



Neutral citation number: [2024] UKFTT 94 (GRC)

Case Reference: EA/2023/0013

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

Decided without a hearing

On: 26 July 2023 & 26 January 2024

Decision given on: 26 January 2024

Promulgated on: 30 January 2024

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER JO MURPHY
TRIBUNAL MEMBER ROSALIND TATAM**

Between

DAVID CALLISTER

and

**INFORMATION COMMISSIONER &
WESTMORLAND AND FURNESS COUNCIL**

Appellant

Respondents

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 2 December 2022 (IC-182684-G2T7, the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”). It concerns information about discussions concerning a drainage and wetland scheme requested from Cumbria County Council (now Westmorland and Furness Council) (the “Council”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. The Appellant owned land that was affected by a scheme to create a wetlands area as part of the planned replacement of a junction with a roundabout. The Appellant sent an information request to the Council on 3 December 2021. This asked for the following:

“All correspondence to include emails, letters, audio recordings and minutes of meetings relating to the property stated below between:

1. *Cumbria County Council and any representatives of Highways England*
2. *Cumbria County Council and any representatives of Richard Turner and Son, Old Sawley Grange, Gisburn Road, Sawley, Clitheroe, BB7 4LH*
3. *Cumbria County Council and any representatives of Amey Consulting*
4. *Cumbria County Council and any representatives of South Lakeland District Council*

Property address:

Land at Crow Tree Farm, Swarthmoor, Ulverston, Cumbria, LA12 0SE

Land registry title number CV223964

Also referred to as: HE Plot 16 and HE569 021-AMEY-LLO-CH-000-16”

4. The Council responded on 10 December that it held no information within scope of the request.

5. The Appellant received a copy of a letter from National Highways to Tim Farron MP dated 13 December 2021 (previously known as Highways England until August 2021). This letter provided information about the wetlands scheme, the Appellant’s land, and the involvement of the Council and National Highways. The letter said that the provision of additional drainage/wetland areas had added some £1.9 million to the costs, funded by National Highways. The letter said that National Highways had worked with the Council in their role as Lead Local Flood Authority. It also referred to having needed to obtain the Council’s approval of wording in an overage clause.

6. On 20 January 2022, the Appellant wrote to the Council and requested the following information, as a follow-up to his first request (the “Request”):

“Thank you for that information. I am surprised that having spent close to an additional £1.9million on the drainage and wetland scheme that there is no information regarding discussions between Highways England and Cumbria County Council and SLDC about this additional work(s). Can you please confirm that there is no documentation regarding discussions about our field being used to implement this additional scheme.”

7. The Council treated this as a request for new information and responded on 27 January 2022. The Council’s response was that they did not hold any information that falls within the scope of the Request. The Council also confirmed on internal review that they had completed a search of their records and did not hold the information in the Request of 20 January 2022.

8. The Appellant complained to the Commissioner on 7 March 2022. The Commissioner decided that on the balance of probabilities no further information was held. The Council had explained that information, if held, would be held electronically within the mailboxes of two individuals, these had been searched using the term “Swarthmoor”, and they had also been consulted and confirmed no information was held. The Commissioner was satisfied on the

basis of this information that the Council has carried out adequate searches for information held within scope of the Request.

The Appeal and Responses

9. The Appellant appealed on 27 December 2022. His grounds of appeal are that the search carried out by the Council was inadequate. He says it was a “token gesture” to only search the email inboxes of 2 people, with the search criteria of “Swarthmoor”, which happens to be the name of the parish where the land is situated. He asks the Council to carry out a proper search for documents etc and not use a “play on words” to avoid the request.

10. The Commissioner’s response maintains that the Decision Notice was correct. The Commissioner’s understanding is that all relevant staff members’ emails were searched and these mailboxes are the only locations where the information, if held, would be stored. The Commissioner remains satisfied that the Council carried out a reasonable search, and submits that he was entirely correct to rely upon the representations of the Council made to him during the course of his investigation. It did not appear to the Commissioner that the Council was attempting to withhold information.

11. The Tribunal initially met on 26 July 2023. Having considered the papers, we decided that it would not be possible to reach a fair decision without further information from the Council. The Council was joined as a party to the proceedings and provided a response. The Council says that it has reviewed the information it holds and maintains that it does not hold information within the scope of the Request. The Council provided further information about its searches and involvement with the relevant scheme, as discussed below.

12. The Appellant and the Commissioner were given an opportunity to reply to the Council’s response but neither did so.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 (“EIR”) are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely

to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....
5(1) ...a public authority that holds environmental information shall make it available on request.

.....
5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

.....
12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

.....
12(4) ...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.

14. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all the circumstances of the case, including the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with regulation 12(4), the information is that held at the time the request is received.

15. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). In discussing the application of the balance of probabilities test, the Tribunal stated that, "*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.*"

Issues and evidence

16. The issue is whether the Commissioner was correct to decide that the information within scope of the Request was not held by the Council. This is to be decided on the balance of probabilities.

17. By way of evidence and submissions we had an agreed open bundle of documents, which we have taken into account in making our decision. We also had a response, witness statement

and additional bundle of documents from the Council after they were joined as a party to the proceedings.

18. The Council's witness statement was from Doug Coyle, the Manager for Flood and Development Management responsible for leading on the Lead Local Flood Authority ("LLFA") responsibility that the Council has under the Flood and Water Management Act 2010. His evidence can be summarised as follows:

- a. National Highways led on the A590 Cross-a-Moor junction improvement scheme. The Council provided some funding to the project and acted as a statutory consultee as the LLFA. National Highways also led on the drainage and wetlands scheme which was part of that project.
- b. The Council, as LLFA, was asked by National Highways to undertake a technical design review of the proposed drainage and wetlands scheme by way of considering various technical drawings. Mr Coyle reviewed those drawings/plans, which did indicate the geographical location of the proposed scheme. However, those technical drawings did not include any information as to who owned the fields which would be used for the scheme and there was nothing within the drawings themselves which would allow the Council to infer whose land was affected.
- c. Mr Coyle provided a copy of the overarching technical drawing/plan to the Tribunal. He explains that the Council simply agreed the technical design of the scheme, and it is clear from this drawing/plan that there is no indication as to whose land was being used to implement the scheme.
- d. He states that the Council was not involved in any discussions in relation to the Appellant's field being used to implement the scheme or in any discussions or negotiations concerning the value of the land or the price to be paid to the Appellant for the purchase of his land to implement the scheme. Mr Coyle says that the Council was entirely ignorant as to whose land would be used and had no role in identifying or purchasing the land proposed for the wetlands and drainage scheme.
- e. The Council understands that National Highways were solely involved in the negotiations for and purchase of the land to be used for the scheme, and National Highways still own the land purchased for the scheme.
- f. Mr Coyle and his colleague (the Capital Projects Lead for the Council) were consulted in connection with the Request, as they were the lead officers involved with the scheme. The Council was purely involved as a technical consultee and was not aware of whose land was being used for the scheme.

Discussion and Conclusions

19. The Appellant says that the searches carried out by the Council were inadequate. We have considered this in light of the evidence.

20. We asked the Council to answer a number of questions in its response to the appeal.

- a. *Why the Council used the sole term “Swarthmoor” in its searches for the requested information, and why it did not use other relevant search terms (either singly or in combination) such as the name of the Appellant, “Crow Tree Farm”, land registry title number of the Appellant’s land, or “A590 Cross-a-Moor scheme”?* The Council now confirms that the search term “Crow Tree Farm” was actually used and not “Swarthmoor”. The Council says that other search terms were not used because the relevant Council officers had direct knowledge of the matter and it was within their knowledge that the Council did not have any documented information within the scope of the request.
- b. *Why the Council only searched the e-mail inboxes of two individuals (the Flood and Development Management Manager and the Capital Programmes Project Lead), and why the Council says that information within scope of the request would not be held anywhere else?* The Council says that all correspondence concerning this road development and drainage and wetlands scheme would have been channelled through these two officers. We note that this is confirmed by the witness statement of Mr Coyle.
- c. *Why there was no search of electronic records other than e-mail inboxes, and why the Council says that no relevant documents would be held outside these email inboxes?* The Council says that all discussions between National Highways and the Council were by e-mail in relation to the drainage and wetlands scheme. There was no e-mail correspondence between the Council officers and South Lakeland District Council in relation to this drainage scheme. This is also confirmed by the witness statement of Mr Coyle.

21. The Appellant had also referred to a letter from National Highways to Tim Farron MP dated 13 December 2021. This letter refers to the Council as being the LLFA, and says that the Council will become the future owner of the land and would need to approve an overage clause. We note that this letter confirms that the additional funding referred to was from National Highways, and not from the Council as is implied in the Appellant’s Request. We asked the Council to answer some questions about this letter in its response to the appeal.

- a. *Does the Council agree that it is the Lead Local Flood Authority? If so, why is it satisfied that it holds no records of discussions about the proposed use of the Appellant’s land for a drainage and wetlands scheme?* The Council confirms that it is the LLFA, but it only has technical drawings concerning the scheme which were supplied to it by National Highways, which do not indicate whose land was be used for the scheme. Since the Council were only involved as a statutory consultee on the drainage aspects of the scheme and had no involvement in the selection of and purchase of the land required, it holds no records of discussions about the proposed use of the Appellant’s land for the scheme.
- b. *Does the Council agree that it will be the future owner of the wetlands including the Appellant’s land? If so, why is it satisfied that it holds no records of discussions within the scope of the Appellant’s request?* The Council says that the land for the drainage and wetlands scheme was purchased by National Highways and is still owned by them, and the Council has not been party to any discussions about the transfer of ownership of the wetlands to the Council.

- c. *Does the Council agree that it was required to approve wording of an overage clause in relation to the wetlands area, which included the Appellant's land? If so, why is it satisfied that it holds no records of discussions about this matter, which would appear to fall within the scope of the Appellant's request?* The Council says that it was not required to approve the wording of an overage clause in relation to the wetlands area, which included the Appellant's land, and had no involvement whatsoever in relation to any overage clause concerning the Appellant's land.

22. Having considered the answers to the above questions and the information in the statement from Mr Coyle, we find on the balance of probabilities that the Council did not hold information within scope of the Appellant's Request of 20 January 2022.

23. The Council appears to have taken a narrow view of the Request, limiting it to information which specifically identifies the Appellant's land. The Council could have used a wider interpretation which included any documentation on matters which affected the Appellant's land, even if it is not specifically identified – such as, for example, the overarching technical drawing/plan. The Council could also have sought clarification from the Appellant. Nevertheless, we find that this is a permissible interpretation of the Request. The Appellant specifically asks about “our field”. This was treated as a separate request to the one made on 3 December 2021. The Council was entitled to limit its search to documentation which actually identified the land described as “our field”.

24. The search term “Crow Tree Farm” was appropriate as it accurately described the land that the Appellant described as “our field” in the Request. In any event, we accept the Council's evidence that its only involvement as LLFA was a technical design review of drawings which did not identify the Appellant's land. Mr Coyle and his colleague were the two individuals with knowledge about the scheme, and we accept the evidence from Mr Coyle about the limited extent of their involvement. The letter from National Highways to Tim Farron MP suggests that the Council would have been involved further. We have received the Council's answers to our questions on this issue which confirm that there have been no discussions about transfer of ownership or an overage clause. We accept that Mr Coyle was not involved in such discussions. We note that he does not say that he checked with other areas of the Council which might have been involved with this issue, such as legal or property services. However, we are satisfied from the evidence that, even if there were any further discussions about the overage clause, these would not have specifically identified the Appellant's land.

25. We therefore find that the Council has conducted adequate searches for the requested information and no such information was held by them. Regulation 12(4)(a) applies – the Council was entitled to refuse to disclose information because it did not hold that information when the Appellant's Request was received.

26. As required by regulation 12(1)(b), we have also considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. We find that it does. We have found that the Council did not hold the requested information and so it would not be possible for the Council to disclose it under EIR.

27. Finally, we note that the Appellant has also referred to his original request of 3 December 2021 in his appeal document, in section 6 where he is asked what outcome he is seeking.

However, the appeal itself is against the Commissioner's decision in relation to the Request of 20 January 2022. We are unable to comment on whether the initial request was dealt with correctly or not. This decision only relates to the Request made on 20 January 2022. Any other requests are outside the scope of this appeal.

28. We dismiss the appeal for the reasons explained above.

Signed: Judge Hazel Oliver

Date: 26 January 2024