraph 16 above we are not called upon to make a final decision about the effect of the letter of 12 June 2006. The formal Decision Notice which was subsequently issued by the Commissioner corrected the deficiency and advised her of her right of appeal to the Tribunal.

The issues raised in the Notice of Appeal

*(A) The Commissioner mishandled her complaint in a wide variety of respects and did not investigate it properly.*

34. In order to reach a conclusion on this it is necessary for us first to consider the substance of the specific matters raised.

*(B) Various public authorities, including the Ministry of Defence, have told her that the information she requires ought to be held by the Council.*

35. We take this into account as part of the overall evidence. The fact that one authority believes that another should hold certain information is clearly relevant. Equally clearly, the general proposition must yield to

direct evidence about what is actually held, where such evidence is available.

*(C) The existence of the files is demonstrated by a letter sent to her on 23 July 2000 by another resident of the Tanbridge Place estate, and by an ICE Contract and Appendix regarding sewer works undertaken in 1997, which were organised and controlled solely by the Council, and for which her late husband paid a contribution of £1,268.51 to a solicitor.*

36. The letter of 23 July 2000 was not written by or on behalf of the Council. It does not expressly mention any files. Mrs Spurgeon's letter of 14 July 2003 gave a detailed explanation of why she believed that inferences could be drawn from the letter of 23 July 2000 concerning what files were held. In our judgment the inferences which she seeks to draw are not justified. But in any event, the fact that the Council holds various files is not in dispute: see paragraph 25 above. The question for us is whether the Council has withheld anything from its files which it ought to have disclosed in response to the January 2005 request. Proof of the existence of the files cannot of itself provide the answer to that question.

37. The works in 1997 were to the private sewer running behind the properties. We have considered the documentation relating to the works, Mr Davison's evidence about them, and Mrs Spurgeon's comments and the submissions made on her behalf. The evidence demonstrates that the works were undertaken on behalf of the residents, encouraged by the Council against the background of its powers under the Building Act 1984 s 59 to require works to a private sewer.

38. The evidence did not include any formally executed ICE contract. The unsigned ICE documentation related to a much larger quantity of works than the works to the private sewer connected to Mrs Spurgeon's property.

39. Even if the ICE contract did relate in some way to her property, it did not seem to us that it assisted us with the issues which we have to decide. The ICE contract is a standard form which is drafted to cater for a wide variety of situations. It is often made subject to further standard amendments to cover yet further eventualities which may arise. The references in the standard amendments to an "Unnamed Principal" arise from lawyers' caution and do not indicate that there was any unnamed principal in relation to the 1997 works.

40. Mrs Spurgeon's suspicions were aroused by the fact that she was treated by the contractor for the 1997 works, Close Contact International Ltd, as a special case, in the sense that she was dealt with separately from her neighbours and her contribution was collected separately from the others. She was concerned that this was because someone was trying to hide something from her. She referred also to the personal connection between one of her neighbours and a member of staff at the Council. The evidence does not demonstrate that her suspicions were well founded. The contemporaneous documents which have been produced on disclosure reveal that the reason why she was treated separately was that her neighbours found the Spurgeons difficult to relate to and indeed were fearful of dealing them. The letter written on behalf of neighbours dated 31 August 1997 stated that the neighbours were "*fearful of the reaction of the household at No. 143*". Similarly, a report to an insurance company from a contractor who sought to carry out a further inspection in 2003 stated: "*During our inspection the owner of number 143 threatened to call the police if we went anywhere near her property, we would therefore advise great caution when dealing with this claim.*" We can well understand that the Spurgeons' genuine determination to defend Mrs Spurgeon's property rights, and their forcefulness in doing so, could be interpreted and experienced differently by others. We do not mean to imply that the Spurgeons set out to alienate anyone; we think it more likely that the Spurgeons, because of their concerns, may not fully realise the impact they can have on others and how they may be perceived.



41. Close Contact International Ltd wrote to the Spurgeons on 29 December 1997 stating that the works had been completed and promising, in return for payment, to provide certificates stating that they had been completed. The Council also wrote to the Spurgeons (as to the other occupiers affected) on 22 January 1998 confirming that the works had been completed and inspected. Payment was duly made, but Mrs Spurgeon did not in the event receive any further certificate or guarantee from the contractor. We have sympathy with Mrs Spurgeon's concern that her husband's cheque did not result in receipt of a formal certificate or guarantee from the contractor, but we note that she received proof of satisfactory completion of the works in the contractor's letter of 29 December 1997 and the Council's letter of 22 January 1998, and in our view her non-receipt of a formal certificate or guarantee has no bearing on the question whether the Council responded correctly to the January 2005 request. Moreover, a certificate would probably now be of limited practical relevance, since more than 6 years (the usual time period within which any claim has to be brought) has elapsed since the works were done.

*(D) It was verbally confirmed to her by a Council official, Chris Sepke, when he visited her property, that there is a file of considerable size held at the Denne Parade offices. Other residents and other council officials (in particular, Miss Filbey of the Technical Services Department) have said the same. Another Council official, Frances Waring, had given her the number of a relevant deed packet, HUDC 142.*

42. A number of Council files have been produced. As we have stated, proof of the existence of the files cannot of itself provide the answer to the question whether the Council has withheld anything which it ought to have disclosed in response to the January 2005 request.

43. The deed packet HUDC 142 relates to a parcel of land which now forms part of the public highway. The communications concerning this deed packet are instructive. Mrs Spurgeon's letter of 11 November 2004 stated:

“2) There should be archived for the whole of Tanbridge Estate, a Section 52 (Section 106) or an “equivalent agreement”, made at the planning stage or when the MOD left the area.

Please see **DEED PACKET NUMBER HUDC 142.**”

44. The Council reasonably read this as a specific request for a section 52 or 106 agreement or equivalent, coupled with a suggestion from Mrs Spurgeon that they might find it in deed packet HUDC 142. There was in fact no such agreement or equivalent in that deed packet.

45. The Council’s reply of 12 January 2005 was “*I can confirm that an extensive research exercise has been undertaken and the only information uncovered relates to question 4 of your letter.*” When understood to relate to the specific information requested, this reply was true. But in the context of the full wording of the request, it was capable of giving the impression that the Council was not acknowledging the existence of deed packet HUDC 142. With hindsight, it can be seen that it would have been better if the Council had replied more explicitly: “We have looked in deed packet HUDC 142, but it does not contain the specific items that you have requested, nor have we been able to find them anywhere else”.

46. The situation was compounded by the wording of the Council’s further response of 20 January 2005, which, in relation to item 2), stated “*the Council holds no information*”. Again this was true in relation to the specific items requested, but was capable of being read as a further denial that deed packet HUDC 142 was held. Objectively, the fact that Mrs Spurgeon had already been given the deed packet number by Mrs Waring demonstrates the Council’s openness. But we can well understand that to Mrs Spurgeon, against the background of the previous correspondence and her distrust of the Council, it appeared to be a denial which she knew to be untrue.

47. This exchange was typical of many between Mrs Spurgeon and the Council, where the Council sought to answer her correspondence, and

she read into the answers meanings or evasions that were not intended and that would not have been inferred by a person reading the correspondence in an objective manner.

*(E) The file held at Denne Parade was in constant use by the Council and by other residents of Tanbridge Place estate.*

*(F) When she met Mr Prevett of the Council at the Technical Services Department on 30 May 2003, he accessed the file in front of her. From it he produced documentation, copies of which she still has in her possession.*

48. In regard to both of these matters we repeat our observations at paragraph 42 above.

*(G) The file contains a redrawn or falsified map of her property. This constitutes personal data, which has been unlawfully processed without her consent. The falsification involves her property (143) being shown as having a separate sewer as opposed to being on the system serving numbers 137 to 149 and onwards. At a meeting with Mr Davison (the Council solicitor) and Mr Prevett on 23 July 2003, all present agreed with Mrs Spurgeon that the plans were contradictory, and Mr Davison promised an urgent investigation. Mr Davison told Mrs Spurgeon's solicitor on the telephone on 14 April 2004 that the Council's engineers had produced the redrawn or falsified map. The solicitor wrote to the Council about this on 15 April 2004 but received no answer.*

49. We have no jurisdiction in this case in relation to any matters of data processing (see further paragraphs 80-81 below), but we consider the topic of the redrawn map in case it sheds any light on the probabilities concerning the documents held by the Council.

50. In 2003 there was a blockage in a private sewer which runs along the front of the line of properties of which Mrs Spurgeon's house forms part. The Council wrote to Mrs Spurgeon and other affected owners on 2 April 2003 referring to its powers under the Building Act 1984 s 59

and requesting that steps be taken to clear the blockage. With the letter the Council sent a copy plan which was intended to identify the sewer in question. Mrs Spurgeon took exception to the plan, because it contained a large number of inaccuracies.

51. The Council's explanation for the inaccuracies is:

(1) The Council did not have to hand a convenient plan, on paper, showing the sewer. The plans retained from when the estate had been developed were on microfiche. The plan attached to the letter had therefore been specially put together for the purpose of the letter.

(2) The plan had been made up by Mr Chris Sepke of the Technical Services department, by a process of printing off from one or more of the plans in the Council's possession, sticking copies together with sellotape, and re-photocopying. Thus it was to be expected that there would be inaccuracies.

(3) The base plan or plans on microfiche, used for the photocopying, were plans that had been submitted by the original developers of the estate prior to construction. It would not be at all unusual for such plans not to correspond precisely with the as-built condition.

(4) The sole purpose of the copy plan was to identify which sewer the Council was referring to. It was not intended to indicate anything else, and the Council neither gave nor intended any guarantee as to its accuracy.

52. Mrs Spurgeon does not believe that the Council's explanation is true.

She appears to believe that one of her neighbours, or possibly someone at the Council, may have been producing or procuring false documentation in order to prejudice her property rights.

53. Having carefully examined all the evidence, we conclude that Mrs Spurgeon's concern has no basis in fact. We accept the Council's evidence concerning the production of the copy plan. Each of the three members of the Tribunal has prior personal experience of observing distortions and other inaccuracies in plans that have been photocopied, especially when the final product has been made up by joining one or more photocopied sections together, when the photocopier has been used to make copies of copies, and when poorly reproduced details have been overwritten by hand. Mrs Spurgeon contended that the discrepancies were incapable of being produced in the manner stated by the Council. We firmly disagree. Every discrepancy was readily explicable.

54. Irrespective of the Council's evidence, and irrespective of our own prior experience, in our judgment Mrs Spurgeon's belief is not realistic. As was confirmed at the hearing, her house and land have the benefit of registered title. She holds a registered freehold with title absolute and has occupied the property for 33 years. The production of an inaccurate derivative photocopy plan can have no effect upon her legal rights. The photocopy plan served its purpose in identifying the private sewer to which the Council's letter of 2 April 2003 was intended to refer. Having served that purpose, the plan has no other effect.

55. She criticised the photocopy plan on many counts. She contended that it showed her property as having a separate sewer, as opposed to being on the system serving numbers 137 to 149 and onwards. We find her criticisms to be wholly misconceived. If the photocopy showed her house as having no sewer at all, or showed her house in the wrong place, or showed her land as having no house on it, none of that would have any legal effect. If instead of using a photocopier Mr Sepke had made an inaccurate sketch plan by drawing it from memory on a piece of plain paper, its legal effect would have been precisely the same, namely, none. Similarly, if the plan had been produced by a neighbour

rather than by Mr Sepke, it would still have had no legal effect whatsoever.

56. It is correct that Mr Davison told Mrs Spurgeon's solicitor on the telephone on 14 April 2004 that the Council's engineers had produced the photocopy plan. It is also correct that the solicitor wrote to the Council about this on 15 April 2004. The allegation that he received no answer is not correct. Mr Davison replied on 23 April 2004, referring the solicitor to five previous letters written on behalf of the Council to Mrs Spurgeon, dealing with the matter. The Spurgeons' belief that the inaccurate photocopy plan might have some legal or other material significance is in our judgment wholly misplaced and in consequence caused them a measure of unnecessary concern.

57. In our view the arguments about the inaccurate photocopy plan have little to do with the issues which we have to decide concerning the January 2005 request. Their relevance seems to us to be only that they are an example of Mrs Spurgeon drawing mistaken conclusions from things said and done by the Council.

58. In connection with this part of the case Mrs Spurgeon also placed emphasis upon a photograph of the rear sewer pipe taken on 16 February 2000, which was given to her by a neighbour. She asserted that this same photograph appeared in a contractor's report prepared on 25 March 2000, where the photograph had been doctored by the removal of the electronic date, the implication being that someone was tampering with evidence for some nefarious purpose. She produced to us a print of the original photograph for comparison. It was immediately apparent that the second photograph (which she asserted had been doctored) was a different photograph, taken from a different angle. The print of the electronic date appeared in a different position in relation to the image of the gulley channel. The reflection of the camera flash, very evident in the first photograph, was absent from the second photograph. The second photograph was over-exposed, with the result that the day of the month could not be seen because of the brightness

and only the month and year of the electronic date were visible (against a darker part of the background). On objective analysis the photographs were innocent and there was no evidence of any tampering. The concerns which the Spurgeons had about the photographs were not substantiated by the evidence.

*(H) The Council failed to give proper assistance in her requests for information. Instead, the Council was deliberately withholding information from her, in particular, as to the true ownership of the land on which her property is built. This was illustrated by their failure to tell her, during previous inquiries, that the estate had formerly housed married quarters owned by the Ministry of Defence. It was further illustrated by their failure to send her deed packet HUDC 142 in response to her letter of 11 November 2004.*

59. We have already addressed the circumstances concerning the deed packet HUDC 142 in paragraphs 43-47 above. It is unsurprising that the Council did not send her the deed packet in response to her letter of 11 November 2004. She did not ask for it in that letter. Since she did not request it in that letter, it is not appropriate for her to criticise the Council for not sending it in response to that letter.

60. The land on which the estate was built was formerly Crown land under the control of the Ministry of Defence and had at one time been used as a Royal Engineers depot. During the 1960s (when the relevant local authority was not the present Council but one of its predecessors, Horsham Urban District Council) there was a proposal to build army married quarters there. We have perused the correspondence constituting Mrs Spurgeon's previous inquiries. We can find nothing sinister or significant in the fact that those inquiries did not elicit information about the previous involvement of the Ministry of Defence. The Council's filing system was less than perfect, and the matters about which inquiry was made occurred many years ago, during the life of a previous local authority.

61. We reject Mrs Spurgeon's contention that the Council was deliberately withholding information from her concerning the true ownership of the land on which her property is built. We have considered the land registration details which were produced to us at the hearing. As already stated, Mrs Spurgeon is the absolute owner of her house and land, with the benefit of the registered title which we have referred to, and has been in uninterrupted possession for some 33 years. We have been unable to find anything in the evidence that raises any real doubt about the true ownership of the land on which her property is built. Indeed we have been unable to think of any way in which any such doubt could conceivably arise in the circumstances of the present case.

62. Some of the Council's letters could have been more clearly expressed. But that is always easy to say with hindsight. On the evidence it seems to us that the Council has consistently aimed to be both helpful and courteous in its dealings with her. It would have been better practice if the Council had undertaken an internal review at an earlier stage, but it does not appear that this would have made a practical difference in the particular circumstances.

63. Specifically, in relation to the January 2005 request, it was reasonably clear what she was asking for, and we have not found any material shortcoming in the Council's performance of their duty of advice and assistance under FOIA s 16 in its response to that request. We do not accept the contentions in point 8 of Mrs Spurgeon's skeleton.

*(1) The Council failed to answer her request about public open spaces in her letter of 18 January 2005.*

64. The third paragraph of her letter of 18 January 2005 stated:

“As the Tanbridge Place Estate is of a “Classic” M.O.D. layout i.e. blocks of terraced housing with open plan gardens – **adopted public open spaces** – where each property is inextricably joined together, it is impossible to isolate one from another; and more especially if the property is positioned in the



middle of a block. Under these circumstances, and with the added complications of “mixed ownership”, it becomes necessary for Access of Information to be made readily available to **all residents.**”

65. We are unable to discern in this any specific information request concerning public open space. This criticism is not upheld.

66. If Mrs Spurgeon believes that her land may be currently subject to a public open space agreement, we do not understand why. In our view there are no grounds for such belief.

*(J) Sewer adoption agreements under s18 of the Public Health Act 1936 were at the material time only made with local authorities, so that the Council was wrong to refer her to Southern Water. Such agreements would show the true land ownership.*

67. It is not in dispute that Southern Water are the current undertaker. It would be expected, in our view, that any sewer adoption agreement would be in their records, not in the records of whichever authority made it originally. This was expressly confirmed by Mr Davison in his evidence: the Council does not hold the records and has no reason to do so. We received evidence about the extent to which the sewers on the Tanbridge Estate have been adopted. It is open to her, if she wishes, to make further inquiries of Southern Water on that topic.

68. The true land ownership, in regard to her own land, is shown in the entries at HM Land Registry. It is open to Mrs Spurgeon to make inquiries about the ownership of other land at the Land Registry if she wishes.

69. In the circumstances we do not consider that on this aspect there is any criticism to be made of the Council, save for their failure to give her the address of Southern Water, which is a matter already covered in the Decision Notice.

*(K) (a) The Council have held a section 40 adoption certificate dated 24 March 1978 since it was completed, but falsely informed her that they held no information. (b) The adoption certificate required explanation, since it was completed more than two years after the section 40 adoption agreement dated 1971. (c) This agreement and certificate are linked to a 7 year resale or lease agreement, a trust of the land on which her property is built (of which the Ministry of Defence are or were the trustees), and a public open space agreement affecting her land.*

70. We have lettered the three parts of this criticism (a) to (c). As regards (a), Mr Davison told us it was possible that the Urban District Council may once have held the adoption certificate for the public highway under an agency agreement with the County Council. On local government reorganisation in 1974 any such documents were passed to the County Council as the continuing highway authority. The Council does not now hold this information.

71. As regards (b), the circumstances do not appear to us to call for any explanation, since we are aware from our own knowledge that it is not unusual for adoption to be delayed for one reason or another, and this was expressly confirmed in evidence by Mr Davison. It is to be hoped that this explanation at the Tribunal will reassure the Spurgeons on this point.

72. As regards (c), the evidence shows that the Crown, through the Ministry of Defence, was a former owner of the land, but such ownership was more than 35 years ago. We have seen no evidence that there is any presently subsisting re-sale agreement, lease, trust, or open space agreement affecting Mrs Spurgeon's land. Indeed we do not understand how it is suggested that there could be any such in existence with current legal force. Mrs Spurgeon purchased the property and has registered title absolute, unencumbered by any such agreement, lease, or trust. Her property is subject to certain restrictive covenants detailed in the Land Registry entries, but these are not

onerous or unusual, and they provide no basis for her belief that there is some other legal instrument to which her land is subject.

73. In her oral submissions Miss Spurgeon referred to information given to her and her mother by Mr Chisholm, the former managing director of the building company which constructed the Tanbridge Place development. We were not provided with any clear evidence as to what Mr Chisholm said. Nor do we consider that Mr Chisholm's recollections from nearly 40 years ago could affect our conclusions. The relevant history of the land is sufficiently clear from the documentation made available to us.

*(L) The contents of deed packet HUDC 142 were dated 1953, so the deed packets that related to her property, from in or around 1970, must be easily accessible.*

74. The premise of this criticism appears to be a belief on Mrs Spurgeon's part that the Council ought to hold some title deeds relating to her land. In our judgment there is no ground for such a belief. There is no evidence that the Council was ever the owner of any part of her land. The Council could have no reason for holding such deeds. Even if it did, they would no longer be of legal effect. Her title is held at the Land Registry.

*(M) In regard to the 1997 sewer works, she has never received any receipt, guarantee, warranty, proof of other contributions paid, copy of the final bill, or any proof of to whom her household's contribution was paid. Her overriding concern is to keep her house deeds and documents in order for the future. She believes the receipt, guarantee and associated documentation are held by the owner of the sewer system or the owner of the land on which her property is built. She might be sued and left bankrupt by any future owners of her property who gain access to the information denied to her by the Council.*

75. We have already dealt with the matter of the receipt or certificate for the 1997 works in paragraph 41 above.

76. It is plain that the owners of the houses are between them the owners of the private sewer system, in the sense that each plot is a distinct unit of ownership, and has the benefit of and is subject to the rights for the passage of sewage through the system.

77. Mrs Spurgeon's idea that there may be some other person or organisation who is the ultimate owner or trustee of the land on which her house is built is not borne out by anything in the evidence. We can see no justified basis for it. It is directly contradicted by her registered title.

Additional matters raised in Mrs Spurgeon's skeleton argument, not dealt with elsewhere

78. Point 1 of Mrs Spurgeon's skeleton indicated a desire to rely on the Data Protection Act 1998, the EIR, and the Human Rights Act 1998, in addition to FOIA. Point 9 of her skeleton repeats her reliance on the Data Protection Act.

79. We have dealt with the applicability of the EIR in paragraph 21 above.

80. As regards the Data Protection Act, the Commissioner's submission was:

"DPA 1998 is mainly concerned with the respective rights and duties of data controllers and data subjects. Data controllers are persons who determine the purposes for which and the manner in which any personal data are or are to be processed. Data subjects are the individuals who are the subjects of personal data. There are two provisions in DPA 1998 that enable appeals to be brought to the Information Tribunal. Under section 28, an appeal may be brought in respect of certain certificates issued by the Secretary of State in relation to matters of national security. Under section 48, a person on whom an enforcement notice, an information notice or a special information notice has been served by the Commissioner may appeal against that

notice to the Tribunal. These are the only rights of appeal to this Tribunal under DPA 1998.”

81. We agree with this submission. We have no jurisdiction under the Data Protection Act in the present case.
82. It is our duty to interpret FOIA in a manner consistent with the Human Rights Act. No point has arisen in the present case which requires us to undertake that process of interpretation.
83. Point 2 of her skeleton criticises the Council for not obeying the Tribunal’s disclosure order and not producing its document retention policy. The evidence showed that the Council had no document retention policy at the material time. We have found no shortcoming in the Council’s obedience to the order. We would, however, encourage them to finalise such a policy as soon as possible, for the avoidance of doubt in the future.
84. In point 3 of her skeleton she refers to the criminal offence of altering, destroying, concealing (etc) records or information after an information request has been made. There is no evidence whatever that the Council has committed any such offence.
85. In point 4 of her skeleton she complains that the Council has destroyed or disposed of her personal data. We have found no evidence of that. She refers to Mrs Herbert’s email to the Tribunal dated 18 April 2007, which was dealing with the Council’s response to the disclosure order, and which stated: *“As for the Mrs Spurgeon files it is not the case that the Council have held papers in the past but that they have been disposed of. I am advised that all files that the Council<sup>2</sup> has ever held have been released to her.”* Mrs Spurgeon contends that this demonstrates (1) the existence of some further files, which are being concealed from her, and (2) that the Council has disposed of files relating to her. Her contentions seem to us to arise from a mis-reading

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<sup>2</sup> The reference here is to the current Horsham District Council, not to its predecessor authorities.

of the correspondence. In context, the reference to “Mrs Spurgeon files” is a reference to the files which she had requested. It is expressly stated that there has been no disposal of files relating to her, and that all such files have been released to her. This meaning was expressly confirmed to us by Mrs Herbert in oral evidence. Mr Davison in his sworn evidence, which we also accept, was at pains to stress that the Council had disclosed everything which it had found which appeared to relate to the Spurgeons’ requests. Miss Spurgeon in her submissions repeatedly made reference to a “wall of silence” put up by the Council in response to the Spurgeons’ inquiries. In our judgment this submission was incompatible with the evidence and was unfair to the Council.

86. Points 5 and 6 of Mrs Spurgeon’s skeleton are not material to the case. She there argues that the Council are wrongly applying exceptions to the duty to disclose. This is a misunderstanding which derives from the standard wording in the Council’s letter of 19 April 2006, which included general information about exemptions. The Council has not at any stage sought to rely on any exemption or exception in this case.

87. Point 7 relates mainly to general criticisms, the details of which we have already dealt with. An additional criticism is that the Council has not responded in the manner required by FOIA s 17. Section 17 relates to exemptions and is not relevant in this case because no exemption is claimed by the Council.

#### Further matters that arose at the hearing

88. During the hearing Mrs Spurgeon produced a further bundle of copy documents recently obtained from an arm of the Ministry of Defence, which she had not previously shown to the Commissioner or to the Council. Copies were made in the course of the day and they were made available to the other parties at the commencement of the afternoon session of the hearing.

89. The further documents were dated from 1964 to 1968. They concerned two proposals for the erection of five houses (Married Officers' Quarters) at Blackbridge Lane for the War Office or Ministry of Public Buildings and Works, on which the former Horsham Urban District Council and the County Council had been consulted. The correspondence showed that the Urban District Council allocated to the original proposal reference HU/457/64 and to the renewed proposal reference HU/339/67. The project was cancelled in 1968 owing to changes in Army deployment plans.
90. Miss Spurgeon in her submissions sought to link the 1967 proposal for married quarters with an application for a small domestic conservatory rear extension, which Mrs Spurgeon's immediate predecessor in title submitted for approval on 12 September 1972 and which was given reference number HU/521/72. Like many building plans, it contained discrepancies (for example, double doors were shown in two different positions). The link with the married quarters proposal was said to be a date on the plan, which said "Drawn 8.5.67". This fuelled her concern that there might have been some s52 or s106 agreement connected with the 1967 army proposal, which in some way became attached to the subsequent development. In our view this cannot be right, since the army proposal did not proceed. Moreover the Spurgeons failed to recognise that the 1967 date was explained by the fact (which emerged on examination of the plan) that the base for the conservatory plan was a proprietary drawing for a Spacemaster Extension, onto which the particular details for her predecessor's proposal had been superimposed in 1972. In our judgment it is clear that there is no connection between the 1972 extension plan and the 1967 proposal for married quarters.
91. After the production of the new documents, telephone enquiries by Mr Davison during the afternoon of the hearing elicited the information that his Council holds some information under the 1964 and 1967 file numbers.

92. None of the parties requested an adjournment of the hearing to another day in order to investigate further what was held under those file numbers.
93. Because the 1964-1967 documents were only produced by Mrs Spurgeon in the course of the hearing, we are not in a position to draw a conclusion that the material filed under references HU/457/64 and HU/339/67 includes material falling within one or more of the five requests made by Mrs Spurgeon which are the subject of this appeal. While we cannot say that there is a probability that such material is held in those records, there is an obvious possibility that it might be. We noted with satisfaction the Council's indication that they would promptly make the material held under those file numbers available to Mrs Spurgeon. If they fail to do so by 9 July 2007, we give liberty to Mrs Spurgeon to refer the matter back to the Tribunal no later than 16 July 2007, so that we can reconsider our decision and make any further order that may be required. This liberty to refer back to the Tribunal is strictly limited to the matter of these 1964 and 1967 files and does not apply to any other topic.

### Conclusions

94. On the present state of the evidence Mrs Spurgeon has not satisfied us that the Council failed to disclose any information which was the subject of the January 2005 request in any of categories (1)-(5). Subject to the possibilities arising from the information of the 1964 and 1967 file numbers, the remainder of the evidence indicates the contrary conclusion. The Council disclosed to Mrs Spurgeon such information as it located within the five categories.
95. We do not uphold Mrs Spurgeon's criticisms of the Council's good faith. We are satisfied that the Council intended to disclose to her what it had, and did not deliberately withhold anything from her.
96. At the same time we consider that it is important to recognise the imperfections of the system of records inherited by the Council from its



pre-1974 predecessors. While we accept the Council's evidence that it made extensive searches for the information requested by Mrs Spurgeon, and that it has tried to disclose everything relevant which it had in its possession, it is apparent that those searches failed to identify the two files HU/457/64 and HU/339/67. A more efficient filing system, or a more thorough search, should have identified those files as ones that ought to be looked at in order to see whether any of the information requested by Mrs Spurgeon was contained within them. While, therefore, the present state of the evidence dictates the dismissal of the appeal, the existence of those two files, and the possibility that they might prove to contain relevant material, demonstrates that Mrs Spurgeon was right to take the position that the Council's answers to her requests should not necessarily be accepted. We emphasize that this is not because of any bad faith on the part of the Council or any desire on the Council's part to withhold any relevant information, but because of the evident inadequacies of the filing reference system for pre-1974 records and, we infer, the consequent difficulty of knowing exactly where to search.

97. In the circumstances we are not persuaded on the current evidence that there was any material shortcoming in the investigation undertaken by the Commissioner. Given our acceptance of the Council's good intentions, if the Council itself failed to locate the two further files, we do not think it right to criticise the Commissioner for ultimately accepting the Council's position as it was presented to the Commissioner. We have considered the further criticisms of the Commissioner in point 10 of Mrs Spurgeon's skeleton and we do not find them to be made out.

98. For the reasons which we have set out, we conditionally uphold the Decision Notice and dismiss the appeal. This is subject to Mrs Spurgeon's right to refer the matter back to us if she encounters any difficulty over obtaining the material in files HU/457/64 and HU/339/67 or if any matter arises in relation thereto which requires a further order

from the Tribunal.<sup>3</sup> If the matter is not referred back to us, our decision to uphold the Decision Notice and dismiss the appeal will become final and binding with effect from 17 July 2007.

99. Our decision is unanimous.

ANDREW BARTLETT

Deputy Chairman

Date 29 June 2007

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<sup>3</sup> The right to refer back to the Tribunal is strictly limited as stated in paragraph 93.