



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

Appeal No: EA/2016/0289

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50625627

Dated: 9 November 2016

Appellant: Sophie Dunwell

Respondent: The Information Commissioner

Heard on the papers: Norwich

Date of Hearing: 4 April 2017

Before

Chris Hughes

Judge

and

Anne Chafer and Marion Saunders

Tribunal Members

Date of Decision: 6 April 2017

Promulgated date: 6 April 2017

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 November 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant was concerned about a significant proposed development and over a period of time sought information from the planning authority, Sheffield City Council. She wrote on 26 August 2015:-

“I ...am writing to ask you to disclose the identity of the third party who is behind this application who is referred to by the applicant as his “client” and by yourselves as “developer”.

2. The Council replied on 26 August:-

“All the information that we hold is that which is disclosed on the application forms that are viewable on our website...

It is perhaps important to remember that a planning permission runs with the land and is not personal to one individual or company, so is subject to change.”

3. She responded stating that she had reviewed the website and had not been able to determine who the developer was, she asked the Council to disclose the identity of the developer or explain why they would not if they were not prepared to do so. The Council replied on 27 August 2015:-

“All our contact throughout the process was with the architects, Aixs Architecture, acting on behalf of their client. It is very common for developers to leave the application process to their agents, though some do take a more hands on approach.

..as far as I am aware, we had no contact with the developer throughout the application process, and were unaware of their identity, as indeed I still am!

...it is even possible, and again quite normal, for a developer to purchase a site post-permission so the original applicant/developer is not necessarily the one who will develop the scheme out.”

4. The appellant was dissatisfied with this response and made further enquiries including a series of FOI requests. On 18 January 2016 she wrote:-

“I am writing to make a Freedom of Information request for a copy of all documents, emails, minutes of meetings, letters, file notes, computations and diary entries held by the Council or any of its officers in relation to the Section 106 agreement, open space contributions and contributions towards affordable housing and education in connection with the above application. This request also covers copies of due diligence undertaken by the Council to ensure that the contracting parties, either now or later have the financial ability to meet their obligations to the Council.

In regard specifically to Planning reference 14/01724/FUL.”

5. The Council provided some information but redacted other information on the grounds that it was personal information or that it was confidential commercial information. The Appellant remained dissatisfied and on 19 April 2016 raised her concerns with the Respondent Information Commissioner (“ICO”) citing her correspondence with the Council, requests she had made for information, including the specific queries she had made as to the identity of the developer and who within the Council should be asked if they knew the identity of the developer.
6. The ICO investigated the issues raised. The decision notice concluded that the information was environmental information and the request should be considered under the Environmental Information Regulations, that certain information had properly been withheld as confidential commercial information or personal data, but that this withheld material did not include the identity of the developer. In considering this part of the request the ICO took account of the grounds on which the Appellant considered the Council held the information (she had been told that the release of the identity was likely to affect the relationship with the developer). The ICO asked a series of questions of the Council with respect to its statement that it did not hold the developer’s name and noted the description of the searches the Council carried out:-

“We have completed searches within the Council’s Plannign department (electronic and physical) as the handling area for planning and development matters and the Councillors involved on the Planning Committee. This is, we consider a reasonable search in all the circumstances and on review of the previous requests. We have not held and then destroyed this information. There is no business or statutory requirement to hold, request or require this information in respect to planning application.”

7. The ICO considered and on the basis of the evidence and arguments presented concluded on the balance of probabilities that no such information was held (DN paragraph 66).
8. The appeal against this decision of the ICO was restricted to the single issue of whether the Council had disclosed all the information it had with respect to the identity of the developer. She did not accept that it had, she had been told that a Councillor had at the planning meeting named the developer and that individual was linked to a company which had options over the parcels of land within the development and was a director of a company which had the same name as the name of the development.
9. In resisting the appeal the ICO noted the various denials and explanations that the Council had made or given with respect to this issue, in particular that councillors would not have been told the identity of the developer since it was not relevant to their decisions. In the light of the evidence the ICO reaffirmed her conclusion that on the balance of probabilities the Council “does not hold any recorded evidence which confirms the developer’s identity.

Consideration

10. The starting point for considering this appeal is to recognise what the FOIA/EIR information access regime (and for the purposes of this appeal there is no relevant distinction) provides and what it does not. The rights under these provisions is for recorded information (s84 FOIA), “any information in written, visual, aural, electronic or other material form”, a public authority is not required to create new information. Nor is a public authority required to draw inferences from information it holds, or ask members of staff what they know about a specific subject. What a

public authority is required to do is to search for records which contain the information requested.

11. This is a very different from the position of the knowledge of an individual. An individual, looking at the records that the Appellant has examined, might well come to the same conclusion that she has, that a specific individual is indeed the developer. That however would be an interpretation of available information and a drawing of inferences from that information, it would not be the recorded information itself.
12. Similarly it may be that a Councillor has said that an individual is the developer based on seeing certain information and drawing inferences from it, however again that is not recorded information. Council officers will have seen the various documents which the Appellant has seen, however they have been clear in their statements (letter 4 May page 137) :-

“..the identity of the developer is not known or recorded. This has been confirmed to you in your correspondence and discussions with the Planning Department”
13. The Tribunal is satisfied that the explanations given by the Council are credible and probable. Common practice is for planning issues to be negotiated with the agent and frequently for the developer not to appear in these negotiations. There is no legal requirement to disclose the name of the developer and no requirement on the Council to record it. The Council has carried out reasonable searches of its records which have failed to disclose the identity of the developer. The tribunal is satisfied that the decision notice is in accordance with the law and the appeal is dismissed.
14. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 5 April 2017