



Appeal Number: EA/2019/0140

Between:

NICHOLAS JAMES DIXON

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

Hearing: Leeds Magistrates Court: 3 September 2019.

Date of Hearing: 3 September 2019.

Panel: Brian Kennedy QC, Jean Nelson, Malcolm Clarke.

Introduction

1. This decision relates to an appeal brought under Regulation 18 of the Environmental Information Regulations 2004 ('EIR') and section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 22 March 2019 (reference FER0771418).
2. The Tribunal Judge Brian Kennedy QC and lay members Jean Nelson and Malcolm Clarke sat to consider this case on 3rd September 2019.

Factual Background to this Appeal:

3. Full details of the background to this appeal, the request for information and the Commissioner's decision are set out in the DN (a matter of public record) and the appeal concerns the question of whether the Public Authority in this case, the London Borough of Barnet ("the Council") was correct to determine that the request was

manifestly unreasonable under Regulation 12(4)(b) of the EIR. The request was for information on a specific planning application with respect to the actions of a named officer and is set out in series of questions referred to in the DN.

CHRONOLOGY

6 April 2018	Request for information about a specific planning application and the conduct of a named case officer
4 May 2018	Council refuses, citing EIR reg.12 (4)(b)
9 July 2018	Internal review refuses disclosure
30 July 2018	Appellant complains to the Commissioner
23 March 2019	DN upholding refusal of disclosure

RELEVANT LEGISLATION

Environmental Information Regulations 2004

Reg. 9. Advice and assistance

- (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- (2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall -
 - (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
 - (b) assist the applicant in providing those particulars.
- (3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.
- (4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.
- (5) The provisions referred to in paragraph (4) are -

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

Reg.12. Exceptions to the duty to disclose environmental information

- (1) 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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Reg.14. Refusal to disclose information

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).
- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.
- (5) The refusal shall inform the applicant

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

COMMISSIONER'S DECISION NOTICE

4. The Commissioner confirmed that the request fell under EIR. She stated that a request may be deemed 'manifestly unreasonable' in two circumstances: it is vexatious, or compliance would incur an unreasonable diversion of resources. She reminded herself of the four broad issues identified in *Dransfield v ICO and DCC (GIA/3037/2011)* for the consideration of vexatiousness: burden on the authority, motive of the requester, value or serious purpose of the request, and any harassment or distress caused.
5. The Council explained that the request of 6 April 2018 arose from a history of correspondence and complaints dating back to the planning application in 2011. The Appellant had submitted a complaint that had progressed through the Council's corporate complaints procedure and then on to the Local Government Ombudsman. When the Ombudsman found no evidence of maladministration, the Council's Chief Executive asked in 2016 that the matter be reviewed, by a lawyer and by the Corporate Anti-Fraud Team. A decision was taken in February 2017 that in light of the Ombudsman's finding that there was no malfeasance and the Appellant's "*repeated serious accusations made against officers*", it would not respond to any further correspondence. It characterised the Appellant's pursuit of the matter to be "*relatively trivial or highly personalised... [and] of little benefit to the wider public*".
6. The Appellant explained that he had discovered what he believed to be a fraudulent retrospective planning application that was allowed to proceed with the connivance of a Council officer. He accepted that he had "*pursued the matter rigorously*" but stated that this was because the Council had engaged in gross misconduct, misconduct in public office and aiding and abetting fraud, and the complaints procedure was a "*sham*". He was dissatisfied with the Ombudsman's investigation and conclusions, and maintained his right to the information requested.

7. The Commissioner noted that she would not expect the Council to discuss the conduct or investigation of one of its officers with the general public in a response to a FOIA/EIR request. She accepted the frustration of the Appellant in regards to this planning application, which had affected him personally, but those concerns, she argued; do not have a wider public interest. While the Appellant has not made a significant number of FOIA requests, the volume of contact and the context of the engagement have created a burden for the Council. The Commissioner considered that the Council had made reasonable and detailed attempts to address the Appellant's concerns over a protracted period. While the Appellant's contact with the Council initially had a serious purpose, as time has gone on the level of contact has become disproportionate and the Appellant is "unlikely" (our emphasis) to be satisfied with any response that does not accord with his predetermined notion of the 'correct' answer. There is, she held, little evidence of harassment, but spending significant amounts of time dealing with these persistent requests "*could*" (our emphasis") become irritating or distressing for Council officers. As such, the Commissioner was satisfied that reg.12 (4)(b) was engaged.
8. Turning then to the public interest test, the Commissioner noted the presumption in favour of disclosure and the importance of transparency and accountability for public authorities. The Appellant added that it would go "*completely against the public interest for this kind of gross misconduct to go unchallenged*". On the other hand, the Commissioner recognised the level of disruption that had already been occasioned to the Council, and the importance of allowing the Council to undertake routine business without disproportionate disruption. The Council's conduct, she felt, has already been investigated by the Ombudsman, and further information, in her view, will not progress the sum of knowledge about these issues beyond the already extensive correspondence.
9. The Commissioner was clear that she could not assess whether there has been maladministration or other wrongdoing; her role is limited to considering whether the suspicion of wrongdoing creates a public interest in disclosure. Her view was that the issue of maladministration has been extensively investigated by the Ombudsman and by the Council even after the Ombudsman's ruling. On balance therefore, she felt the public interest lies in protecting public resources from being diverted disproportionately to deal with an issue that has been examined

exhaustively, and the Commissioner concluded that the Council was correct in using the exemption.

GROUND OF APPEAL AND APPELLANT'S SUBMISSIONS

10. The Appellant provided a lengthy submission in support of his appeal, but broadly there are five grounds of appeal:

- i. The Commissioner was too willing to accept the Council's incorrect and insufficient submissions;
- ii. The Council had not honoured its own complaints procedure, and it should explain how the process failed and provide assurances that similar failings will not occur again;
- iii. The Council had not addressed concerns about the conduct of its officers and, given that the Council's responses were misleading or untrue, the Appellant could not be seen as vexatious;
- iv. The value of the request outweighs the burden, which would not have been occasioned but for the Council's own obdurate conduct;
- v. The public interest favours disclosure, especially because there is "*so much local unrest and distrust of planning*" in the local area that the Council has failed to allay.

11. The Appellant also submitted a solicitor's letter and further, more detailed evidence of the chronology of his interactions with the Council, noting particularly that a number of named Council employees with whom he had had disappointing interactions had left the Council shortly after his correspondence with them. He also explained that he had attempted to gain information on the conduct of the case officer in charge of the application through the Council's HR department. He had pursued his claim through two MPs, and stated that the Council had invited him to a face-to-face meeting in which he was given the opportunity to present his case and all his evidence. His complaint was that the Council was permitted to investigate itself, and the Ombudsman's processes meant that it refused to investigate the matter adequately. His point about the wider public interest was that if the planning system for the Council is so defective that it permits fraudulent applications to be made and passed without intervention, it must be exposed and reformed, and

public employees must not be permitted to engage in misleading or fraudulent conduct.

COMMISSIONER'S RESPONSE

12. The Commissioner reiterated the comments made in *Craven v ICO and DECC* [2012] UKUT 442 (AAC) at para.30 to the effect that the concept of 'manifestly unreasonable' under EIR is essentially the same as 'vexatious'. She also referred to Arden LJ's comments in *Dransfield & Craven v ICO* [205] EWCA Civ 454 in which she described the distinction between manifestly unreasonable under EIR and vexatious under FOIA as "*vanishingly small*".
13. Considering then what vexatiousness is deemed to mean, the Commissioner cited the four broad themes identified by Judge Wikeley in *Dransfield* [2012] UKUT 440 (AAC): burden on the authority, requester's motive, request value or purpose, and any harassment or distress occasioned.
14. The Commissioner dealt with the burden and value together, as the Appellant did in what the Commissioner considered to be the fourth ground of appeal. She was satisfied that the burden on the Council was significant and long suffered. She considered that the Appellant's line of questioning has been pursued beyond the point of usefulness, and the wider public interest is extremely limited.
15. Regarding the Appellant's complaints about the Council and its officers' conduct, the Commissioner stated that the Council's position was that it was legally obliged to act in the manner that it did in the course of the planning application to which the Appellant referred. She therefore concurred that the Appellant's repeated correspondence with the Council on this matter "*could only create meaningless work*". The Appellant's motive may be *bona fide* but the Commissioner considered that it was a personal interest in the outcome of the planning application rather than a request with a wider public interest. There is, the Commissioner maintains, no suggestion that the allegations of misconduct have any merit, and as she feels the issues have been extensively investigated, there would be little to be gained from responding to the request, as the Appellant is "*already aware of the Council's position*".
16. The Commissioner also added that the Council could have relied upon the personal data exceptions at reg.12 (3) and 13 in regards to the aspects of the

request that invited comment on the conduct or investigation of a named employee.

TRIBUNAL FINDINGS

17. The Tribunal concurs that this matter falls within the ambit of the EIR; the request concerns the state of the Environment through the Council planning application process, and the Council's policies and activities for the management of this issue. This is clearly an important issue for the Appellant and the local area, and the Tribunal find that the motive is serious and public-spirited.
18. Considering the *dicta* of Judge Wikeley in *Craven* at para 30, we accept that the concept of 'manifestly unreasonable' in EIR is essentially the same as 'vexatious'. With that in mind, we remind ourselves of the four broad themes identified by Judge Wikeley in *Dransfield* [2012] UKUT 440 (AAC): burden on the authority, requester's motive, request value or purpose, and any harassment or distress occasioned.
19. The context of the case is essential for the consideration of these four themes. The Appellant has provided us with extensive documentation of his attempts to obtain information from the Council. Including a reference to the Ombudsman and subsequent costly legal advice on the shortcomings of that investigation by the Ombudsman. We pause here to note that this is precisely the situation in which FOIA and EIR were intended to apply, and attempts to acquire information explicitly through the statutory mechanisms when informal engagement has failed is not generally to be criticised.
20. In contrast to the evidence provided by the Appellant, the Tribunal has not received any significant evidence that would establish that the request would be unduly burdensome. We do not have sufficient evidence before us to persuade us that there is, or was a disproportionate or unjustified level of disruption, irritation or distress to the Council. We are not persuaded that there is harassment or genuine distress caused to the Public Authority. The Respondent accepts that the Public Authority could rely or have relied on regulations 12(3) and 13 if appropriate. We have stated above that we consider the motive for the request to be public-spirited and genuine. It raises questions of serious concern about the implementation and application of Council planning policy. We have not been persuaded that the Council did attempt to provide sufficient advice or assistance on how to amend or refine the request, as it is obliged to do under Regulation 9. We do not accept that

the tone of the request was so derisory or offensive as to justify its refusal. We are of the view that the Council should have at least provided advice and assistance to the Appellant as to how best to refine the request and/or provided further information as appropriate. We note that the Respondent accepts the Appellant's motive appears to be bona fide and there is no indication that his motive is maligned.

21. At the hearing of this appeal, the Appellant provided the Tribunal with a detailed explanation of his concerns as outlined in his Grounds of Appeal as set out above. He has provided us with correspondence from his Solicitor Gary Phillips, (dated 13 August 2019) to support his grounds of appeal. Inter-alia, in this correspondence his Solicitor expresses serious and apparently well-founded concerns about the decision of the Ombudsman. This in itself undermines the Respondent's reliance on the Ombudsman's findings (as expressed above) and in our view significantly enhances the weight to be given to public interest arguments in favour of the Appellant's request. On the submissions made by the Appellant before us we are further persuaded there is an important matter of wider public interest, which provides the serious motive of wider public concern in the subject matter of his request. In contrast to the evidence provided by the Appellant, the Tribunal has not received any significant or persuasive evidence that the request is manifestly unreasonable.

22. *Accordingly, in the circumstances and reasons referred to above we allow the appeal. [We therefore substitute the Commissioner's decision notice to the effect that the Council should issue a fresh response to the request of 6 April 2018 which cannot seek to rely on regulation 12(4)(b)]...*

Brian Kennedy QC

(First Tier Tribunal Judge)

Date of Decision: 02 October 2019

Date Promulgated: 03 October 2019

(Amended Para 22 by slip rule on 14 October 2019)