



NCN: [2023] UKFTT 00665 (GRC)

Case Reference: EA-2022-0097P

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

Heard in GRC Remote Hearing Rooms, Leicester: on the papers

Heard on: 6 July 2023

Decision given on: 8 August 2023

Before

**TRIBUNAL JUDGE A. MARKS CBE
TRIBUNAL MEMBER E. YATES
TRIBUNAL MEMBER D. PALMER-DUNK**

Between

MR LAURENCE ALFRED HANNINGTON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

SWANSEA COUNCIL

Second Respondent

Representation:

The Appellant: represented himself

The First Respondent: was represented by Louisa Lansell

The Second Respondent: was not represented

Decision: The appeal is **allowed**. The Substituted Decision Notice below is substituted for the Information Commissioner's Decision Notice:

SUBSTITUTED DECISION NOTICE

To: Swansea Council ('the Council')
Information Governance Unit
Civic Centre
Oystermouth Road
SWANSEA
SA1 3SN

By email to: data.protection@swansea.gov.uk

By Decision reference **EA-2022-0097** of the First-tier Tribunal, General Regulatory Chamber (Information Rights), the Tribunal is – on the balance of probabilities:

- A. satisfied that the Council does not hold the information requested by part (1) of the request; and
- B. not satisfied that the Council does not hold the information requested by part (2) of the request

The Council is therefore directed to:

1. Reconsider its analysis of part (2) of the Appellant's request in light of the Tribunal's Decision.
2. Rigorously and efficiently interrogate its Geographical Information System (GIS) - and carry out other searches as necessary - to identify information such as the title, version, scale and date of the maps and plans that have been digitised and entered on the GIS as data sources to create the Council's plan entitled '*Land at High Nook*' dated 3 March 2020.
3. Provide a fresh response to part (2) of the Appellant's request.

No further directions are necessary.

Dated: July 2023



Alexandra Marks CBE
(Recorder sitting as a Judge of the First Tier Tribunal)

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-96416-S3G8 dated 11 April 2022 [A1-10]. The Commissioner decided that the Council did not have to disclose requested information because the information is already publicly available and easily accessible to the applicant.
2. In this decision, references to the Bundle provided by the First Respondent to the Tribunal are shown in emboldened text by page number e.g. [A1-10].
3. The parties agreed to the Tribunal making a decision based on all the papers in the case rather than requiring an oral hearing. The Tribunal was satisfied, in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), that it could properly determine the issues in this case without a hearing.

The requests for information, internal review and responses

4. On 22 January 2021, the Appellant ('Mr Hannington') wrote to the Council as follows [C84]:
 - (1) *'...I received a plan (the Plan) entitled 'Land at High Nook' and dated 03.03.2020 under cover of an email dated 11.01.2021 from [AB at the Council]. Please provide the information that identifies why the Plan was produced, what purpose the Plan has fulfilled, details of the Council activity that the Plan forms a part of, all information related to the Plan including reports, notes, correspondence, plans and photographs. I am the owner of High Nook and wish to establish if the Plan was produced to support an investigation of the ownership of the land at the southern end of the garden of High Nook... on which stands a shed owned by [SJ] of 7 Village Lane....*
 - (2) *Provide information on the data sources used to prepare the Plan... Examples could be: HM Land Registry Title number, Adverse possession plan reference and Commons Plan reference. Provide the Plan scale.'*
5. The Council responded on 18 February 2021 [C92-93] that:

'We can confirm that the Plan produced was for our records to capture what was discussed during a meeting with yourself and a Council officer in the Civic Centre in 2019. It was also produced to assist with any subsequent FOI requests submitted by yourself to the Council thereafter.

The Plan was produced from the Council's Geographical Information System (GIS) which holds all of the Council's land ownership details. The Plan was not produced to scale as it was created for discussion and viewing purposes only.

There is a Key/Legend attached to the Plan, which highlights the area that was subject to adverse possession (formerly Council land); highlights Council Freehold land, land registered at Land Registry and it highlights the Common land boundary.'
6. On the same day [C94], Mr Hannington asked the Council to carry out an internal review of its response to his request.

7. The Council replied on 22 March 2021 [C97-99] maintaining its position, stating that the correct legal regime for the request was both the Freedom of Information Act 2000 ('FOIA') and The Environmental Information Regulations 2004 ('EIR'), that there is no further information held by the Council and providing a link to the search facility available at the Land Registry. The Council relied on s. 21 FOIA (Information accessible to the applicant by other means).

8. On 23 March 2021 [D122-125], Mr Harrington complained about the Council's handling of his request to the Information Commissioner ('the Commissioner').

The Commissioner's investigation and Decision Notice

9. On 21 October 2021 [D129-136], the Commissioner notified the Council that it had accepted Mr Hannington's complaint for investigation.

10. On 11 April 2022 [A1-10], the Commissioner issued Decision Notice IC-96416-S3G8 which in summary concluded that:

- (a) The appropriate legislation under which to consider the request is EIR. Instead of relying on s.21 FOIA, the Council should have cited EIR 6(1)(b).
- (b) Whilst the Commissioner accepts that it is reasonable for Mr Hannington to expect additional information, the Commissioner concluded, based on the balance of probabilities that, combined with information provided in response to previous related requests, in respect of part (1) of the request the Council holds no further relevant information than that already provided.
- (c) The Council's explanation to the Commissioner of the various layers which make up its GIS system is not from recorded information but based on the knowledge of Council officers. Further, if the manager of the GIS is unaware of what Mr Hannington means by a unique identifier and version, the Commissioner accepts that on the balance of probabilities, this information is not held.
- (d) The Council had informed Mr Hannington that its GIS includes land registered at the Land Registry and provided the relevant link. The Council had previously informed Mr Hannington that he would need to use the registered reference to his property to access the information he required. The Council was therefore entitled to refuse this part of the request by virtue of EIR 6(1)(b).

Appeal to the Tribunal

11. Mr Hannington's Notice of Appeal to the Tribunal [A11-20] challenged the Commissioner's Decision Notice.

12. The papers available to panel and the parties are set out in paragraph 20 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

13. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'Any person making a request to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if this is the case, to have that information communicated to him.’

Regulation 2 EIR: definition of ‘environmental information’

14. ‘Environmental information’ is defined by Regulation 2(1) EIR as any information 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;...

Regulation 5 EIR: access to environmental information held by public authorities

15. EIR 5 sets out a specific duty by public authorities to make environmental information available on request.

Regulation 6 (1)(b) EIR: information already publicly available

16. There are qualifications to the duty to disclose environmental information. That referred to in this appeal is EIR 6(1)(b) which provides that if the applicant requests information be made available in a particular form or format, a public authority shall make it so available unless the information is already publicly available and easily accessible to the applicant in another form or format.

17. Unlike the exceptions in EIR 12, there is no obligation under EIR 6(1)(b) for the public authority to balance the public interests between disclosing the information and not doing so.

Standard of proof

18. Where there is a dispute as to whether a public body holds information within the scope of a request, the Commissioner and Tribunal consistently apply the civil standard of proof, that is whether ‘on the balance of probabilities’ the information is held. The Tribunal in Linda Bromley and Information Commissioner v Environment Agency (EA/2006/0072) said (at §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... (emphasis added)

The role of the Tribunal

19. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of FOIA are as follows:

s.57 Appeal against notices...

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.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.

Evidence

20. Prior to the hearing the parties had submitted written evidence and submissions. These were set out in an Open Bundle of 162 pages (including an Index).

Submissions

Appellant's submissions

21. In his Notice of Appeal [A11-20], Mr Hannington said, in summary:

- (1) The request sought a detailed specification of the maps and plans used to create the Plan, thus enabling Mr Hannington to obtain the same information as used by the Council. Although the Council claims that the information is publicly available, only the Council is aware which maps and plans it used to create the Plan. The identity of the underlying map and plan data will be available via GIS features.
- (2) Mr Harrington cannot be sure of, for example, the date or scale of information used to create the Plan yet these define its accuracy.
- (3) The Council state that the Plan was created as a record of the 1 October 2019 meeting. It is inconceivable that a full record of the meeting comprises only the plan without any text. In addition, there must be a request for the plan to be created and a record of the decision that a record of the October 2019 meeting was required.

- (4) It is vital that for any specific plan produced by GIS the source data is identifiable. Configuration management is a key feature of GIS. Even if historic sources have been destroyed, each data source should be recorded.
- (5) At the October 2019 meeting, it was clear that the GIS had out-of-date information about his property boundary. When the current title boundary for his property was downloaded, it showed an enlarged garden area obtained via adverse possession in 1973.
- (6) If the Council did not comprehend the information request, clarification should have been sought.
- (7) If the GIS manager did not understand ‘*source code*’, the manager would surely have understood ‘*unique identifier and version*’ because these are central to data management within a GIS. An example would be the title, version and date of a paper map that has been digitised.
- (8) The requested information must have been available to enable the Plan to be created. The Plan has no practical value without a specification of the information used to create as otherwise its accuracy cannot be verified.
- (9) The ‘*publicly*’ available information applies only to the HMLR element: even then, it is necessary to provide unique referencing because HMLR records can change over time.
- (10) The purpose of the requested information is to check that the Council have used the correct information in the Plan. The Council is the only source for the information which is akin to part numbers that make up assembly of a mechanical item.
- (11) If the information cannot be supplied, it would suggest that any information extracted from the GIS is of unproven source and therefore unreliable.

Commissioner’s submissions

22. In the Commissioner’s response [A21-35] to the Notice of Appeal, the Commissioner said that:

- (1) In response to a previous information request by Mr Harrington, the Council gave title number CYM473164 and provided a weblink to the property search function on the Land Registry website.
- (2) The Council explained to Mr Harrington that the Plan was produced from its GIS, a system which creates, manages, analyses and maps data and connects data to a map, integrating location data with all types of descriptive information. The Council also confirmed that the Plan ‘*was not produced to scale as it was created for viewing and discussion purposes only.*’
- (3) During the Commissioner’s investigation, the Council was asked a series of questions including details of the searches undertaken to identify information relevant to the request; the Council’s records management policy; details about the sources of the Council’s GIS land ownership information, and whether it was manipulated before being included in the Plan.
- (4) The issue is not whether the Council should have held the information but whether it did in fact hold it at the time of the request.
- (5) The Council officer who created the Plan confirmed it ‘*was created as a result of a face to face meeting in order to provide a record of the discussion and that no other*

data was created other than the Plan'. Accordingly, the Council did not search for further information.

- (6) The Commissioner was entitled to accept at face value the response of a public authority where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession (*Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190*).
- (7) The Commissioner considers that an objective reading of part (2) of the request would include the layers behind the Council's GIS used to create the Plan namely:
 - (i) The Council Terrier – a document which maps all Council-owned land was digitalised and put into the database of the GIS: this is not publicly available and the original paper maps were destroyed.
 - (ii) Register of Common land – an electronic version created from paper Ordnance Survey maps which are available for inspection by appointment.
 - (iii) Land Register of Wales data which is external to the Council and publicly available.
- (8) The Council confirmed that the Plan was produced by capturing these three layers and a fourth layer was created by overlaying the Land Registry and Council's Freehold ownership layer.
- (9) The Council's explanation of the GIS and description of its various layers is not held as recorded information but is based on the combined knowledge and experience of the Council's GIS manager and its archivist.
- (10) The Council did not consider the title, version and date of a paper map and a detailed specification of the maps and plans used to create the Plan to be within the scope of an objective reading of part (2) of the request. It further confirmed that the source data (original maps etc) used in the GIS were not manipulated or altered before producing the Plan.
- (11) The Commissioner understands that the Plan was created by overlaying images of the various layers of the GIS from the digitalised version of the original paper records (not the paper records themselves) and creating a screenshot when the Plan was created.
- (12) Mr Harrington is attempting to widen the scope of part (2) of the request. It would be nonsensical for the Council to withhold any recorded information that reflected its submissions. There is no evidence of the Council attempting to mislead the Commissioner or of a motive to withhold information actually in its possession.
- (13) The public authority was not required to ask the applicant to provide more particulars in relation to the request and assist the applicant in providing those particulars in accordance with EIR 9 because that regulation is triggered where the request is formulated in too general a manner: that was not the case here.
- (14) The Decision Notice erred in applying EIR 6(1) because that regulation is concerned with the requester's preferred form or format. In this case, Mr Harrington specified no preference as to the form or format of the information.
- (15) The Council had explained to the Commissioner that providing the information used to create the Plan was accessible to Mr Harrington from the Land Registry using the title reference and weblink that the Council had provided to him.

- (16) Ultimately, the Council's position, which is accepted by the Commissioner, is that it does not hold any recorded information relevant to part (2) of the request.

Discussion and decision

23. The panel considered first the scope of the appeal. The panel considers that Mr Harrington's appeal grounds touch only lightly on part (1) of his request but challenge robustly the Decision Notice insofar as it relates to the Council's response to part (2).

24. The panel accepts the Commissioner's conclusion that the appropriate legislation under which to consider the request in its entirety is EIR rather than FOIA. The panel agrees with the Commissioner's analysis that the information requested in this case falls within the definition of 'environmental information' as defined in EIR 2(1).

25. The panel notes that the Commissioner concedes that the Decision Notice was erroneous in finding that EIR 6(1)(b) is applicable to this case. That regulation provides that a public authority has no duty to provide information which is publicly available and easily accessible to the requester – but only if the requester has asked for information in a particular form or format. That is not the case here.

26. The panel then considered the facts of this case.

The facts

27. The following facts are not disputed:

- (1) On 1 October 2019, Mr Hannington met with a Council officer to discuss land ownership around High Nook, other properties in Mumbles Lane, and Council property/Common land to the rear of those properties [D142]. Maps and plans were examined and discussed at the meeting. Mr Hannington produced a note of the meeting [D141] included in the Bundle in slightly redacted form [D147-148].
- (2) More than a year after the meeting, following internal review of its response to a separate information request by Mr Hannington, on 11 January 2021 the Council emailed Mr Hannington the Plan (file ref. HIGH-NOOK 03.03.2020.pdf) [A50].
- (3) The Plan was not used during the meeting with the Council in October 2019 [C94].
- (4) Mr Hannington also provided to the Tribunal the following plans:
 - (i) A plan 'Land at Village Lane Mumbles' (file ref: village_lane_commonplan.pdf) [A49] disclosed to him by the Council by attachment to their email to him dated 11 June 2021 [C104]; and
 - (ii) Bracelet Common CL3(S) plan Edition 4 (file: cl3(S)-1-11-2019.pdf) dated 1 November 2019 [A51].
- (5) The Plan shows (as set out in the Council's internal review response [C97-99]):
 - (i) land ownership acquired by adverse possession (formerly Council land) by grey shading;
 - (ii) Council freehold land coloured yellow;
 - (iii) land registered at the Land Registry edged in red;
 - (iv) the Common land boundary show by blue dashes

though the reliability and accuracy of the Plan is not accepted.

28. To the extent that other relevant facts are disputed, the panel finds on the balance of probabilities that:

- (1) The Council did not make any notes of the 1 October 2019 meeting – perhaps because Mr Harrington provided to the Council his own notes [D145-146] just a few days later.
- (2) There is no evidence, only speculation, that the Council must have a record of the request for the Plan to be created and a record of the decision that a note of the October 2019 meeting was required.
- (3) The layers of the Plan comprise (as set out in the Council’s response to the Commissioner’s enquiries [D144] and supplemented by the Council’s response to further enquiries [B61]):
 - (i) Land Registry information;
 - (ii) information taken from the register of Common Land (an electronic version of a paper record held by the Council); and
 - (iii) the Council’s own land ownership as derived from its title deeds and the Council’s original Terrier (both of which have paper antecedents. The Council’s freehold title is now registered at the Land Registry.
 - (iv) an adverse possession layer (land within the Council’s historical title but subsequently registered within a separate freehold title at the Land Registry as adversely possessed land) created by overlaying (i) and (iii) above.
- (4) The area of land acquired from the Council by adverse possession and added to High Nook’s title (by a predecessor in title to Mr Harrington) as long ago as 1973 [A16] became known to the Council by at least by 2009 when the Council sought to register its freehold title to the adjoining common land known as Bracelet Common [D140].
- (5) Mr Hannington does not seek copies or originals of the maps and plans which were used to create the Plan but instead requests information about them e.g. HM Land Registry Title number; adverse possession plan reference; and Commons plan reference.
- (6) On 23 January 2020 [C72-73], the Council sent Mr Hannington a website link to the Land Registry’s search facility and provided Land Registry reference CYM473164. That title number comprises the Council’s freehold property known as Bracelet Common, Mumbles, Swansea namely layer (iii) referred to above.
- (7) The Council has not provided any further requested information about layers (i)-(iv) above, maintaining that it does not hold such information.

Error of law or wrongful exercise of discretion?

29. In light of the undisputed facts and those facts found proved on the balance of probabilities, the panel went on to consider whether the Decision Notice is not in accordance with the law or that the Commissioner ought to have exercised his discretion differently.

30. The panel recognises that the Commissioner’s role is not to decide whether or not the public authority *should* hold the information: merely whether, on the balance of probabilities, it does or

does not hold it. Further, we recognise that EIR does not require public authorities to *create* information to answer a request, though they may have to bring information together from different sources.

31. On this basis, the panel agrees with the Commissioner's points summarised at paragraph 22 (4)-(6) above. The panel accepts that, on the balance of probabilities, the Council does not hold any further information in relation to part (1) of the request.

32. However, with regard to part (2) of the request, the panel notes the persuasive (albeit not binding) comments of this Tribunal in the case of *Bromley and others v. Information Commissioner EA/2006/0072* cited above in paragraph 18 that:

“... We think that [the balance of probabilities] 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.” (paragraph 13)

33. The panel has reviewed the factors mentioned by the Tribunal in the *Bromley* case. The panel shares Mr Harrington's doubts that as a competent public authority, managing a GIS system, the Council has no further information relating to the sources of the data used to create the Plan as requested by part (2) of the request.

34. The panel agrees with the Commissioner's finding (at paragraph 28 of the Decision Notice) that an objective reading of part (2) of the request would include the layers which sit behind the Council's GIS – and that even if this was not clear from the original request, Mr Harrington's clarification in his request for an internal review confirmed that his request was for the identification of the source data used by the GIS to create the plan.

35. In response to the Commissioner's enquiries, the Council stated that *'these 4 layers were displayed upon the Ordnance Survey Mastermap Topographic line and Cartographic text current at that time'* (emphasis added) [B60]. It is unclear what 'time' is being referred to – whether, for example, 1 October 2019 being the date of Mr Harrington's meeting with the Council; or 3 March 2020 being the apparent date of creation of the Plan; or some other date before the Plan was sent to Mr Harrington on 11 January 2021. However, the Council's statement indicates that it can assess what is 'current' and therefore has some way of identifying whether source material used by GIS is up-to-date.

36. The panel notes the Council's explanation to the Commissioner that *'the GIS system is a very fluid system, and there is no manual on the various layers or how it was produced'* [D157]. However, the panel finds plausible Mr Harrington's submission in his grounds of appeal [A16] that precisely because the information within the GIS is constantly changing, it is vital for any specific plan which may be produced by GIS that the source data is identifiable. As Mr Harrington puts it: *'Configuration management is a key feature of GIS [w]ithout [which] there is nothing more than a data soup that cannot be used with confidence.'*

37. Mr Harrington gave a striking example in his grounds of appeal [A16] of a failure of configuration management when, during his meeting with the Council on 1 October 2019, the officer used out-of-date information in GIS about the property boundary to High Nook. The officer's plan did not take account of High Nook's enlarged garden area, obtained by adverse possession as long ago as 1973 – and of which Council had been aware since at least 2009.

38. Confidence in the consistency of the data sources in the Council's GIS is further undermined by the discrepancies between the Plan at A50 and another plan provided by the Council at A49 presumably also generated by the GIS. The 'Land at Village Lane' plan [A49] shows coloured green Common land noticeably more extensive than the Council's registered title to the common land shown in yellow on the Plan [A50]. There also appear to be slight differences in the common land boundary shown on the two plans. It is interesting too that the plan at A49 has a scale '1:500 @A4' while the A4-sized plan at A50, though of similar magnification and showing similar features, has no scale.

39. If, as the Council has repeatedly maintained, no source data on the GIS was entered manually or manipulated to produce the Plan, it seems to the panel that the discrepancies must surely be due to differences in the data sources used. The panel considers it implausible that the GIS cannot be interrogated to divulge at least the dates if not other reference information of its data sources when producing a specific composite plan. The panel therefore does not, on the evidence before it, accept that the Council does not hold such information.

Conclusion

40. In short, the panel reminds itself that:

- (1) the Commissioner concedes in these proceedings that EIR 6(1)(b) does not apply and that the Decision Notice is erroneous to that extent;
- (2) no other exceptions to the duty to disclose environmental information are claimed in this case; and
- (3) a public authority must apply a presumption in favour of disclosure under EIR 12(2).

41. As a result of these factors, the panel considers that the Commissioner exercised his discretion inappropriately in accepting the Council's explanations about its management of the GIS without further probing the likely existence of information within the scope of the request, especially as EIR 6(1)(b) cannot be relied upon to relieve the Council of its duty to disclose.

42. Further, the panel concludes that the Commissioner made an error of law in finding, in the absence of adequate evidence, that on the balance of probabilities, the Council does not hold the information requested by part (2) of the request.

43. Nevertheless, for the reasons set out above, the panel finds no error of law nor wrongful exercise of discretion by the Commissioner when concluding that, on the balance of probabilities, the Council does not hold the information requested by part (1) of the request.

44. The Tribunal allows the appeal in respect of part (2) of the request, and substitutes for the Commissioner's Decision Notice IC-96416-S3G8 the Substituted Decision Notice set out on page 2 above.

Alexandra Marks

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)

Date: July 6 2023

Promulgated

Date: August 8 2023