



Case Reference: EA/2022/0126

Neutral Citation number: [2022] UKFTT 00461 (GRC)

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

Determined on the papers

On: 29 November 2022

Decision given on: 08 December 2022

Before

**TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER MS J MURPHY
TRIBUNAL MEMBER MS K GRIMLEY EVANS**

Between

IAN HALL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed.

REASONS

1. The appeal was determined without a hearing in accordance with Rules 2 and 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Each party consented and the Tribunal was satisfied that it could

properly determine the issues without a hearing and that it was fair and in the interests of justice to do so.

2. In reaching its decision the Tribunal took into account an open bundle of 119 pages. References to page numbers in this Decision are to pages of that bundle.

Background

3. This appeal concerns information about conservation areas. Local planning authorities are obliged by the Planning (Listed Buildings and Conservation Areas) Act 1990 to designate as “conservation areas” parts of their areas which are of special architectural or historic interest. Designated conservation areas are subject to additional planning controls. According to Historic England, there are around 10,000 conservation areas in England.
4. The “local planning authority” varies from area to area in England. In some areas, it is the district council; in others, the national park authority or the unitary council. In Hertfordshire, the local planning authorities are the ten local district and borough councils, and not the county council.
5. Most local planning authorities publish spatial datasets showing their conservation areas on their websites. Many also provide their datasets to Historic England, who publish a national spatial dataset for environmental purposes in line with the INSPIRE Regulations 2009.

The Request for Information

6. The Appellant runs a “pro bono open data project” to publish a national spatial dataset of conservation areas under an Open Government Licence (OGL). On 1 January 2021, he requested information from the Hertfordshire County Council (“the County Council”) as follows (“the Request”):

“I understand that the County Council holds a consolidated spatial dataset incorporating the boundary data for conservation areas designated by district councils across the county. I would like to request a copy of that dataset under Open Government Licence, so that it can be incorporated into an updated national dataset which already covers over 99% of LPAs. Although earlier versions of the datasets for other districts have already been released under OGL, the dataset for Hertsmere remains a key gap in the national picture, to this LPA area is my main priority, although an up-to date version of the boundary datasets for other areas would also be of great value in ensuring that the national summary is as current as possible.”

7. The County Council confirmed that it held the requested information but refused to provide it to the Appellant. It relied initially on Regulation 12(5)(c) of the Environmental Information Regulations 2004 (EIR) (adverse effect on intellectual property rights) because the dataset was built on Ordnance Survey maps. That decision was not changed on internal review.
8. The County Council changed its position after the Appellant complained to the Commissioner, and on 18 March 2022, refused to disclose the requested information in reliance instead on the Freedom of Information Act 2000 (FOIA). The County Council relied on the exception in Section 21 FOIA (reasonably accessible) in relation to eight of the ten district council areas because the same or newer information as that held by the County Council was available on the Historic England website. For the remaining two districts, Broxbourne and Three Rivers, the County Council relied on section 22 FOIA (intended for publication).
9. On 4 April 2022, the County Council changed its position a second time and relied instead upon Regulation 6(1)(b) EIR (publicly available), and in respect of Broxbourne and Three Rivers, Regulation 12(4)(d) EIR (material in the course of completion).

The Decision Notice

10. The Commissioner issued Decision Notice IC-97374-F0V0 on 25 February 2022. The Commissioner decided that:
 - a. with the exception of the data relating to Broxbourne and Three Rivers, the information held by the County Council was publicly available and easily accessible on the Historic England website and therefore excepted from disclosure under Regulation 6(1)(b) EIR; and
 - b. the County Council could not rely on Regulation 12(4)(d) EIR in respect of information held for Broxbourne and Three Rivers and must therefore disclose that information within 35 calendar days.
11. The Commissioner decided that it was not relevant to the application of EIR that the information made available by Historic England was subject to conditions on re-use, or made available in a different format to that requested by the Appellant. The EIR did not require a public authority to grant particular rights or licences in respect of disclosed information.
12. The Commissioner noted under a heading of "Other Matters" that the County Council (and Historic England) were subject to the Re-use of Public Sector Information Regulations 2015 ("RPSI"), and that the Appellant would be

entitled to make a fresh complaint to the Commissioner if re-use conditions imposed by those bodies were contrary to RPSI.

The Appeal and Pleadings

13. The Appellant appealed the Decision Notice on the following grounds:

- a. the dataset published by Historic England was historic, not time stamped, and submitted by different district councils, which made it difficult to confirm that it was the same as that held by the County Council; and
- b. the Commissioner had failed to address in the Decision Notice the Appellant's complaint about the County Council's failure to comply with RPSI. The Appellant observed that the Historic England dataset contains "an assertion of HE copyright that is inconsistent with the intent of the OGL".

14. The Appellant noted that Buckinghamshire County Council had released "their equivalent dataset" under OGL after being advised by the Commissioner to consider a very similar request from the Appellant under RPSI.

15. The Appellant confirmed in an email to the Commissioner on 4 May 2022, and in his Notice of Appeal, that he no longer needed copies of the Broxbourne and Three Rivers datasets because he had obtained them under OGL from the individual district councils.

16. In their Response to the appeal, the Commissioner relied upon the findings and reasons set out in the Decision Notice.

17. The Commissioner submitted that the Tribunal had no jurisdiction in relation to RPSI because the Commissioner had not issued a substantive decision in that regard and its observations were made under a heading of "Other Matters". The Commissioner submitted that the Appellant's request for re-use related only to any information "that was disclosed" by the County Council pursuant to the Request and referred to National Archives guidance that re-use requests for information not already provided or otherwise accessible be handled first as access requests, before re-use was considered.

18. In Reply, the Appellant submitted that the dataset published by Historic England was an undated, out dated and reformatted version of data provided by the district councils and not the same as the consolidated dataset held by the County Council. He submitted that RPSI applied because the dataset had been received by the County Council in the context of its obligations, was not

publicly available in the requested format, and was not constrained by third party intellectual property rights.

The Law

The Environmental Information Regulations 2004

19. Regulation 5(1) EIR provides that a public body that holds environmental information shall make it available on request. Neither party disputed that the requested information which was the subject of this appeal was “environmental information” as defined in Regulation 2(1) EIR. It is information on the state of the elements of the environment, such as land, landscape and natural sites (Regulation 2(1)(a)), and on measures designed to affect the landscape (Regulation 2(1)(c)).

20. Regulation 6(1)(b) EIR provides that:

“Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

...(b) the information is already publicly available and easily accessible to the applicant in another form or format.”

21. Regulation 12(1) EIR provides as follows:

“Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

22. Regulation 12(2) provides that: “A public authority shall apply a presumption in favour of disclosure.”

23. Regulation 12(4) provides that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

... (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.”

The Re-use of Public Sector Information Regulations 2015

24. Regulation 7(1) RPSI provides that a public sector body (which includes county councils) must permit re-use of a document where it receives a request made in accordance with Regulation 6. The request must be in writing, giving the requester's name and address, and specifying the document requested and the purpose for which the document is to be re-used (Regulation 6).

25. A "document" is "any information recorded in any form, including any part of such information, whether in writing or stored in electronic form or as a sound, visual or audiovisual recording, other than a computer program" (Regulation 2).

26. Regulation 5 sets out a number of exclusions where the Regulations do not apply, including in Regulation 5(1)(a) where:

"the activity of supplying the document is one which falls outside the public task of the public sector body, provided that the scope of the public task of that body is transparent and subject to review".

Right of Appeal to the Tribunal

27. Regulation 18 EIR and Regulation 18 RPSI provide that the appeals provisions of Part V, FOIA apply for the purposes of EIR and RPSI respectively, subject to certain modifications.

28. Section 50 FOIA, as applied to RPSI, provides that any person may apply to the Commissioner for a decision whether a request for a document has been dealt with in accordance with RPSI. On receiving an application, the Commissioner must make a decision except in certain circumstances set out in section 50(2). The Commissioner must either notify the complainant that he has not made a decision because one of the grounds in section 50(2) apply or serve notice of his decision (Regulation 50(3)).

29. Section 57 FOIA provides that where a decision notice has been served, the complainant or public authority may appeal to the Tribunal against the notice. Section 58 FOIA provides that the powers of the Tribunal in determining an appeal are 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.

30. On an appeal, the Tribunal “steps into the shoes” of the Commissioner. It may review any finding of fact on which the Decision Notice was based and may make any decision which the Commissioner could have made.
31. 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.

Analysis

32. The Tribunal’s findings were made on the balance of probabilities and applying our specialist expertise. The Tribunal included a specialist lay member with experience of requests for information in relation to planning and conservation areas.

Disclosure under EIR

33. The Tribunal found that the consolidated spatial dataset of conservation area boundaries held by the County Council at the date of the request was a compilation or combination of a number of individual datasets provided to the County Council by the district or borough councils within Hertfordshire. The district and borough councils are the local planning authorities for their areas and therefore “responsible for maintaining the local datasets”, as acknowledged by the Appellant in his Notice of Appeal. In many cases, the district and borough councils would also have provided those datasets to Historic England for publication on their website.
34. The Tribunal therefore accepted the conclusions of the County Council in its email of 18 March 2022 that, with the exception of Broxbourne and Three Rivers, the information held by the County Council was the same as or older than the information published by Historic England on its website. This was consistent with our findings about the respective statutory obligations of the County Council and the individual district and borough councils, and with statements made by the Appellant himself. For example, in an email to the Commissioner dated 4 February 2022 (page D68), he confirmed that “it’s true

that I managed to obtain district-level data for all but one Hertfordshire district via the Historic England dataset, and for a final district direct from the district council”.

35. We found that it made no material difference for these purposes that the Appellant had requested the County Council’s “consolidated” dataset and not the individual district council area datasets. The consolidated dataset was simply a compilation or combination of the individual datasets.
36. The term “publicly available” in Regulation 6(1)(b) does not mean that the information must be publicly available for re-use, and there is no obligation on public authorities to make available information which is already publicly available and easily accessible elsewhere so that different sources can be compared and checked.
37. The Commissioner was therefore correct to conclude that, with the exception of the data relating to Broxbourne and Three Rivers, the information held by the County Council was already publicly available and easily accessible to the Appellant at the date of the Request, either from Historic England or the individual councils, and therefore excepted from disclosure under Regulation 6(1)(b) EIR.
38. The Commissioner was also correct to conclude that Regulation 12(4) EIR did not apply to the datasets for Broxbourne and Three Rivers because “the process of compiling and presenting the necessary data... becomes complete at the moment that all data has been compiled and presented” (paragraph 33 of the Decision Notice). The County Council’s assertions that it would be misleading for them to release data about conservation areas are not relevant to Regulation 12(4). We noted that the County Council had not appealed this aspect of the Decision Notice.

RPSI – The Tribunal’s Jurisdiction

39. The Tribunal concluded that it had jurisdiction to consider the issue of the County Council’s compliance with RPSI.
40. It was evident that the Request and the Appellant’s complaint to the Commissioner raised issues under RPSI. The Commissioner acknowledged this at paragraph 38 of the Decision Notice, observing that the Request “might simultaneously be considered to be” a request under RPSI. As noted by the Appellant in his Notice of Appeal, the Commissioner had advised Buckinghamshire County Council to consider a very similar request from the Appellant under RPSI (Decision Notice IC-90244-B8G0 of 31 May 2022 at page

F112 of the bundle). The request satisfied the requirements of Regulation 6 RPSI.

41. As noted in paragraph 28 above, on receiving an application for a decision about whether a request for a document has been dealt with in accordance with RPSI, the Commissioner must make and serve notice of its decision, unless one of the grounds in Section 50(2) FOIA apply. The Commissioner has not identified any such grounds.
42. The Decision Notice therefore contained the Commissioner's decision in relation to RPSI; namely, that it expressed no opinion on the subject because, as explained in the Response, it regarded the request for re-use as premature and as applying only to information which might be disclosed by the County Council in response to the Request. Alternatively, it represented an exercise by the Commissioner of a discretion not to deal with the RPSI complaint. In either case, the Appellant has a right to appeal to the Tribunal against the Decision Notice.
43. In deciding that the Tribunal has jurisdiction, we took into account the First-tier Tribunal decisions referred to by the Commissioner in its Response. Those decisions are not binding upon us, and in any event, deal with very different circumstances. In both, the Commissioner had upheld the appellant's complaint, rendering an appeal unnecessary – that was not the case here. In *William Stevenson v Information Commissioner* EA/2015/0117, the Judge found that he did not have jurisdiction for that reason. In *David Billings v Information Commissioner* EA/2007/0076, the "Other Matters" referred to in paragraph 8 of the Commissioner's Decision Notice were general concerns about the public authority's conflicts of interest policy, a matter over which the Commissioner had no direct responsibility. By contrast in this case, the issue concerns the Appellant's legal rights to re-use information pursuant to RPSI, a matter over which the Commissioner has a statutory supervisory role. It is not open to the Commissioner to deprive an appellant of appeal rights simply by dealing with their complaint under a heading of "Other Matters".

RPSI – Substantive issue

44. The Tribunal therefore considered the Appellant's request to re-use the County Council's consolidated dataset pursuant to RPSI, and in particular, whether the exception in Regulation 5(1)(a) (outside public task) applied.
45. In considering whether the activity of supplying a consolidated spatial dataset of conservation area boundaries fell within the "public task" of the County Council, we took into account the National Archives "Guidance on public task

statements” dated May 2020. This guidance is not binding upon us, but we found its interpretation of “public task” to be helpful and appropriate.

46. At page 3, the Guidance states that “public task relates to your core role and functions” which “may be statutory or established through custom and practice”. At page 4, under “What information falls within my public task?”, the guidance goes on:

“Any information you produce, hold, collect or disseminate to fulfil your core role and functions is within your public task. This information is a key component of your statement of public task. Generally, information produced as part of your public task:

- is essential to your public service
- is produced as part of a statutory requirement
- is produced by established custom and practice
- enjoys authoritative status by virtue of being issued by you as a public sector body
- you are the only source for the information
- its creation and maintenance is funded through taxation rather than revenues or private investment.”

47. The Tribunal noted that the County Council is not the local planning authority and is not responsible for the designation of conservation area boundaries. The Appellant accepts in his Notice of Appeal that it is the individual district and borough councils who are “responsible for maintaining the local datasets”. Data about conservation boundaries is received by the County Council in an ad hoc manner and the production of a “consolidated” dataset of county-wide information is not a statutory requirement on the County Council. It is not the only source of this information. By contrast, we note that Buckinghamshire Council is a unitary council and the local planning authority.

48. The Tribunal concluded that the activity of supplying a consolidated spatial dataset of conservation area boundaries falls outside the public task of the County Council, and therefore pursuant to Regulation 5(1)(a), RPSI does not apply. As the Tribunal was satisfied that the exception in Regulation 5(1)(a) applied, we did not go on to consider whether any other exceptions might apply.

Conclusion

49. The Tribunal finds that Decision Notice IC-97374-F0V0 is in accordance with the law in respect of the application of EIR to the Request.
50. Decision Notice IC-97374-F0V0 did not address the issue of the application of RPSI to the Request. In this Decision, the Tribunal has made a substantive decision about the application of RPSI to the Request. However, our decision is that RPSI does not apply, and therefore, no substitute decision notice is required.
51. The appeal is dismissed.
52. The Appellant asked the Tribunal to address in its Decision “the broader context of requests for OGL copies of designated area spatial data created by public bodies” in light of the various legislation to avoid delay and expense in future. This is not the Tribunal’s role. Our role is to make a decision on the appeal before us and whether or not the Decision Notice issued by the Commissioner is in accordance with the law. It is not our role to issue general guidance as requested by the Appellant.

Signed District Tribunal Judge C Goodman

Date: 7 December 2022