



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

Appeal Reference: EA/2019/0199

**Decided at a hearing
On 16 October 2019**

Before

JUDGE HAZEL OLIVER

Between

MR TERENCE ANDREW

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

DEVON COUNTY COUNCIL

Second Respondent

DECISION

The appeal is upheld.

SUBSTITUTE DECISION NOTICE

For the reasons set out below Devon County Council did not deal with the appellant's request for information dated 4 November 2018 in accordance with the Environmental Regulations 2004. The Tribunal consider that on the balance of probabilities it did hold further relevant documents recording the information requested which it has failed to provide to the appellant.

Devon County Council must re-consider the request in the light of this decision and supply the appellant with copies of any further relevant documents which it holds by 18 November 2019.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 15 May 2019 (FER0806000, the “Decision Notice”). It concerns information sought from Devon County Council (the “Council”) regarding a specific planning application. The Chamber President notified the parties on 26 July 2019 that this appeal was suitable to be decided by a Judge alone.

2. On 4 November 2018 the appellant made the following request for information about a planning application pending before South Hams District Council (“SHDC”):

“Good Day, I have discussed the situation and have been asked to make it clear to you that we need all information including Officers notes including any site visits, copies of any background information relied upon and for the avoidance of any doubt everything is disclosable under EIR and FOI rules and please send copies of everything ASAP and provide a date of when you intend to do this so that we can provide this correspondence to SHDC.”

3. The appellant followed up the request on the same day (together the “Request”):

“Good Day, Noted but with respect the information I have requested dates back to the local government act of 1971 which other authorities we’ll outline on their web sites and anything concerning planning applications is disclosable including background information on which Officers rely. As I have already seen SHDC pre application file there should not be the slightest difficulty in providing a copy of the highways pre application advice immediately and EIR regulations mean this data should be proactively held. I have been completely unimpressed by DCC response so far (obviously not you as yet) which is in stark contrast to the approach of SHDC and in addition I require all background information on the material road, the site of the application, officers notes etc. I appreciate this latter may take more time. All Officer emails etc are relevant and there is transparency in SHDC file which so far is sadly lacking from DCC.”

4. The Council responded on 28 November 2018 and disclosed a set of information. The appellant requested an internal review, and on 7 January 2019 the Council wrote to the appellant stating it held no further information. The appellant complained to the Commissioner on 4 December 2018 and 7 January 2019. He complained that the Council had withheld information, including pre-application advice and emails with SHDC, as shown by information provided by SHDC.

5. During the Commissioner’s investigation, the Council notified the appellant and the Commissioner that additional information was held. They said that this was not disclosed originally due to an error when the information was collated by the Information Governance Team. The additional information was provided in April 2019. The Commissioner asked the Council a series of questions as part of her investigation. The Council explained in their response on 30 April 2019 that they had conducted searches of the email system (including archives) of the case officer for this planning application (Mr Richard Jackson). The same searches were conducted by the Development Manager (Mr Brian Hensley). The Council said

that details of the search terms used had not been retained, but they believed the search terms used were “Fish Hoek” (the location that the planning application related to) and the specific planning application reference number. Only electronic information would be held.

6. The Commissioner issued her Decision Notice on 15 May 2019. She found that the information requested would fall within the Environmental Regulations 2004 (“EIR”). She found that, on the balance of probabilities, the Council had disclosed all information within the scope of the request. The Commissioner noted that the amount of information the Council would be expected to hold would be limited due to their limited role in deciding this planning application, and its role was to provide advice based on the plans – which is recorded in the emails provided. She was satisfied that the Council had carried out appropriate searches and was aware of no evidence that suggests further information was held.

The Appeal

7. The appellant appealed against the Commissioner’s decision on 18 March 2019. His grounds are that there is considerable information not released by the Council, they did not make a serious attempt to provide the information, and the Commissioner lacked due diligence in her decision. The appeal attached copies of some information said not to have been released by the Council.

8. The Commissioner’s response maintains that the appeal should be dismissed. The appellant had refused during her investigation to identify specific items he considered missing from the disclosure, and has not explained how the supporting documents provided with the appeal provide evidence that further information is held. Given the appropriately directed searches conducted by the Council, the Commissioner remains of the view that it does not hold any further information. The fact that further information is held by different public authority (SHDC, which is the principal planning authority with statutory obligations regarding this planning matter) is not sufficient evidence that further information is retained by the Council.

9. The appellant’s response maintains that the Council holds more information than was released, and the appellant has provided a bundle of documents which he says shows this.

10. The Council was joined as a party to the appeal by Directions made on 23 July 2019. The Council’s response adopts the Commissioner’s submissions. The Council also submits that the supporting emails provided by the Appellant are all dated after his information request was received, and do not prove that information was held at the time of the request.

Applicable law

11. The relevant provisions of EIR are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

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

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

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) ...a public authority that holds environmental information shall make it available on request.

12. A public authority may refuse to disclose information to the extent that it does not hold that information when a request is received (Regulation 12(4)(a)). This means that the Tribunal must consider the information held at the time of the appellant's request, not at the time of the appeal.

13. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority which should have been disclosed.

Evidence and submissions

14. I had an agreed bundle of open documents, which I have read. The appellant did not bring a copy of this bundle to the hearing, but the Tribunal's records indicate that this was delivered to him by the Commissioner and signed for on 13 July 2019. The appellant submitted a further set of documents with his response to the Commissioner's response, and I have also read these documents.

15. On 2 October 2019 the appellant provided an additional page for the bundle. This is a response by the Council to a freedom of information request dated 2 September 2019. The Commissioner says that she is neutral as to the inclusion of this document. The Council objected on the grounds that it relates to a separate request, and the appellant has not appealed this response or referred the matter to the Commissioner. I allowed this document to be included on the basis that it shows the Council's ongoing position in relation to what has been disclosed under the earlier request.

16. The appellant attended the hearing. The Commissioner and the Council had notified the Tribunal that they would not be attending.

Discussion and Conclusions

17. The appellant provided background to the request and the difficulties he has experienced in relation to disclosure of information about this contentious planning matter. His overall position is that the Council has not complied with its obligations, and he should not have needed

to go through this whole process to obtain information which is incomplete. The Council should have been proactive in keeping and disclosing properly organised records on an ongoing basis, and the Information Commissioner has failed to require this of them.

18. I explained during the hearing the Tribunal's role in this appeal, namely that I would be making my own decision on whether the Council holds further information. I also explained that I could only consider information actually held by the Council at the time of the appellant's request on 4 November 2018 in accordance with Regulation 12(4)(a), not their response to later requests or an obligation of ongoing disclosure. Many of the copy emails provided by the appellant were from after this date. I allowed the appellant a short break to help him to focus on presenting me with evidence that information held as at 4 November 2018 had not been provided.

19. The Council's position as presented to the Commissioner is that they had conducted appropriate searches and held no further information. As set out in their response to the Commissioner of 30 April 2019, these searches were limited to the email records of the two individuals at the Council - the case officer and the Development Manager. Records of the search terms used had not been retained, but they believe the search terms used were "Fish Hoek" and the planning application reference number. The Council has said that they do not use paper files. However, they do not appear to have searched for electronic documents which are held other than in email correspondence. Although email may be the method of communication with the planning authority, the Council has not specifically addressed whether other separate documents may be held.

20. The appellant is seeking a copy of a traffic survey that was conducted in 2009. This is referred to in the second paragraph of a letter from Mr Hensley to the appellant dated 12 November 2018 (page 49 in the appellant's additional bundle). The appellant says that this is very relevant to the planning application, as many local objections are based on the existing highway being unsuitable. It appears that this traffic survey data was then used to make traffic assumptions relating to the planning proposals – it was not created for the purposes of the planning application. The question is whether this falls within the scope of the Request.

21. The first part of the Request does refer to "*copies of any background information relied upon*". The second part similarly states, "*including background information on which Officers rely, and 'all background information on the material road'*". The letter from Mr Hensley of 12 November 2018 indicates that the traffic survey from 2009 was relied on by the Council to make traffic assumptions, and so this would be "background information" within the scope of the Request. It appears that the Council holds this information and has failed to provide it to the appellant.

22. The appellant is also seeking information relating to site visits conducted by the Council. There is an email from Richard Jackson dated 18 September 2017 (page 39 in the appellant's additional bundle) which refers to a meeting with the applicant and another party in 2014. The Council also sent an email to the Commissioner on 16 May 2019 confirming that site visits are essential on all sites where the Highway Authority gives a consultation response – correcting the statement in the Commissioner's decision that site visits are rare.

23. The appellant believes that there were three site visits, but no documents have been disclosed about these site visits, such as notes taken at the time. The appellant says it is implausible that there would be no record of these site visits. The Council's own

correspondence shows that there was at least one site visit in 2014. Notes or other records of these site visits would not necessarily have been sent to anyone by email, and so would not have been located by the searches carried out by the Council. I agree that it is implausible that the Council would have retained no written record at all of these site visits. The Request specifically asks for *“Officers notes including any site visits”*. I find on the balance of probabilities that the Council holds further information in the form of notes about site visits and has failed to disclose this information to the appellant.

24. The appellant is also seeking information about *“pre application advice”* provided by the Council. He makes the point that no planning application number would be available at this point, so this would not have been picked up by a search using the application number. He refers to an email from Jon Capel (the planning applicant’s agent) to SHDC on 27 June 2018 (page 28 in the appellant’s additional bundle) which states, *“we have been in discussion with DCC Highways to verify the design detail...as part of the pre-app process”*. He says that he has not seen details of the discussions between the Council and the applicant’s agents at the pre-application stage, or advice provided to them by the Council. He understands that Mr Jackson at the Council had been dealing with the matter since 2014 and would have been in discussions with the applicant’s agents. He also refers to an email from Mr Jackson to one of his neighbours dated 12 November 2018 (page 55 in the appellant’s additional bundle) which copies in “Willi” at infradesign, who he believes may also be the applicant’s agent. The appellant says that the Council should search for emails with the planning applicant’s agents in order to locate records of all pre-application advice.

25. It does appear from the evidence provided by the appellant that there were discussions between the Council and Mr Capel as part of the pre-application process, and he says that no records of these discussions have been disclosed. I agree that a search of emails based on a planning number may not have located this information, as it was from before the planning application itself was made. The emails may have contained the other search term “Fish Hoek”, but they may not have done, and in any event the Council has not retained a record of the exact search terms used. A search using the names/e-mail address of the planning applicant’s agents is more likely to locate this information. I find on the balance of probabilities that the Council does hold further information in the form of pre-application advice and discussions with the planning applicant’s agents and has failed to disclose this to the appellant.

26. I note that the Council says that it asked the appellant for further information about what documentation or emails might be missing from the disclosure, but the appellant took the position that he had already specified the information required and would not repeat himself (email from the appellant to the Commissioner of 11 April 2019). It would have been helpful if the appellant had provided more information during the Commissioner’s investigation about what he thought was missing, rather than waiting until this hearing. The appellant has now explained to me during the hearing what he believes is missing and why, and this is the basis for my decision.

27. I find on the balance of probabilities that the Council does hold further information with the scope of the Request. The evidence indicates that this information is: (a) a traffic survey from 2009 which was used to make traffic assumptions in relation to the planning proposals; (b) notes or other records of site visits conducted by the Council; and (c) pre-application advice provided to the planning applicant’s agents and associated communications as contained in emails or other documents. The Council also limited its search to the email records of two

individuals and has failed to search for other electronic documents that fall within the scope of the Request.

28. The Council is to consider in light of my findings what further information it does actually hold that should be disclosed under EIR. Copies of any further relevant documents which the Council holds are to be provided to the appellant by 18 November 2019.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 19 October 2019
Promulgation date: 21 October 2019