



Neutral Citation Number: [2023] UKFTT 00781 (GRC)

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

Appeal Reference: EA/2022/0133

Determined without a hearing on 2 June and 24 August 2023

Decision given on: 25 September 2023

Before

**JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER ROSALIND TATAM
TRIBUNAL MEMBER RAZ EDWARDS**

Between

MICHAEL BELL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

EAST WOODHAY PARISH COUNCIL

Second Respondent

DECISION

The unanimous decision of the Tribunal is that:

- (1) The environmental information within the properly agreed scope of the Appellant's request, other than that supplied to him pursuant to the request, was not held by the Second Respondent at the time of the request.

- (2) Accordingly, the appeal is dismissed.

REASONS

Introduction

1. The Second Respondent ('the Council') is the parish council for a group of communities in a rural part of Hampshire not far from Basingstoke, one of which is the village (or perhaps hamlet) of East Woodhay.
2. On 3 September 2021, the Appellant, Mr Michael Bell, a resident of East Woodhay, made a request to the Council for information in the following terms:
 - a) sports and community provision in the area covered by Evingar Ward, in particular:
 - i. since January 2017, facilities for football including for Woolton Hill Argyle Football Club (WHAFC), the grant and operation of its hiring agreement for land at Woolton Hill Junior School (WHJS) (including any annual increase from the initial rent of £3,100pa), the possible termination of that agreement before the end of the term, and proposals for the renewal of the agreement at the end of the term (2027);
 - ii. since January 2016 complaints about WHAFC's use of land at WHJS (for example but not limited to parking, noise, generator powered or other floodlights);
 - iii. since January 2017 any proposals by the Council or by third parties to identify or acquire new facilities or land for new sport or community facilities for WHAFC alone or in conjunction with other sports clubs;
 - iv. since January 2017 any suggestion, proposals or discussions of the actual or potential use of land at Woolton Hill Sports Club, WHJS, or East Woodhay Cricket Club for housing and the need to protect these sites from that use;
 - v. since January 2018 any proposals to expand, extend, develop or re-develop, re-locate, merge or provide additional sport or community facilities in Evingar Ward at, adjacent or opposite existing sites or ancillary land or generally;
 - vi. since June 2019 any information on proposals for Basingstoke and Deane Borough Council to acquire or to support third parties to acquire land within the East End conservation area for sport or community purposes;
 - vii. since January 2017 any information on the potential to designate land at Sungrove Farm as a community facility.
 - b) since January 2018 information relating to East Woodhay Neighbourhood Plan (EWNP) including minutes of meetings of the East Woodhay Parish Council's EWNP Steering Group¹ and consultation with Chapman Planning and Basingstoke and Deane Borough Council on a) the designation of community facilities and Green Infrastructure in the Neighbourhood Plan and b) the inclusion of clauses supporting the future development of community facilities and c) the use of the term "ancillary land" in the Neighbourhood Plan.

¹ As will be seen, the existence of such minutes during the period referred to in the request is in dispute. For brevity only, we will refer to them as 'minutes' rather than 'alleged minutes.'

c) since August 2020 information relating to former Ward Cllr [name redacted] involvement in the re-draft of EWNP between September 2020 and July 2021, including the draft of the EWNP which existed before his direct involvement in September 2020 and that at the end of his involvement.

The information is to help understand Cllr [name redacted] of EWPC's Sports Statement June 2021 on WHAFC need for facilities and to protect existing sites from housing development, EWNP policies such as CF1, 9.7-9.9 on page 47 and the decision to change the list of community facilities in the June 2018 draft of the Neighbourhood Plan to include East Woodhay Cricket Club.

3. For context, Mr Bell had submitted an earlier information request to the Council, on 24 August 2018. That request resulted in a decision notice in which it was found that certain relevant information had not been disclosed.
4. The Council responded on 6 October 2021. As to parts a) ii, iv, v, vi and vii, it stated that no information was held. For part a) i it stated that it did hold a lease agreement, but that it had been shared in confidence and was exempt from disclosure. As for part a) iii, the council advised that a public document outlining its stance on the sports facilities was available on its website, but the information sought was provided in response to his previous request made in 2018. Turning to part b) the Council stated that all information on the Neighbourhood Plan minutes and related emails were provided in response to the 2018 request and, as previously informed, all updates via the Neighbourhood Plan Steering Group (hereafter, 'NPSG') were published in the EWPC monthly minutes which could be viewed on the Council's website. For part c) of the request, the Council provided emails it held.
5. Mr Bell challenged the Council's answer but on 22 October 2021, following an internal review, it confirmed it.
6. Mr Bell then complained to the Commissioner about the way in which the Council had dealt with his requests. An investigation followed.
7. In a letter of 24 March 2022 to Mr Bell, the Commissioner stated:

The focus of my investigation will be to determine whether the council handled your request in accordance with the FOIA/EIR. Specifically, I will look at whether it is correct when it says that it does not hold the meeting minutes you requested.

Please contact me within the next 10 working days, that is, by 8 April 2022 if there are matters other than these that you believe should be addressed. This will help avoid any unnecessary delay in investigating your complaint. If I do not hear from you by this date, my investigation will focus only upon the matters identified above.

Mr Bell did not respond on the subject of the matters to be investigated within the stipulated time limit. Indeed, he raised no challenge concerning the scope of the Commissioner's inquiry until after it was completed.

8. By a Decision Notice dated 9 May 2022 ('the DN'), the Commissioner determined, on a balance of probabilities, that (apart from that already communicated to Mr Bell) the Council did not hold any of the information requested. The material parts of the DN were the following:

12. The complainant contacted the Commissioner on 13 October 2021 to complain that he considers further information is held, specifically he is of the view that there are steering group minutes that have not been released.
13. The scope of the case is to firstly determine whether the request falls under the FOIA or the EIR and then determine whether the council holds further information within the scope of the request.
14. The complainant has not disputed the council withholding the lease agreement in response to part a)i of the request and so the Commissioner has not considered this refusal in his decision notice.

And:

20. The Commissioner has asked the council to explain the searches it has carried out to determine that no further information is held that falls within the scope of the request.
21. The council has told the Commissioner that the clerk has carried out numerous searches on email and Dropbox, as this holds all council documents and since the findings of the previous decision notice FER07952241, the process of saving documents has been improved.
22. The clerk has carried out the searches because the clerk holds all copies of documents and correspondence. The Neighbourhood Plan Steering Group was also contacted and it confirmed no other information was held by them.
23. The council has confirmed to the Commissioner that no information has been deleted or destroyed relevant to this request.
24. The council, in its initial response to this request, said some information was previously provided in response to the complainant's 2018 request which it provided following the decision notice FER0795224.
25. However, the complainant has stated to the Commissioner that with regards to this, in particular, he is interested in being provided with Steering Group minutes created and held that post dates his 24 August 2018 request.
26. The Commissioner has asked the council to confirm therefore that it has also focused its searches for information between 25 August 2018 up to the date of this request of 3 September 2021.
27. The council has confirmed that and told the Commissioner there were no Neighbourhood Plan Steering Group minutes created between the complainant's 2018 request and 3 September 2021.
28. The council has explained that in its January 2019 meeting it was anticipated that the steering group would "publish minutes of meetings held on the Parish website and Facebook".

29. The council added that the steering group was never formalised as anticipated at that January 2019 meeting and so the minutes of meetings were never taken by the steering group, primarily because they were not required to be taken. So instead summaries of the reports were recorded in the minutes of the council's meetings which are available on the council's website, as advised in its response to this request.
 30. The council maintains that there are no further minutes and that no further information is held falling within the scope of the request. ...
 31. The Commissioner has reviewed the above, and having reviewed the previous decision notice FER0795224, can understand why the complainant would be of the view that he has not been provided with all the information requested, as that investigation brought to light further information held.
 32. However, the council maintains that, in this case, it holds no further information and appears, to the Commissioner, to have carried out reasonable checks in the most relevant places to determine this.
 33. On review of the explanations given, the Commissioner has determined that, on the balance of probabilities, no further information is held falling within the scope of the request.
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9. Pursuant to a direction of the Tribunal, the Council was in due course joined in the appeal. By a response dated 10 January 2023 it resisted the appeal, adopting the grounds relied on by the Commissioner.
 10. The appeal came before us on 2 June 2023 for consideration on the papers. The parties had expressed themselves content with that procedure and we were satisfied that it was just and proper to decide the matter without a hearing.
 11. We were provided with a bundle of some 575 pages.
 12. In the event, the Tribunal did not reach a concluded view on 2 June and adjourned its deliberations until the next mutually convenient date, 24 August, inviting written submissions from the parties in the meantime on one particular point, namely whether, despite appearances, the Commissioner did *in fact* address the full breadth of Mr Bell's request.

The appeal

13. Mr Bell challenged the Commissioner's finding that the requested information was not held on two quite separate bases. First, he mounted a narrow attack upon the determination that relevant information was not held. Second, he contended that the Commissioner had impermissibly confined his inquiry to the subject of the NPSG minutes, when the request had been framed in much wider terms.
14. By a response dated 28 November 2022 the Commissioner resisted the appeal, essentially on the grounds set out in the Decision Notice. He readily agreed

that he had understood the request to be concerned with the minutes. He pointed out that he had been very clear with Mr Bell about the scope of the investigation which seemed to be required and the latter had raised no objection. In those circumstances, said the Commissioner, he could not be faulted for proceeding as he did. And his conclusion that the minutes were not held was unimpeachable.

The applicable law

15. It is common ground that the request relates to 'environmental information' and the applicable legislation is the Environmental Information Regulations 2004 (hereafter, 'EIR').
16. By EIR, reg 5(1) a public authority that holds environmental information is obliged to make it available on request.
17. Environmental information is 'held' by a public authority if it is in the authority's possession and has been produced or received by the authority, or it is held by another person on behalf of the authority (EIR, reg 3(2)).
18. Whether particular information is 'held' by a public authority is essentially a question of fact (*University of Newcastle upon Tyne v ICO and BUAV* [2011] UKUT 185 AAC, [41]). Any issue as to whether material requested under freedom of information legislation is 'held' is to be decided on a balance of probabilities (*Bromley v Information Commissioner and Environment Agency* EA/2006/0072).
19. By EIR, reg 18(1), the enforcement and appeals provisions of the Freedom of Information Act 2000 ('FOIA') are applied to environmental information disputes. The appeal is brought pursuant to FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:
 - (1) If on an appeal under section 57 the Tribunal considers -
 - (a) that the notice against which the appeal is brought is not in accordance with the law; or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
 - (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Conclusions

20. It is convenient to consider first Mr Bell's broad argument that the Commissioner wrongfully treated the request as being confined to the NPSG minutes. Here there is no real dispute about the approach taken by the Commissioner. In his representations sent following the Tribunal's deliberations on 2 June, the Commissioner maintained his prior position that he had justifiably started by focussing on what he understood to be the nub of the request and, absent any resistance from Mr Bell, had seen no warrant for widening his inquiry thereafter. We agree that that is what happened, although perhaps certain passages of the decision notice can be read as evidencing a more ample investigation. Mr Bell also agrees, but says that the Commissioner's focus was impermissible.
21. Was the Commissioner's management of the case in accordance with the law, or did it involve any wrongful exercise of discretion? We think not. Like many others, the Information Commissioner's Office is a hard-pressed public body with limited resources at its disposal, which it must use efficiently and in a proportionate way. One standard technique employed by the Commissioner to this end is to seek the requester's agreement at an early stage as to the proper scope of the request. At least, this should ensure clarity and avoid misunderstandings. In some instances, it will result in a consensual narrowing of the inquiry, avoiding needless delay and expense. There is nothing wrong with this. On the contrary, it is to be encouraged.² The Commissioner reasonably, and certainly permissibly, formed the initial view that the request was directed to the minutes, and, by the letter of 24 March 2022, he explained his intention to concentrate on the minutes 'only' and invited Mr Bell to agree or disagree. No pressure was applied. A reasonable period for response was allowed. There was no material response, within the period or after it had elapsed. Mr Bell was (and is) a conspicuously capable and articulate individual. In our view, the Commissioner proceeded, and was entitled to proceed, on the footing that the scope of the statutory inquiry had been limited by agreement to the matter of the minutes. That involved no error of law or wrongful exercise of discretion.
22. If, as we hold, the Commissioner was entitled to limit his inquiry as he did, was he correct to find as a fact that no minutes within the (agreed) scope of the request were held? In our judgment, he was. There was ample material on which the finding was based (see in particular the decision notice, paras 20-33). We detect no error of law or wrongful exercise of discretion. To the contrary, the Tribunal considers that the Commissioner reached the right view, for the right reasons. The Council's account of why there were no NPSG minutes between August 2018 and September 2021 was, we think, unremarkable. Much less plausible to our minds are the two alternative theories on which Mr Bell's appeal necessarily depends: that minutes were generated in that period but somehow innocently (if perhaps carelessly) overlooked during the Council's

² Of course, *unilateral* variation by the Commissioner of the terms of a request would be quite another matter (see *eg Home Office v IC and Cruelty Free International* [2019] UKUT 299 (AAC), esp at [14]).

searches, or deliberately and dishonestly suppressed. The Council supplied convincing evidence of the detailed searches which were conducted. It is not, in our view credible that the minutes, had they existed, would have escaped detection. Nor do we think it credible that anyone on behalf of the Council would have stooped to serious wrongdoing in order to frustrate Mr Bell's request. We will leave the obvious risks of doing so speak for themselves.

Outcome

23. For all the reasons given, the appeal is dismissed.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 22 September 2023