



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

Information Tribunal Appeal Number: EA/2015/0087
Information Commissioner's Ref: FER0554468

JOHN FORTUN

Appellant

– and –

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held at Fox Court, London on 17 September 2015 on the papers
Before: Anne Chafer, Paul Taylor and Judge Claire Taylor

Decision

The appeal is unanimously dismissed for the reasons set out below, such that we find in favour of the Information Commissioner.

Steps to be taken

There are no steps to be taken.

Our Reasons

Background

1. On 25 April 2014, the Appellant made a request from Thanet District Council ('the Council') for information which so far as is relevant to this appeal asked for:

“Question 2.

As per the Guidelines on Contaminated Land Statutory published under Part 2A of the Environmental Protection Act 1990 by the Secretary of State:

(1) Does the Local Authority inspect its area as is required from time to time for the purpose of identifying contaminated land and of enabling the authority to decide? If yes, is there a record of all the areas inspected and if so please could I have a copy of these records in either electronic (CD or DVD) or paper form.

(2) Has the Local Authority conducted and completed inspections of land (including but not limited to soil, subsurface Hydrology and surface waters) to assess the risk of pollutants on the potential harm to human health, local ecological systems and controlled waters? If yes and a risk assessment has been carried out, I request a copy of these Risk Assessments for the last 10 years in either electronic (CD or DVD) or paper form.”

2. The Council responded that:

(1) Local authorities have a duty to inspect their areas for the purposes of identifying contaminated land (Part IIA of the Environmental Protection Act 1990).

(2) In fulfilment of this duty, it had compiled a database of sites that may have been subject to former industrial use, and had undertaken risk prioritisation of those sites. This database was licensed and not available on CD, but the Appellant was invited to view it at the Council offices;

(3) The redevelopment of sites as part of planning application assessments was the principal mechanism for inspection of contaminated land, which process included the receipt of risk assessments for sites. The reports submitted with all planning applications since 2002 were available on a website, and provided the appropriate link.

3. The Appellant was unsatisfied and complained to the Commissioner, who investigated the matter. By his Decision Notice of 12 March 2015 the Commissioner decided that

a. the information sought was 'environmental information' because it was about the state of the elements of the environment for the purposes of reg.2(1)(a) EIR. Therefore the request was to be

considered under the Environmental Information Regulations 2004 ('EIR'). (We note that this is not disputed in this appeal, and we agree with the Commissioner's reasoning such that the request is for 'environmental information'); and

- b. Following internal review, the Council provided some of the information in DVD/CD format and the remainder of the information was not provided in the requested format, but the complainant was given options in relation to accessing the remainder of the information. The Council was correct to refuse to provide the information sought under Question 2 in the format requested by the Appellant.
4. The Appellant now appeals to this Tribunal primarily arguing that the Council did not fully respond to his request and that the form in which the information was made available to him was not reasonable within the meaning of regulation 6 of EIR. His reasons or grounds are set out over a number of pages and not easily summarised. They are dealt with below to the extent that they seem to present arguable points.

The Task of the Tribunal

5. The Tribunal's remit is governed by s.58 Freedom of Information Act 2000 ('FOIA'). This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the ICO's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
6. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. In this case, our remit is limited to considering whether the Council complied with requirements under the EIR in responding to his request. It is not within our remit to consider or comment on the Council's compliance with any other environmental legislation, such as whether or not the Council has or has not complete records in relation to contaminated land.

The Law

7. Public authorities are under a general duty under the EIR to disclose information where it is requested under regulation 5:

“Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request...

(4) For the purposes of paragraph (1), where the information made

available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes...

8. Regulation 6, addresses the format in which requested information must be provided:

6. Form and format of information

“(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.

(2) 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;

(b) provide the explanation in writing if the applicant so requests; and

(c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.”

9. Under regulation 9 EIR, public authorities must provide advice and assistance to applicants seeking information. This obligation is deemed to be satisfied where the authority has complied with a code of practice made under regulation 16 EIR:

“9.— Advice and assistance

(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.

...

(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.”

10. The Code of Practice on the discharge of the obligations of public authorities under the EIR 2004 (SI 2004 No. 3391) issued under regulation 16 EIR states, at paragraphs 22-23:

“22. Regulation 6 allows for the applicant to be given the information available in a particular form or format unless there is another reasonable approach to supplying the information. A public authority should be flexible, as far as is reasonable, with respect to form and format, taking into account

the fact, for example, that some IT users may not be able to read attachments in certain formats, and that some members of the public may prefer paper to electronic copies.

23. Although there is no specific reference in the Regulations to the provision of information in the form of a summary or digest, a request for environmental information may include a request for information to be provided in the form of a digest or summary. This should generally be provided so long as it is reasonably practical to do so, taking into account the cost. Many applicants will find a summary more useful than masses of data, and this should be taken into account when considering proactive dissemination.”

Submissions and Findings

11. We have received a bundle of documents including submissions, all of which we have reviewed, even if not specifically referred to below. We have not received any documents or submissions in ‘closed’ or confidential.
12. Provision of information in paper form: The Appellant argues that the Commissioner overlooked the possibility that the Council could supply the requested information in paper format by stating that he had requested the information be provided in either electronic (CD or DVD) or paper. **Our Finding:** We accept and adopt the Commissioner’s response to this in its entirety, as summarised in paragraph 23 of its Response.
13. The Council’s own response as to whether it complies with the relevant environmental legislation: The Appellant argues that the Council failed to respond to his question as to whether the Council complies with relevant legislation. The Council’s duty in relation to EIR is set out in relation to regulation 5 (summarised above). This provides for the circumstances where it has an obligation to make available information that it holds when it receives a request for it. It is not required to create new information. **Our Finding:** We accept the Commissioner’s response set out in paragraph 24 of its Response as it is clear that the Council has explained what it holds and made that available for the Appellant to view.
14. Information not available on the ‘planning portal’ website: The Appellant contends that the Council cannot rely on regulation 6 EIR in respect of all the requested information, as the Decision Notice states that not all information within the scope of his request will be available on the planning portal website. **Our Finding:** We accept and adopt the Commissioner’s arguments in relation to this as set out in paragraph 26 of the Response.
15. The database licence: The Appellant contends that, contrary to the Council’s position, the licence for the Council’s database must not preclude the Council providing the information to the Appellant. (The Council had explained to the Commissioner that the terms of its licence for the database precludes it from

providing the database in CD or DVD format.) **Our Finding:** The Council has stated that the Appellant has found no reason not to believe that the terms of the licence precludes copying the whole database, and nor can we.

16. **Provision of the information in another format:** Essentially, the Appellant seems to be arguing that the format in which the Council has offered to provide the information is unreasonable. This is because:

i) **Accessibility**

a. The information is not 'easily accessible' in the format offered by the Council – he states that he would need to look at 11,000 planning applications to select the risk assessment reports and the database does not have an option to search by specific report or risk assessments. He argues that the scope of his search is restricted by the poor record-keeping of the Council and this does not absolve the Council from its obligation to supply the information requested.

b. The Commissioner responds that the Council would have to go through the same sequential process as the Appellant in order to access the information the Appellant is interested in. It states that the Council is not required to compile a summary of the information requested. In order to identify the particular risk assessments the Appellant seeks it would have to search the planning portal in the same way as would the Appellant. In light of the volume of the information, the Commissioner therefore considers that it would not be reasonably practical for the Council to summarise the information for the Appellant in this case. It therefore considers that the format in which the Council has offered to provide the information is reasonable in accordance with regulation 6 EIR, notwithstanding that it is not the format the Appellant requested.

c. **Our Finding:**

In brief, the Appellant requested in relation to certain statutory guidelines, (1) to know whether the Council made certain inspections and if so if there was a record of all areas, and if so for a copy of those records and (2) to know whether the Council conducted and completed certain inspections to assess certain things and if so whether a risk assessment had been carried out and for copies of those risk assessments.

The Council responded that (1) it fulfilled its duty by compiling a database of sites that may have been subject to former industrial use, and had undertaken risk prioritisation of those sites; and (2) it received risk assessments in relation to planning applications for the redevelopment of sites and this was the principal mechanism for inspection of contaminated land. The reports were available online and it provided the Appellant with the appropriate link.

The Appellant argues that the database is inaccessible. However, he requested the records that were kept (*as summarised in paragraph 1(1)*) and from what the Council has stated the complete database is the Council's records in the form held by the Council, such that the request has been complied with. The Council does not hold a summarised version, and we cannot see that they are required to create a summary in these circumstances. In these circumstances where the database is vast, providing access to it (as opposed to producing a copy by dvd, cd or paper form) would appear to us to be reasonable within the meaning of regulation 6 EIR. (*See paragraph 8 above.*) We consider this to be a strong enough reason on its own for providing access rather than copying the material, but additionally, we are informed that the terms of the licence preclude doing so.

In any event, it seems from what the Appellant has stated that the Appellant would want the Council to first extract individual parts of the database. The Appellant complains that it would take a long time to find the information he is interested in, and criticises the Council's record-keeping. The way the Council chooses to keep its records or its search mechanism is not something we consider relevant to comment on as it is beyond our remit. As we have stated, we do not think this is what the Council is required to do within the terms of his request because he has requested the 'records' and the only form of records is the complete database. Further, it has been made clear to us that extracting individual parts would be timely which would be a considerable cost to the authority. Extracts from the Code of Practice referred to above (*See paragraph 10*) indicate that costs are a relevant factor when considering whether it is reasonable for the public authority to make the information available in the form that it did instead of providing it in the form that the Appellant requests, such that the authority's response seems to us to be reasonable.

ii) Left Unattended

The Appellant seems to state that providing access to the material on the Council's premises would be unreasonable based on him having been left unattended in the office of the Council on another occasion, and therefore he states he will not repeat the situation. He stated that he chose not to provide more details of this to us, which makes it difficult to know what his arguments are. **Our Finding:** On the information before us, even where the Appellant is left unattended, we would consider this means of access to information to be reasonable under regulation 6 EIR.

iii) Paragraph 19 of the Decision Notice.

a. The Appellant refers to paragraph 19 of the Decision Notice, which states:

"In response to question 2(2) of the request, the Council has stated that redevelopment of existing sites is the principal mechanism for detailed inspection where risk assessment reports are received. These reports

are held on planning applications and the Council provided a link to these applications dating back to 2002. It is possible that other reports exist where redevelopment has not taken place. An example would be where the site was being cleaned up and the party concerned with the operation chose to work with the Council. Such reports could not be provided on DVD or CD due to size but can be viewed at the Council offices. The Council is unaware how many such reports there might be but does not consider that they represent a significant number. The Council has explained that it has compiled an in house database of sites that may have been subject to former industrial use and which have undertaken a risk prioritisation. The Council has clarified to the Commissioner that all of the information held on the planning portal is also available on the database.”

- b. The Appellant interprets this paragraph to mean that “*the database of information that the Council purported to contain the reports of contaminated land is not complete*”, and asserts that “*the stated insignificant number of ‘other’ reports might have been required because they relate to sites with high levels of contamination. Clearly, the ‘other’ reports that exist where redevelopment has not taken place are not on the planning portal. Consequently, even if it was possible to look at the estimated 11,000 planning applications, such a search would not locate the ‘other’ reports that exist where redevelopment has not taken place.*”
- c. **Our Finding:** We again revert back to what the Appellant requested in paragraph 1(1) above: “*Has the Local Authority conducted and completed inspections of land (including but not limited to soil, subsurface Hydrology and surface waters) to assess the risk of pollutants on the potential harm to human health, local ecological systems and controlled waters? If yes and a risk assessment has been carried out, I request a copy of these Risk Assessments for the last 10 years in either electronic (CD or DVD) or paper form*”. It seems to us that the answer to the Appellant’s question was that the local authority did not conduct and complete inspections of land to assess risk of effects of pollutants and did not conduct the risk assessments and therefore could not provide the Appellant with the risk assessments it had done in line with his request. However, it did explain that it received risk assessments made by others through the planning applications procedures and it provided the links to this. According to paragraph 19 of the decision notice, the Council also said that other reports might exist but it was not specific (However, we were not able to find a record in the bundle for where the Council had said this). The Appellant now argues that the Council has been unreasonable because of these potential other reports. However, as explained in this paragraph, on a strict reading of the Appellant’s request we do not think such reports fall within the scope of his request, such that we do not think the Council is required to provide them.

17. To conclude, we have not been persuaded by the Appellant's arguments and dismiss the appeal. Our decision is unanimous.

Judge Taylor

29 September 2015