

NCN: [2026] UKFTT 01499 (GRC)

Case Reference: FT/EA/2026/0118

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Considered on the papers 9 October 2026

Decision given on: 29 October 2026

Before
Judge Cragg K.C.
Tribunal Member
Ms Anita Bapat

Between

LINDA BROMLEY

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed in relation to the question as to whether further information is held by the Warwick District Council.

Substituted Decision Notice: - IC-391218-Z3Y0

Organisation: Warwick District Council.

Complainant: Linda Bromley

1. For the reasons set out below the Warwick District Council (the Council) has not established that it does not hold further information within the scope of Parts 7 and 8 of the request.

2. The Council is required to take the following steps within 35 calendar days of the date that this decision is sent to the parties by the tribunal: The Council is required to issue a fresh response to the request, confirming whether it holds further information and must either i. supply the information sought, or ii. serve a refusal notice including the grounds relied on.

3. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

DECISION AND REASONS

MODE OF DETERMINATION

1. The appeal has been determined without a hearing, with the consent of the parties, under rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The Tribunal has considered the hearing bundle of 336 pages, including the Commissioner's decision notice, the Appellant's grounds and supporting material, the Commissioner's response, the correspondence generated during the Commissioner's investigation, and the Appellant's later observations.

2. The appeal was listed before a panel of three members, but one member was unable to attend. The relevant practice direction[1] permits the Tribunal in a case such as this

[1] Senior President of Tribunals, Practice Direction, Composition of the First-tier Tribunal in relation to matters that fall to be decided by the General Regulatory Chamber, 19 May 2023.

to proceed with a judge and one member with substantial experience of data protection or freedom of information rights, and we decided to proceed in that way.

BACKGROUND

3. St Mary's Lands include Lammas Field Common, Saltisford Common, the grandstand and paddock area and the racecourse extension. Warwick District Council (the Council) is the freehold owner. The land is subject to a number of leases, rights of use and operational arrangements.

4. Section 6(3) of the Warwick District Council Act 1984 (the 1984 Act) provides that, except on race days, the Council must ensure that not less than 25 hectares in aggregate of St Mary's Lands are outside the exercise of specified statutory powers relating to buildings, enclosures, lettings and other uses. The Appellant wishes to establish whether that requirement continues to be met.

5. Since 2021 the Council has authorised seasonal temporary fencing on Lammas Field to protect ground-nesting birds. The material before us includes ecological reports, plans and a Cabinet report dated 8 February 2024. The Cabinet report recommended continuing the protective measures for a further two years, with an amended area shown on a plan, and approved provision for the cost of fencing and ecological work.

6. The Appellant contends that this documentation shows that the Council, rather than the racecourse operator, was responsible for the fencing; that the fenced land was not part of the demised premises under the racecourse lease; and that the Council therefore should have held records sufficient to answer all of her request as set out below. She also relies on the Council's ownership of the land, its statutory obligations, its commissioning of ecological work and its approval of expenditure on the fencing.

THE REQUEST, REPLY AND DECISION NOTICE

7. The Appellant wrote to the Council on 27 December 2024 and requested information inthe following 8 parts:

> Under the Freedom of Information Act/Environmental Regulations, I request to know the following in relation to St. Mary's Lands.

1. The size in acres of the Golf Course area, including the Club House and driving range.
2. The size in acres of the area of the Caravan Park.
3. The size in acres of the area of Racing Club, Warwick (including the pitch and the MUGA).
4. The size in acres of the area of the Corps of Drums.
5. The size in acres of the area of the Racecourse demised premises including track, stand, forecourt, etc. and stables.
6. Size in acres of the area of all the car parks.
7. Other than on racedays and eliminating the areas of the above, what area in acres of St.Mary's Lands is open and available for use by the public?
8. Of the remainder, how many acres of land was available for use by the public when the fencing was in place in 2024?

8. At internal review the Council disclosed figures relating to parts 1, 3, 4, 5 and 6, but said that it did not hold the information requested in parts 2, 7 and 8. It relied on regulation 12(4)(a) of the Environmental Information Regulations 2004 (the EIR).

9. The appeal concerns decision notice IC-391218-Z3Y0, dated 25 February 2026. In that decision notice, the Commissioner concluded that the Council had not demonstrated that it held no further information relevant to part 2, concerning the caravan park, because adequate searches had not been carried out, and the Council had relied on the word of one officer that the information was not held. The Commissioner required further searches and a fresh response to that part. In relation to parts 7 and 8, although the same approach was taken by the Council, however, he accepted that the Council did not hold the requested recorded information and upheld its reliance on regulation 12(4)(a) EIR.

10. During the Commissioner's investigations of parts 7 and 8 of the request, the Council explained that the placement and movement of temporary pins and fencing were undertaken by the racecourse as tenant of the land, not by the Council. The land is leased to the racecourse, and the Council does not exercise day-to-day operational control over how the land is configured.

11. As a result, the Council explained that is not responsible for deciding where temporary pins or fencing are placed, and such features can be moved by the racecourse as part of its operational use of the site. Specifically in these circumstances, the Commissioner accepted that the Council would not reasonably be expected to hold contemporaneous

or definitive records showing the precise location of temporary pins or fencing, or measurements of the areas fenced off or available for public access at any given time.

12. In his decision notice the Commissioner also noted that the EIR would not require a public authority to retrospectively establish the position of temporary features placed by a third party on leased land, nor to carry out inspections or surveys to create new information. The Council was therefore not required to obtain such information from the racecourse where it is not held on the Council's behalf.

13. Although consideration was given to whether such information might exist in correspondence or plans, the Commissioner was satisfied that the temporary and movable nature of the pins and the racecourse's operational control of the land meant that such information would not reasonably be expected to exist within the Council's records, even though searches had not been carried out.

LEGAL FRAMEWORK

14. Regulation 5(1) EIR provides:-

> 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.

15. Regulation 5(2) provides:-

> Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

16. Regulation 12(4)(a) provides that a public authority may refuse to disclose information 'to the extent that it does not hold that information when an applicant's request is received.' Regulation 12(2) further provides that 'A public authority shall apply a presumption in favour of disclosure.'

17. By virtue of regulation 18, the appellate provisions of the Freedom of Information Act 2000 apply. In considering an appeal, the Tribunal's task is to determine whether the decision notice was in accordance with the law and, where applicable, whether any

discretion should have been exercised differently. The Tribunal reaches its own conclusion on the evidence before it at the date of the hearing and is not confined to the material available to the Commissioner when the decision notice was issued.

18. The principal issue is whether the requested information was "held" by the Council at the date of the request.

19. The established approach was summarised by the Tribunal in *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072). The question is whether, on the balance of probabilities, the information was held. In determining that issue, the Tribunal may consider the quality of the authority's analysis of the request, the adequacy of the searches undertaken, the nature of the authority's record keeping systems and the reliability of the explanations provided concerning the information sought.

20. The same broad approach has been adopted in numerous subsequent cases. The burden does not rest upon a public authority to prove with certainty that information is not held. Rather, the Tribunal must determine, on all the evidence, whether it is more likely than not that the requested information existed in recorded form and was held at the relevant date.

21. It is also well established that a distinction must be drawn between recorded information which is held and information which could only be produced by creating new information from existing material. The EIR require disclosure of information that exists in recorded form. They do not generally require a public authority to undertake calculations, generate new datasets or compile information which has not previously been recorded.

THE APPEAL

22. Thus, the appeal concerns only parts 7 and 8 of the request as set out above. The Appellant submits that the Commissioner's conclusion that the Council did not hold the requested information was based on inadequate searches and materially inaccurate information supplied by the Council.

23. The Appellant advances three principal grounds. First, the Council did not consult the officers, departments and records most likely to hold the information. Secondly, the Council should have held information sufficient to demonstrate compliance with its statutory obligations concerning St Mary's Lands. Thirdly, the Commissioner wrongly accepted that the relevant land and the temporary fencing were under the control of the racecourse rather than the Council.

The Council's searches and records

24. The Appellant criticises the Council's reliance upon the knowledge of one officer in the Green Spaces Team. During the Commissioner's investigation, the Council said that it had not carried out searches and that the relevant officer knew what information was held; and 'there was no need to look as we didn't have that information to hand' (see paragraph 33 of the decision notice). The Appellant submits that information not being immediately to hand is not the same as information not being held elsewhere within the Council.

25. She says that the Council should also have consulted its estates and property officers and examined its lease, property and mapping records. At internal review, the Council obtained acreage figures for several of the areas identified in parts 1 to 6 from a Land and Property mapping layer within its GIS system. Internal correspondence indicated that the racecourse figure within that system was inaccurate and that the leases contained red-line plans, although not stated measurements.

26. The Appellant submits that this material demonstrates that potentially relevant records existed but were not adequately or systematically searched.

The lease and control of the land

27. The Appellant challenges the Council's assertion that the relevant land was leased to and controlled by the racecourse. She relies on the racecourse lease dated 27 June 2005, which distinguishes between the 'Demised Premises' and other land, including land within the racing tracks, over which the racecourse was granted rights of use.

28. The lease provides that ownership and possession of land outside the demised premises remained with the Council and that some uses required the Council's

consent. It also reserved rights to the Council, particularly outside race days. The Appellant submits that the land on which the bird-protection fencing was erected was not part of the demised premises and that the racecourse's rights over the land did not remove the Council's responsibility for it.

The Council's role in the fencing scheme

29. The Appellant relies on the Council's Cabinet report of 8 February 2024. The report sought approval to continue the protective measures for a further two years, to amend the protected area as shown on an attached plan, to commission further ecological work, and to provide annual funding for fencing and ecological services. Cabinet adopted those recommendations.

30. The ecological reports were prepared for the Council. They mapped the fenced area, recorded bird territories within and outside it, and recommended changes to the protected area. The Appellant also relies on an invoice of 9 February 2024, addressed to the Council, for fencing materials including 600 steel pins and 29 rolls of mesh.

31. The Appellant submits that these documents contradict the Council's account that the fencing was installed and managed independently by the racecourse on leased land. They show that the Council authorised and funded the scheme, approved a plan depicting the protected area and commissioned ecological monitoring of it.

Whether measurements were held

32. The Appellant argues that the Council could not sensibly approve and fund the fencing, alter its intended boundary and commission surveys comparing areas within and outside the enclosure without holding information about its extent. Although a plan may not expressly state an acreage, she submits that the Council held detailed plans, mapping, lease information and ecological records from which the requested figures were readily ascertainable.

33. The Appellant also relies upon section 6(3) of the 1984 Act. That provision requires the Council to ensure that, except on race days, not less than 25 hectares of St Mary's Lands remain outside the exercise of specified statutory powers. She submits that the

Council should maintain accurate records sufficient to demonstrate compliance with that duty.

34. Her case is therefore not simply that the Council ought to create new information. It is that the Council's documents undermine the explanation accepted by the Commissioner and make it likely either that the requested information was held or that further searches would locate it. She seeks a fresh response to parts 7 and 8 and, if necessary, further evidence from or the joinder of the Council.

THE COMMISSIONER'S RESPONSE

35. The Commissioner opposes the appeal. He submits that the decisive question is whether the Council held recorded information answering parts 7 and 8 when it received the request. On the adequacy of the searches, the Commissioner relies upon the Council's consultation with its Green Spaces Team and its explanation that the figures were not held. The Council had said that the fencing was under the operational control of the racecourse and that consulting lease records would not reveal the changing position of temporary fencing.

36. The Commissioner submits that he was entitled to accept the Council's account in the absence of evidence that it was unwilling to conduct appropriate searches or had a reason to conceal information. He nevertheless accepts that the Tribunal may determine the matter afresh and consider evidence that was not before him.

37. As to the 1984 Act, the Commissioner submits that an obligation or administrative reason to maintain information does not establish that the information was in fact held. The EIR require disclosure of existing recorded information; they do not require an authority to conduct a survey, undertake a new calculation or obtain information from another person in order to answer a request.

38. The Commissioner submits that, even if the Tribunal finds that the Council had a greater role in the fencing scheme than was described in the decision notice, that would not prove that the requested acreage figures had been calculated and recorded.

39. The Commissioner's ultimate position is that the existence of leases, plans, ecological reports and mapping does not establish that the requested information existed in recorded form. If the Tribunal concludes otherwise, the appropriate remedy would be to require the Council to issue a fresh response, not for the Tribunal to calculate the acreage.

DISCUSSION

The issue for the Tribunal

40. The Commissioner decided that, on the balance of probabilities, the Council did not hold recorded information within the scope of those parts and that it was therefore entitled to rely on regulation 12(4)(a) EIR. His conclusion was set out at paragraphs 40 to 46 of the Decision Notice.

41. It is important to identify precisely the basis of that conclusion. The Commissioner did not find that the Council had conducted adequate searches of all the records in which information relevant to parts 7 and 8 might be held. The Council accepted during the investigation that it had not conducted searches. As set out above its position was that the request had been referred to an officer who knew the relevant area and information sources.

42. In relation to part 2, concerning the caravan park, the Commissioner considered that this was insufficient. He found that the absence of information immediately to hand did not establish that no relevant information was held elsewhere in the Council's systems. He identified places where relevant information might reasonably be found. Because no targeted searches had been undertaken, he concluded that the Council had not demonstrated, on the balance of probabilities, that it held no relevant information.

43. The Commissioner reached the opposite conclusion in relation to parts 7 and 8. That distinction was based on the Council's explanation that the relevant land was leased to the racecourse; that the racecourse, rather than the Council, installed and moved the temporary fencing; and that the Council did not exercise day-to-day operational control over the location or configuration of the fencing. On that footing, the

Commissioner considered that the Council would not reasonably be expected to hold records identifying the precise position of the fencing or measurements of the areas fenced off and available for public use.

The additional evidence

44. However, the Appellant has produced evidence which was not before the Commissioner when the decision notice was issued. As set out above, that evidence materially challenges the factual explanation upon which paragraphs 41 to 46 of the decision notice were based. That evidence refers to the racecourse lease, the Council's direct involvement in the provision of protective fencing (see the minutes of the 8 February 2024 meeting, the invoice dated the following day, and the ecological reports commissioned on behalf of the Council.

45. The lease does not appear to support the broad proposition that the relevant land was simply demised to and controlled by the racecourse, with no significant continuing role for the Council. The evidence is difficult to reconcile with the Council's explanation that it was not responsible for determining where temporary fencing was positioned and had no operational or legal reason to record its location. The Council was making decisions about whether the scheme should continue, the area which it was intended to protect, its funding and its subsequent evaluation. The surveys involved walking the fenced boundaries and adjacent land and plotting bird territories by reference to the enclosure. The invoice does not itself establish the acreage enclosed, but it is evidence that the Council was directly involved in procuring and funding the fencing.

The adequacy of the Council's enquiries

46. The Council's evidence to the Commissioner was that it did not undertake searches because the relevant officer knew that the information was not held. The officer's statement that the information was not "to hand" did not establish that no recorded information existed elsewhere. Nor did reliance upon that officer's personal knowledge establish that no relevant records were held by other Council functions, including estates and property, legal services, democratic services, finance or

procurement, or within the Council's GIS, Cabinet, ecological or correspondence records

47. The fact that the final figures do not appear on the face of the documents produced by the Appellant does not answer whether other records exist. The exercise required by regulation 12(4)(a) is not confined to asking whether the requester has identified the precise document containing the answer. The authority must provide a sufficient evidential basis for concluding, on the balance of probabilities, that relevant recorded information is not held.

Comparison with part 2.

48. The Commissioner's reasoning in relation to part 2 provides the appropriate comparison. As potentially relevant GIS, planning, property and estates records had not been searched, the Council had not demonstrated that information was not held.

49. In relation to parts 7 and 8, the Council had appreciably more involvement in the land and fencing scheme than the Commissioner was led to understand. Once this is taken into account, and adopting the Commissioner's response to Part 2 of the request it is, in our view, not sufficient for one officer merely to assert that the information is not held without targeted searches being undertaken. The Commissioner's own reasoning in relation to part 2 applies with equal force to parts 7 and 8.

The Commissioner's response to the appeal

50. The Commissioner submits that the additional material does not prove that the acreage figures had already been calculated and recorded. We agree. But that does not resolve the appeal. The issue is whether the Commissioner had a sufficient basis for finding, on the balance of probabilities, that no information within the scope of parts 7 and 8 was held. In the absence of searches, and once the Council's principal explanation for not searching has been undermined, in our view that sufficient basis is not established.

51. The Commissioner accepted in his response that, if the Tribunal concluded that the decision notice was wrong, the appropriate remedy would be to require the Council to issue a fresh response. That is the course we consider appropriate.

CONCLUSION

52. In our view the Council has not demonstrated, on the balance of probabilities, that it does not hold recorded information falling within the scope of Parts 7 and 8 of the request. Its original enquiries were insufficient, and its reason for not carrying out searches was based upon a materially incomplete account of its ownership and control of the land and involvement in the fencing scheme.

53. The appeal is therefore allowed and the Tribunal substitutes the decision notice as set out at the beginning of this decision.

Stephen Cragg KC

Judge of the First-tier Tribunal

Date: 28 October 2026.