



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

Appeal Reference: EA/2018/044

**Heard at East London Tribunal
On 14 September 2018**

**Before
KAREN BOOTH
JUDGE**

**MARION SAUNDERS and ROGER CREEDON
TRIBUNAL MEMBERS**

Between

TONY MASON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

LONDON BOROUGH OF BARNET

Second Respondent

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 19 February 2018 (Reference: FS50690196) is in accordance with the law and the appeal is dismissed.

REASONS

(NB: References below to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

Background to the appeal

2. The Appellant is one of six residents whose gardens back onto a piece of land owned by the London Borough of Barnet (“the Council”) and leased to Middlesex University. The Appellant has taken the lead on behalf of the residents in negotiating with the Council regarding their interest in buying portions of that land to incorporate into their gardens.
3. In June 2016 (following a valuation of the land by the Council’s surveyors), each resident was offered a portion of the land at a specified price of between £30,000 to £35,000. The residents were unhappy with the valuation. In October 2016 the land was valued by the District Valuation Service, which used the same valuation method but applied a 50% reduction in value “to reflect a willing buyer/purchaser”.
4. Final offers were made in December 2016. The residents were still unhappy with the figures. The Council had previously indicated that all plots needed to be sold in order for any of the sales to proceed. As five out of the six residents decided not to proceed the Council terminated the offers on 16/1/17.
5. The Appellant has been pursuing his concerns about the lawfulness of the Council’s land sales processes (in particular, their valuation methods) with the Council and others since then. His main focus has been on trying to ascertain the existence/whereabouts of certain procedures which are referenced in the Council’s *Management of Asset Property and Land Rules* (at page 276), which the Council asserts are referenced in error.

The request for information and the response

6. On 2/1/17, the Appellant emailed a request for information to the Council’s FOI Officer (which starts at page 84). That email refers to the detailed context for the request as set out in his email of 1/1/17 (which starts at page 85).

The Respondent’s decision notice includes the text of the key part of the 2/1/17 email i.e. the request for information:

“Please provide copies of All Procedures, Rules and documentation historically used (since Jan 2012) to guide the administration of the Estate Management and Valuation function of Barnet Council (or relevant departments prior to any organisational change). This should include:

1. **The specific input documentation that were merged to create the current 2014 Management of Assets, Property and Land Rules** (i.e. I wish to check for myself if there was truly a clerical error in retaining the reference to separate procedures, or whether there was always an intention to have a separate set of supporting procedures in addition to the Rules).

2. **All other process, procedure, or guidelines documents generated or used since Jan 2013 (i.e. historic and current) related to the Estate Management & Valuation Function.** I am interested primarily in any final, or final draft documents (i.e. I do not need to receive "revision history" documents). The intent here is to establish whether there the Estate Management and Valuation function does in fact have Procedural Guideline documents that should be separately referenced in the Management of Assets, Property and Land Rules.

For clarity, I am seeking existing documentation related to:

a. **LBB Estate Management Procedures & Guidelines.** These are requested to establish whether they do in fact exist. Equally, if it were the case that such document do not exist, then this may well be a breach of accepted good practice, and this raises a whole set of other questions for the ARG to consider.

b. **LBB Valuation Guidelines & Procedures.** These are requested to better understand the logic for the insistence by the Barnet Valuer (and other Council Leadership) that 'due process' has been followed in all aspects of this Ravensfield Land disposal process. For example, I am seeking any documentary evidence that "Enhanced Valuation" for pricing of adjoining land garden-only land is legitimate (note any such evidence would need to reference specific procedures and not some generic statement such as "consistent with Red Book Guidelines"). As an example previous FOI request to Barnet indicated that Enhanced Valuation was applied to 2 other requests to purchase garden land. Neither request completed (which they are highly unlikely to do when land is valued on an enhanced valuation basis). See [here](#)

For the benefit of the FOI Officer, this detailed context for this request is given in the email below."

7. The Appellant made a related request for information on 26/6/17, which is the subject of a linked, but separate, appeal (appeal ref: EA/2018/0045 and ICO ref. FER0724242) and which we also decided on the papers on 14/9/2018.
8. The Council's response to the request dated 2/1/17 is at page 90. In summary, the Council refused the request in reliance on section 12 (exemption where cost of compliance exceeds appropriate limit) of the Freedom of Information Act 2000 ("FOIA"). The Council estimated that it would take approximately 20 hours to comply with the request. They acknowledged the usual requirement to provide advice and assistance with a view to bringing the request within the cost limit but did not consider it appropriate to offer such advice and assistance in this case due to the history and context of the Appellant's previous dealings with the Council and the likelihood of any further request about this subject

being treated as a vexatious request. The Appellant sought a review of the Council's decision. The review response, which covers both appeals, is at page 140.

The complaint to the Information Commissioner

9. On 10/7/17, the Appellant complained to the Respondent about the Council's responses to his requests for information dated 2/1/17 and 26/6/17 (page 145).
10. The Respondent issued her decisions in relation to both requests on 19/2/18. In relation to the request dated 2/1/17 (incorrectly referred to as being dated 3/1/17) she decided as follows.
 - The Council correctly refused to comply with the Appellant's request in reliance on section 12(1) of FOIA.
 - The Council breached section 16(1) of FOIA as it rejected considering any advice and assistance that it could offer the Appellant.
 - The Council was not required to take any steps to ensure compliance with FOIA.

The appeal to this Tribunal

Appeal grounds

11. The Appellant appealed to this Tribunal. His grounds of appeal are set out at pages 14-15 and can be summarised as follows (although he refers to pink and yellow highlighting to denote his most/lesser relevant arguments, we had not been provided with colour copies of the documents and could not, therefore, see that highlighting – we drew this to his attention at the hearing and he said that he was happy to proceed despite this).
 - The two linked appeals relate to the same underlying issue i.e. the failed negotiated land sale referred to above. The Council considers both requests vexatious but has applied cost limits to this one.
 - The Appellant has experience in dispute resolution. In this appeal neither the Council nor the Respondent have presented sufficiently strong arguments to demonstrate why, in the context of information law, they are right and he is wrong.
 - Having read what he believes to be the most recent case law on "vexatious"/ "manifestly unreasonable requests" (*Dransfield and Ainslie*) and the Respondent guidance (dealing with vexatious requests) he considers that he has strong grounds for appealing both decisions.
 - In this appeal he understands that he needs to challenge the "effort estimates" submitted by the Council and considered reasonable by the Respondent.
 - The Tribunal is asked to note that the Appellant has submitted a subject access request (under the Data Protection Act) for the purpose of obtaining any additional Council information that has been passed to the Respondent.

- His request indicated a willingness to discuss how to keep the request within the time limit and an explanation as to why the information was being sought (the fact that it is specifically referenced in the Council's constitution is adequate justification for spending time to locate it).
- He challenges the time/effort estimates submitted by the Council. In his experience as project manager it is inappropriate to provide effort estimate to the nearest 30 mins. The correct approach is to discuss how best to limit the scope of the search (in agreement with the requestor) and "time box" the search.
- If time-boxing is not accepted practice in this context he strongly challenges the effort estimates provided. Relevant documentation is held on a single server and only an electronic key word search is thus necessary (manual searches are unnecessary).
- The individual who undertook the estimate is the same person whose work the Appellant criticised in the past. The Appellant is not saying the effort estimates are deliberately inflated but that the Tribunal should not place reliance on the search effort estimates given by the Council. The organisation operating the services (Capita) is a high-tech IT company with the capability to apply advanced search/retrieval methods.
- As the Appellant had offered to discuss the wording of the request he challenges the Respondent's decision not to require that the Council work with him to reword it. He has made a separate complaint against the Respondent regarding their alleged failure to constructively engage with him.

12. On page 16, the Appellant states his desired outcome, which is:

- The Tribunal should not simply accept the effort estimates provided by the Council without additional proof that they are justified (suggesting that GDPR legislation re-sets expectations relating to power searches).
- The Tribunal is encouraged to instruct the Council to work with him to agree alternative wording to achieve the core purpose of FOIA.

Respondent's response to appeal

13. The Respondent's Response to the appeal is at pages 19-35. Paragraphs 9-11 set out the text of section 12 of FOIA and regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations (SI 2004/3244) and paragraph 11 summarises the effect of those provisions.

Paragraphs 12 and 13 of the response helpfully summarise the relevant case law on the purpose of section 12 and the key principles in relation to its application. The remainder of the Response addresses (and rejects) the grounds of appeal.

The Council's response to the appeal

14. On 4 May 2018 the Tribunal made the Council a party to the appeal (page 36, paragraph 4). The Council's Response to the Appeal is at pages 59-76. It includes a detailed section on the background to the failed land sales and the

disputed valuation approaches. It reveals that the Council made a final offer to the Appellant to sell the land at the rear of his property to him for £12,600 and that the Appellant made a counter offer for a significantly lesser sum which the Council rejected. This is followed by a summary of the other information requests he has made to the Council over the last 3 years (paragraphs 18 and 19).

The Council's response to the section 16 issue is at paragraphs 26-31. There is then a section headed "Searches carried out" (paragraphs 33-48). That heading is misleading as that section explains how the Council holds its records, how the relevant officer estimated the likely cost of complying with the request and why they concluded that the provision of advice and assistance to try to refine the request was inappropriate.

15. Paragraphs 45 to 55 are poorly drafted and quite hard to follow. They refer to a *subsequent* subject access request made by the Appellant which apparently took 50 hours of time to process. It was not clear to us what information had been requested or what was provided to him, but from what the Appellant told us at the hearing it seems that there was an element of overlap between that request and the request that is the subject of this appeal and that the Appellant received some information on valuation processes that was relevant to part a. of the latter and which he found helpful.

Appellant's Skeleton Argument

16. On 7/5/18 the Appellant sent the email at page 40 and a draft reply (page 46-56) to the Respondent's Response. On 27/8/18 the Appellant provided a detailed skeleton argument with an Appendix headed "Legal Framework" (pages 117a-r). Somewhat confusingly, the skeleton covered both appeals. The points that the Appellant flagged up as being relevant to this appeal are as follows:

- Paragraphs 2.1 to 2.3
Context to the request.
- Paragraphs 7 to 11
The Appellant was now asserting (for the first time) that the request for information to which this appeal relates fell to be determined under the Environmental Information Regulations 2004 ("the EIRs") and not under FOIA. This was on the basis that "The land sale procedures ... are measures relating to the land sale" (paragraph 11).
- The section dealing with the question of whether the request was "manifestly unreasonable"
Much of this section is relevant to the issue of vexatiousness and is therefore not relevant to this appeal.
- The section dealing with whether or not the information was held.
Contrary to what the Appellant appeared to be asserting, this is *not* an issue that is relevant to this appeal. The Council did not say in its response that it did not hold the information. The Council refused the request on cost grounds.

- Paragraph 32
The advice and assistance issue.
- Paragraph 34
The Appellant's responses to the Council's submissions on the section 12 issues.
- Paragraphs 35-39
Other points of potential relevance to the "manifestly unreasonable" balancing exercise (which we understood to be a reference to the public interest test). Most of this relates to the issue of vexatiousness and is therefore not relevant to this appeal.

Our task and the issues we had to decide

17. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

18. The Appellant requested an oral hearing, which he attended on 14/9/18. He was not represented. The Respondent and the Council elected not to attend the hearing. The Appellant took us through the relevant parts of his skeleton argument and provided some helpful context and background information.

19. The evidence consisted of: the evidence in the open hearing bundle (463 pages); the additional open documents, so far as they were relevant to this appeal; the authorities bundle provided by the Appellant; a paper produced by the Appellant at the hearing (about "Goals") and the Appellant's oral evidence.

20. The issues we had to decide were as follows.

- a) Was the information requested "environmental information", as defined in regulation 2(1) of the EIRs?
- b) If it was "environmental information", was the request "manifestly unreasonable" within the meaning of regulation 12(4)(b) of the EIRs on cost grounds and, if so, in all the circumstances of the case did the public

interest in maintaining that exemption outweigh the public interest in disclosing the information.

- c) If it *was not* “environmental information”, did section 12 of FOIA apply?
- d) If either regulation 12(4)(b) or section 12 had been correctly applied, had the Council met its duty to provide advice and assistance in accordance with regulation 9 of the EIRs or section 16 of FOIA?

What we decided and why

Issue (a)

21. “Environmental Information” is defined in regulation 2(1) of the EIRs as follows:

“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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

22. The Appellant raised the issue of whether his request had been handled under the correct legislative regime for the first time in his skeleton argument (presumably after recognising that the EIR regime is more generous to the requestor). He appeared to be asserting that the land sales procedures information that he is seeking constitutes information falling within (c) above; i.e. that it is “informationon measures affecting or likely to affect the elements and factors referred to in (a) and (b)”. Neither the Respondent nor the Council responded to that assertion and so we did not have the benefit of their views on this issue.

We decided, on balance, that the information being sought was not environmental information.

23. The Appellant is essentially trying to ascertain whether the “procedures” referred to in paragraphs 1.5, 2.15 and 3.3 of the 2014 Rules at pages 276-287 exist or ever existed (see paragraph 34.2 on page 117(i)), or whether there are other procedures/guidelines that the Council is required to apply alongside the Rules when valuing its assets.

We accepted that the Rules and any related processes/guidance could be described as “policies” (and therefore “measures”). We also accepted that the definition of environmental information needs to be interpreted broadly and purposively. However, whilst there are references in the Rules to environmental terms/matters, it seemed to us that neither the Rules nor any associated procedures/guidance constitute (or would be likely to constitute) information “on” (about, relating to or concerning) policies affecting or likely to affect the state of the elements of the environment.

Paragraph 2.1 of the 2014 Rules explains that the Rules “provide the **governance structure** [my emphasis] within which the Council may acquire, lease, act as landlord, licence, develop, appropriate, change use of, or dispose of Assets within its Asset Portfolio.” The aims of the Rules are set out in paragraph 2.3. The Rules deal with such matters as: delegation of decision making; links to other corporate and strategic plans; responsibility and accountability of the Council’s Directors; valuation methods; and evidence requirements etc. prior to acceptance of asset acquisition/disposal.

The Appellant has not explained *why* he considers that the processes/guidance that he is seeking would constitute *information on measures affecting or likely to affect the state of the elements of the environment*. In our judgement, they did not. It was unnecessary, therefore, for us to consider issue (b).

Issue (c)

24. Paragraphs 33-42 of the Council’s Response (pages 70-72) set out the basis for the Council’s decision to refuse the request in reliance on section 12 of FOIA. In determining whether the Council had correctly relied on section 12 we also considered the key principles that have emerged from relevant case law as correctly summarised in the Respondent’s Response.
25. The Appellant suggests that FOIA prevents a requestor from challenging a section 12 decision. That is clearly not the case as the application or otherwise of section 12 is one of the issues that the Respondent had to determine (and which we considered afresh).

Although this is not relevant, given our decision in relation to issue (a), he is also of the belief that there is no section 12 equivalent in the EIRs. That is not the case. The “manifestly unreasonable” exemption (regulation 12(4)(b)) covers cost grounds as well as vexatious requests.

26. We did not accept the Appellant's assertion that the correct approach is for the public authority to discuss how best to limit the scope of the search (in agreement with the requestor) and "time box" the search. The *actual* request for information is the correct starting point for the estimate; limiting the scope of the search is only relevant if and when it is clear that the original request exceeds the cost limit and is relevant to issue (d). "Time-boxing" may be the Appellant's favoured method of estimating time, but the Council was free to choose its own method.
27. We rejected the Appellant's assertion that only an electronic key word search was necessary. This is at odds with the Council's explanation on page 70 that "semi-current" paper records are held (by Stor-a-File) at an off-site storage facility in Corby.
28. We noted the Appellant's concerns about the officer who undertook the estimate being the same person whose work the Appellant criticised in the past. He did say, however, that he was not suggesting the estimate had been deliberately inflated. There was no basis for us to have taken a different view. At the hearing he asserted that the officer was not the best person to do this job as she had no "governance knowledge" and it was unclear whether she had the necessary technical ability.

We rejected those assertions. The Council was at liberty to choose any suitable person to produce the estimate. It made sense for the Council to allocate this task to someone who was familiar with the background to the request and specific governance knowledge should not have been necessary. Realistically, the officer would not have been working on this in isolation. It is very unlikely, in our view, that she would have produced the estimate without consulting relevant colleagues (including the Council's IT specialists).

29. The Appellant refers to the GDPR legislation re-setting expectations relating to power searches. However, that legislation was not in force at the relevant time.
30. As regards an "obvious alternative" means of searching, the Appellant says in paragraph 34.2 on page 117(i) that "the obvious missing alternative is to properly search for the missing referenced "Procedures"The obvious missing alternative is .. to ask those accountable for managing the drafting process for these document[s] and who signed-off these documents as valid." At the hearing he suggested that the CEO of the Council should have been consulted.

We did not accept that this was an "obvious alternative". The right under FOIA is to *recorded* information *held* by a public authority. Even if there are officers still working in the Council who have some personal recollection of the procedures concerned (if indeed those procedures ever existed) this does not mean that they will have any knowledge regarding *where* in the Council's

records they are/were held. We thought this was even less likely to be so in the case of a senior officer.

31. We were satisfied from the evidence before us that the Council had adequately investigated, assessed and calculated the likely cost of complying with the request and that its estimate was reasonable. We did not require the “additional proof” that the Appellant asserted was necessary.

Issue (d)

32. Section 16 of FOIA provides as follows.

16 Duty to provide advice and assistance

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Paragraph 14 of the Code of Practice provides as follows.

“Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit” (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.”

33. The Council’s reasons for declining to provide advice and assistance are included in the review letter at page 136

“When refusing under s12 the council is ordinarily required to provide advice and assistance to the requestor to help them refine a request that they could submit which would be unlikely to exceed the appropriate limit. However, in this case the council does not feel it is appropriate to provide such advice and assistance. Given the history and context of this requestor’s dealings with the council over this matter and associated issues over a period of time, the council considers that to encourage a further request would be misleading to the requestor. The council is likely to refuse a further request about this subject as vexatious (under s 14) based on the context and history of the requestor’s dealing with the council over this issue.”

This is also covered in paragraph 59 of the Council’s Response – page 76.

34. The Respondent accepted that the Council had failed to comply with its duty under section 16 to provide advice and assistance to the Appellant (paragraph 38 of the decision notice – page 9). This is confirmed in paragraph 34 of the Respondent’s Response – page 32.
35. We considered the Respondent’s reasoning in this respect to be somewhat muddled. By concluding that the Council had contravened section 16, they must have decided that the Council had *not* done all that was reasonable by

way of advice and assistance. However, the Respondent cites various factors which support the Council's assertion that it would not have been possible to meaningfully refine the request. We were not satisfied that the request could not be refined/narrowed to bring it within the cost limit. It seemed to us that the obvious starting point would have been to discuss with the Appellant how this might be achieved but no attempts were made to do this. The likelihood of future requests being treated as vexatious was not a good reason for failing to provide advice and assistance. It was open to the Council to have refused this request in reliance on section 14 but they did not do so.

36. We agreed that the Council had contravened section 16 but we did not agree with the Respondent's conclusion that "it would not have been possible to meaningfully refine the request to bring complying with it within the cost limit". The Council had not made any attempt to achieve this.

We could not, however, offer the Appellant any remedy for this failure. Section 50 (application for decision by Commissioner) provides the right of complaint against a public authority's handling of a FOIA request. Subsection (4) requires the Respondent's decision notice to specify steps to be taken by the authority in the circumstances specified in (4)(a) and (b). There is no such requirement in relation to a breach of section 16. When determining an appeal the Tribunal has the same powers as the Respondent. The Respondent does not have the power to specify steps to be taken in relation to a breach of section 16 and neither does the Tribunal.

Conclusion

37. For the above-mentioned reasons, we concluded that the Respondent's decision notice was in accordance with the law and we therefore dismissed the appeal.

Signed: Karen Booth

Judge of the First-tier Tribunal

Date of Decision: 16 November 2018

Dated Promulgated: 19 November 2018