



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Information Tribunal Appeal Number:

EA/2009/0101

Information Commissioner's Ref:

FS50193203

Heard on the papers at Holborn Bars, London, EC4

Decision Promulgated

On 8th April 2010

6th July 2010

BEFORE

Fiona Henderson

And

Marion Saunders

And

Gareth Jones

Between

ARNOLD MARTYRES

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

HUNTINGDONSHIRE DISTRICT COUNCIL

Additional Party

Subject matter:

Environmental Information Regulations 2004

- Information Not held r.3 and r.12
- Format and means of Communication r.6
- Advice and Assistance r.9

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

- Overriding objective and Parties' obligation to co-operate with the Tribunal r.2
- Disclosure Evidence and Submissions r.15

Freedom of Information Act

- Appeals to Tribunal s.58

Case Law:

Bromley & Others v Environment Agency EA/2006/0072

Berend v ICO and London Borough of Richmond Upon Thames EEA/2006/0049 & 50

Fowler and Brighton and Hove City Council EA/2006/0071

Decision

The Tribunal allows the appeal in part and amends the decision notice (FS50193203) dated 5th November 2009 as set out below:

Information Tribunal

Appeal Number: EA/2009/0101

SUBSTITUTED DECISION NOTICE

Public authority: **Huntingdonshire District Council**

Address of Public authority: **Pathfinder House, St Mary's Street, Huntingdon, PE29 1AB**

Name of Complainant: **Mr Arnold Martyres**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that:

- Parts ii and iii of the request was a request for information from the planning records as well as the highway records.
- The information requested which would have been filed with the highways records when it was created, was not held by Huntingdonshire District Council at the date of the request,
- Some information requested was held within the planning records retained by Huntingdonshire District Council, but was not provided because it was publicly available and easily accessible for inspection by other means under its Publication Scheme.
- The failure of the refusal notice to record this constitutes an additional breach of regulation 6(2)(b) EIRs.

Reasons for Decision

Introduction

1. Mr Martyres is seeking to establish the legal status of his crossover from the High Street that he has used to enter private unregistered land adjoining No. 49 High Street, Ramsey. There has been a long running dispute between Mr Martyres's family and the various public authorities

who have responsibility for planning and maintenance of the Highway, in relation to this crossover dating back more than 30 years. At present there are legal proceedings in the Chancery Division between Mr Martyres and a property developer relating to Mr Martyres' use of the crossover which are stayed pending the outcome of this appeal.

The request for information

2. The local authority's highways functions for the town of Ramsey were undertaken by Huntingdonshire District Council (HDC) on behalf of Cambridgeshire County Council (CCC) between 1974 and 2005. In 2005 the highways functions were transferred to CCC.
3. Mr Martyres requested the following information from HDC on 17th January 2008.

"The attached is a link to Cambridgeshire County Council's website to assist you track the recorded information that your public body and/or agents hold.

 - i) *Written authorisation issued by your public body and/or your agents for the construction of vehicular crossings (in full compliance with section 184 of the Highways Act 1980), for the use of properties to the South Side of the High Street, Ramsey, PE26 1AB (in particular numbers 43 to 49). To assist you and/or your agents these works may have been carried out by your public body and/or your agents sometime on or about 1985.*
 - ii) *Documentary proof that your public body and/or your agents hold that you/or your agents have approached the District Planning Authority regarding planning permission that was granted or was not necessary for vehicular crossings to be constructed for the properties to the south side of the High Street, Ramsey PE25 1AB (in particular numbers 43 to 49.)"*
 - iii) *The Information detailing the procedures and specification for the construction of the vehicular crossings over footways and verges to be used by the applicants of numbers 43 to 49 High Street, Ramsey PE24 1AB on the dates those vehicular crossings were constructed."*

The appellant offered to clarify or refine the request if required.

4. Mr Martyres received a response dated 17th March 2008 in which HDC stated that they did not hold the information because highways functions had now passed to CCC and all records had been transferred to them. Mr Martyres requested an internal review on 30th March 2008 in which he noted that HDC:

“has not been delegated the Authority to make comments for the County Council as Highway Authority on planning applications under the provisions of the Town and Country Act 1990 etc.

Would you please concentrate on planning applications [7 reference numbers provided].”

5. Mr Daniel Horrex (Information Manager HDC) asked for clarification of the request pursuant to this application for a review:

“Please could you provide me with a more precise date for when a written authorisation and documentary proof might have been produced?”

6. Mr Martyres provided the information that the original properly constructed crossover was constructed on or about 3rd November 1977 and reconstructed on or about 22nd March 1985.
7. The review decision dated 4th July 2008 upheld the earlier decision (and did not refer to the planning files referred to in the application for review or give an explanation for why it did not consider them relevant). The review noted that some highways files had been found but that they did not contain the information requested.

The complaint to the Information Commissioner

8. Mr Martyres complained to the Commissioner on 12th July 2008. The Commissioner’s Decision Notice (FS50193203) dated 5th November 2009 found that the request should have been dealt with under the Environmental Information Regulations (EIRs). He considered the Council’s retention and destruction policy and concluded on a balance of probabilities that the public authority did not hold the information requested and therefore the exception in Regulation 12(4)(a) of the EIR applied.

The appeal to the Tribunal

9. Mr Martyres appealed to the Tribunal on 27th November 2009. The central question in this Appeal is whether the Commissioner was right to conclude on a balance of probabilities that the information was not held by HDC. Additionally in his grounds of appeal Mr Martyres also raises¹:

- whether the information was held by another on behalf of HDC e.g CCC, a law firm or a contractor, (for completeness the Tribunal considers this to be included in the central ground of appeal).
- Whether there were additional breaches of regulations 14(2)² and 14(3)(a)³.

The Commissioner found that the refusal notice was not issued within 20 working days of the request and did not cite Regulation 12(4)(a) EIR in the refusal notice; these were the facts upon which the Commissioner found that there was a breach of regulation 14(1) EIRs. Consequently the Tribunal is satisfied that there is no additional issue to be determined that has not already been dealt with in the Decision Notice.

10. The Grounds of Appeal purported to name as respondents:

- Cambridgeshire County Council (to whom he had addressed an identical information request on 17th January 2008),
- Cambridgeshire Constabulary and
- The Commission for Local Administration for England.

Although Mr Martyres has addressed freedom of information requests on the same topic to these organizations they were never party to this appeal and have not been joined, because the Decision Notice that is the subject of this appeal deals only with the request insofar as it applies to HDC.

Evidence

11. This was a paper hearing where no party applied to cross-examine any of the witnesses.

However, Mr Martyres challenges the authority of the witnesses relied upon by HDC to produce their witness statements before the Tribunal, as they are not the Executive

¹ During the preparation of the appeal, Mr Martyres has raised other issues that he wishes the Tribunal to determine as part of this appeal, these are dealt with at paragraph 69 et seq below.

² failure to respond no later than 20 working days after the date of receipt of the request.

³ The refusal shall specify the reasons not to disclose the information requested, including any exception relied on under regulations 12(4),

Officers, Directors or Senior Managers who investigated his complaints under their Complaints Handling Procedures. The Tribunal observes that it is not bound by the formal rules of evidence. Under rule 15 of *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (GRC rules):

(2) *The Tribunal may—*

(a) *admit evidence whether or not—*

- (i) *the evidence would be admissible in a civil trial in [the United Kingdom]; or*
- (ii) *the evidence was available to a previous decision maker;*

12. Additionally the Tribunal is satisfied upon consideration of their evidence that the witnesses did have appropriate experience and knowledge of e.g. the relationship between the Highways Authority and Planning Authority and the Document retention/disposal policy to assist the Tribunal.

13. Mr Martyres had asked that various officers of HDC, CCC and the LGO provide the Tribunal with the recorded information they relied on to arrive at their earlier decisions. The Tribunal has not ordered this because:

- The Tribunal makes a fresh decision upon the facts and is not confined to the evidence that was before the Commissioner.
- The CCC and LGO are not parties to this case and their decisions have no bearing upon either the Commissioner's Decision in this case or this appeal,
- The role of CCC is confined to whether they may have held the information and if so whether they were doing so on behalf of HDC.
- The Tribunal is satisfied that it has sufficient evidence before it to determine those issues.

14. The Tribunal has considered all the evidence before it in reaching its decision, specific parts of the evidence are referred to in the analysis set out below.

Legal submissions and analysis

15. There is an exception to the general requirement to disclose environmental information in Section 12 EIR which provides:

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received;

16. When considering the evidence the Commissioner found facts on a balance of probabilities. It is not clear whether Mr Martyres is arguing that the Commissioner applied the wrong standard of proof to this consideration of the issue or that he is arguing that by applying this standard the Commissioner ought to have found differently on the facts. Mr Martyres has not provided any authority to support a different standard of proof, neither has he challenged the Commissioner's reliance in his submissions upon *Bromley & Others v Environment Agency EA/2006/0072* where this Tribunal (differently constituted) stated:

“the standard of proof... is the normal civil standard, namely, the balance of probabilities...”

This Tribunal finds no reason to differ from the approach set out in *Bromley* and applies the same standard of proof in considering the evidence in this case.

Interpretations of the requests

17. It is Mr Martyres case that this information fell within the scope of the request was to be found in HDC's planning files and should have been disclosed or referenced in HDC's response to his request. It is notable that his belief that his request would include consideration of the planning files was explicit in his application for a review dated 30th March 2008.

18. HDC accept that documents in the planning files give planning permission to alter the access, but they argue that this does not fall within the scope of the request since upon their construction the request was addressed to the Council as a Highway Authority and was only seeking information from the Highway records.

19. In *Berend v ICO and London Borough of Richmond Upon Thames EEA/2006/0049 & 50* the Tribunal (differently constituted) found that *“the request should be read objectively.*

The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request". The case additionally held that where a request was clear there was no requirement for a public authority to seek a second meaning or ask for clarification. The Tribunal adopts this approach and applies it to the facts in this case.

Request i)

20. HDC and the Commissioner argue that the fact that request i) asks for written authorisation "*in full compliance with section 184 of the Highways Act 1980*" meant that an objective reading of the request was that what was sought was written permission from the highways authority and **not planning permission.**

21. Section 184 HA provides inter alia:

(1)Where the occupier of any premises adjoining or having access to a highway maintainable at the public expense habitually takes or permits to be taken a mechanically propelled vehicle across a kerbed footway or a verge in the highway to or from those premises, the highway authority for the highway may, subject to subsection (2) below, serve a notice on the owner and the occupier of the premises—

(a)stating that they propose to execute such works for the construction of a vehicle crossing over the footway or verge as may be specified in the notice; or

(b)imposing such reasonable conditions on the use of the footway or verge as a crossing as may be so specified.

Additionally where land is being developed in accordance with planning permission and a crossover appears necessary, the Highway Authority may serve a notice on the owner and occupier stating that they propose to construct a crossover (Section 184(3) HA), and further

184(9) Where a person who is carrying out, or proposes to carry out, such a development as is referred to in subsection (3) above offers to execute the works specified in a notice under that subsection, the highway authority by whom the notice

was served may authorise him to execute those works in accordance with plans approved by them.

22. The Tribunal agrees with HDC's interpretation of this part of the request which is clear, unambiguous and overtly couched in terms of section 184 HA (wherein planning permission is incidental to the notice served permitting the construction of the cross over). The Tribunal accepts the evidence that notices under section 184 HA would as a matter of course be kept in discrete Highways files and not in planning application files.

Request ii)

23. *Documentary proof that your public body and/or your agents hold that you/or your agents have approached the District Planning Authority regarding planning permission that was granted or was not necessary for vehicular crossings to be constructed for the properties to the south side of the High Street, Ramsey PE25 1AB (in particular numbers 43 to 49.)"*

24. HDC argue that in the context of the rest of the request and the specific references to highway matters, along with the reference to the CCC website and section 184 of the Highways Act 1980 meant that the request was addressed to the Council as a Highways Authority in relation to notices they issue under section 184 HA. Highways matters would be recorded on Highways Files.

25. Mr Neil Coleman Special Projects Officer Planning Services HDC stated in a memo dated 26 Feb 2010:

"..Planning permission is required to create a new or altered access to a classified highway ...This requirement ensures that the Highway Authority are consulted before development is determined. Once gained however, planning permission does not either prove or disprove any persons' legal property rights to create or alter such access nor any right to carry out works on the highway which requires a separate consent under the section 184 of the Highways Act 1980.

...Mr Martyres' request related to the Highways consent regime which the Local Planning Authority have no responsibility for and did not relate to Planning Permissions"

26. HDC argue that as Highways Authorities do not require planning permission in order to issue a notice under section 184 HA, and both the Highway Authority and the Planning Authority would have known this and hence there would be no correspondence of this type.

27. The link to <http://www.cambridgeshire.gov.uk/transport/roads/kerbs/vehicle/> which prefaced the request provided inter alia:

“It is illegal to construct an access in certain positions without planning permission and it will be necessary for you to provide documentary proof that you have approached the District Planning Authority (see links on right hand side) regarding permission and that this has either been granted or is not necessary.”

28. The Highways Authority is a Statutory Consultee pursuant to Article 11 (A) of the Town and Country Planning General development (Amendment) Order 1974 and from the excerpts of the planning records before the Tribunal there is:

- *Form H – Form of Notification by the Cambridgeshire County Council as Local Highway Authority Relating to an application for permission for Development affecting classified and proposed roads*, which enables the Local Highway Authority to direct that permission is refused or direct that conditions be imposed.
- Form 12 which has a section entitled “Local Highway Authority” which records whether there is an objection from the local Highway Authority or a condition imposed by them.
- Grants of planning permission record the conditions and the reasons (which can include those raised by the Highway Authority).

29. The Tribunal notes that whilst the Highways Authority does not require planning permission to construct a crossover **itself**, an individual wishing to obtain permission to construct a crossover has to approach the planning authority before approaching the Highways Authority. Within the planning process there is the opportunity for the Highways Authority to comment/impose conditions on planning applications which would alter or require the construction of a crossover.

30. The Tribunal is satisfied such part of the records dealing with the observations/objections or acceptance of the plans by the Highways Authority from within the planning records would be within scope of this part of the request insofar as they related to the properties to the south side of the High Street Ramsey.

31. In coming to this conclusion the Tribunal notes that:

- there was no specific reference to 184 Highways Act within this part of the request or in the pre-amble.
- The relevance of section 184 HA is therefore confined to request i).
- The request refers to “Planning permission” and hence the planning files and not “written authority for the construction” which would be found within the Highways Files.

32. Pursuant to the test in *Berend* the Tribunal is satisfied that the objective reading of the request included searching records from within the planning files. The Tribunal observes that at the internal review stage this expectation was made explicit by Mr Martyres when he listed 7 planning files that he wished HDC to concentrate upon. This was not dealt with by HDC in their review. Whilst an applicant cannot expand his request at the review stage, the Tribunal observes that under regulation 9 EIR:

9. - (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Where there is clearly a difference in expectation as to the scope of a request between the public authority and the applicant it is within the spirit of regulation 9 EIR to address this at the earliest opportunity to enable the Applicant to understand their position and if necessary make a differently worded request.

Request iii)

33. It is common ground between Mr Martyres and HDC that the construction of accesses by owners/developers onto classified roads requires planning permission. He submits

that the planning applications to form an access and the request to drop the kerbs in front of No.s 31 to 103 (in particular 43,45,47 and 49 High Street Ramsey) are within scope.

34. HDC have stated that they no longer have a copy of the standard construction standards applicable at the dates of the construction/reconstruction of the relevant crossovers, as they have been superseded. The Tribunal has been provided with a copy of the current specifications dated August 2005 by way of example.

35. From the memorandum of Neil Coleman (Special Projects Officer, Planning Services HDC, dated 26th February 2010) which states:

“this request is clearly a County Council (as Highways Authority) matter and as such there is no record of the same kept by this Council in its capacity as Local Planning Authority.”

It is clear that HDC have interpreted the request in the context of section 184 HA and not within the context of planning permission and consequently only searched the Highways Files.

36. The Tribunal does not accept that this is the objective reading of the request for the following reasons:

- The reference to section 184 HA is confined to the first part of the request,
- The wording of the request refers to “applicants”. As has been acknowledged by HDC the Highways Authority does not need to **apply** for planning permission to construct a crossover, therefore the Tribunal is satisfied that it cannot be referring to them and must be referring to those applying for permission either to construct a crossover or for planning permission (i.e. owners/developers).
- Procedures and specifications are not limited to the standard technical specifications but include planning considerations such as materials to be used, landscaping and timing considerations.

Time covered by the requests

37. Part i) of the original request stated:

To assist you and/or your agents these works may have been carried out by your public body and/or your agents sometime on or about 1985.

There is no date within the other 2 parts of the request. The Tribunal notes that on 30th April 2008 Daniel Horrex (information Manager HDC) wrote to Mr Martyres in the following terms:

“In order to fully review your request please could you provide some clarification regarding your initial request...”

Mr Martyres was asked to provide (in relation to requests i) and ii)) a *“more precise date for when a written authorisation and documentary proof might have been produced”*.

38. The Tribunal is satisfied that this was (somewhat belated) clarification sought pursuant to Regulation 9 EIRS:

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall -

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request;

39. Although the first part of the original request referenced 1985, there was no date specified in the other parts of the request which could therefore be taken to relate to any vehicular crossing constructed at any time on the South side of the High Street. Although the document in which Mr Martyres' conveyed his response is not included in the bundle it does not appear to be in dispute that he informed HDC that the original properly constructed crossover was constructed on or about 3rd November 1977 and reconstructed on or about 22nd March 1985.

40. The Tribunal does not distinguish between “construct” and “reconstruct” despite the terms of the request relating to “construction”, since on an ordinary interpretation of the word the act of re-construction includes construction.

41. In light of the clarification sought and given the Tribunal is satisfied that the time frame to be considered by HDC and this Tribunal is from 3rd November 1977 until March 1985.

Is the Information Held?

42. Daniel Horrex's evidence was that– it is common practice for the Council to assess where the information requested may be held by the Council. It is not common practice for the Council to search non relevant files for information which has been requested. In responding to this request which seemed clearly directed at highway functions, HDC searched only highways files (where it held them.)
43. In light of the Tribunal's findings above the Tribunal is satisfied that searches of both the Highways Files and the Planning Files were required to establish whether the disputed information was held or not.
44. Fowler and Brighton and Hove City Council EA/2006/0071 considered that in establishing on a balance of probabilities the information was or was not held that such evidence could include:

“evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place...”

The reasonableness of the search re the Highways Files:

45. From the evidence of Daniel Horrex (Corporate Systems and Information Manager for HDC since 2005) on 31st March 2005 CCC terminated the Agency Agreement for the highways function with HDC and all **live** files relating to highways were then transferred to CCC.
46. The Council's document retention and records management policy does not include a section for Highways but provides as follows:
- “maintaining and repairing roads, streets, bridges, bridle paths, rights of way and tunnels – Destroy 7 years after action completed”.*

CCC's account to the Commissioner (in the letter dated 12th August 2009 from Julia Terry Data Protection and Information Security Officer CCC) was that at the time of transfer to CCC a decision was taken to retain 6 years plus current year's records as there was no business need for older records and any older records were destroyed. The Tribunal is satisfied therefore that this is consistent with HDC's policy as set out above and that this was being applied to the Highway's Files that would have contained the disputed information.

47. The Tribunal notes that the crossing would have been completed 24 years before the request which is outside the retention period envisaged. Mr Martyres argued that the "action" was not completed because the crossing required maintenance and that e.g. the original specifications would have to be retained for this purpose. The Tribunal rejects this argument.

48. Mr Steven Douglas (Area maintenance engineer CCC formerly assistant engineer highways for HDC). Stated that:

- Between 1974-2005 highways matters in Ramsay were the responsibility of HDC.
- CCC no longer hold information relating to the construction specifications in place prior to 1974.
- The remaining files were left to be dealt with under the District Council's Document Retention and Records Management Policy because they were obsolete so far as future highway authority needs were concerned.
- No fundamental changes were made to the crossing when the footway paving works were undertaken in 1985 and the existing crossings were rebuilt in their original positions.

49. The fact that there were apparently monthly inspections of the footway by Highways Engineer is not evidence that the inspection is to ensure that the footway continues to meet or refer to the "as built" specification. The Tribunal finds that it is more likely that any such inspection would be to ensure that the footway is fit for purpose and safe, which would not require retention of the original specifications.

50. On internal review it was discovered that HDC still retained some records in Microfiche format. The Tribunal accepts on a balance of probabilities the evidence that these had been overlooked, but once discovered were searched and found not to contain the information requested. These records were transferred to CCC in January 2009 but rechecked in February 2010 as part of the preparation of this appeal and did not contain the requested information.
51. Mr Martyres raised the question of whether the service of a notice or the submission of a request under section 184 HA is a registerable charge for inclusion in the local land charges register maintained by the district Council. HDC's evidence which the Tribunal accepts was that it was not, however, section 305 of HA enables the highways authority to recover its expenses – this becomes a charge on the premises and can be entered on the local land charges register. A search has been conducted of the land charges register against Number 49 High Street and no relevant record was found. In any event the land charges register is publicly available.⁴
52. Additionally Mr Martyres questions whether the information requested would be contained within the Minutes of the Huntingdonshire Traffic Management Area Joint Committee, however, these are publicly accessible from the County Council's public archive and held by CCC not HDC (Ms Dawn Cave of CCC Democratic Services).

Regulation 3 (EIRs) Held on behalf of another:

53. Within the terms of the request (by way of references to “you/or your agents”) Mr Martyres explicitly raises the question of whether the disputed information is held by another party on behalf of HDC, pursuant to regulation 3 EIRs which provides:

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

...

(b) is held by another person on behalf of the authority.

⁴ See para 52 below

54. The Tribunal is satisfied that even if any of the information that falls within the request is held by CCC (which they deny in the letter of 12th August 2009) it would not be being held on behalf of HDC because:

- CCC's retention guidance from 2005 states that the longest retention period for those records would have been 12 years. Since the retention period for HDC is 7 years – any decision to retain it would have been pursuant to CCC's policy and not HDC's.
- There is no evidence of agreement between the parties providing for the holding of such information,

55. Mr Martyres argues that information falling within the scope of the request would be contained in the files of e.g. *“Zurich Municipal, GAB Robins UK Ltd, Snow Walker Associates and/or WC Atkins Construction Ltd and other highways contractors authorised by and contracted by HDC and CCC to handle our legal liability claims against both public bodies in July 2000. Our liability claim was made after a 20 year dispute with HDC and CCC.”*

56. Whilst Mr Martyres asserts that *“I have evidence that the information I have sought is held by [the various named firms]. ... I rely on the Expert witness report prepared by Michael Snow of Snow Walker Associates who was provided with the information I have sought from HDC and CCC...”*

- He does not provide it to the Tribunal,
- If he has never been provided with a copy he does not explain how he knows of the contents,
- Neither does he provide details of what the information was that was provided to these experts.

57. In his letter to HDC dated 29th January 2010 Mr Martyres seems to suggest that *“No.49 Insurance Claim File held by HDC Section 151 Officer and Zurich Municipal and GAB*

Robins”, is publicly accessible. He does not provide further detail or explanation as to its contents.

58. The Tribunal does acknowledge that this point was not dealt with in the evidence or submissions of HDC however, the Tribunal is satisfied that it is not in the interests of justice to obtain further evidence and submissions on this point because.

- Mr Martyres has made a 9 page witness statement in support of this appeal in which he provides no evidence relating to this aspect of his appeal at all.
- The Tribunal notes that the proceedings appear to have been issued at least 15 years after the conclusion of the reconstruction of the cross-over (more than double the document retention period proposed by HDC’s document retention policy) and is not satisfied therefore, on a balance of probabilities that the disputed material is held by these various firms at all.

59. In so determining the Tribunal is giving effect to rules 2(2)(a) and (e) of the GRC rules namely:

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

...

(e) avoiding delay, so far as compatible with proper consideration of the issues.

The Planning Files

60. HDC’s Corporate Policy on Document Retention and Records Management states that planning files are kept permanently. Planning files for pre 1998 applications are kept on microfilm, post 1998 they are either scanned electronically or kept as hard copy files.

According to the HDC publication scheme the planning files on microfiche can be viewed in person at the Council Offices or copies requested by telephone for a fee.

61. HDC accept that if the request is deemed to include planning records rather than simply a request to search highway records (which is not their case) the response to Mr Martyres information request should have read:

“the records were either not held, or were held and easily accessible for his inspection by other means under its Publication Scheme.

Easily Accessible

62. Whilst it is not in dispute that the planning records are publicly available, Mr Martyres originally asked for them to be provided on CD ROM or by any other electronic form or format. This was refused under regulation 6(1)(b) EIRs:

- (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

63. Mr Martyres argues that attendance in person or payment for a copy is not publicly available⁵ and the records should be available on the web. HDC argue that the fact that Mr Martyres had been on numerous occasions to look at planning files, is evidence in support of the fact that they are easily accessible and publicly available. The Tribunal has no details of how much this would cost or how long it would take or the level of public interest as demonstrated by the frequency of those wishing to inspect it. However, the Tribunal notes the Commissioner’s model publication scheme⁶ which provides;

⁵ Although in his letter dated 29th January 2010 he refers to the planning files held on microfiche as being “publicly available”.

⁶ IC model publication scheme 2008

Where it is within the capability of a public authority, information will be provided on a website. Where it is impracticable to make information available on a website or when an individual does not wish to access the information by the website, a public authority will indicate how information can be obtained by other means and provide it by those means....

“Charges made by the authority for routinely published material will be justified and transparent and kept to a minimum. “

64. The Tribunal supports the IC’s guidance offered and notes that access is free of cost; only the requirement to make a copy attracts a fee. FOIA itself notes that charging to provide information is acceptable if the relevant criteria are adhered to. Therefore Mr Martyres is able to obtain the information from the Planning files freely provided he does not require the Council to make a copy. FOIA provides for the provision of information rather than the provision of specific documents.
65. The Tribunal is satisfied that in relation to the planning records they are publicly available and easily accessible. In light of this finding the Tribunal notes that there is an additional breach of regulation 6 (2) EIR because the fact that planning files were available for inspection or as photocopies for a fee was not referred to in the refusal Notice:

If the information is not made available in the form or format requested, the public authority shall -

(a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;

Matters not within the scope of this appeal

66. Mr Martyres has provided the Tribunal with details relating to his dispute with a property development company who are seeking to install a barrier to prevent his use of the vehicle crossover, and his perception that the Council are undermining his case. This is not a matter that is within the Tribunal’s jurisdiction and the Tribunal expresses no view on the wider history of the matter. Similarly whilst HDC have detailed the history

of their contact and dealings with Mr Martyres and have commented upon the nature of his presentation of his appeal,⁷ there is no application that the appeal be struck out for any procedural reason and the Tribunal disregards these comments and confines itself to the substantive issues before it.

67. During the preparation of this case and in particular in his reply submissions of 7th April 2010 Mr Martyres asked the Tribunal for various decisions and reliefs. Under section 50 FOIA a complaint to the Commissioner must relate to a **specified request for information**. Under section 57 FOIA an appeal lies against the **Decision Notice**.

68. The Tribunal's jurisdiction is set out in section 58 FOIA:

(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.

69. The Appellant asks that:

- a Practice Notice to be issued against Huntingdonshire District Council.

Practice Notes are dealt with under section 48 FOIA and are not within the Tribunal's jurisdiction.

- That the Tribunal order HDC to disclose all the Planning and Highways Register documents it holds in respect of the granting of permissions or licences for the vehicle crossovers and

⁷ It is accepted that this was in response to the Tribunal asking for submissions as to whether clarification of the request should have been sought or advice and assistance given under section 9 EIRs

accesses for properties situated to the south of the High Street, Ramsey, in particular No 43 to No 49, to the Appellant.

This is far wider than the information request that is the subject of the appeal as set out in paragraphs 9 et seq above. The Tribunal is confined to the terms of the request

- That the Tribunal order HDC to disclose their response to the letter from James Jackson dated 13th May 1977 and their response to the letter from the Mayor of Ramsey of the same date. These are not within the terms of the request as set out in para 3 above.
- For a judicial review, the relief sought is a mandatory order requiring HDC to make a decision on the status of the Appellant's vehicle crossing.

This is not the appropriate forum in which to seek to initiate judicial review proceedings, the Tribunal has no jurisdiction to grant the relief beyond that set out in section 58 FOIA.

- That the Tribunal recommend that HDC (a party to this case) and CCC (not a party to this case) apologize to the appellant in the event that HDC decide that the vehicle crossover is in fact a dropped kerb.

This is not within the Tribunal's remit and CCC are not a party to this appeal (as was explicitly explained to the Appellant at the Telephone Directions Hearing).

- The Appellant invites the Tribunal's opinion as to whether HDC breached the Data Protection Act in relation to information he alleges was passed to others in connection with his dispute.

This is not within the Tribunal's remit and does not pertain to the information request.

- Cambridgeshire Constabulary redirected traffic on a date in February 2010 when work was carried out on the kerb. Mr Martyres questions why the Constabulary do not hold records of this diversion.

Not only does this event post date the request, and apply to a different public authority but it also not the type of information asked for in the request that is the subject of this appeal.

Other Matters

70. The Tribunal wishes to note at this stage that the presentation of this appeal was not assisted by the way that the bundle was prepared. The planning material should have been in the original bundle. HDC made a qualified acceptance that on one reading of the request the planning material should have been disclosed. It is difficult to see how the Tribunal was meant to determine that proposal in the absence of the planning material. Additionally the Highways Agreement should have been in the bundle since there appeared to be a potential dispute as to what role HDC had and therefore what records could be expected to exist. These items were voluminous and were served the day before the hearing. All parties have had the opportunity to add documents these were clearly material to the background and should have been considered earlier.
71. The Tribunal's consideration of this matter has taken much longer than desirable because of the Appellant's failure to confine himself to the issues, repetition, irrelevance, attempts to expand the ambit of this appeal and persistent submission of additional material notwithstanding the directions which set out a clear timetable.
72. Pursuant to the directions issued on 29th January 2010 this case was listed for a paper hearing on 8th April 2010, a timetable was set down for the submission of evidence and arguments for consideration by the Tribunal on that date. The paper hearing took place on 8th April after all parties had been given the opportunity to submit any matters that it wished the Tribunal to consider. Due to the volume of material accompanying the replies served on 7th April, the panel did not finalize their decision on that date. Mr Martyres has submitted additional material on 18th and 26th April and 12th and 14th May.
73. The Tribunal has considered this material for the following reasons:
- the final decision had not yet been made,
 - The Tribunal considered all parties to share responsibility for the late submission of the planning material and the Highways Agreement⁸.
 - Mr Martyres is a litigant in person,
 - Through the oversight of the Tribunal Judge, it was not until the 14th May 2010 that the Tribunal Judge issued a ruling clarifying the position (after which time Mr Martyres did not send any additional material).

⁸ See para 71 above

- The Tribunal was satisfied that in the event that any matter was addressed by Mr Martyres which had not already been covered by the other parties, they could issue directions asking for submissions from the other parties.
- On the facts of the additional submissions/evidence they either repeated matters which had already been dealt with by the parties, or were not material to the matters to be determined by the Tribunal. (Hence it was not necessary to seek additional submissions from the other parties).

The Tribunal was satisfied that in adopting this approach they were giving effect to the overriding objective as set out in rule 2(2)(a)(b)(d) and (e) GRC Rules.

Conclusion and remedy

34. For the reasons set out above the Tribunal allows the appeal in part and finds an additional breach of regulation 6(2)(b).

35. Our decision is unanimous.

Signed

Fiona Henderson
Tribunal Judge

Dated this 6th day of July 2010