First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0289

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ANNE CHAFER AND GARETH JONES

BETWEEN

EVA ALDRIDGE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the bundle

1. This is the appeal by Mrs Eva Aldridge against the rejection by the Information Commissioner (the Commissioner) on 15 November 2017 of her complaint that the Planning Inspectorate (PI) had wrongly failed to disclose certain information to her under regulation 5(1) of the Environmental Information Regulations 2004

(EIR). [1] The PI's position is that it has disclosed all the information it has within the scope of the request.

2. The PI is not, strictly speaking, a public authority for the purposes of the EIR or the Freedom of Information Act 2000 (FOIA). It is a joint executive agency of the Department for Communities and Local Government (DCLG) and the Welsh Government. The DCLG is the EIR/FOIA public authority for information about planning appeal casework in England. However, since the PI has handled Mrs Aldridge's request on behalf of the DCLG, the Tribunal will for convenience follow the Commissioner's lead in referring to it as the public authority. [2]

3. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could 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 PI (or, more accurately, the DCLG) was not a party to the appeal.

The request

4. On 19 April 2017, Mrs Aldridge made the following request of the PI:

> '*Please may I have a copy of the inspector's notes for the following cases [Mrs Aldridge then gave the references for four planning appeals*]'.

5. One of the appeals relates to the property she owns with her husband, Mr Simon Aldridge, at the nursery. Its reference is APP/P0240/W/16/3146576. Her appeal was rejected. The other three appeals appear unrelated. It seems that Mrs Aldridge is using them to underscore her argument that there has been inconsistency. [4] Although she did not challenge further the decision in her case, it appears from her Grounds of Appeal that she and her husband are intent on resubmitting a planning application and for that purpose wish to understand as much as possible about why the previous application was rejected.

Factual background

6. In 2015, Mrs Aldridge and her husband applied for change of use of their property at Chalkcroft Nursery, the Ridgeway, Moggerhanger, Bedford (the nursery) from a nursery to residential. They wanted to demolish some buildings and construct nine dwellings with car parking and associated works. On 12 November 2015, the planning authority, Central Bedfordshire Council (the LPA), refused permission

[1] FER0687711

[2] See footnote 1 to the Commissioner's Response **[43, 44]**

[3] SI 2009 No 1976

[4] See para 8 of Mrs Aldridge's Reply **[59, 60]** where she claims that one of the other decisions – APP/KO235/W/16/3145924 – accepted that one house on the edge of Bedford would add to the vitality of the town whereas, on her application, the view was that nine houses in Moggerhanger would not contribute to the life of the village or nearby villages

[26]. The LPA considered the proposed development unsustainable and therefore contrary to the aims of the National Planning Policy Framework which sought to achieve sustainable development and avoid isolated homes in the countryside. The development would also harm the character and appearance of a rural area.

7. Mrs Aldridge appealed to the Secretary of State for Communities and Local Government, who appointed an inspector, Mr Andrew Owen, to determine the appeal. Mr Owen is a relatively new inspector. [5] He identified as the main issues whether the occupants of the development would have acceptable access to goods and services and its effect on the character and appearance of the area. He dismissed the appeal on 24 May 2016 **[31]**.

8. It emerged during the course of the complaint to the Commissioner that, because of his relative inexperience, Mr Owen was required to submit his draft decision to a Senior Inspector Training (SIT), known colloquially in this context as a reader or mentor. This was for quality control and performance assessment.

The related request made by Mrs Aldridge's husband

9. For reasons which will be explained presently, it is also relevant that Mrs Aldridge's husband has made his own request for information, some five months after his wife's.

10. At **[23]** is a letter from Ms Aggie Lewis-Jones, customer quality manager at the PI, to Mr Aldridge. This was in response to three requests for information which he made on 10 September 2017 relating to the nursery appeal. One of the requests asked for (i) the name of the reader for Mr Owen; and (ii) his or her comments.

11. In relation to the other requests, which the PI considered under the Freedom of Information Act 2000 (FOIA), Mrs Lewis-Jones said that the appeal file had been destroyed – the appeal decision was by this time over a year old. However, the LPA was required to archive appeal documentation (which should be identical to that held by the PI). The PI did hold electronically some of the appeal evidence but it might not be complete (and a charge might be levied for its disclosure).

12. The PI considered the third request under the EIR. Mrs Lewis-Jones said that it held the information but was withholding it under the exception in regulation 12(4)(e) (internal communications). This was subject to a public interest test. She acknowledged that there was a public interest in the promoting better understanding of planning decisions. The information sought would provide further information about the internal quality assurance process undertaken for the appeal. However, there was a competing public interest in providing safe space for good decision-making, thus allowing full and frank exchange of comments as part of the quality assurance process. The planning decision was the inspector's alone: readers did not interfere with the inspector's judgement (see

[5] The appeal reference was APP/Po240/W/16/3146576

Billy Smith v Secretary of State for Communities and Local Government and South Bucks District Council [6]). As a result, the public interest favoured withholding the information. In addition, disclosure of the personal data involved would breach the first data protection principle under the Data Protection Act 1998 (DPA 1998) in that the individual concerned (it is not clear whether Ms Lewis-Jones was referring to the inspector or the reader or both) would have a reasonable expectation that the information would not be disclosed. None of the conditions in schedule 2 to the DPA 1998 (relevant to the first principle) applied. As a result, the exception in regulation 13 of the EIR also applied. [7]

13. It is, incidentally, unclear why it is sometimes Mrs Aldridge who takes the lead – as with the planning appeal and the present request – and sometimes her husband, when they appear to own the nursery jointly. In any event, they seem to be acting in concert, as one would expect.

The initial response to Mrs Aldridge's request and the PI's review

14. On 4 May 2017, Ms Lewis-Jones of the PI replied **[76]** to Mrs Aldridge's request and enclosed notes kept by the inspector for the four appeals. She explained that they were in a format prepared by Mr Owen and were intended as his aide memoire. They were not a word for word account of the proceedings and had no official status.

15. On 13 June 2017 **[78]**, Mrs Aldridge wrote to Ms Lewis-Jones pointing out that she witnessed Mr Owen filling in two sheets on his site inspection of her property. Ms Lewis-Jones replied that Mr Owen had confirmed that the only notes made throughout the appeals were those taken at the site visits (the ones already provided). Mrs Aldridge expressed surprise, given that inspectors work on four cases a week.

16. In fact, it transpired that Mr Owen also annotated notes on the site plans and these were also provided to Mrs Aldridge. This explains why Mrs Aldridge saw Mr Owen complete two documents (the site visit notes and the plans). The PI checked with Mr Owen that he had no further records.

Proceedings before the Commissioner

17. Mrs Aldridge made a complaint to the Commissioner on 26 June 2017 **[74]**.

18. On 25 September 2017 **[83]**, the Commissioner asked the PI a number of questions. On 29 September 2017 **[89]**, Mr Martin Long replied. He enclosed Ms Lewis-Jones's emails with Mr Owen about the requests and answered the questions as follows:

[6] [2014] EWHC 935 (Admin)
[7] http://www.legislation.gov.uk/uksi/2004/3391/regulation/13/made

- Site visit notes, if taken, are for an inspector's own use but the PI asks the inspector to retain them in case of a legal challenge. Otherwise, inspectors do not have to make or retain any working notes. The official record of an appeal consists only of parties' written representations and the inspector's decision

- Inspectors are field-based and are responsible for storing their hand-written site notes. There is no obligation to convert any notes into electronic form

- Mr Owen was asked what records he had

- Site visit notes should be kept for three months following issue of an appeal decision, appeal representations for a year and appeal decisions for five years.

- Mr Owen was not aware of information being deleted or destroyed. In fact, he had kept information beyond the expected retention period of three months (each appeal decision was made at least eight months before the request). Inspectors were not asked to make or retain memory aid information or record its creation or destruction.

19. Although not asked about this, Mr Long added that the PI held Mr Owen's submission of the proposed decision to the reader and the reader's comments. The PI regarded this record as outside the scope of Mrs Aldridge's request. It was processing a separate request by her husband for this information (see above).

20. In letters dated 22 and 27 October 2017 to the Commissioner **[114]** and **[116]**, Mrs Aldridge explained why she felt there must be more information. She attached extracts from the PI's *Inspector Training Manual* (the training manual) **[118]** which she said supported her case that there must be further records (see below).

21. The Commissioner subsequently asked the PI for the status of the training manual and whether it imposed obligations on inspectors when preparing appeal decisions. Mr Long replied on 9 November 2017 **[129]**. The training manual constituted practical advice to inspectors. It was not Government policy or guidance. It placed no obligation on inspectors with regard to the records they created. The PI did expect inspectors to retain for three months notes relating to site visits, hearing or inquiries they did make. Any other notes were considered 'ephemera' and could be discarded once they had served their purpose as working information.

The Commissioner's decision notice (DN)

22. The Commissioner set out the history. She noted that inspectors enjoy wide discretion about the notes they take for an appeal. Notes do not have to be in specific form. Although the PI required site notes to be retained for only three months, Mr Owen had retained his for periods of between nine and 14 months for the four appeals. The training manual did not assist Mrs Aldridge.

23. On the balance of probabilities, the PI had disclosed everything within the scope of the request.

The Grounds of Appeal and the Commissioner's Response

24. In her **Grounds of Appeal [13]**, Mrs Aldridge, at least arguably, sought to extend the scope of her request. She said that she had sought the complete records of the four cases, not just the site notes. The records included the documents passing between Mr Owen and his reader. Mrs Aldridge argued that there was no reason the documents should not be disclosed. The Tribunal addresses scope below.

25. Mrs Aldridge also argued that there had to be notes taken by an inspector before a site visit – otherwise, how would be know what to look for? Annex 8 of the training manual – relating to checking by readers – *required* inspectors to send information to the reader.

26. Finally, Mrs Aldridge explained why she thought the planning decision relating to the nursery was wrong.

27. In her **Response**, the Commissioner set out the history and explained that Tribunal caselaw showed that the question whether a public authority held requested information had to be determined on the balance of probabilities. She argued that the scope of the request was clear (the inspector's notes for the four appeals) and did not extend to the reading process, such that the public interest arguments Mrs Aldridge put forward in that connection were irrelevant. It did not follow from the fact that, as Mrs Aldridge had pointed out, the PI claims consistently to achieve a quality target of 99% for its decisions that there must be further notes (Mrs Aldridge's argument was that such a high level of decision-making would not be possible without accurate record-keeping).

28. Mrs Aldridge served a **Reply** on 16 February 2018 **[59]**. She noted that the training manual requires that inspectors' decisions must flow from the evidence before them and not from any external source, although inspectors could bring their own general expertise and common sense to bear in interpreting and weighing the evidence. [8] In this context, there was no reason why notes should not be disclosed.

29. Mrs Aldridge added that the High Court, in a 2017 case, had confirmed the need for consistency in planning decisions, a point indeed made by the training manual. Consistency was lacking here. Information should not be withheld because publication would cause embarrassment, expose wrongdoing or lead to a loss of confidence in a public body.

[8] Para 50

Discussion

Scope of the request

30. The first issue is the scope of the request. Is it limited to 'notes' (in whatever form) created by the inspector, Mr Owen, or does it extend to the communications between him and the reader? This is important because, whilst the PI says it has disclosed all Mr Owen's notes – his *pro forma* notes for the site visits and annotations on the site plans – it acknowledges that there is additional information in the form of the reader communications. It regards this information as out of scope of her request (it is within the scope of her husband's request but, as noted, there the PI relies on exceptions under the EIR).

31. The Tribunal has borne in mind guidance from the House of Lords in *Common Services Agency v Scottish Information Commissioner* [9] (a case under the Freedom of Information (Scotland) Act 2002) that requests should be construed liberally. The Tribunal respectfully agrees. Both the EIR and FOIA create an important constitutional right for information, to enhance informed public debate on matters of public importance and to improve accountability and therefore the quality of decision-making by public bodies. Requesters do not usually have the benefit of legal advice and one should not, therefore, construe requests as though drafted by a lawyer.

32. There are, however, limits to the liberality with which a request may be construed. Public authorities are entitled to know what is being asked of them. Where there is doubt, they can seek clarification. However, in the present case the request seemed clear: Mrs Aldridge wanted the inspector's notes relating to four particular planning appeals (including her own). It would be stretching language to include within the scope of a request asking for inspector's notes the communications between Mr Owen and his reader.

33. In fact, it appears likely that Mrs Aldridge and her husband found out about the reading process only after her request. Her husband then made a separate FOIA request for information under this process relating to the nursery appeal. After his request was turned down, Mrs Aldridge has sought to argue – for the first time explicitly, in her Grounds of Appeal – that her request extended to the information.

34. The Tribunal considers that the reader information is outside the scope of her request. It cannot reasonably be described as part of the inspector's notes. Indeed, the fact that Mr Aldridge has made a separate request for the information indicates that he thought it did not fall within the scope of his wife's request. The proper approach, if Mr Aldridge is unhappy with the PI's decision in this regard, is for him to challenge it before the Commissioner. He may indeed have done that.

[9] [2008] UKHL 47

35. Even if this analysis is wrong and the reader information is within scope, the Tribunal agrees with the PI that the exceptions in regulation 12(4)(e) and 13 apply, for the reasons it gives. Mr Owen, in particular, would have had a reasonable expectation that information touching on his performance as an inspector would not be made public.

Is the requested information 'environmental information'?

36. The next question is whether the information within the scope of the request is 'environmental information' within regulation 2(1) of the EIR. The answer will determine whether it is indeed the EIR which govern the request or rather FOIA.

37. The definition of 'environmental information', though not limitless, is extraordinarily wide. In *BEIS v Information Commissioner and Henney*, [10] the Court of Appeal looked for a sufficient connection between the information requested and the environment. The Tribunal considers that there is a sufficient connection between the information requested and the environment. For example, the character and appearance of the proposed development were in direct issue in the planning appeal.

38. It follows that it is the EIR rather than FOIA which governs Mrs Aldridge's request, although in fact the result would be the same under FOIA. [11]

The right to information which is held

39. Regulation 5(1) of the EIR says:

> '*Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and part 3 of these regulations, a public authority that holds environmental information shall make it available on request*'.

40. The 'remaining provisions of this Part' include regulation 12, which sets out exceptions to the duty to disclose (including internal communications) and regulation 13, which exempts third party personal data in certain circumstances.

41. So, there is a qualified right to information held by public authorities under the EIR. But, of course, a public authority cannot disclose information which it does not hold.

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[10] [2017] EWCA Civ 844

[11] Section 39(1) FOIA provides:
'*Information is exempt information if the public authority holding it –*
(a)is obliged by [the EIR] to make the information available to the public in accordance with the regulations, or
(b)would be so obliged but for any exemption contained in the regulations'

Meaning of 'holds' in regulation 5(1)

42. 'Holds' is not defined by the EIR. By contrast, section 3(2) FOIA gives a partial definition:

> *'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'*

The definition means that mere possession of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). In the present case, it does not matter whether, as a question of law, possession by Mr Owen as an employee of the PI constitutes possession by the PI (DCLG) under the principle of attribution (see the Upper Tribunal decision in *University of Newcastle v BUAV and Information Commissioner* [12]) or, by analogy with the extended definition in section 3(2)(b) FOIA, the concept of 'holds' in the EIR includes information held on behalf of a public authority. In the latter event, Mr Owen would hold the information on behalf of the PI.

43. The issue for the Tribunal is therefore simply stated: does Mr Owen (and therefore the PI) hold information falling within the scope of the request in addition to that which the PI has disclosed, as Mrs Aldridge believes he does?

The standard of proof to be applied

44. The classic exposition, albeit in the context of an FOIA request, was by the Tribunal in *Bromley and Information Commissioner v Environment Agency*: [13]

> *'There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. 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*

[12] [2011] UKUT 185 (AAC) (11 May 2011). Upper Tribunal Judge Wikeley quoted Arden LJ's dictum in the Court of Appeal in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd & Ors* [2007] EWCA Civ 197 (at [49]): 'In general, an employer is deemed to have notice of anything of which any of his employees obtains knowledge in the course of his employment".

[13] EA/2006/0072 at [13]
http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i64/Bromley.pdf

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'.

45. The Tribunal therefore has to assess, on the balance of probabilities, whether Mr Owen and the PI do hold further information within the scope of the request.

Application of the standard to the present case

46. Although this is a question of pure fact, the Tribunal is more likely to find that information is held where (i) the public authority (or one of its employees) is under an obligation to hold information of the relevant kind or (ii) although there is no obligation, it would be difficult for it to carry out its responsibilities without the information. Mrs Aldridge argues that both apply.

i. Obligation to create and hold relevant information

47. Her argument is that the training manual imposes an obligation on inspectors to create and therefore to hold notes additional to those which have been disclosed.

48. This is wrong. The manual does not impose an obligation on inspectors to create any form of notes, or indeed any other document other than the decision. As Mr Long said in his email of 9 November 2017 to the Commissioner, it represents practical advice. Paragraph 10 in the chapter *Overview of how Inspector work* **[122]** does suggest that inspectors should have a system to help them keep track of their work, for example a casework log. But, again, this is not obligatory and is likely to say no more than the stage an appeal has reached. Paragraph 12 contemplates that an inspector will keep some records, as one would expect, but does not stipulate the form they should take (or indeed make them mandatory).

49. Annexe 7 **[125]**, on which Mrs Aldridge relies, is headed *Check list for producing robust appeal decisions*. Mr Long explains that it is not a physical checklist but rather a summary of the matters to which inspectors should have regard. One of the items asks whether, in preparing for a site visit, the inspector has compiled a checklist of things to see (including matters raised by the main and interested parties and any relevant local sites/developments). Again, it is not mandatory.

50. Annexe 8, on which Mrs Aldridge again relies, simply sets out the categories of decision which will be pre-read by Group Manager. Mrs Aldridge's planning appeal does not appear to fall into any of the categories but, in any event, the PI does not dispute that it holds information on a pre-reading process in which Mr Owen engaged as a new inspector.

51. The training manual does have something to say about the *retention* of records an inspector does make:

'*80. PINS destroys appeal files one year after the date of decision unless there has been a High Court Challenge or post-decision correspondence.*

81. You should retain your own appeal notes for 3 months following the issue of your decision or following the Secretary of State's decision – unless the appeal has been subject to a complaint or High Court Challenge - in which case your notes should be kept until the complaint has been concluded or the completion of the high court proceedings (and those of the higher courts where relevant)'.

The obligation is to retain that which is created, not to create. Mr Owen did retain his site notes and site plan annotations, in fact beyond the required three months. That is why the PI was able to disclose them.

ii. Necessity for hold the information to fulfil its responsibilities properly

52. Of course, irrespective of whether under any obligation, in practice inspectors will have to keep *some* records in order to carry out their functions on appeals. Mrs Aldridge's argument is that Mr Owen must have created records additional to those disclosed, bearing in mind a workload of 4 (written) cases a week. The Tribunal rejects that argument. Mr Owen's pro forma site visit notes **[95] to [98]** contain a reasonable amount of information. They include sections *Reasons for refusal* and *Things to check* which Mr Owen would no doubt have completed before the visits (corresponding to the checklist advised by Annexe 7 of the training manual). In addition, he annotated site plans **[108]**.

53. Other inspectors may keep more detailed records. The training manual gives considerable latitude as to how inspectors should work, including with regard to record-keeping. The important point is that it cannot be said that Mr Owen could not do his work properly based on the types of notes he keeps.

54. In any event, the Tribunal accepts that Mr Owen has sent to his employers all that he has relating to the four appeals within the scope of Mrs Aldridge's request and that the PI in turn has disclosed all that information. There is nothing more. The fact that Mrs Aldridge thinks there should be more if Mr Owen was to do his job properly is therefore irrelevant. There is no reason for Mr Owen to conceal any notes. It is always possible that someone may mislay information but there is no indication that that is the case here. Mr Owen knows his *modus operandi* and would know if he routinely created a different type of note from those disclosed.

The thoroughness of the PI's enquiries and the Commissioner's investigation

55. There is no question that the PI has conducted appropriate enquiries of Mr Owen, the only person likely to hold notes within the scope of the request. As shown by the internal emails, it has pressed him and indeed its enquiries have produced further information (the annotated site plans).

56. Similarly, the Commissioner has conducted a thorough investigation and has asked appropriate and searching questions of the PI. The *Bromley* test is met.

Conclusion

57. For these reasons, the Tribunal has concluded that the PI has disclosed all the information it holds (in particular, that in the hands of Mr Owen) within the scope of the request.

58. The appeal is therefore dismissed. The decision is unanimous.

David Thomas
Judge of the First-tier Tribunal

Date of Decision: 9 July 2018
Promulgated: 9 July 2018