



Case Reference: EA/2023/0076

Neutral Citation Number: [2024] UKFTT 173 (GRC)

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

Heard: GRC Remote Hearing Rooms

Heard on the papers on: 4 March 2024

Decision given on: 5 March 2024

Tribunal: Brian Kennedy KC, Paul Taylor and Miriam Scott.

Between

FRANK WILSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation in writing:

For the Appellant: Frank Wilson as a Litigant in person.

For the Respondent: on behalf of the Commissioner, Clare Nicholson, Solicitor and Daniel Roberts, Para Legal, both from the ICO.

1. Decision:

- a. The application to Strike Out the appeal has been granted and the appeal is Struck Out as regards paragraph one and two, under rule 8(3)(c) of the Tribunal Rules; and
- b. as regards to paragraph three to eight, under rule 8(2)(a) or 8(3)(c) of the Tribunal Rules.

REASONS

Introduction:

2. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA") against his decision notice of the Commissioner dated 19 January 2023 Ref. IC-205042-B7V5 ("the DN") which is a matter of public record.
3. The Commissioner applies for the appeal to be struck out, variously, under Rule 8(2)(a) [no jurisdiction] and/ or 8(3)(c) [Appellant's case has no reasonable prospects of success] of the Tribunal Rules. The Appellant resists this application. Alternatively, should the appeal not be struck out, the Commissioner submits that the appeal should be dismissed. The Appellant has requested a paper decision if the matter proceeds to a hearing. The Commissioner agrees that such a mode of hearing is appropriate, and consents to this matter being dealt with on the papers.

Factual Background to this Appeal and Decision Notice:

4. The Decision Notice in this case stemmed from an information request made by the Appellant to Newcastle City Council ("the Council")
5. It is clear from the papers provided by the Appellant that there has been lots of communication between them and the Council over a prolonged period of time.
6. The Commissioner's investigation focused on an information request made on 5 July 2022, in which the Appellant asked for: *"A copy of Newcastle City Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme."*
7. From the papers and submissions provided by the Appellant, it appears that in response to this request the Council provided the Appellant with an email chain between Gemma Potter of the Council and James Quigley at Systra. In this chain, Ms Potter submits a request for Systra to undertake a Stage 3 Safety Audit.
8. The Council also provided the attachments from the email chain, consisting of the Stage 1 & Stage 2, Safety Audit, along with various other documents.
9. This request was not subject to an internal review.
10. The Commissioner concluded that the Council complied with section 1(1) of FOIA.

Legal Framework:

11. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing (1) whether it

holds the information (s.1(l)(a) FOIA) and (2) to have that information communicated to him if the public authority holds it (s. 1(l)(b) FOIA).

12. When determining whether or not information is held the Commissioner and Tribunal apply the normal civil standard of proof, on the balance of probabilities, for instance in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) at [13], *Malcolm v Information Commissioner* EA/2008/0072, at [24]; *Dudley v Information Commissioner* EA/2008/008, at [31], and *Councillor Jeremy Clyne v Information Commissioner and London Borough of Lambeth* EA/2011/0190 at [21-22].
13. In the recent Upper Tribunal case of *Andrew Preston v Information Commissioner and Chief Constable West Yorkshire Police*, [2022] UKUT 344 (AAC), these above cases were cited with approval by the Upper Tribunal.
14. Accordingly, the test is whether a public authority holds information, on the balance of probabilities (in other words, whether information is, on the evidence, more likely to be held than not).

Grounds of Appeal:

15. The Appellant challenges the Commissioner's Decision Notice and in relation to the Grounds of Appeal, paragraph one expands on the Appellant's reasoning why they do not believe they have received all the information requested in regard to the Council's submissions to undertake a Stage 3 Audit.
16. - Paragraph two is the Appellant's views on an excerpt of one of the emails provided to the Appellant by the Council in response to their information request.
17. - Paragraphs three to eight consist of submissions about various other issues, but none of these submissions relate to the information request that the Decision Notice is based on, nor are they issues within the Tribunal's jurisdiction.

Commissioner's Response:

18. The Commissioner resists the Appeal. In response to paragraph one, the Commissioner submits that neither he or the Tribunal can consider the content of the Audit Report or what action was or was not taken. The Commissioner submits that, from the wording of this paragraph, the information that the Appellant still seeks does not appear to fall within the scope of the specific wording of their request, in which they asked for: "*A copy of Newcastle City*

Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme." The Commissioner does not consider that the Appellant's submissions in this paragraph contradict the Council's submissions that it holds no more information that falls within the scope of the request.

19. In response to paragraph two, The Commissioner submits that the Appellant's issue with the contents of the excerpt does not alter the findings of the Decision Notice, nor does it fall within the Tribunal's jurisdiction.
20. The Commissioner submits that this kind of information would not fall within the scope of the request for "...Newcastle City Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme."
21. Again, the Commissioner does not believe that the Appellant's submissions in this paragraph contradict the Council's submissions that it holds no more information that falls within the scope of the request.
22. The Commissioner did not respond to paragraphs three to eight as none of these submissions relate to the information request that the Decision Notice is based on, nor are they issues within the Tribunal's jurisdiction. The Commissioner submits that the Appellant may be expecting more information to be provided to them without appreciating that under FOIA the Council is only bound to consider if it holds information described in the request.
23. As previously stated, the Commissioner submits that even if the Council holds the further information the Appellant states, they expect to have been provided in paragraph one and paragraph two it would not fit within the scope of the specific description of the Appellant's request for: *"A copy of Newcastle City Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme."*
24. The Council have provided the Appellant with a number of emails that shows it submitting a request for a Stage 3 Safety Audit to be undertaken by Systra. They also provided the Stage 1 & Stage 2 Safety Audits and various other documents that were attached to the emails.
25. In response to the Commissioner's investigation, the Council have confirmed to the Commissioner that they hold no more information that would be described as 'its submission for a road safety audit'. The Appellant's grounds of appeal do not provide any basis to disturb the Commissioner's findings on this.

Strike Out Application:

26. The Commissioner invites the Tribunal to strike out the appeal:

- a. as regards paragraph one and two, under rule 8(3)(c) of the Tribunal Rules; and
- b. as regards to paragraph three to eight, under rule 8(2)(a) or 8(3)(c) of the Tribunal Rules.

Reply of the Appellant:

27. The Appellant provided background information about their appeal and why it is in the interests of the public. The Appellant explained their communications with the Council in relation to the Stage 3 Audit.

28. The Appellant identified what he says ought to have been provided to him. Further, he outlined the procedure to be applied. The Appellant requested that the Commissioner review the claim made by the Council that they have disclosed all the information.

Initial Hearing 10 October 2023:

29. The Tribunal sat to consider this appeal on the papers and decided to adjourn the appeal as there appears to be missing or incomplete papers from the Bundles provided. In the absence of these papers the Tribunal is unable to make a definitive determination on the relevant issues to be deliberated upon. The Tribunal referred to copy emails from [name redacted] to [name redacted] dated 5 July 2022 and 9 February 2022, reference OB - C79 and C80. The contents of the email dated 9 February were missing and/or incomplete. To assist the tribunal in their deliberations we asked the Commissioner to find, or request that the Public Authority provide an unredacted version of the contents of the email dated 9 February 2022 from {name redacted} to [name redacted] on or before 24 October 2023. The Tribunal reserved its position on both the Strike Out applications and the alternative application to dismiss on the merits and sought further information warning that, if necessary, we may require the Public Authority, the Newcastle City Council, to join the proceedings as a Second Respondent.

Final Hearing: 4 March 2024:

30. The Tribunal wish to thank the ICO and the public authority for providing a comprehensive and complete Open Bundle ("OB" supported with all the adequate material papers required), (- including a most helpful alphabetically sectioned introductory note) which has allowed us to determine the issues fairly and properly in this appeal. The OB has been satisfactorily indexed and paginated making it possible to do so. In the circumstances now prevailing we are in a

different position to enable us to consider afresh the Strike Out applications and the appeal more generally.

The Request: (OB p11 Paragraph 4)

31. On 5 July 2022, the complainant wrote to the Newcastle City Council (the "Council") and requested information in the following terms:

"A copy of Newcastle City Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme."

It is clear from this that the Appellant seeks information sent by the Council to the contractor setting out their request for a safety audit to take place.

Clarification:

32. At OB p357 there is an email, sent by a relative of the Appellant on his behalf on the 10th of August 2022, to the Council, which reads as follows:

"Hi Robert,

Thank you kindly for sending this information.

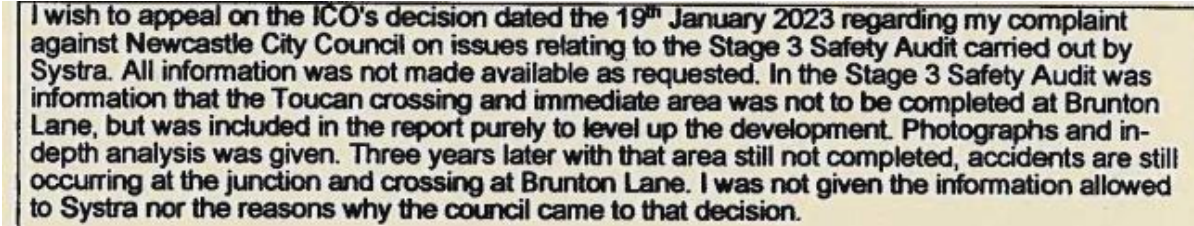
However, I am looking for a copy of the submission you or your department made to Sistra for the Stage 3 Road Safety Audit to go ahead.

If you could provide this, I would be grateful."

Even though this is sent after the Council responded to the request (on 5th August 2022), it is clear that the Council understood what the Appellant was seeking.

Notice of Appeal: (OB P17 - Grounds).

33. The first paragraph of the Appellant's grounds includes the following.

34. 

35. In the third line down, it states: *"In the Stage 3 Safety Audit was information that the Toucan crossing, and immediate area was not to be completed at*

Brunton Lane but was included in the report purely to level up the development. It goes on to say: *"I was not given the information allowed to Systra nor the reasons why the council came to that decision."* (our emphasis).

36. It is understandable why the Appellant feels that an explanation as to why the toucan crossing and related work was not to be completed at Brunton Lane. However, that does not necessarily mean that this was set out in instructions to the auditor at the time the audit was requested. It is possible that this arose during fact finding discussions between Systra and the council, for example.

Balance of Probabilities:

37. We refer to the Commissioners' notes at OB A53, para.39:

"As previously stated, the Commissioner submits that even if the Council holds the further information the Appellant states they expect to have been provided in paragraph one and paragraph two [of his notice of appeal] it would not fit within the scope of the specific description of the Appellant's request for: "A copy of Newcastle City Council's submission for a safety audit on the Broadway to Brunton Lane cycle lane scheme.""

38. He goes on to state at OB A53, para.40:

"The Council have provided the Appellant with a number of emails that shows it submitting a request for a Stage 3 Safety Audit to be undertaken by Systra. They also provided the Stage 1 & Stage 2 Safety Audits and various other documents that were attached to the emails."

39. We agree with the Commissioner. Although it is clear that at some point NCC took a decision that the toucan crossing and related work was not to be completed at Brunton Lane, **this does not mean that it had to be set out in the form suggested by the Appellant, i.e. pre-audit submissions and therefore in scope (our emphasis).** The Appellant's interest may have been better served by asking the question directly, i.e. information as to why it was decided not to go ahead with the works in question.

40. On the balance of probabilities and in view of NCC's responses to the Commissioner we find that no such pre-audit submissions are held.

41. For completeness, see this extract from OB Page D281 setting out what Systra received from NCC in relation to the required audit. It is obvious from this, no submissions from NCC as to their instructions for an audit are listed.

1.5 Information Provided for Audit

- 1.5.1 The Audit Team were not informed of any Departure from Standards with regard to the design of the proposed highway works.
- 1.5.2 The Audit comprised an examination of the following documents, provided prior to the site visit.

DOCUMENT REF/DATE	DOCUMENT TITLE
Great North Road Cycle Improvements RSA Stage 1 09 March 2016	Great north Road Cycle Improvements. Stage 1 Road Safety Audit Report 09 March 2016
Road Safety Audit Procedure V2 Dated: 17.03.16	Designers Response to a Road Safety Audit Form – Audit Ref: NCC 2016/010/1 CS/072684-01-52
RSA2-CAP-TGE-CS092992-08 Dated: 19 March 2018	Great North Road Broadway to Brunton Lane. Stage 2 Road Safety Audit
SCR4/13042/003/003 Rev A	Broadway – Brunton Lane CCAF-SCR4 General Arrangement Sheet 1 of 3
SCR4/13042/003/003 Rev A	Broadway – Brunton Lane CCAF-SCR4 General Arrangement Sheet 2 of 3
SCR4/13042/003/003 Rev A	Broadway – Brunton Lane CCAF-SCR4 General Arrangement Sheet 3 of 3

42.

43. The email chain which was the subject of the adjournment of the initial hearing before this Tribunal on 10 November 2023 appears to be complete in respect of the safety audit, the issue that the tribunal had was whether the email of 09 February 2022 was complete. However, on reconsideration and after the additional material information was provided the Tribunal is persuaded that on the balance of probabilities the email which was under consideration was a forwarding email from [email address redacted] and that there are no additional documents that are within the scope of the original request of the Appellant dated 05 July 2022.

Conclusion:

44. Accordingly, on hearing this appeal afresh, and on all the material evidence now before us, the Tribunal strike out this appeal variously, under Rule 8(2)(a) [no jurisdiction] and under Rule 8(3)(c) [Appellant's case has no reasonable prospects of success] of the Tribunal Rules.
45. Further or in the alternative we find no error of law in the DN, or in the exercise of discretion as applied by the Commissioner therein and we must dismiss the appeal.