



Neutral citation number: [2024] UKFTT 001119 (GRC)

Case Reference: EA/2023/0387

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

Decided without a hearing

Decision given on: 16 December 2024

Before

**JUDGE HAZEL OLIVER
MEMBER MARION SAUNDERS
MEMBER MIRIAM SCOTT**

Between

JULIE ABBOTT

and

INFORMATION COMMISSIONER

Appellant

Respondent

Decision: The appeal is Dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 7 August 2023 (IC-213462-N2Q5, the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”). It concerns information about the felling of trees adjacent to a specific property requested from Basingstoke & Deane Borough Council (the “Council”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. The background to this matter is the felling of two trees by the Council that were subject to a Tree Preservation order (“TPO”). The Council was served with a notice of claim in relation to a number of trees on the council-owned verge that adjoined the insured’s property. The Council agreed to remove some trees without admission of liability.

4. On 7 January 2022, the Appellant wrote to the Council and requested the following information in relation to the felling of trees adjacent to the named property (the “Request”):

“Request for information regarding the felling of two amenity trees adjacent to [redacted] in Spring 2021

I would like to request the following information:

1. What was the reason for the felling of these trees in line with BDBC Tree Policy June 2012?

2. If the reason was subsidence please provide ‘strong evidence that a tree is causing damage to a building’ (Policy 03, Section 3.2) to include the engineers report including an accurate survey, a history of damage and precise level monitoring information provided to demonstrate that the trees were responsible for the damage in line with Policy 05, Section 5.2. If the council required further information including crack monitoring, soil analysis, foundation details, root analysis or drain surveys please also provide these (Also Policy 05, Section 5.2).

3. If the reason was subsidence, please also provide the Council’s own expert specialist advise sought to verify submitted evidence in line with Policy 05, Section 5.4.

4. If the reason was subsidence, had the 2007 version of the BSBC Tree Policy still been extant, and given that the trees felled were both LTOA Amenity Value Medium/ BS5837 Category B (as a minimum), what additional evidence detailed in BDBC Tree Policy 2007 Appendix C would have been required?

5. If the reason was shading, please provide the justification using the council’s adopted Shading Assessment Methodology in line with Policy 03, Section 3.3. Please include evidence of how this was weighed against the value of the trees as a landscape feature of significant amenity value. (Please also provide access to the Shading Assessment Methodology or highlight where it is available on the council’s website). Also, how was the environmental (including biodiversity) value of two relatively mature oak trees taken into consideration? (Policy 04, Section 4.6) and how was the shading weighed against the value of the trees as a landscape feature (Policy 03, Section 3.3)?

6. What is the plan for replacement of the trees (either oak or another species), either in the same position or elsewhere on the same site? (Policy 04, Section 4.16 and Policy 07 Section 7.2)

7. Please provide details of any further trees covered by TPO LAW87UCR0A200 that are currently the subject of a felling request (either by a householder or an insurer). In each case provide the information submitted to date and the Council’s own expert advice where this has been procured.”

5. The Council responded on 4 February 2022. It answered some of the questions, said it did not hold information for question 5, and withheld information under questions 1 to 4 under regulation 12(3) (third party personal information). The Appellant requested an internal review and the Council's reply amended its response. It answered question 1. It withheld information under questions 2, 3 and 7 under regulation 12(3) and 12(5)(b) (course of justice). After further correspondence the Council gave a further amended response to questions 5 and 7.

6. The Appellant complained to the Commissioner on 29 January 2023. The Council revised its response again and provided further information during the investigation. The Commissioner decided:

- a. The Council had conducted reasonable and proportionate searches, and no further information is held within the scope of the Request.
- b. The Council was entitled to rely on regulation 12(5)(b) in relation to the information withheld under this exception. The information was obtained as part of a live and ongoing insurance claim, and disclosure would inhibit its ability to effectively take expert advice and would undermine public confidence in such advice being undertaken and provided appropriately. The public interest was weighted in favour of maintaining the exception on the basis that the matter was ongoing at the time of the Request.
- c. The redacted personal information had correctly been withheld under regulation 13.

The Appeal and Responses

7. The Appellant appealed on 1 September 2023. Her summary grounds of appeal are as follows:

- a. The Decision Notice reads as if the Council had not done anything wrong in the handling of the Request – she queries whether this is correct.
- b. Information within the Decision Notice appears inconsistent with the decision.
- c. Some of the information used in the Decision Notice is misleading or incorrect.
- d. The points she raised in her complaint are not adequately addressed, but she has received a lengthy rationale as to why personal data she requested was not released when she had not requested personal information.

The Appellant provided more detail on each of these points in her full grounds of appeal and final submissions, which are covered in the discussion and conclusions below.

8. The Commissioner's response maintains that the Decision Notice was correct.

- a. In relation to missing documentation, the Commissioner confirmed that he had a report of 12 September 2019 that was not provided to the Appellant by oversight (but will now be provided). The Commissioner made further enquiries of the Council during this appeal and is satisfied that no additional information, including an engineer's report, is held.
- b. In relation to expert specialist advice, the Commissioner says there is a compelling public interest in protecting the ability of public authorities to defend legal proceedings brought against them to ensure the Council is able to have a fair hearing.

- c. Overall the Commissioner says that the Appellant has raised rhetorical questions and complaints about the Council's conduct that are not within the Tribunal's remit.

9. The Appellant submitted final written representations which confirm that she is not seeking personal information, and that she does not dispute the application of Regulation 12(5)(b) to the information withheld under question 3 of her Request (the Council's expert specialist advice). She continues to dispute that the third party insurers engineer's report is not held by the Council. She complains about how the Commissioner dealt with this matter and failed to respond to the dissatisfactions she has raised. The Commissioner's final written representations maintain the same position.

Applicable law

10. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) *...“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;

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

11. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR as it relates to trees and the landscape.

12. In determining whether or not information is held, the standard of proof is the balance of probabilities. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. A public authority is not obliged under EIR to keep accurate or complete records, or to keep its records in an organised

manner – the obligation is simply to provide the information that it actually holds at the time of the request, not information that it should have held.

13. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). In discussing the application of the balance of probabilities test, the Tribunal stated that, “*We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*”

Issues and evidence

14. As clarified in the Appellant’s final written representations, the remaining legal issue is whether the Council holds further information within the scope of question 2 of the Request (a third party insurers engineer’s report). She is not challenging the application of section 12(5) (b) to the Council’s expert specialist advice. She additionally makes various complaints about the Council’s and Commissioner’s handling of the matter.

15. By way of evidence and submissions we had an agreed bundle of open documents and final written representations from both parties, all of which we have taken into account in making our decision.

16. We also had a closed bundle of documents which contains the withheld information and some investigation correspondence between the Commissioner and the Council (and some reports that have already been disclosed to the Appellant).

17. The Appellant has raised some concerns about the closed bundle, in particular the statement from the Commissioner that “*The chain of emails comprising the further investigation referred to in Paragraph 35 and 36 above will be included in the Closed Bundle...*”. These are communications between the Commissioner and the Council about the third party engineer’s report. After considering the papers, the Tribunal made some open and closed directions requiring the Commissioner to answer some questions about the closed bundle. This resulted in some additional disclosure to the Appellant of a redacted chain of emails between the Commissioner and the Council in October 2023, and the Appellant was given the opportunity to make further representations about this additional information before this decision was finalised. The redactions to these emails related to the withheld information, irrelevant information or personal data.

Discussion and Conclusions

18. Our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. We may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision on what information is held, and the application of any exceptions if these are challenged by an appellant.

19. **Does the Council hold further information within the scope of question 2 of the Request (a third party insurers engineer's report)?** Having considered the evidence available to us, we find on the balance of probabilities that the Council does not hold this further information.

20. The Appellant accepts that the Council cannot disclose information that it does not hold. As put in her final written submissions, *"My question sought to establish if, on the balance of probabilities, a competent Council would ask to see (and therefore to hold) a key document on which the 3rd party request to fell trees was based"*. She also makes the point that the Arboricultural report that has been provided to her refers to and makes assumptions based on an engineer's report. She says in her additional evidence provided for the appeal on 9 January 2024 (page 399 to 400 in the open bundle) that this reference in the Arboricultural report is evidence that the Council are more likely than not to hold the engineer's report, and *"it is somewhat incredible that [the Council] (and their expert advisors - civil engineers or lawyers) made decisions without important source information pertaining to the case"*.

21. We have considered the Appellant's representations and understand why she says the Council ought to hold this report. However, we are satisfied that it does not, and did not at the time of the Request. The Commissioner queried the position again with the Council during the appeal, and received a clear answer that this particular report was not held by either the Council or their insurers. This is shown in the email correspondence between the Commissioner and the Council from October 2023, a redacted version of which has been provided to the Appellant. This shows that the Commissioner asked the Council to look into the existence of the engineer's report, and asked specific questions about the withheld information. The Council provided a response to these questions, and key responses are:

- a. In response to the question, *"Whether the Council holds an Engineer's Report"*, the reply is *"we can confirm we do not hold an Engineer's report and neither does our insurers"*. The email goes on to say, *"As explained above, we have never received a document that was described as an 'Engineer's Report' and neither does our claims handler"*.
- b. In a table answering specific queries from the Commissioner about the withheld information, the Council lists the various reports that had been provided to the Appellant. This states, *"The letter accompanying the above documents also listed 'Engineers Report (to follow)'. As discussed previously, it seems we never received the report and our insurer confirmed that they did not either"*. The Tribunal has seen the letter referred to (which is withheld information in the closed bundle) and confirms that the letter says the report is "to follow".

22. The Appellant provided some additional representations after receiving this redacted email correspondence, which we have read and considered. The Appellant makes the point that the information from the Commissioner is confused, and that this shows the engineer's report referred to was that of the third party insurer. We agree that the engineer's report referred to is that of a third party. However, the correspondence shows that the Council maintains it did not hold such a report.

23. We note that other reports, including the Arboricultural report, were provided to the Council by the third party's insurers. These reports have all been disclosed to the Appellant

during this process. The reference to the engineer's report "to follow" indicates that it was not provided to the Council at the same time as the other reports. We have seen no evidence that this was provided to the Council later. The Appellant may feel that the Council ought to have held the engineer's report as well before proceeding to fell the trees. However, the Council cannot be required to disclose information that it did not hold.

24. We have also considered the specific grounds set out in the appeal.

25. *The Decision Notice reads as if the Council had not done anything wrong in the handling of the Request – she queries whether this is correct.* The Appellant complains that the Council did not follow the Commissioner's timeline guidance, and it took multiple prompts from both her and the Commissioner before the reason for felling or any technical detail was released. We note that the Appellant's concerns appear to be correct, and her initial Request was not handled efficiently or accurately. She was given amended responses a number of times, and some information was not provided until after she had complained to the Commissioner. She also asks questions about what the Commissioner should have done. This delayed disclosure is regrettable. If a full and accurate response had been provided initially then there may have been no need for these proceedings. However, these are not grounds for an appeal to this Tribunal. Our role is to make our own decision on whether information was held and what exceptions apply to that information. We also note that it is not unusual in our experience for new material to be disclosed during a Commissioner's investigation or during the appeal process itself. Although this may result in a delay to disclosure, this is not an appeal point for this Tribunal.

26. *Information within the Decision Notice appears inconsistent with the decision.* The Appellant complains that the Commissioner should not have said that the Council was correct in withholding information and then released more in the Decision Notice, and highlights various areas of confusion in these documents. She also asks some questions about why this additional information was not released earlier. We note that some new explanations do appear to have been provided in the Decision Notice. However, as explained above, our role is limited to making a decision on whether information was held and what exceptions apply to that information. We also note that EIR gives a right to information held by a public authority, not a right to answers to general questions.

27. *Some of the information used in the Decision Notice is misleading or incorrect.* The Appellant highlights various inconsistencies and points of confusion in the Decision Notice, and asks some further questions about the Commissioner's actions. As already explained, the Tribunal's role is limited. We have looked at two specific points raised by the Appellant.

28. Firstly, whether further information is held in relation to question five in her Request ("*If the reason was shading, please provide the justification using the council's adopted Shading Assessment Methodology...[etc]*"). She complains about a retraction of the Council's statement on this and says she is still missing some of the information about shading methodology. We have considered this point. The Appellant's question was put on the basis of "*if the reason was shading*". The Council has confirmed that the reason was not shading. This means that they were not required to provide any information in response to this part of the Request. The precondition to the request for information under question five (that the reason was shading) did not apply.

29. Secondly, whether further information is held in relation to question seven in her Request (*“Please provide details of any further trees covered by TPO LAW87UCR0A200 that are currently the subject of a felling request (either by a householder or an insurer). In each case provide the information submitted to date and the Council’s own expert advice where this has been procured”*). She says that the scope of her questions has been muddled and the Decision Notice is misleading. We note that the overall scope of her Request is for information about the felling of two specific trees. Question seven asks about any “further” trees that are covered by the named TPO. This must mean any trees apart from the two that had already been felled.

30. The Council’s final answer to this question was provided to the Commissioner on 20 July 2023 (page D291 in the open bundle) – *“We appear to have had a mixed response to this during the duration of this matter. The answer is there has only ever been felling requests from the Council in relation to this matter and these were for the trees that were felled. There have never been any resident requests on our system. I can also confirm that there are no current felling requests either by a householder or the Council. There have never been any insurer requests. Therefore there are no exemptions to apply nor any personal data to be removed. The simple answer here should have been ‘no’.*” The Council is saying that no information is held in response to question seven.

31. The Appellant was previously given different answers to this question and we appreciate that this was confusing. However, the Council has now given a clear answer that the only felling requests were for the trees that have actually been felled, there are no current felling requests, and there have never been any insurer requests. We note that the Arboricultural report recommends removal of four trees which are covered by the TPO, not two trees. However, this is a recommendation in a report rather than a request to actually fell those trees.

32. ***The points she raised in her complaint are not adequately addressed, but she has received a lengthy rationale as to why personal data she requested was not released when she had not requested personal information.*** The Appellant asks why the Decision Notice covers personal information. It appears that the Commissioner covered this point because it was one of the exceptions relied on by the Council. The Appellant is not now challenging the application of this exception. The Appellant goes on to raise issues about the missing engineer’s report and deficiencies in the information provided which are addressed in the discussion above.

33. We dismiss the appeal for the reasons explained above.

Signed: Judge Hazel Oliver

Date: 13 December 2024