



Neutral citation number: [2025] UKFTT 98 (GRC)

Case Reference: FT /EA/2024/0163

**First-tier Tribunal**  
**(General Regulatory Chamber)**  
Choose jurisdiction.

**Decided without a hearing**  
**Decision given on: 4 February 2025**

**Before**

**JUDGE HUGHES**  
**MEMBER MATTHEWS**  
**MEMBER YATES**

**Between**

**ROBERT ANGUS HILL**

Appellant

**and**

**INFORMATION COMMISSIONER (IC)**  
**SHEFFIELD CITY COUNCIL (SCC)**

Respondent(s)

**Decision:** The appeal is Dismissed

## **REASONS**

1. In 2007 a significant redevelopment called the New Retail Quarter was being proposed in Sheffield and an inquiry was held into a Compulsory Purchase Order. The Appellant in this FOIA case is a director of a company which owned a property affected by the proposed CPO. As a result of the financial crisis triggered by the reckless management of financial risk in the USA sub-prime mortgage market through the use of collateralised debt obligations (CDOs) the envisaged development did not take place in the way originally planned. There has been litigation by the company against SCC and the Appellant has made a significant number of FOI requests to SCC.

2. On 14 July 2023 the Appellant wrote to SCC:

*“Thank you for your e mail of [date redacted] containing the two Agreements requested. SCC has confirmed that those two Agreements were not placed before the September CPO NRQ Public inquiry.*

*I request pursuant to the Freedom of Information Act 2000 a copy of the advice given to the Council that lead to those Agreements being withheld from the Inquiry”*

3. On 12 August SCC replied relying on s12(2) FOIA confirming that it could neither confirm nor deny holding the information in accordance with its duty under S1(1) of FOIA by reason of the cost of ascertaining whether it did would exceed the financial limit of £450 or 18 hours work.

4. The Appellant complained to the IC who investigated and issued his decision notice IC-263669-H2H0 on 29 April 2024. He recorded what he had been told by SCC that the Council had

*“no records that go back to when such advice would be given. We are unsure if it ever was. Any Sheffield City Council records that were contemporaneous with the public inquiry have long since been destroyed or lost.”*

5. SCC further explained that any such advice would have been given by one of the two firms acting for it at the time, these were DLA LLP and Herbert Smith (both firms continue under slightly different names). DLA’s records had been searched for a previous information request and accordingly if the information existed in recorded form it would be held by Herbert Smith Freehills (HSF) at its London offices. There were 28 boxes of records held by that firm and it would be necessary to dispatch officers to London to search. HSF had confirmed that the records had not even superficially been examined and it was not known what they held. The IC’s view of the travel, subsistence and accommodation costs as well as travelling time totalled £500 before any search was undertaken. If the records were in Sheffield the IC considered that 14 hours would be needed to search them which would not leave enough money to pay the transport costs. There was also a need to meet the cost of an HSF employee accompanying the files. He was satisfied that s12(2) FOIA applied:

**12 Exemption where cost of compliance exceeds appropriate limit.**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

6. In appealing against this the Appellant argued bad faith on the part of SCC, that he had recently obtained the Master development Agreement from 2006 and a draft lease from 2007. He challenged the costs and time estimates arguing that material would be in chronological order and easily searched.
7. The IC maintained the position set out in its decision, noting that the approach of the Appellant begged the question of whether the advice existed and the issue to be addressed was the cost of determining, within the available records, whether or not it existed. He considered the estimate from SCC which he had considered was reasonable, realistic, sensible and supported by cogent evidence.
8. On 5 October the tribunal, having considered the bundle and such statements as the statement by the IC in seeking information from SCC:

*"Please also explain how you determined that no information is held by the Council apart from those documents held on its behalf by solicitors, that falls within the scope of the request:"*

9. In the light of this approach to legal records held by firms of independent solicitors the tribunal felt significant issues had not been properly addressed by the parties and made a direction in the following terms:

*"SCC had long since destroyed the relevant records. Solicitors which formerly acted for it in connection with the CPO hold records. However such records are held (primarily) by the solicitors for their own purposes, to comply with regulatory obligations and in order to defend the firm against litigation. From the material before the tribunal it appears that SCC has, possibly in the light of litigation by a company with which the Appellant is associated, approached solicitors which acted for it in relation to long completed transactions for information. While the solicitors will continue to have obligations to its former client the status of any information held by the solicitor needs analysis – is such information "held" by SCC for the purpose of access by a private individual to information held by a public authority?"*

*The requested information, if it exists, is legal advice relating to a statutory inquiry into the making of a Compulsory Purchase Order for the acquisition of land by SCC. As such is the correct information access regime Freedom of Information Act or Environmental Information Regulations?"*

10. In responding to the direction the IC argued that FOIA was the correct information regime and that:

*"the Commissioner's position is that the fact whether information is held by SCC, held on behalf of SCC, or exists but not held by SCC is 'secondary' and not the main issue for the Tribunal to determine"*

11. SCC responded

*"We have obtained our own quote for the transport of the twenty-eight boxes to SCC. The quote is £262 plus VAT. However, this is independent of HSF and does not account for any fees they may think applicable."*

*Our submission therefore is that if HSF accepted that the boxes belonged to SCC and were prepared to release them to SCC the cost for a courier would be £262 plus VAT."*

12. In the light of this inconclusive response the tribunal further directed:

1. The jurisdiction of this tribunal to determine appeals in relation to FOIA and EIR is set out in s58 FOIA which provides:

**"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."

2. The request relates to the conduct of the Council's case before a statutory inquiry into a Compulsory Purchase Order relating to the acquisition of land for the construction of a shopping centre. The definition of environmental information in Regulation 2(1) is wide ranging and the "measure" to which the requested information relates could encompass the decision-making concerning a significant programme of demolition and building in Sheffield.

3. The ICO's decision notice did not address the EIR/FOIA bifurcation and relied on the cost limit in FOIA s12(2) for which there is no equivalent provision in EIR; reliance on regulation 12(4)(b) (sometimes regarded as broadly equivalent) raises different considerations.

4. The decision notice is based on the proposition that if the requested information is still held by solicitors acting for the Council at the time of the Inquiry it is held by the Council.

- FOIA provides by section 3:

(2) For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

- EIR provides by regulation 3:

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

(a) is in the authority’s possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority.

4. In order to determine whether the information requested is within the scope of either information access regime the basis upon which the solicitors (some 16 years after the Inquiry and apparently long after the Council destroyed its own records) continued to hold the information that they hold at the time the request was made.

5. I direct that by 10 January 2025:

- both Respondents to file submissions as to the correct information access regime,
- the Second Respondent (having consulted the external solicitors for their understanding) to file submissions and evidence as to whether, at the date of the request, the information was or was not held on behalf of the Second Respondent, and
- the First Respondent to file submissions on the status of records in the possession of external solicitors after the relevant proceedings have concluded and the retainer relating to those proceedings has come to an end.
- The Appellant is at liberty to file submissions on these issues by the same date.

13. In response to this direction the ICO recognised that

“3. The Commissioner wishes to make clear that, during his investigation, SCC maintained it had a degree of control over the records in the law firm’s possession which led the Commissioner to make the reasonable assumption it was held by SCC.

4. The Commissioner was therefore surprised to read SCC’s submissions on 22 November 2024 in which it stated it has not had confirmation from the law firm that the information is held by SCC.

5. Notwithstanding this, and the fact that the Directions order SCC to provide more comprehensive evidence as to whether or not it (SCC) holds the information, the Commissioner’s position on information held by external solicitors after the relevant proceedings have concluded and the retainer relating to those proceedings has come to an end are as follows:

6. The Commissioner’s guidance explores this scenario and says it is possible that a legal firm is holding information on an authority’s behalf to the extent its not holding it solely for their (the legal firm’s) own purposes (i.e. to defend themselves in negligence claims). The guidance gives an example of an FTT case *Francis vs Information Commissioner and South Essex Partnership NHS Foundation Trust*, EA/2007/0091 (21 July 2008)) where the Tribunal found the firm was holding the information on the authority’s behalf. The EIR equivalent in the guidance has the same position, although in the example used there the Tribunal reached the opposite

conclusion (ie the information was not held by the solicitors on the authority's behalf).

7. It appears it is a question of fact depending on the circumstances of each individual case:

8. In this case, SCC said that Council's records relating to the inquiry would have "long since been destroyed or lost" [para. 17 of the DN]. This signals a disposal decision of the records (or their misplacement) that SCC was holding for its own purposes. In this scenario, the question should then be whether SCC entrusted the legal firm with the safe keeping of its own records so that it could be argued the firm is holding them on the SCC's behalf for the purposes of the legislation. One would normally expect these arrangements (i.e. whether a third party is managing records on the authority's behalf) to be documented somewhere, e.g. in a Records Management and Retention and Disposal policy (see for example para. 2.3 of Code of Practice on the management of records issued under section 46 of the Freedom of Information Act)."

14. SCC in responding noted that the IC had in cases relating to CPOs resolved some relying on FOIA and others using EIR. With respect to the status of material held by external solicitors SCC noted that in connection with a previous request where the material was in the possession of solicitors DLA which had also acted for SCC in 2007; the solicitors' insurers had insisted on conditions relating to SCC access to the records to inspect them which had cost SCC £4,219, in the light of this:

"We believe the conditions under which the records were accessed indicate that at the time of Mr Hills' request on 13 July 2023 the information was not held on behalf of the Council."

## Consideration

15. It is clear that in assessing this information request neither SCC nor IC thoroughly assessed the request, the information, where the information (if it existed) was held and the reason it was where it was. SCC had indicated during the IC's investigation:

"no records that go back to when such advice would be given. We are unsure if it ever was. Any Sheffield City Council records that were contemporaneous with the public inquiry have long since been destroyed or lost."

16. However instead of recognising that this clearly indicated that within the Council's records management policy the retention period for such a record had elapsed and accordingly the Council no longer held any such information, the Council (under the pressure and in the context of the litigation the Appellant's company had commenced) considered the question of records held by the firms of solicitors which it had instructed nearly two decades before. What is clear is that any records held by those solicitors were their own records; hence the requirement of DLA's insurers that DLA control and supervise access to the records at considerable expense to the Council. While from the Council's perspective such expenditure may be appropriate

in obtaining any necessary evidence to assist in the defence of high value litigation there is no requirement to seek information which it does not hold for the purposes of FOIA.

17. The position of the firms of solicitors is equally straightforward. The firms will have their own retention periods for information which they hold; such periods determined in the light of risk management in respect of possible claims against the firm. As long as they hold the information they will have certain obligations with respect to it; notably a duty of confidentiality to the client which instructed the firm with respect to the transaction or proceedings to which the records relate, however these are the firm's records - there are duties owed to the former client but the records do not belong to the client and they are not held on behalf of the client.
18. It is clear, on a consideration of the evidence, that the IC erred in not determining as a first step whether, in the light of the clear statement that SCC had destroyed contemporary records, SCC now held any such record. The tribunal is satisfied, taking into account the evidence reviewed above (in particular the significant costs incurred on the previous request) that the records held by Herbert Smith Freehills are the firm's own records and not those of SCC.
19. The IC proceeded on the basis that information held by solicitors was held by SCC. On that premise it concluded that the costs of determining whether the information was held meant that the costs provision in s12(2) applied. Having tested the evidence with relation to costs the tribunal is satisfied that the IC's decision on this point is robust.
20. Accordingly the tribunal dismisses the appeal and further finds that if the IC was correct in treating any such information held by the solicitors as within the scope of FOIA then the costs provisions in s12 justified refusal.

Signed Hughes

Date: 27 January 2025