



Appeal number: EA/2019/0246P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

BERNARD MONAGHAN

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA (CP)

**Determined on the papers, the Tribunal sitting in Chambers
on 23 July 2020**

MODE OF HEARING

1. This determination was conducted by a Judge sitting alone in accordance with paragraph 11(3)(a) (i) of the Chamber's Composition Statement.¹
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules².

¹ <https://www.judiciary.uk/wp-content/uploads/2014/10/amended-grc-feb-2015.pdf>

² <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 277, plus a bundle of “Additional Open Documents” and a Closed Bundle with 8 pages.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. The Appellant made an information request to Sefton Metropolitan Borough Council on 27 January 2018 concerning applications and consents for work on a specified watercourse. The Council initially responded under FOIA but on internal review responded under the Environmental Information Regulations 2004 (“EIRs”).³

6. The Council’s decision on review dated 23 March 2018 was to disclose some information and withhold some information containing personal data. Further information has been disclosed subsequently.

7. The Appellant complained to the Information Commissioner. He helpfully clarified that he did not seek disclosure of the withheld personal data. He requested a copy of a specific receipt which he says should have been disclosed but which the Council says it does not hold.

8. The Information Commissioner issued Decision Notice FER0736588 on 18 June 2019. The Decision Notice concluded that the Council was correct to say it did not hold the receipt and thus to rely on regulation 12 (4) (a) of the EIRs. It required no steps to be taken.

9. The Appellant appealed to the Tribunal.

Appeal to the Tribunal

10. The Appellant’s Notice of Appeal dated 12 July 2019 relied on grounds that there are undisclosed documents held by the Council and that the ICO had not investigated the issue sufficiently. He suggests additional questions that should have been asked of the Council. He refers to having made a FOIA request to the ICO to obtain additional documents.

11. The Commissioner’s Response dated 12 August 2019 relied on the analysis in the Decision Notice in resisting the appeal. It is noted that, in correspondence with the ICO, the Appellant stated that he himself believed the receipt he was seeking had never been issued. It is not accepted that the additional enquiries suggested by the Appellant would have affected the conclusions of the Decision Notice.

³ <https://www.legislation.gov.uk/uksi/2004/3391/contents/made>

12. The Appellant's Reply (pages 28 to 42 of the open bundle) challenges the *bona fides* of the Council by adding his own comments to extracts from previous correspondence. He also refers to the investigation documents obtained from the ICO under FOIA and now concludes that an additional fourteen documents have not been disclosed.

The Law

13. Section 12 (4) (a) EIR entitles a public authority to refuse to disclose environmental information *to the extent that it does not hold that information when an applicant's request is received.*

14. A decision as to whether a public authority held the requested information at the relevant time is to be decided by the Information Commissioner, and by the Tribunal on appeal, on the evidence before it, applying the standard of the balance of probabilities.

15. The powers of the Tribunal in determining this appeal are set out in s.58 of Freedom of Information Act (imported into the EIRs) as follows:

"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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

16. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Submissions and Evidence

17. Neither party to this appeal has provided the Tribunal with witness evidence. The Tribunal's open bundle contains documentary evidence in the form of correspondence between the Appellant, the Council and the Information Commissioner's Office.

18. The closed bundle contains the documents from which personal data was redacted. I do not need to refer to it in making this Decision.

19. The Appellant has provided the Tribunal with an undated colour-coded Reply to the Information Commissioner's Response. It is clear from this that he is concerned about the quality of workmanship to a culvert which affects his land. He regards the Council's actions as suspicious and possibly criminal and considers that the receipt he has requested will uncover wrongdoing. He regards the ICO's investigation as having been inadequate to uncover the alleged wrongdoing.

20. On 19 December 2019, the Appellant complained to the Tribunal that the bundle prepared by the ICO contained inaccurate information which he wished to have an opportunity to correct for the Tribunal.

21. On 23 January 2020 the Appellant made an additional submission to the Tribunal in which he alleges that the Information Commissioner's solicitor made an inaccurate submission to the Tribunal in an attempt to distort the facts and discredit his own submission.

22. On 31 January 2020, the Tribunal's Registrar extended the time allowed for the Appellant to file his final submissions. In so doing she refused to make a Direction, requested by the ICO, to limit the volume of his final submissions to ten pages. She provided advice as to the necessary focus for any further submissions.

23. The Appellant's final submissions extend to twenty-one pages. He repeats his submission that the Council is engaged in a cover up of irregular behaviour in relation to the watercourse and that the Information Commissioner has misled the Tribunal. He submits that the Council admitted to holding the information requested in its first response to his information request, but that the Information Commissioner's Office failed to notice this key admission during its inquiry. He suggests that this was not a mere oversight by the ICO.

24. The Appellant submits in his final submissions that the focus of his request has never been the receipt itself, but other documents which have not been disclosed. This appears to raise a new ground of appeal to the effect that the Decision Notice erred in its understanding of the scope of his complaint. He submits that the document he seeks is not available because the Council's officers used the wrong procedure and are now seeking to cover up that fact. He refers to a complaint to the Local Government Ombudsman and exhibits correspondence in relation to a proposed judicial review which was not in fact lodged with the Court.

25. On 7 June 2020, the Appellant sent a further submission to the Tribunal which refers to page 227 of the open bundle. He submits that the information in this spreadsheet under Council reference LDC/SMBC/0007 *in all probability suggests that (1) the Council did receive the £50 fee, or (2) the LLFA did not in fact process the LDC application.*

26. The Information Commissioner made no final submissions.

Conclusion

27. The Decision Notice records at paragraphs 15 to 24 the inquiries that the ICO made of the Council and the steps the Council told the ICO it took to search for additional information within the scope of the request. The Decision Notice records

at paragraph 26 the Information Commissioner's conclusion on the balance of probabilities that the further information requested was not held.

28. The Appellant's pleaded case is that the Council provided misleading information to the Information Commissioner and that the Information Commissioner either colluded with, or did not notice the Council's deception. These are very serious allegations to make against public authorities and I have considered them carefully.

29. Having done so, I conclude that the only basis for the Appellant's contention that there has been wrongdoing and a cover up of wrongdoing in this matter is his own belief and he has not provided evidence in support of his theory. He has not persuaded me that the evidence provided by the Council to the ICO is so discredited that I should not rely on it. I conclude that I am content to rely on the accuracy of the documentary evidence before me consisting of the Council's answers to the Information Commissioner's inquiries in determining this appeal.

30. Whilst acknowledging the Appellant's strength of feeling about these issues, he has not persuaded me that the Council on the balance of probabilities holds additional information within the scope of his original request.

31. It does not seem to me that the Appellant may fairly raise new grounds of appeal in his final submissions. The Information Commissioner fairly understood his complaint to be about the receipt only and issued the Decision Notice on that basis. I discern no error of law in this respect.

32. I conclude that the Appellant has not in this case met the burden of proof which rests on him in establishing to the requisite standard that the ICO was wrong to conclude on the evidence that the Council did not hold additional information within scope of the request. I discern no error in the Decision Notice in this regard and accordingly I must now dismiss this appeal.

JUDGE ALISON MCKENNA

DATE: 23 July 2020

CHAMBER PRESIDENT

DATE PROMULGATED: 24 July 2020