



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

Appeal References: EA/2017/0036, 0074 and 0075

Decided without a hearing

**Before
CHRIS RYAN
JUDGE**

Between

PHILIP THORNEWELL

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION AND REASONS

Subject matter: FOIA: Whether information held s.1

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeals are dismissed.

REASONS FOR DECISION

Introduction

1. Under a Case Management Direction dated 19 April 2017 it was directed that these Appeals should be considered together. All three arose from requests made by the Appellant to Rotherham Metropolitan Borough Council ("the Council") and arose from the Appellant's concerns about various aspects of the Council's March 2016 publication entitled "Rotherham Local Plan Submission Sites & Policies Consultation Statement" and planning processes related to that document.
2. The Chambers President has directed that the appeals are suitable to be decided by a Judge alone and the Appellant has opted to have that decision made on the basis of the papers, without an oral hearing. I am satisfied that these were both appropriate procedures to adopt for the determination of these particular appeals.
3. Despite the connection between all three appeals I propose to deal with each in turn.

**APPEAL FROM DECISION NOTICE FS50657166 OF 8 FEBRUARY 2017
(EA/2017/0036)**

4. This arose from the Appellant's concern that the Council had established a predominantly internet-based process for planning purposes and that the effect was to "disenfranchise" those who did not have access to the internet, including older residents.
5. A lengthy information request submitted on 20 August 2016 was intended assist the Appellant to investigate that concern. However, it was refused by the Council and, after an internal review of that decision had produced the same result, the Appellant submitted a complaint to the Information Commissioner which, it was agreed, should be treated as an invitation to the Information Commissioner to investigate the Council's rejection of the following requests:

"How did [the Council] decide that a predominantly internet/database based process did not disadvantage/disenfranchise older residents or other minority groups?"

Given the size and complexity of the database and documents, what was done to optimise these for devices other than PCs (eg tablets, phones)?"

6. The Council's position at that stage was that it did not hold any information that fell within the scope of either part of the request. Accordingly, it argued, its rejection of the information request did not breach its obligation, under section 1 of the Freedom of Information Act 2000 ("FOIA"), to make information it held available to anyone who requested it.
7. As to the first part of the information request the Council wrote to the Information Commissioner with the following explanation:

"The Council does not hold the information requested. There is no information relating to any decision as to whether the Council considered its web-based approach for Local Plan consultation disenfranchised any groups. Government regulations set out how the Council must publicise its Local Plan ...As the Council was following the regulations it had to meet in publicising the Local Plan, the question of whether this was an appropriate approach id not arise ..."

8. In respect of the second part of the information request the Council pointed out that its website was optimised for mobile and tablet device access. There was therefore no need to take any steps to improve the situation and none was taken. No information was therefore held about that, non-existent, activity.
9. The Information Commissioner accepted both of the Council's submissions and therefore concluded that the Council had been right to say that, on the balance of probabilities, it did not hold any information falling within the scope of the information request.
10. The Appellant appealed the Information Commissioner's decision notice to this Tribunal but his Grounds of Appeal contained no mention of the rejection of the second part of the information request. As to the first part he argued, simply, that the Council had been under an obligation to ensure that developments in digital publishing and interaction with the public did not leave behind those who were unable or unwilling to adapt to modern online systems. He argued that it was "*utterly incredible*" in those circumstances that the Council had no information on how well the system would meet the needs of that group. He added:

"If it is confirmed that there is no information, then I probably need to pursue that via the National Audit Office"

11. I have approached the issue on the basis that I must be satisfied, on the balance of probabilities, that the Council did not hold the relevant information at the time of the information request. I should consider the way the Council approached that request, the focus and care of the search made for any relevant information and the credibility of the result that ensued from those processes.
12. I do not accept that the Appellant's case is supported by the fact that there is a general approach, across all governing bodies, of introducing digitisation in a way that does not leave behind those without the necessary equipment or inclination to use it. The Appellant has certainly not established that the existence of that policy undermines the credibility of the Council's statement that it did not feel the need to make a specific decision on the point in relation to the relevant part of its planning processes. The fact that it did not is supported by the fact that (as the Appellant was told by the Council when rejecting the information request on internal review) it did not rely on the internet alone but made copies of consultation documents available in its libraries and provided other means for the public to participate.

13. The regime established by the FOIA does not authorise this Tribunal to determine whether a public body should have created a record of information in particular circumstances. Its jurisdiction is limited to determining whether it did in fact hold such a record at the time when it received an information request. The Appellant's comments on how the Council should have behaved therefore have limited relevance.
14. I am satisfied that, on the balance of probabilities the Council did not hold the information requested in either part of the information request in this case. The Decision Notice is therefore correct and the Appeal should be refused.

**APPEAL FROM DECISION NOTICE FS50657153 OF 14 MARCH 2017
(EA/2017/0074)**

15. The Appellant believes that the March 2016 consultation document contained an error. It described a particular site as being in a place called Dinnington, when he believed it was in fact in a place called Todwick.
16. The relevant request for the purpose of this Appeal was sent to the Council on 21 August 2016 and was in these terms:

"Could I please have a copy of all information, including meeting minutes and email exchanges relating to how [the Council] reacted to the information that site LD830 was in Todwick, what was considered, how and why it decided to continue to refer to the site as in Dinnington, and what efforts were made to ensure that Todwick residents and others were not confused by the continued use of geographically inaccurate labelling....."

17. I have some sympathy with the Council in determining how to respond to a communication in that form, which appears to have been designed to make a point of criticism rather than to operate as a genuine request for information. The Council's initial responses were muddled, but it settled on a "not held" response during the Information Commissioner's investigation of the Appellant's complaint over the response he had received.
18. The essence of the Council's argument, which it maintained during this Appeal, was that:
 - a. The description of the site's location was based on the geography of the area rather than strict compliance with parish boundaries.
 - b. It had never considered that residents and others would be confused by the location description and had not therefore held any meetings on the subject or debated it in email correspondence.
 - c. The Council had nevertheless consulted with senior officials in its Planning Department in an effort to trace any recorded information that did exist. None had been located.
19. The Information Commissioner concluded, following careful analysis of the facts and arguments, that the Council had contacted the relevant parties to consider whether any relevant information was held. She was satisfied, on the basis of the reported outcome of those enquires, that none was.
20. In lengthy grounds of appeal to support his appeal to this Tribunal the Appellant provided detail on his concerns about the Council's planning processes and his

various communications with the Council on the subject. In particular, he criticised the Council for the way that it had described the location of the piece of land under consideration and explained why he thought this disadvantaged those wishing to be involved in the planning debate encouraged by the March 2016 consultation document. Although the Appellant said that he accepted that it was not the role of the Information Commissioner to involve herself in those issues, it seemed to me that his case was based on the argument that the Council should have agreed with his view on how the land should have been described and that it was absurd that it had not held discussions on the point and recorded the outcome of those discussions.

21. In a written Response to the Appeal the Information Commissioner acknowledged that the Appellant may believe that the requested information should be held by the Council, but argued that this was irrelevant and that the Decision Notice was correct in considering whether or not it in fact did hold it.
22. I approach this Appeal on the same basis as set out in paragraph 11 above. The Council made an appropriate search and the fact that this produced no information within the scope of the information request was entirely to be expected, given the Council's explanation of the approach that, rightly or wrongly, it took to the way in which the land in question had been described.
23. Once again, therefore, I am satisfied that, on the balance of probabilities the Council did not hold the information requested the information request in this case. The Decision Notice is therefore correct and the Appeal should be refused.

**APPEAL FROM DECISION NOTICE FS50657154 OF 14 MARCH 2017
(EA/2017/0075)**

24. The Decision Notice from which this Appeal arises was limited to one aspect of a lengthy information request submitted to the Council by the Appellant on 21 August 2016. The Council had said that it did not hold a list of requests for meetings or a list of meetings held in respect of certain planning issues, even though it had stated publicly that such meetings had taken place with members of the public who wished to engage with a planning officer outside more open forum discussions.
25. The Decision Notice recorded the questions the Information Commissioner had put to the Council about the nature and extent of the search for information that had been made. The Council's response was that no relevant information had been found even though it had consulted the two senior officers who had dealt with the preparation of the local plan since its inception in 2006. The Information Commissioner was told that, whereas careful records were kept of public meetings, drop in sessions and organised workshops held as part of the consultation on the local plan, no equivalent records had been kept of less formal interchanges.
26. The Information Commissioner concluded that, while she appreciated the Appellant's frustration that the Council did not hold the specific information he sought, the test to be applied, again, was not whether such information ought to have been recorded and retained, but whether it had in fact been so recorded and retained. She was satisfied on the basis of the evidence provided to her that, on the balance of probabilities, no relevant information was held.

27. In his Grounds of Appeal, the Appellant again raised a number of wider issues, with which I need not concern myself. He criticised the Information Commissioner for having accepted that a statement by the Council that it did not hold a "list" of meetings was an adequate response to the information request because, the Appellant argued, there could be other information which would have gone to answer the questions he had posed. However, the main point of the Grounds of Appeal was that it was not credible that the Council could have managed a process of receiving and responding to requests for meetings without having maintained at least some records.
28. The Information Commissioner's written Response to the Appeal argued that the Council's response to the information request had been carefully explained – enquiries made of the two officers with relevant knowledge had not brought any information to light and there was no evidence to contradict that explanation.
29. I have sympathy with the Appellant on two aspects of the Council's behaviour in relation to the subject matter of this information request. It does seem strange that no relevant information exists in circumstances where any member of the public was able to ask for a meeting and, I assume, the Council was interested in the views expressed at such meetings. I also think that the initial response from the Council was a little ambiguous in that it focused on the existence of a "list" of meetings and appeared not to consider other forms in which information about such meetings may have been recorded.
30. However, during the Information Commissioner's investigation a fuller explanation was given of the enquiries the Council made and I have decided that this provided a credible explanation for why no relevant information was uncovered. On balance, therefore (and based again on the approach described in paragraph 11 above) I have decided that the Information Commissioner was correct to have concluded that the Council did not hold any information falling within the scope of the information request.
31. In this case also, therefore, I am satisfied that, on the balance of probabilities the Council did not hold the information requested. The Decision Notice is therefore correct and the Appeal should be refused.

Chris Ryan
Judge of the First-tier Tribunal

Date of Decision: 17 January 2018
Promulgated: 17 January 2018