



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

**EA/2016/0092**

**NILS KOSKINEN V ICO**

**And**

**Appellant**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Date Of Decision: 10 November 2016  
Date Promulgated: 11 November 2016**

**Hearing**

Held on 14 September 2016 at Staffordshire Administration Centre.<sup>1</sup>  
Before Henry Fitzhugh, Gareth Jones and Judge Taylor.

**Decision**

The appeal is unanimously allowed for the reasons set out below.

Within 20 working days, the Council is required to respond to the Appellant with answers to the questions set out in paragraphs 30, 33 and 35 (as explained in paragraph 28) and to provide the Lettings Policy in hard form as set out in paragraph 31. We consider that this will satisfy the Council's requirements under section 1(1) or 16 Freedom of Information Act 2000 ('FOIA').

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<sup>1</sup> The matter was heard 'on the papers' i.e. there was no oral hearing.

## Reasons

1. On 12 August 2014, The Assistant Director of Revenues and Benefits wrote to Councillor Thomson copying in the Appellant as follows:

*"Mr Koskinen contacted you with a request for clarification of the allocations policy on the Yorkshire Grove Estate ...*

*I am informed that some properties were formally described as 'Older Person's Dwellings'. This meant that they were considered suitable for older people because they were on lower floors and had some features that made them more accessible. This is included [part of Yorkshire Grove Estate].*

*However, the term 'Older Person's Dwellings' is no longer in use. Although Hackney Council has continued to follow a general policy of allocating such properties to older people, they are not reserved for any group to the exclusion of families.*

*The demand for housing in Hackney has changed in the last few years and the greatest need now is to provide homes for younger, smaller families who may be homeless. In order to avoid keeping families in unsuitable temporary accommodation, and to make the best use of its permanent housing policy, any of Hackney's properties may be allocated to families (unless specifically adapted for people with disabilities or designated as sheltered housing.)..."*

*(Emphasis Added)*

2. On 29 September 2014, the Appellant sent a letter by recorded delivery requesting information from the London Borough of Hackney (the 'Council') a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA'). He stated:

*"... Background*

*I was the Secretary of the Tenants Association of the Yorkshire Grove and a member of The Stoke Newington Tenants Associations for several years up to 2001. From that period I know that our estate was opened for tenants in June 1980 consisting of 60 specially adapted and equipped flats for older and disabled people, while the ground floor flats were meant for those with walking difficulties.*

*Three months ago the Channel 4 TV program informed the public, that Tower Hamlet Council still reserves the ground floor flats for those individuals with walking difficulties.*

### Request

*In her reply [the Assistant Director of Revenues and Benefits] explained to me that this policy does not exist any more. Here are my questions:*

*Question 1: When was the policy dismantled?*

*Question 2: Who takes the responsibility for this action? Hackney Council?*

*Hackney Council and Hackney Homes together? Or  
Hackney Homes alone?*

*When old people and young people with kiddies live side by side in different cycles of life, this creates inevitably in-built frictions regarding the needs of privacy etc.*

*Question 3: Who in Hackney takes the responsibility for the inevitable, but in this case intentionally inbuilt frictions created by this new scheme?*

*I had asked who in Hackney Homes deals with allocations, but [person's name redacted] was not prepared to inform me (sic!). ('Question 4').*

*As soon as I get your replies I will distribute them to the following organizations mentioned below...*

*Cllr Louisa Thomson*

*Age UK*

*Disability Rights UK*

*The Disability Law Centre*

*The Guardian*

3. On 3 November 2014, the Council's response included:

- a. As regards Question 1: The letter of 12 August 2014 'contained an inaccuracy'. It advised that the term Older Person's Dwelling is no longer in use. This was not the case and the Council's Lettings Policy introduced in April 2014 made specific reference at page 33 to that type of property. The Council referred the Appellant to a webpage at <http://www.hackney.gov.uk/Assets/Documents/lettings-policy.pdf>.
- b. As regards Question 2: The Council asserted that the policy not having been dismantled 'negated' the Question 2.
- c. As regards Question 3: His third question alluded to potential tensions that may arise from inappropriate allocations. Hackney had a wide range of applicants for housing some of whom would undoubtedly prefer to live with neighbours of similar age, whilst many others may prefer to live in a more mixed community. As such, it was obliged to keep the policy under review and make decisions as to whether or not properties should remain designated for older people. The decisions as to which properties have been designated as particularly suited for older people were all made a long time prior to the Council being computerised and there have been some gaps in recording fully which properties the policy applies to. This had led on occasions to properties being wrongly advertised.
- d. In respect of the Appellant's street name, when last checked in 2010, all tenants were over 40, with only one under 58. As such it was recorded as a viable scheme to remain designated for older people. Since then, it had only once advertised one affected unit and that was advertised with a minimum age of 55.
- e. Each week its Medical Assessment Team assessed all the properties that were due to be advertised and determined which were suited for those

needing the ground floor for medical reasons. It had advertised 18 properties with preference on medical grounds in the first three months of the current financial year.

4. The Appellant was unsatisfied and progressed the matter, making a complaint to the Information Commissioner (the 'Commissioner'). He explained to the Commissioner that he was a 74-year old disabled gentleman living in a first floor one bedroom Hackney Council flat administered by Hackney Homes as a sub-contractor in the Yorkshire Grove Estate. During the Commissioner's investigation, the Council provided further information. On 8 February 2016, the Commissioner provided the Council's responses to the Appellant's requests, as follows:
  - a. As regards Question 1, the Council confirmed that its current Lettings Policy went live on 1 April 2014. The new policy replaced the previous one 'how we let our homes' which had been in place since May 2012.
  - b. As regards Question 2, the Council had stated that the person with overall responsibility for the policy was the Assistant Director of Revenues and Benefits.
  - c. As regards Question 3, the Council had explained that it considered this to be a request for an opinion, rather than a request for information held by the Council. The Council had stated that it was not aware of any in-built frictions created by its policy.
  - d. As regards Question 4, the Council had explained that its allocation work was wide-ranging and completed by various teams. It stated that there was no one individual responsible for allocation.
5. The Commissioner's Decision Notice of 9 March 2016, found that on the balance of probabilities, the Council did not hold any further information falling within the scope of the Appellant's request.
6. The Appellant now appeals this decision.

### **The Task of the Tribunal**

7. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion it exercised should have been exercised differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact. □
8. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. This is the extent of the Tribunal's remit in this case, and therefore we do not consider any other issues raised, such as the proper use of public funds or points related to Council email addresses.

9. We have received a bundle of documents and submissions, and further arguments in response to our further directions, all of which we have considered even if not specifically referred to below.

## The Law

10. Under s1(1) FOIA:

*“Any person making a request for information to a public authority is entitled -*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.”*

(b) A person making a request of a public authority for information is generally entitled to be informed in writing whether it holds the information requested, unless exemptions or exclusions set out in the FOIA apply. (S.1(1)(a)FOIA). This is known as the ‘duty to confirm or deny’. (S.1(6)FOIA).

11. In the case of *Bromley v IC and Environment Agency EA/2006/0072* at paragraph 13, the Tribunal stated:

*“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner’s findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. **Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.**”*

*(Emphasis Added.)*

12. In other words, when deciding whether information is ‘held’ within section 1 FOIA, the Tribunal determines whether the public authority is likely to be holding any further information based on the civil standard of the balance of probability. We find the *Bromley* case persuasive on the point and adopt its reasoning here.

13. In certain circumstances, a public authority has a duty to advise and assist a requester. This is set out in s.16 FOIA:

*“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*

*(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”*

14. The Code referred to in section 16<sup>2</sup> states:

**“Clarifying the request: □**

*8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. □*

*9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought... Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought. □*

*10. Appropriate assistance in this instance might include:*

- providing an outline of the different kinds of information which might meet the terms of the request; □*
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority; □*
- providing a general response to the request setting out options for further information which could be provided on request. □*

*This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.” □*

15. The Appellant argues that the Commissioner had erred in describing his request as being for information as to why its lettings policy was dismantled, not when. However, as it was correctly described at paragraph 4 of the Decision Notice and we consider the matter afresh on the basis of the correct wording of the request, this point is not considered further below.

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<sup>2</sup> See the “Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’ functions under Part 1 of the Freedom of Information Act 2000, Issued under section 45 of the Act”

## Our Findings

### **Questions 1 and 2**

16. The Appellant states that the Yorkshire Grove Estate in London N16 was built in the 1970s, consisting of 249 homes together with 60 one-bedroom flats specifically adapted and equipped for elderly and disabled (vulnerable) people. Ground floor flats were reserved for the elderly and disabled with walking problems. He asserts that he had requested a specific date that there was a meeting held by either the Council or Hackney Homes changing its policy regarding the 60 flats on the Yorkshire Grove Estate.
17. The Commissioner responds that the Council had made clear that its letter of 12 August 2014 had been inaccurate and that the policy had not been changed. It refers to the web-link the Council provided to show the extant policy.
18. In his letter of 20 February 2016 (see page 64 of the Bundle) and grounds of appeal, the Appellant stated that 'this policy' in his Question 1, was referring to the *"fact that Yorkshire Grove Estate has 60 flats which were specifically designed, adapted, and equipped for older and vulnerable people. For example the ground floor flats were designated to those with walking difficulties, the first floor flats for older and disabled people and the second floor for general use."* He stated: *"To my knowledge our estate with its 60 flats was and is the only one in Hackney for older and vulnerable people... The Council's reply deals conveniently with GENERAL letting [policy] and therefore it is of no interest in this connection as it does not deal with the those 60 flats on the Yorkshire Grove Estate."*
19. The Commissioner responds that whilst the Lettings Policy is phrased in general terms, there is no reason to doubt that it is the relevant policy for the Yorkshire Grove Estate.
20. The Council's duty to provide information under FOIA is based on what the Appellant's original request stated. He wrote:

*"Three months ago the Channel 4 TV program informed the public, that Tower Hamlet Council still reserves the ground floor flats for those individuals with walking difficulties.*

#### **Request**

*In her reply [the Assistant Director of Revenues and Benefits] explained to me that this policy does not exist any more. Here are my questions:*

*Question 1: When was the policy dismantled?*

*Question 2: Who takes the responsibility for this action? Hackney Council? Hackney Council and Hackney Homes together? Or Hackney Homes alone?*

21. As regards Question 1, the Appellant asked about the dismantling of 'this policy'. He referred to a policy that stated the assistant director in her letter stated did not exist any more. Since he has referred to this directly before the question, and this

is the only 'policy' that he had been told had been changed, on an objective reading of his question, it is the changes described in the assistant director's letter of 12 August that he is asking about.

22. We therefore consider what the assistant director had said had changed. In summary, our understanding of what she stated as having changed:

- a. The term 'Older Person's Dwellings' was no longer in use.
- b. The Council continued to follow a general policy of allocating properties suitable for older people (because they were on lower grounds and more accessible) such as on the Yorkshire Grove to older people. However, it no longer followed an exclusive policy of reserving these flats for one particular group. The properties might also be allocated to younger smaller families. This was because younger smaller families now represented the greatest need.
- c. The exception to this seemed to be that homes that been specifically adapted for people with disabilities or designated as sheltered housing were exclusively allocated as such.

23. In other words, the changes seemed to be to no longer use the term 'Older Person's Dwellings' and to no longer reserve properties exclusively for older people where they were not specifically adapted for disability or designated as sheltered housing. Accordingly, by asking when the policy was dismantled, the Appellant was asking when it was decided to make these changes.

24. Based on our interpretation of Question 1 in paragraph 23, we find the Council's response confusing and unsatisfactory. The Council's response of 3 November 2014 stated that the letter of 12 August 2014 'contained an inaccuracy'. It seemed to state that the term 'Older Person's Dwelling' was in use and that its Lettings Policy made specific reference to this type of property.

25. Page 33 of the Letting Policy it refers to states:

*"D. Sheltered/Retirement and Older People's Housing*

*The Council manages some stock that has been designated as particularly suitable for older applicants. These properties will be advertised, or directly offered, to applicants who meet the age criteria for these properties. Typically the lower age limit is 45 or 50 but may on occasion be as low as 40.*

*In addition the Council has nomination rights to sheltered/retirement housing managed by housing associations for which the lower age limit is typically 55 or 60. The Council will allow bids from applicants in the Reserve Band who meet the age criteria for these units but will overlook bids from Reserve Band bidders for any property not designated as a sheltered/retirement home."*

26. It is not clear from this whether the 'inaccuracy' referred simply to the term 'Older Person's Dwelling' still being in use (we note that the term was not actually used in page 33 of the Letting Policy) or whether the properties described as 'Sheltered/Retirement and Older People's Housing' were reserved exclusively for older people. Further, it is not clear whether it was confirming that properties specifically adapted for the disabled were exclusively reserved for disabled persons.



27. The Appellant asserts that he was actually asking for information on the specific policy for the 60 flats he mentions in his request. However, his letter did not refer to the specific policy for 60 flats. Even so, it is clear from what he has written that his underlying concern was to know whether the 60 flats originally reserved for older and disabled people were still exclusively reserved for this purpose, and if not when this had changed.
28. The Appellant received a letter of 12 August that contained an inaccuracy. The Appellant relied on the accuracy of the letter when phrasing his request. The Council then responded explaining that the letter of 12 August contained an inaccuracy, although this left the situation not entirely clear as to what was and was not accurate in the letter of 12 August. In the circumstances where there is confusion which must at least in part be due to the Council having given inaccurate advice and the Appellant's request having been based on this inaccurate advice, we consider that the Council had a duty under section 16 to provide advice and assistance to ensure it was clear what was and was not accurate in the letter of 12 August and to then clarify what it was that the Appellant wanted to know. We consider that if the Council responds to the questions set out in paragraphs 30, 33 and 35 and provides the Lettings Policy in hard form as set out in paragraph 31, it will have fully satisfied what is reasonable within the meaning of section 16.
29. As regards Question 2, the Appellant was told that the Assistant Director of Revenues and Benefits was had overall responsibility for the policy. The Appellant claims that this was not a full answer to his question where he had asked which organisation was responsible. Question 2 was phrased to ask both who was responsible and which organisation was responsible for the change of policy. Assuming there was a change of policy, then the latter has not been answered.
30. We consider that on the balance of probabilities, the Council would hold information sufficient to respond to the following questions which would either need to be answered under sections 1(1) or 16 in response to Questions 1 and 2.<sup>3</sup>
- a. Are there currently properties exclusively reserved for older people (for instance because they are on lower grounds and more accessible)?
    - i. If not, then Questions 1 and 2 need to be responded to as follows:
      1. When did this change occur?

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<sup>3</sup> We note that the Appellant objected to the Commissioner's use of the phrase 'balance of probabilities.' However, as stated in paragraphs 11 and 12 above, we consider this to be the appropriate test to apply. Under the FOIA, we are asked to make a finding of whether the Council holds information. Where it is not possible to know for sure whether such information is held, we resolve this by deciding whether it is more probable than not that the information is held. This is known as the 'balance of probabilities'.

(See *(Re B [2008] UKHL 35)*, Lord Hoffman: "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened." See also *Miller v Minister of Pensions [1947] 2 All ER 372*) Denning J: "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.")

2. Who was responsible for this change? Was Hackney Council, Hackney Homes, or both bodies responsible for this change?
    - ii. If so, then Questions 1 and 2 do not need to be responded to in relation to this point.
  - b. Are there currently are properties exclusively reserved for disabled people?
    - i. If not, then Questions 1 and 2 need to be responded to as follows:
      1. When did this change occur?
      2. Who was responsible for this change? Was Hackney Council, Hackney Homes, or both bodies responsible for this change?
    - ii. If so, then Questions 1 and 2 do not need to be responded to in relation to this point.
  - c. Are the 60 flats the Appellant refers to exclusively reserved for older and/or disabled people?
    - i. If not, then Questions 1 and 2 need to be responded to as follows:
      1. When did this change occur?
      2. Who was responsible for this change? Was Hackney Council, Hackney Homes, or both organisations responsible for this change?
    - d. If so, then Questions 1 and 2 do not need to be responded to in relation to this point.
31. We note that in responding to the Appellant, the Council provided a web-link to its new policy. In view of the Appellant having written by letter and not provided an email address, we think that it would have been preferable under section 16 (*duty to advise and assist*) for the Council to have provided the Appellant with a copy of the policy, rather than assume he had access to the internet. Further, the policy should also have been provided by the Respondents in the Bundle.<sup>4</sup>

### **Question 3**

32. From reading Question 3 in the context of the whole letter, the Appellant's reference to a 'new scheme' appears to be the change in policy, whereby properties previously reserved for older people and/or disabled people might also be allocated to families. The Appellant asserts that frictions will result from older and younger people living next to each other because of for instance the need for privacy. The Council responded that it was not aware of frictions and that the question reflects an opinion from the Appellant and therefore falls outside the scope of FOIA. The Commissioner responds additionally that the assistant director would have been identified as the person with overall responsibility for lettings policy, she would also be responsible for frictions resulting from the policy.
33. Again, as stated above, in our view, it is not clear whether there has been a change in policy so as to allocate properties reserved for older people and/or disabled persons also to families. If there has been, then the Council should respond as to whether there is someone or some organisation who addresses

<sup>4</sup> See the Tribunal's 'Hearing Bundles – Good Practice Guide 2015' – where the Appellant would then have had sight of it and so would the panel on the date of the hearing.

tensions and frictions arising from conflicts between younger and older people, and whether the assistant director is the relevant person.

#### **Question 4**

34. The Appellant has asked who in Hackney Homes dealt with allocations. The Council responded that no one individual is responsible for allocations where the work was completed by various teams. The Commissioner has now provided the name of the Head of Benefits & Housing Needs who had overall responsibility for allocations and the name of the Assistant Director of Revenues & Benefits who it was stated was 'responsible for the division'. It seems that these were the two people with public-facing roles related to allocations at the time of the request.
35. In the circumstances where it has taken many months for the Council to provide a response to this question during which the relevant official has left the Council, and section 10 FOIA sets out a time for compliance with the request, we think that it would be reasonable for the Council to clarify who currently overall responsibility for allocations.

#### **Conclusion**

36.

#### **Other Matters**

37. In completing the form entitled 'Notice of Appeal', the Appellant stated that the outcome the Appellant was seeking was for the Council to answer his three questions and pay compensation for his expenses, inconvenience and distress that the case had caused him. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 govern the rules of this Tribunal.
38. Rule 10 addresses the Tribunal's powers to make what is known as an 'order for costs'. This states:

*"Orders for costs*

- 10.(1) ... *the Tribunal may make an order in respect of costs ... only—*
- (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;*
  - (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings;...*
- (3) A person making an application for an order under this rule must—*
- (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and*
  - (b) send or deliver a schedule of the costs or expenses claimed with the application.*
- (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after*

*the date on which the Tribunal [sends— (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; □...”*

39. With reference to rule 10(3), the Appellant has not included a schedule of costs or expenses claimed and we have seen nothing to suggest to us that it would be appropriate to issue an order for costs against the Council or Commissioner.

40. Our decision is unanimous.

Judge Taylor

Date: 10 November 2016