



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

Appeal No: EA/2014/0096

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0511709

Dated: 26 March 2014

Appellant: Evelyn Jones

Respondent: The Information Commissioner

Heard at: Kidderminster Magistrates Court

Date of Hearing: 5 September 2014

Before

Chris Hughes

Judge

and

Gareth Jones and Paul Taylor

Tribunal Members

Date of Decision: 18 September 2014

Attendances:

For the Appellant: in person, assisted by Jane Green and Sheridan Tranter.

For the Respondent: no attendance

Subject matter:

Environmental Information Regulations 2004

Cases:

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal .

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings, Mrs Jones, is concerned about proposals to build a waste incinerator near where she lives. On 8 May 2013 she wrote a very detailed request for information under the Environmental Information Regulations (the request is set out as Annex A to the decision notice) seeking information from Worcestershire County Council (“the Council”) about the details of the proposal and its implications. The Council replied in a five page letter (bundle pages 25-29). Some information was provided, some issues were referred back to the outcome and the documents of the planning inquiry, others to a future business case. Some of the answers indicated that the information was held by Mercia, the contractor building the incinerator and request 15 “*please provide an updated Risk Assessment and the Variation Business Case, if these are not finalised please provide these as soon as they become available*” was responded to “*These are not available*”
2. On review the Council maintained its position that the information was not held for many parts of the request (regulation 12(4)(a)) for part of the request it declined to provide the information relying on regulation 12(5)(e) (commercial or industrial confidentiality).
3. Mrs Jones complained to the Information Commissioner (“the ICO”) who investigated. During the course of the investigation the Council confirmed that the specific information to which it had applied 12(5)(e) was not held.
4. The Council acknowledged that it had incorrectly applied regulation 12(5)(e) with respect to the “risk assessment” as information about risks relating to construction, delivery and commissioning of the plant would be held by the contractor. *However, the Council has conceded that the request was ambiguous, and the complainant may have referred to the risks associated with the wider matter, which are recorded in various cabinet papers regarding the contract, and have been collated in the council’s report of December 2013. The Council has advised that it has received a further request on the 16 January 2014 by the complainant for the Variation Business*

Case and Risk assessment, in which it expects to be able to clarify what information is requested and provide the council's current position."

5. The Commissioner concluded with respect to the parts of the request still in contention – 1,3,7,8,9,11,12,14- that the information was not held at the time of the request in May 2013. With respect to request 15 he accepted that the variation business case did not exist, that the matter remained live and that further information would be contained in a report to the Council's Cabinet in December 2013 and that a proportion of the information may not be held by the Council until that time.

The appeal to the Tribunal

6. Mrs Jones appealed against this decision. In her appeal notice she was critical of the project as a whole and what she saw as unfairness in the planning process. She raised issues with respect to the findings of the ICO concerning parts 1, 3, 7,8, 9, 12,15 of her request. In oral argument she claimed that more information should be available, that she and others had not been able to get good information on costs and that there had been no transparency. She repeatedly argued for what she considered should be available. She criticised the Council for delays in responding to requests for information. She acknowledged that if information was not held at the time of the request she would have to ask again at a future date.
7. Request 1 (DN paragraph 19) Mrs Jones argued the centrality of electricity generation to the project and challenged the response that no information was available because negotiations were in train.
8. In the Tribunal's view while it was understandable that Mrs Jones was frustrated by the absence of information that deficit was adequately explained by the ICO in his decision notice. The heart of the issue was that there was an arrangement under which a separate contractor, Mercia Waste Management, was developing and delivering the incinerator project and therefore the level of information held by the Council would be very much less than if the Council was delivering the project. The Tribunal was satisfied that the ICO was correct to conclude that the information was not held at the time of the request (DN paragraph 21).
9. Request 3 (costs of consultation) Mrs Jones argued "*I would have thought that the local authority had a duty*" (to consult) and that the "*only consultation was by the*

waste company”. She felt that the consultation was therefore biased. At the hearing she had no evidence to indicate that the Council held the information.

10. This is a criticism of the consultation process. The request was “costs of consultation” (bundle page 23 email request of 8 May 2013). The ICO was correct to conclude that since no public consultation had taken place it was unlikely for such information to be held (DN paragraph 22.).
11. Request 7 was about the selection of the site and asked “*why was this changed to situate one site in a different unsuitable site?*”. The Council replied (bundle page 27) “*At the time the site (Ravensbank) was a realistic opportunity and it was following a request from Redditch and Bromsgrove Councils*” (letter 4 June 2013, bundle 25-29), and “*at the time Ravensbank fitted the planning criteria for a waste facility of this size, for the communities it serves. Documents 10-27 within the planning documentation cover site selection – accessible online via link below. Document 10 provides an Executive Summary of the Site Searches and addresses this..* In her statement of appeal Mrs Jones stated that this was “*disingenuous*” .
12. In oral argument she advanced arguments against site selection, however she was unable to put forward any evidence why there should be more information held than was contained in the documentation put before the planning inquiry.

The questions for the Tribunal

13. Request 8 was “... *has this land already been “Appropriated” to Mercia Waste*”. In its reply of 17 July the Council confirmed that it had been appropriated for planning purposes but that the Council “*cannot appropriate it to Mercia, but Mercia will be able to benefit from our appropriation*” . In his decision notice the ICO accepted this explanation and concluded that it was unlikely that there was any relevant held information. Mrs Jones submitted an extract from a Herefordshire Council report of 7 January 2010 with her appeal. This report in a summary section stated “*The site is*

owned by Worcestershire County Council who are proposing to appropriate the land to Mercia". Mrs Jones argued (statement of appeal bundle page 19) *"The council did state that they did plan to "appropriate" this site to the waste company."*

14. The Tribunal did not find any inconsistency or error in the finding of the ICO. The explanation given by the Council is clearly robust, the extract from the Herefordshire report is a summary not a full statement of the position. The explanation given by the Council in its reply of 17 July states the land cannot be "appropriated" to the company; this is both clear and probable. The ICO is correct in stating that it is unlikely that there is any relevant information.
15. Request 9 is a detailed request in approximately thirteen parts. Much of the request related to various costs of the project which in her appeal Mrs Jones argued:- *"These costs are vast and must be available to the owners of the land i.e. Worcestershire County Council and some or all of these costs should be available to the public."* The Commissioner analysed the request and the Council's response at paragraphs 25-28 of his decision notice. He accepted that since the costs were initially carried by the contractor the Council's information was very limited and not at the level of detail of the request. Relevant information to other parts of the request were held by the contractor and would be passed to the Council at a later stage. With respect to the final part of the request concerning responsibility for possible health effects from working on the site and for the risk of gas explosion from surrounding landfill sites; the Council informed Mrs Jones that this was an issue for Mercia and subsequently informed the ICO that a specialist officer of the Council concerned with the matter had no relevant information. Mrs Jones in oral argument asserted that there was a strong public interest in knowing the costs. As landowner, the Council had responsibility for the site and the environmental questions including the final part were things the Council should be concerned about on behalf of residents.
16. The issue for the Tribunal is whether or not the information is held by the Council. It is not whether, as a matter of public policy, it should be held by the Council. The Council has indicated that, as a result of the contractual arrangements, at the time of the request, it did not hold the information requested. That seemed to the ICO and to the Tribunal a reasonable explanation why the information would not be held and the Tribunal accepts that on the balance of probabilities the information was not held at the time of the request.

17. Request 12 was a statement with respect to the prices of different options: *“do the Council accept that it would be cheaper to carry on with existing arrangements...”* The Council responded: *“this will be considered in the business case.”* The ICO accepted that there was no evidence to show that the information on relative costings was held but that it had come to be held subsequent to the request as part of the Council’s decision-making process. In her appeal Mrs Jones argued that subsequent requests had still not generated the information. *“The relevant financial analysis was not available to be produced to the Cabinet in Dec 2013. This was only an incinerator or do nothing option.”* In oral argument the centrality of the information and the economics of waste incineration to the justification for the project was advanced. It was argued that it was the responsibility of the Council to have that information.
18. The Tribunal was satisfied on the evidence before it that at the time of the request the information of the differing costs of possible options for the disposal of waste was not held by the Council. The Council in its response to the ICO of January 2014 (bundle pages 55-68) drew attention to information before the Council cabinet in December 2013 which set out the information and stated in its letter: *“The cost information is subject to final negotiation with Mercia following the decision by cabinet on 12 December 2013 to adopt the recommendations in the report. It is intended to further negotiate the costs down...”* The Tribunal is satisfied that there is no evidence that at the time of the request the information was held.
19. The final request, 15, was for *“an updated risk assessment and the variation business case.”* In his decision notice the ICO noted the ambiguity of the request and that the Council had indicated that it would respond to a further request from Mrs Jones. In her arguments Mrs Jones complained about the delay in finally obtaining the updated business case which had only been sent to her in July.
20. The issue for the Tribunal is whether at the time of the request in May 2013 the Council held *“an updated Risk Assessment and the Variation Business Case.”* The evidence is clear that at the time of request there was no Variation Business Case. The position is less clear with respect to the risk assessment. The Council interpreted the risk assessment as relating to various risks relating to construction which were the business of Mercia. That is understandable, indeed much of the response to the request overall was that this was information which Mercia had but not the Council.

However the project, while being carried out by Mercia, had significant implications for the Council. Within normal corporate governance frameworks the Council could be expected to have carried out some assessment of the risks for the Council associated with the project and these would be expected to be in the form either of a separate risk assessment or incorporated in a wider corporate risk register. Such documents are routinely reviewed and updated to enable large organisations to understand and where possible control the risks of their activities. It is not clear that the Council properly understood the request; it did not seek to resolve any ambiguities in it as to what was sought by the request for “*an updated risk assessment*” and consider whether any information existed which could be seen as meeting this description. There was no evidence before the Tribunal upon which it could conclude that any such information was held.

21. In addition to the benefit of attempting to resolve the possible ambiguity, the Tribunal considered that it would have been helpful if in its response to Mrs Jones the Council had considered its duty under regulation 9(1) and provided some advice and assistance to her explaining why so much of the information she sought was not held by the Council – that key responsibilities lay with Mercia rather than the Council.

Conclusion and remedy

22. The Tribunal is satisfied that there is no error in law in the ICO’s decision notice and, for the reasons set out above, each element of the appeal fails and is therefore dismissed.
23. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 18 September 2014