



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

Appeal Reference: EA/2018/0156

**Heard at Norwich SCS Tribunal
On 29 January 2019**

Before

**JUDGE ANTHONY SNELSON
MR NARENDRA MAKANJI
MR NIGEL WATSON**

Between

MR ROBERT CRAGGS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

NORFOLK COUNTY COUNCIL

Second Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Mr Robert Craggs, to whom we will refer by name, is a resident of Norwich. On 20 April 2017 he wrote to the Second Respondent ('the Council') requesting, pursuant to the Freedom of Information Act 2000

(‘FOIA’), information held by it pertaining to a footpath which runs through his land, including:

... all communications including telephone communication; emails; drawings; statements; reports; investigations; complaints; proposals; planning submissions; notices and all money transactions associated with this footpath.

This includes what you refer to as being a dispute over this property, the information you say is in the public domain, and the source of this information. Very recently I have been subjected to harassment with the veiled threat of more to come from an employee known only as [redacted] and I also wish to know exactly the ‘authoritative information’ his boss provided to him and from what source he obtained it. The names of these two employees is (sic) very important to this FOI request.

2. It may help at this early stage of the narrative to make three points. First, although Mr Craggs fiercely denies that there has ever been a ‘dispute’ about the footpath, he entirely agrees that there has been a long history of ‘issues’ about it, dating back as far as 2003.¹ Second, title to the land over which the footpath runs is not in question: it belongs to Mr Craggs. But the rights and duties associated with its maintenance attach to the Council, together with rights of access enabling it to fulfil such duties. Third, the ‘employee’ referred to (‘Mr X’) was at all relevant times a local resident who worked for the Council. On or about 13 February 2017 Mr X and Mr Craggs had what may be described as a frank exchange of views about the footpath, in the course of which, according to Mr Craggs, the former referred to information about it to which he was privy through his employment by the Council.
3. The Council replied on 15 June 2017. It treated the request as falling under the Environmental Information Regulations 2004 (‘EIR’). Some information was provided but some withheld (wholly or partly by means of redaction), under reg 13(1) (personal data of third parties) and reg 5(3) (personal data of the applicant). The Council explained that, in the incident of 13 February 2017, Mr X had been acting in a personal capacity, which explained why it had no information relating to it.
4. Mr Craggs was not happy with the reply of 15 June 2017. Correspondence followed through which the Council sought to establish his reasons for being dissatisfied. In the course of its investigation, the Council came across some further relevant documentary material, which had been overlooked. This was made available to Mr Craggs in May 2018. To the extent that it constituted his personal data, it was supplied to him under the Data Protection Act 1998 (‘DPA’). Later still, yet further relevant material was found by the Council and

¹ The ‘issues’ seem to have mainly concerned Mr Craggs’s unhappiness at (as he sees it) (a) the Council performing works to the footpath without consulting him or otherwise respecting his rights as the owner of the land and (b) the Council (and/or others) blaming him for not permitting the footpath to be upgraded or maintained.

disclosed, save for certain information withheld (some wholly, some in part)² on data protection grounds.

5. In the meantime, on 26 June 2017, Mr Craggs complained to the First Respondent ('the Commissioner') about the way in which the Council had dealt with his request.
6. The Commissioner proceeded to carry out an investigation. This took the form of considering the information supplied by Mr Craggs in support of his case and the Council's responses to a number of questions formulated by the Commissioner, directed to the nature of the documentary records kept, the searches which had been carried out, policies and practices relating to the destruction or deletion of material and related matters. These inquiries elicited, among much else, the information that some categories of file were retained for six years, others for seven years and others in perpetuity.
7. By a decision notice dated 26 June 2018 the Commissioner determined that the Council had correctly stated that it did not hold the disputed information and had complied with its legal obligations. She further found that the email of 7 March 2017 contained the personal data of Mr X *and* Mr Craggs, that such data were "indivisibly intertwined" and that the document was therefore exempt under reg 5(3) (see below). She added some observations on the Council's obligations to Mr Craggs under the DPA, while noting that her decision, being limited to the information rights jurisdiction, did not extend to that Act.
8. By a notice of appeal dated 2 September 2018, Mr Craggs sought to challenge the Commissioner's decision. The document is less than clear. There are repeated complaints of "harassment" and "abuse" (apparently from members of the public) to do with the footpath. There is criticism of a reference on behalf of the Council to information being "in the public domain". There is a challenge to the redaction of Mr X's name in a disclosed document. There are numerous allegations of "lies" and "deceit" and "obfuscation and obscurantism" on the part of the Council. The notice of appeal contains much besides, the relevance of which is not easily grasped. Lengthy appendices are attached. These general comments having been made, we accept the appeal as including a challenge to the central decision that the Council did not hold the disputed information and we adopt the Commissioner's analysis, which picks out the following further grounds advanced by Mr Craggs.
 - (1) Mr X intimated on 13 February that he had been given information about the footpath by his "boss".
 - (2) The names of Ms X and his "boss" ought not to have been redacted.
 - (3) The disclosed material does not include documents relating to money paid to the Council under the Town & Country Planning Act 1990, s106.

² A two-page email written by Mr X, dated 7 March 2017 was withheld in its entirety; some other documents were disclosed in redacted form

- (4) It is not credible that information about a planning application of 2003 has been lost.
9. In her submissions of 15 October 2018 responding to the appeal the Commissioner contended that the evidence pointed to the conclusion that the relevant information was not held and that the further grounds did not provide any basis for upholding the appeal.
10. Further written representations followed from Mr Craggs.
11. Mr Craggs attended the hearing and presented his case with good grace and impeccable courtesy. The Respondents did not attend, preferring to rely on their written representations alone.

The applicable law

12. The information sought by the Appellants falls within the scope of the Environmental Information Regulations 2004 ('EIR').³ By reg 2(1) relevant information comprises "any information in written, visual, aural, electronic or any other material form".
13. Reg 5(1) enacts a general duty on public authorities holding environmental information to make it available on request. The duty is disapplied to the extent that the information requested includes personal data of which the applicant is the subject (s5(3)).
14. Reg 13 prohibits disclosure of information to the extent that the information requested includes personal data of a third party and specified conditions are met.
15. In *Bromley and Information Commissioner v Environment Agency* EA/2006/0072, the Information Tribunal held that a question as to whether a public authority holds information relevant to a request is to be decided on a balance of probabilities, adding:

Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.

16. The appeal is brought pursuant to the Freedom of Information Act 2000, s57, as modified by EIR reg 18. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal considers -

³ Mr Craggs told us that he was deeply suspicious of the Council's contention that the case fell within the realm of EIR rather than FOIA. He has made this point on numerous occasions in correspondence. We sought to reassure him that the Council's view was plainly correct and that, if anything, EIR offers wider rights to the citizen than FOIA. He appeared to accept the reassurance.

- (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.

Conclusions

17. We are satisfied on a balance of probabilities that the Council's case must be preferred to that of Mr Craggs. We have no reason to doubt the truthfulness of its response to the request. We find nothing about its defence implausible. There is no 'paper trail' suggestive of the existence of further, undisclosed material. No motive for supplying a false response has been proposed and the risks of doing so are obvious. We have been shown no evidence to sustain the immoderate allegations of "lies", "deceit" and "obfuscation and obscurantism" on the part of the Council. Rather, we see a familiar story of a public authority struggling to address a litany of sincere but confused and obscurely-presented concerns.
18. We have not overlooked the fact that, on its own case, the Council needed three attempts to complete proper disclosure in response to the request. That unimpressive record has given us pause, but on balance we are persuaded that, belatedly, the duty to disclose has been complied with in full.
19. If and in so far as Mr Craggs is to be taken as challenging the Commissioner's ruling on the email of 7 March 2017, we find no arguable ground for doing so. The document is included in the closed material before us and we have considered it. The Commissioner was plainly right to decide that it contained the personal data of Mr X and Mr Craggs and that those data were "indivisibly intertwined". It necessarily followed that the exemption under reg 5(3) applied.
20. Turning to the four numbered grounds, point (1) does not argue for the existence of further disclosable material. It is consistent with the disclosure already given. As to (2), Mr Craggs here seeks impermissibly to raise a matter not included in his complaint to the Commissioner and accordingly not considered by her. He also advances no basis for the implicit complaint that she has somehow misapplied EIR, reg 13. Point (3) goes nowhere because there was no request for information about s106 monies. Point (4) also lacks any substance: it is entirely plausible that the Council has no documents relating to a 2003 planning application, since it would have been entirely consistent with its policies and practices to destroy such documents after seven years.

21. Mr Craggs's points about the Council's references to material "in the public domain" were not easy to follow. We explained that the freedom of information regime is concerned with the rights of citizens to extract from public authorities material which is *not* in the public domain, and that it is the act of disclosure which puts them into the public domain. So a request for documents which are already public (because, say, they are available on the Council's website) is inappropriate.
22. For the reasons stated, we conclude that the Commissioner's decision was in accordance with the law.
23. It follows that the appeal must be dismissed.

Signed: Anthony Snelson

Judge of the First-tier Tribunal

Date: 20 February 2019