Neutral citation number: [2023] UKFTT 00205 (GRC)

Case References: EA/2022/0068, EA/2022/0072

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

**Heard by: determination on the papers**

**Heard on: 1 December 2022**
**Amended Decision given on: 01/03/2023**

**Before**

**TRIBUNAL JUDGE STEPHEN ROPER**
**TRIBUNAL MEMBER AIMÉE GASSTON**
**TRIBUNAL MEMBER ROSALIND TATAM**

**Between**

**(1) FIONA WATMORE (EA/2022/0068)**
**(2) HELEN BULLIVANT (EA/2022/0072)**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Decision:** Both appeals are Allowed

**Substituted Decision Notice:**

The Tribunal's Decision Notice in case references EA/2022/0068 and EA/2022/0072 is substituted for the Commissioner's Decision Notice reference IC-116753-L2W2 dated 1 March 2022 and Decision Notice reference IC-111939-T3K0 dated 1 March 2022, respectively.

*Substituted Decision Notice*

1) Witherley Parish Council shall make a fresh response to each of the Appellants' requests for information (namely, in the case of the First Appellant, the request for information dated 4 February 2021, as referred to in paragraph 10 of this decision and, in the case of the Second Appellant, the request for information dated 11 May 2021, as

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referred to in paragraph 21 of this decision).

2) Each of the fresh responses must make clear whether information within the scope of any parts of the relevant request is held and, if it is held, must either disclose such information or claim any relevant exemptions to disclosure.

3) The public authority must issue each fresh response within 20 working days (as defined in section 10(6) of the Freedom of Information Act 2000) of the date on which the Information Commissioner sends them notification of this decision in accordance with the Direction below.

4) Each such response will be subject to the rights given under s50 of the Freedom of Information Act 2000 (as applied by regulation 18 of the Environmental Information Regulations 2004) to make a new complaint to the Information Commissioner.

5) Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 (as applied by regulation 18 of the Environmental Information Regulations 2004) and may be dealt with as a contempt of court.

*Directions*

The Information Commissioner is directed to send a copy of this decision to Witherley Parish Council within 28 days of its promulgation or an unsuccessful outcome to any appeal that is made.

## REASONS

### Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

| | |
|---|---|
| Appeals: | The Watmore Appeal and the Bullivant Appeal. |
| Appellants: | The First Appellant and the Second Appellant. |
| Bullivant Appeal: | The appeal referred to in paragraph 6. |
| Bullivant Decision Notice: | The Decision Notice of the Information Commissioner dated 1 March 2022, reference IC-111939-T3K0, relating to the Bullivant Request. |
| Bullivant Request: | The request for information made by the Second Appellant dated 11 May 2021, as referred to in paragraph 21. |
| Commissioner: | The Information Commissioner. |
| Council: | Witherley Parish Council. |
| Decision Notices: | The Watmore Decision Notice and the Bullivant Decision Notice. |

| | |
|---|---|
| ECHR: | The European Convention on Human Rights. |
| EIR: | The Environmental Information Regulations 2004. |
| First Appellant: | Fiona Watmore. |
| FOIA: | The Freedom of Information Act 2000. |
| HBBC: | Hinckley & Bosworth Borough Council. |
| HBBC Report: | The Regulation 14 Stage consultation response (under the NDP Regulations) by HBBC to the Council, published on the Council's website on 27 January 2021 titled "Consultation response to the draft Witherley Neighbourhood Plan – Pre Submission (Regulation 14)" and referred to in the Decision Notices. |
| NDP: | The Councils' proposed neighbourhood development plan (relevant for the purposes of the NDP Regulations) which is the subject of some of the Requested Information. |
| NDP Regulations: | The Neighbourhood Planning (General) Regulations 2012. |
| Public Interest Test: | The test applicable pursuant to regulation 12(1)(b) of the EIR (as set out in paragraph 55). |
| Requests: | The Watmore Request and the Bullivant Request. |
| Requested Information: | The information which was requested by way of the Watmore Request and/or the Bullivant Request (as the context permits or requires). |
| Second Appellant: | Helen Bullivant. |
| Watmore Appeal: | The appeal referred to in paragraph 5. |
| Watmore Decision Notice: | The Decision Notice of the Information Commissioner dated 1 March 2022, reference IC-116753-L2W2, relating to the Watmore Request. |
| Watmore Request: | The request for information made by the First Appellant dated 4 February 2021, as referred to in paragraph 10. |

2. We refer to the Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notices, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Requests and the date of the Appellants' subsequent complaints to the Commissioner.

3. Unless the context otherwise requires (or as otherwise expressly stated), references to

numbered paragraphs are to paragraphs of this decision so numbered.

## Introduction

4. The Tribunal heard two joined appeals: case references EA/2022/0068 and EA/2022/0072. This decision relates to both appeals.

5. Case reference EA/2022/0068 is an appeal against the Watmore Decision Notice, which held that, although the Council had determined (on review) that the Watmore Request was vexatious for the purposes of section 14(1) of FOIA, the EIR applied instead and that the Watmore Request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Watmore Decision Notice concluded that the Public Interest Test favoured maintaining the exception in regulation 12(4)(b) of the EIR and accordingly that the Council was entitled to withhold the Requested Information. The Watmore Decision Notice did not require the Council to take any steps.

6. Case reference EA/2022/0072 is an appeal against the Bullivant Decision Notice, which held that, although the Council had determined (on review) that the Bullivant Request was vexatious for the purposes of section 14(1) of FOIA, the EIR applied instead and that the Bullivant Request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Bullivant Decision Notice similarly concluded that the Public Interest Test favoured maintaining the exception in regulation 12(4)(b) of the EIR and accordingly that the Council was entitled to withhold the Requested Information. The Bullivant Decision Notice did not require the Council to take any steps.

## Mode of Hearing

7. The parties in each of the Appeals consented to them being determined by the Tribunal without a hearing.

8. The Tribunal considered that the Appeals were suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way for each of the Appeals.

## Background to the appeals

9. The background to the Appeals is as follows.

The Watmore Appeal

***The Watmore Request***

10. On 4 February 2021[1], the First Appellant sent an email to the Council, requesting information in the following terms:

    "*A request is made under the Freedom of Information Act for the following;*

[1] The Watmore Decision Notice erroneously referred to the Watmore Request as being dated 8 February 2021; this error was recognised by the Commissioner in his response to the Watmore Appeal.

*a) The minutes of the NDP Steering Group 13/11/2019 - Under the Heading of Matters arising mention is made of The Housing and Build Environment Theme Group issuing a statement in which they say that they 'reject any suggestion that they would demonstrate bias in their deliberations and that they will continue to adhere to the Parish Council's Code of Conduct and the Nolan Principles'.*
*This comment appears to relate to the previous meeting of the NDP Steering Group held on the 9th October 2019. Please disclose all documents and transcripts that explain why the Housing and Build Environment Theme Group felt is necessary to issue this statement.*

*b) The Terms of Reference for the Steering Group have been published on the NDP pages of the Parish Council's Web site. However, on reviewing the minutes it seems input was made to the Terms of Reference by both the representative from RCC as well as by YourLocale. Please therefore disclose copies of all versions of the Terms of Reference plus all the professional advice provided by RCC, YourLocale and any other external consultants, on the content of the Terms of Reference.*

*c) Please provide a copy of the advice or source information that the Parish Council were provided with which suggested and/or recommended that the minutes and information provided by the Theme Groups might be exempt from enquiries under The Freedom of Information Act, given that the legislation provides for the redaction of any commercially sensitive material or information.*

*d) The Parish Council Website only displays the NDP Steering group minutes. Please supply copies of all the Steering Group Agenda as well as the Agenda and Minutes for the three Theme Groups.".*

***The Council's reply and subsequent review***

11. The Council responded by letter dated 8 March 2021. It stated that no information was held in respect of parts a to c of the Watmore Request. In respect of part d of the Watmore Request, the Council stated that it had printed the information it held and that it had provided that with its reply.

12. The First Appellant contacted the Council by email on 15 March 2021 requesting an internal review of the Council's response. Before receiving a response from the Council to that email, the First Appellant sent a further email to the Council on 11 April 2021 requesting a second internal review of the Council's response, based on concerns that the First Appellant had in respect of: (a) the completeness and accuracy of the information which was provided in response to the Watmore Request; and (b) documentation which was missing from that response.

13. On 12 July 2021, the First Appellant complained to the Commissioner about the way her request for information had been handled. At this point the Council had not responded to the First Appellant's requests for internal reviews.

14. The Council wrote to the First Appellant on 14 July 2021. Its letter did not specifically refer to the Watmore Request, nor to the reviews that had been requested by the First Appellant. However, the letter stated that the Council considered that the First Appellant's recent requests for documents under FOIA were vexatious and gave some explanations in support of that view.

15. On 28 July 2021, the Commissioner contacted the First Appellant about her complaint

dated 12 July 2021 and asking for further information. On the same date, the First Appellant sent several emails in response to the Commissioner, providing various documents and additional information, including certain further submissions relating to her complaint. In essence, the First Appellant considered that the Council had incorrectly responded to the Request (in respect of the information it had provided) and had erroneously determined that the Watmore Request was vexatious. The First Appellant also referred to previous requests to the Council for information to be provided under FOIA, which she stated were met with a belated or inadequate response and sometimes with no response at all. She stated that the Commissioner had already issued four "Enforcement Orders" against the Council. There was further correspondence between the First Appellant and the Commissioner in August and September 2021, in which (amongst other things) the First Appellant provided additional information and made further submissions to the Commissioner, including copies of email correspondence between the First Appellant and HBBC (which we understand to be the borough council which would be the recipient of a NDP submission from the Council).

16. Various additional emails were exchanged between the First Appellant and the Commissioner between November 2021 and February 2022, which included the First Appellant making further submissions in connection with her complaint and providing additional information. The correspondence in November 2021 included a document from HBBC providing updates on the local plan and neighbourhood planning and information on the population sizes for the 25 parishes in the borough area.

*The Watmore Decision Notice*

17. In investigating the complaint made by the First Appellant, the Commissioner wrote to the Council on 7 December 2021 setting out the Commissioner's views regarding the Requested Information being environmental information pursuant to the EIR, inviting the Council's views if it disagreed with that assessment and requesting (amongst other things) information relating to the Council's assessment that the Watmore Request was vexatious/manifestly unreasonable.

18. The Council responded by providing various additional information to the Commissioner, including information on the background to the Watmore Request (and other requests) and the Council's view of the First Appellant being part of a 'campaign' group acting against the Council, information relating to the Council's resources and time spent dealing with requests for information, copies of flyers circulated to local residents in connection with the NDP and logs relating to (amongst other things) previous requests for information made to the Council and the actions it had taken in connection with those requests.[2]

19. In responding to the Commissioner, the Council maintained its position that FOIA applied to the Requested Information, submitting that the NDP was not environmental information and that the EIR did not apply and setting out its reasons for those views. The Council also maintained that the Watmore Request was vexatious pursuant to

[2] We should note that the log appeared to contain embedded documents and that some of those documents were not separately included in the bundle, but that we did not consider those documents to be necessary for our considerations in the Watmore Appeal (particularly given that in most instances there was a summary explanation provided of the document in question and it was not material to the matters before us).

section 14(1) of FOIA.

20. Following his investigations, the Commissioner decided, by way of the Watmore Decision Notice, that the Watmore Request fell within the scope of the EIR, that regulation 12(4)(b) of the EIR was engaged, that the Public Interest Test favoured maintaining the exception in regulation 12(4)(b) of the EIR and accordingly that the Council was entitled to withhold the Requested Information.

The Bullivant Appeal

***The Bullivant Request***

21. On 11 May 2021, the Second Appellant sent an email to the Council, requesting information in the following terms:

"*I would like to submit a Freedom of Information request for:-*
1. *The minutes taken by the Conway's*[3] *during the meeting with Highways England/ Agency in May 2019.*
2. *The subsequent report written by the Conway's drawing the findings of the meeting together.*
3. *Evidence of this report being circulated to all Steering Group members.*
4. *Evidence this report was discussed and minted at a Steering Group meeting.*
5. *Details of any contact with any representative of Highways England/ Agency since May 2019 on any Witherley Parish Matter, including date, time duration of contact, who was contacted and details discussed during the contact.*".

***The Council's reply and subsequent review***

22. The Second Appellant complained to the Commissioner on 10 June 2021 that no response had been received from the Council. Following the Commissioner's intervention by way of letter to the Council dated 18 June 2021, the Council responded to the Second Appellant by letter dated 23 June 2021. It stated that no information was held for parts 1 to 3 of the Bullivant Request. In respect of part 4 of the Bullivant Request, the Council stated: "*An update was given at the Steering Group meeting minuted as 14th May 2019 and available online*". In respect of part 5 of the Bullivant Request, the Council refused to provide the information requested on the basis that it was considered to be a "fishing expedition" and a vexatious request under section 14(1) of FOIA.

23. The Second Appellant contacted the Council by email on 28 June 2021 requesting an internal review of the Council's response.

24. On 5 July 2021, the Second Appellant contacted the Commissioner in connection with her various requests to the Council for information and stating that the Council had still not responded to her request for an internal review in connection with the Bullivant Request (albeit the request for a review was only made on 28 June 2021).

25. The Council wrote to the Second Appellant on 14 July 2021. Its letter did not specifically refer to the Bullivant Request, nor to the reviews that had been requested by the Second Appellant. However, the letter stated that the Council considered that

[3] This was referring to Kay Conway, Chair of the NDP Steering Group and Councillor Brian Conway, Chair of the Council.

the Second Appellant's recent requests for documents under FOIA were vexatious and gave some explanations in support of that view, including referring to 27 other requests for information which had been made by the Second Appellant since 11 May 2021.

26. On 16 July 2021, the Second Appellant contacted the Commissioner complaining about her requests to the Council for information and making various submissions, including in respect of the Bullivant Request and the Council's position regarding it being vexatious.

27. Some additional emails were exchanged between the Second Appellant and the Commissioner between July 2021 and August 2021, and then again in December 2021 and February 2022, in connection with the Bullivant Request and other requests for information made to the Council by the Second Appellant, which included the Second Appellant making further submissions in connection with her complaint and providing additional information.

*The Bullivant Decision Notice*

28. In investigating the complaint made by the Second Appellant, the Commissioner wrote to the Council on 7 December 2021 requesting information relating to the Council's assessment that the Bullivant Request was vexatious for the purposes of section 14(1) of FOIA. Unlike his letter written in connection with the investigation of the Watmore Request (written on the same date and prepared by the same Case Officer), the Commissioner made no mention of the possibility that the Requested Information might constitute environmental information and therefore fall within the EIR[4] rather than FOIA.

29. The Council responded to the Commissioner by letter dated 6 January 2022. The Council provided various additional information, including information on the background to the Bullivant Request (and other requests) and the Council's view of the Second Appellant being part of a 'campaign' group acting against the Council, details of some alleged disputes between the Second Appellant and certain individuals within the Council, information relating to the Council's resources and time spent dealing with requests for information, copies of flyers circulated to local residents in connection with the NCP and logs relating to (amongst other things) previous requests for information made to the Council and the actions it had taken in connection with those requests.[5] The Council's Clerk also explained her views on the pressures and difficulties she encountered in connection with various matters relating to the NDP and the numerous requests for information the Council had received, particularly due to her limited working hours.

30. The Council's response to the Commissioner maintained the Council's position that the Bullivant Request was vexatious pursuant to section 14(1) of FOIA.

[4] For completeness, we note that the letter which was produced by the Commissioner appeared to be based on a template where various information was marked in square brackets for population or deletion, with one of those sections still containing a reference to 'EIR'. However, no further mention was made of the EIR and evidently the letter was intended to address only FOIA.

[5] We should note that some of the contents of the log provided by the Council were redacted (in respect of certain personal data), but we did not consider that we would need to see any of the redacted content for the purposes of our consideration of the matters before us. As with the log provided in connection with the Watmore Request, there also appeared to be some embedded documents which were not separately included in the bundle, but we did not consider those documents to be necessary for our considerations in the Watmore Appeal (particularly given that in most instances there was a summary explanation provided of the document in question and it was not material to the matters before us).

Unsurprisingly, given that (as mentioned in paragraph 28) the Commissioner did not raise the issue of the EIR, the Council made no submissions regarding the application of the EIR or whether the Requested Information comprised environmental information for the purposes of the EIR.

31. Following his investigations, the Commissioner decided, by way of the Bullivant Decision Notice, that the Bullivant Request fell within the scope of the EIR, that regulation 12(4)(b) of the EIR was engaged, that the Public Interest Test favoured maintaining the exception in regulation 12(4)(b) of the EIR and accordingly that the Council was entitled to withhold the Requested Information.

## The appeals

32. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIR, subject to certain modifications.

33. The Decision Notices in the Appeals were given in response to the Appellants' respective complaints to the Commissioner relating to the Council's refusal to provide the Requested Information. At the time of the complaints, only FOIA was referred to by the Appellants but, as the Commissioner decided that the EIR applied to the Requested Information, both of the Decision Notices were issued pursuant to the EIR.

34. The Appeals are therefore appeals against the respective Decision Notices made by the Appellants pursuant to the EIR, in accordance with section 57 of FOIA as applied by regulation 18 of the EIR.

35. We consider that it is important to stress what is outside of the scope of the Appeals. The Appeals are not about the Council's compliance with the NDP Regulations, nor about its compliance with its own policies and procedures. The Appeals are also not about the merits of the NDP, nor the conduct of any individual Councillors or staff working for the Council. Any observations and findings we may make in connection with any of those matters are relevant only for the purposes of determining the Appeals before us (in accordance with the remit and powers of the Tribunal to which we refer below) and they should not be relied on for any other purposes.

36. Further, we note that the Commissioner has, in correspondence with both Appellants in connection with his investigations preceding the Decision Notices, indicated that the Decision Notices are to be used as 'lead' cases and that the outcome was likely to have significance in relation to a number of other complaints which the Appellants have made to the Commissioner in connection with other requests for information they have made to the Council. A similar point was made by the Commissioner in each of the Decision Notices (in the 'other matters' section). We reiterate that the observations and findings we make are for the purposes of the Appeals only and are not related to any other investigations undertaken or to be undertaken by the Commissioner, even if there are similarities or connections in any of the subject matter. Our remit is limited to determining the Appeals in respect of the Decision Notices only.

### *The grounds of appeal*

37. The grounds of appeal for both Appellants were based on five topics, the headings of which were written in identical terms (save for the fifth heading). The headings (taken

from the Bullivant Appeal) are as follows:

*"1. Contradiction by the ICO of the intention of the European Commission and UK Parliament (by EU treaty) concerning the adoption and application of the Environmental Information Regulation (EIR) 2004.*

*2. Failure by the ICO to distinguish in law between Freedom of Information (FoI) Act 2000 and EIR 2004, neglecting appropriate consideration of EIR 2004 application to Witherley Parish Council's (WPC) behaviour (non-publication).*

*3. ICO misstates the respective legal roles and constraints of Regulation 14 and 16, incorrectly postulating that the Regulation 16 stage provides a public consultation opportunity highly similar to that of Regulation 14, so that the FoI request was premature.*

*4. European Convention on Human Rights 1950 treaty breaches arising from errors in law 1-3: consequent 'vexatious request' finding unlawfully denies citizens' rights under Arts. 6(1) [civil proceedings – unfair trial] and 10(1) [freedom to receive information and ideas].*

*5. Case law: excessive weight given to Betts case under EIR 2004."*.

38. Heading five in the Watmore Appeal differed from the Bullivant Appeal by also stating "*insufficient weight given to Thackery 'justified persistence' similarities*".

39. The Appellants each provided extensive submissions and documentation in support of the respective Appeals. Whilst acknowledging all of the contents of each Appellant's grounds of appeal, for expediency we set out below the Commissioner's summary of them in his response to one of the Appeals. We use this to cover both Appellants' grounds of appeal, as there is considerable duplication in the grounds of appeal and consequently in the Commissioner's summary of them. There are some differences, but we consider those not to be material for current purposes. We have taken the Commissioner's summary from his response to the Watmore Appeal, as it is more detailed than the summary in the Bullivant Appeal and it refers to some other points made by the Appellants in their submissions which extend beyond the five headings set out above. The Commissioner's summary of the grounds of appeal in the Watmore Appeal is as follows (retaining bold text):

"**a. *Intention of European Commission and UK Parliament appears to be contradicted by ICO ruling and its implications.***

*The Appellant considers that the Council's failure to provide the information requested defies the intentions of Article 3 of the EC Directive 2003/4/EC which is implemented by the EIRs. Furthermore the ICO failed to apply the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391) ("the EIR Code of Practice") to the Council's handling of this request.*

*The Appellant also considers that the Council's failure to provide the information requested is contrary to its own terms of reference and Standing Orders.*

*The Appellant considers that the Commissioner's failure to take into account the intention of the legislation will lead to smaller public authorities being in a position to withhold information and has led to an imbalance in the public interest test carried out.*

***b. Failure to distinguish between FOIA and EIR requirements (ie an absolute breach***

***if not published promptly under EIR versus less strict timing under FOIA)***

*The Appellant acknowledges that there are critical differences between FOIA and the EIR which she has said is emphasised and addressed in the EIR Code of Practice. She considers that the EIR requirements are much stricter than FOIA even if the clauses concerning grounds for rejecting requests are similar.*

*She considers that the information she requested should have been made publicly available irrespective of a request under FOIA or EIR.*

*Due to the Council's obligations under the EIR Code of Practice that information is published promptly and proactively, the ICO was incorrect to determine that the Council (in accordance with the Hinckley and Bosworth Borough Council (HBBC) report) had the opportunity to ensure openness and transparency subsequent to the Regulation 14 consultation (DN [49]-[51]). This finding meant the Commissioner incorrectly balanced the public interest test in this case.*

*Part 111 (Provision of Advice and Assistance) paragraph 8 of the EIR Code of Practice diminishes the importance of section 12 FOIA 'disproportionate cost and burden'.*

*Part Ill (Provision of Advice and Assistance) paragraph 8 of the EIR Code of Practice sets out that if an applicant's requests are too general (and 'lengthy'), the public body - here the Council - has a duty to help refine the request or series of requests.*

*Unlike FOIA, the EIR does not require requests or clarifications to be made in writing Part I paragraph 2 and Part III, paragraph 15 of the EIR Code of Practice. This flexibility under EIR means the request should not have been deemed manifestly unreasonable.*

*Part III paragraph 16 of the EIR Code of Practice explicitly states that, for the purposes of EIR enforcement, an authority must not determine the aims or motivation of the applicant. Paragraph 21 also states that there are no special provisions for 'campaigns' being considered as 'manifestly unreasonable' grounds for refusal. Contrary to paragraphs 16 and 21, the Council submitted arguments that the request could be rejected because the Applicant was part of a campaigning group which sought 'to bring down the council.'*

*The Commissioner was incorrect to accept arguments relating to costs and burden as this breaches various aspects of the EIR Code of Practice.*

*Regulation 7 EIR allows for an extension up to 40 working days per request specifically in order to process complex and 'high volume' requests. This was never considered by the Council and was not addressed by the Commissioner under cost and burden, or in all the circumstances of the case.*

***c. Misinterpreting the respective legal roles and constraints of Regulation 14 and 16 of the NDP Process***

*The ICO has misinterpreted the respective legal roles and constraints of Regulation 14, 15 and 16 of the NDP Process. The ICO incorrectly postulates that the Regulation 16 stage provides a public consultation opportunity very similar to that of Regulation 14. The Appellant asserts that the only stage at which a full public consultation can take place is at Regulation 14.*

***d. The ICO appears not to have been notified by [the Council] that it was attempting to rush through the NDP at all stages to regulation 16 completion as quickly as***

***possible.***

***e. ICO misperceptions concerning the HBBC report - related issues of evidence***

*The Commissioner's perception of the HBBC report suggesting that documents could be released no earlier than regulation 16 is incorrect.*

***f. ECHR breaches arising from domestic law errors by the Commissioner.***

*The Decision Notice breaches the European Convention on Human Rights. [The Appellant] considers that there are two clear grounds of such potential unlawfulness, Article 6(1) - denial of fair trial (civil proceedings) and Article 10(1) - denial/disproportionate restriction regarding freedom to receive information and ideas.*

***g. Case law: insufficient weighting (Thackery 'justified persistence') and failure to address distinctions (Sett's case) under EIR 2004***

*The Commissioner failed to give sufficient weight to the similarities between this request and Thackeray v Information Commissioner (EA/2011/0082 and 0083).*

*The Appellant considers her request is distinguishable to Betts v Information Commissioner, (EA/2007/0109) due to the fact that the Council had not disclosed information in accordance with agreed Terms of Reference (outside of EIR), the information requested had no wider public interest outside the specific interest of the requester and there was no evidence of secretive or hostile behaviour on the part of the public authority.*

***h. Other matters***

*The Appellant raised 'other matters' in her grounds of appeal including issues with the Council's website.".*

40. For the reasons referred to, each of the Appellants considered that the respective Decision Notices involved errors of law. The Appellants argued that the Commissioner was incorrect to determine that the exception in regulation 12(4)(b) of the EIR was engaged but they also argued that, in any event, the public interest in favour of disclosure outweighed the public interest in maintaining the exception in their cases.

***The Commissioner's responses to the Appeals***

41. We do not set out here full details of the Commissioner's response to each Appeal, whilst acknowledging all of their contents. The Commissioner relied on the reasons given in each of the Decision Notices in addition to the points raised in his responses. In summary, the Commissioner's position is as follows in respect of the grounds of appeal for both Appeals. Again, we refer to the summary of the grounds of appeal we noted above in respect of the Watmore Appeal (and using the same lettering), on the basis that all material points are replicated across both Appeals:

    a. The Commissioner correctly applied the EIR and took into account the intention of the underlying European Council Directive (which we refer to below). It is outside of the Commissioner's remit to determine whether the Requested Information should be published in accordance with other obligations or requirements outside of the EIR. In applying the Public Interest Test, all relevant

considerations were taken into account.

b. The Commissioner recognised that there are differences between FOIA and the EIR but the application of the EIR in respect of manifestly unreasonable requests operates in the same way as a vexatious request under FOIA. All appropriate factors were taken into account in determining whether regulation 12(4)(b) of the EIR was engaged and when balancing the Public Interest Test.

   The parts of the EIR Code of Practice referred to by the Appellants were not relevant. This was because they relate to the provision of advice and assistance and clarifying requests, which were not applicable in the context of the Requests. The Council refused to provide the Requested Information on the basis that the Requests were vexatious/manifestly unreasonable due to the previous context and history; the Council did not refuse based upon costs or upon burden alone and there was no indication that the Council needed clarification regarding the information sought.

   The Commissioner was correct to consider the size of the Council and its limited resources in assessing the burden imposed by each of the Requests. The Commissioner accepted the Council's position that it has been placed under a disproportionate and unjustified level of disruption by each of the Requests and that this impacted on its ability to function.

   Extending the time to comply with either of the Requests under regulation 7 of the EIR was not a relevant factor given that the Council refused to provide the Requested Information on the basis that the Requests were vexatious/manifestly unreasonable.

c. The Commissioner acknowledged that HBBC recognised the Council's failings regarding transparency and openness at the 'Regulation 14' stage of the NDP process (namely regulation 14 of the NDP Regulations), however the Commissioner noted that the HBBC consultation response explained that there was still time (at the time of the Requests) for the Council to ensure full transparency and openness within the NDP process. The Commissioner was correct to take this into account when assessing all of the circumstances of the case to determine whether the Requests were manifestly unreasonable.

d. It was outside of the Commissioner's remit to assess the Council's actions within the NDP process, but he took into account the findings of the HBBC Report when assessing all of the circumstances of the case.

e. The Decision Notice does not suggest that documents could not be released earlier than 'Regulation 16' stage of the NDP process (namely regulation 16 of the NDP Regulations).

f. Article 10 of the ECHR does not have a bearing upon the Decision Notice in accordance with the case of *Moss v Information Commissioner and the Cabinet Office* ([2020] UKUT 242), in which the Upper Tribunal determined that Article 10 of the ECHR does not create a right in domestic law to request information from a public authority and does not have any bearing upon FOIA.

   The Decision Notice does not contravene the Appellant's rights under Article 6

ECHR and the Appellants have exercised their right to appeal the Decision Notice to the Tribunal.

g. The Commissioner considered the case of *Betts v Information Commissioner* (EA/2007/0109) and the arguments of the Appellants and the Council in relation to that case in his assessment of matters pertaining to the Decision Notice. The Commissioner determined that the volume of requests for information, coupled with the volume of emails from the Appellants imposed a disproportionate and unjustified burden on the Council.

   With regard to the case of *William Thackerary v Information Commissioner* (EA/2011/0082, EA/2011/0083), the Commissioner did consider whether the persistence of each Appellant was reasonable on the facts of each case. The Commissioner considered that, because the HBBC Report had already suggested a timeframe for the Council to make the relevant information available, the Requests were not proportionate.

h. The 'other matters' raised by the Appellants fell outside of the remit of the Decision Notice and therefore outside of the remit of the Tribunal.

42. Fundamentally, the Commissioner's position is that:

    a. the EIR (not FOIA) applied to the Requested Information;

    b. whilst he acknowledged the serious purpose and value behind the Requests, he considered them to be manifestly unreasonable for various reasons - including due to the volume of previous requests and correspondence, the size of the Council and the Council still being within the timeframes referred to in the HBBC Report to make the relevant information available at the time of the Requests;

    c. regulation 12(4)(b) of the EIR was therefore correctly engaged; and

    d. in respect of the Public Interest Test, the public interest in the Requested Information and the factors advanced by the Appellants are insufficient to outweigh the "very strong" public interest in maintaining the exception, given the burden placed on the Council by the Requests.

***The Appellants' reply to the Commissioner's responses***

43. Each of the Appellants' replies to the Commissioner's responses contained detailed and lengthy submissions on various points. The submissions of both Appellants were largely written in identical terms, although there were some differences in the points raised and documents referred to. In addition, many of the submissions were extensions of, or otherwise related to, points which had already been raised in the Appellants' grounds of appeal. Whilst acknowledging all of the specific points made by the Appellants, we consider that, for current purposes, the material points raised in their replies can appropriately be summarised as follows:

    a. there are concerns about information being withheld or miscommunicated to the public in connection with the NDP and these concerns were justification for the Requests and the persistence in seeking various information from the Council;

b. members of the Council were engaged in a campaign to discredit those who the Council considered were involved in a campaign against it;

c. similarities between the circumstances in the appeals and those in the case of *Thackeray* were insufficiently considered by the Commissioner;

d. in contrast, the Commissioner mistakenly placed excessive reliance upon the *Betts* case and (in respect of the Bullivant Appeal) the quotation cited from the case of *Dadswell v Information Commissioner* (EA/2012/0033) in the Bullivant Decision Notice was "*an 'absolutist, single (numerical) factor' isolated from its context - which contradicted the Commissioner's own recognition of the need in law for a 'holistic approach'*";

e. additional First-Tier Tribunal cases – namely the cases of *Marsh v ICO* (EA/2012/0064) and *John McGoldrick (obo Mersey Tunnels Users Association) v Information Commissioner* (EA/2017/0103) - supported the Appellants' position and there are similarities between the facts of those cases and the circumstances relevant to the Appeals;

f. no repeated requests were made for the same information, therefore distinguishing the current circumstances from those in the case of *Coggins v ICO* (EA/2007/0130);

g. the Commissioner failed to take into account (or did not adequately take into account) the Appellant's representations that requests for information were being submitted on behalf of a number of local residents seeking transparency and accountability, despite the *McGoldrick* case (which the Appellants also stated was referred to on the Commissioner's website as an example of a case where a request was not vexatious when seen in the context of previous requests);

h. there was no clear empirical evidence that the Council was placed under a disproportionate and unjustified level of disruption associated with its size and administrative load, or that the Requests adversely impacted on its function;

i. the Commissioner placed undue reliance on the submissions of the Council regarding the burden placed on it by the Requests and there was evidence that the Clerk to the Council had sometimes worked more hours than were notified to the Commissioner, but there was no particular evidence to demonstrate that the Requests contributed to any disruption in its normal workload;

j. the Clerk had confirmed at a Parish Council meeting on 10 June 2021 that she has all the information she needs to respond to FOIA requests submitted in respect of the NDP, which challenges the notion that the volume of correspondence and size of authority risked or caused disruption to the Council's functions;

k. there was no "aggressive correspondence" between the Appellants and the Council in connection with the Requests;

l. the workload of the Clerk to the Council was in fact generally related to the NDP process and the large number of comments which had been received by residents in connection with that; many of which related to there being a lack of transparency in the process;

m. the Clerk's workload was also linked to inefficiencies in working practices and were not related to the volume of the Appellants' correspondence;

n. (in respect of the Bullivant Appeal) the assessment by the Council of the Bullivant Request being a "fishing expedition" was wrong; the Commissioner's guidance on a 'scattergun approach' "*defines such a request as 'part of a completely random approach, lacks any clear focus, or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed'*" – in contrast, the Bullivant Request was specifically focused on very limited records which "*required only readily-available Councillor/senior NDP contacts to check*" and it has a clear purpose (namely "*verification of all documents relating to Highways England-Conway's/WPC to define a relationship of public interest*");

o. the Council had routinely failed to meet various legally required publication deadlines, in breach of its own Standing Orders;

p. the Council had not published certain information relating to environmental matters, potentially in breach of the EIR;

q. the Commissioner misinterpreted the NDP Regulations and the consultation phases that take place pursuant to the NDP Regulations, such that the Commissioner was wrong to consider that (in effect) residents have the same opportunities to review and input on documents at different stages of the process and that the Council still therefore had the opportunity to remedy its failings regarding transparency and openness at earlier stages;

r. it was also wrong of the Commissioner to conclude that, because there was still this perceived remedial opportunity, the Requests were premature and therefore vexatious;

s. the Commissioner failed to adequately appreciate that because 'Regulation 14' of the NDP process (namely regulation 14 of the NDP Regulations) was completed in January 2021 it meant that there had been no progressive publication already of "hundreds of documents" for approximately three years – and this failure was incompatible with the legislative intentions of ensuring that a population was "fully informed and engaged with environmental matters";

t. the Commissioner offers no explanation of how this is legally compatible with the EIR requirement for 'progressive publication' outlined in the Appeals (even if there were to be a statutory timeframe for submitting NDPs as wrongly suggested by the Commissioner);

u. the Commissioner's interpretation of the EIR is inconsistent with the legislators' intention regarding 'progressive publication' and the Commissioner should not permit the Council to delay the publication of extensive records relating to environmental information;

v. the Commissioner was wrong to cite the case of *Dransfield* in "an absolutist sense" and he did not take into account distinctions between that case and issues in respect of the Appeals;

w. upholding the Decision Notices would effectively reward public bodies for

hiding documents as they could then argue that requests for that information were vexatious rather than disclosing the information;

x. the Commissioner was wrong to dismiss the parts of the EIR relating to advice, assistance and clarifying requests and has been inconsistent in his reasons, including because: (i) the Commissioner's response stated that the Council has not refused the Requests on the basis of cost and burden, yet the Decision Notices relied significantly on identifying and applying those factors; and (ii) the Commissioner's response argues that the Council did offer assistance (which is disputed in any event);

y. the Appellants have previously encountered difficulties obtaining documents from the Council and decision notices have previously been issued by the Commissioner against the Council, yet the Commissioner has not addressed the evidential nature of those decision notices nor given any explanation regarding them;

z. the Council has misrepresented its circumstances to the Commissioner in respect of the Council's size and resources, so that the functional burden placed on the Council by the Requests is inaccurately portrayed in the Decision Notices;

aa. the difficulties in processing requests for information portrayed by the Council are not encountered in other similarly-resourced Clerks and Parish Councils, which have better working practices and publish information progressively as required by the EIR;

bb. the fact that the Appellants were seeking information on behalf of others reinforces the fact that information was not being disseminated as suggested by the Council, plus the Appellants stated that they were aware of other (unconnected) requests for information being made by various third parties and they considered that this was also indicative of the Council giving misleading information to the Commissioner as to who was submitting information requests and therefore creating the false impression of a disproportionate, unjust burden being imposed by the Requests;

cc. the Commissioner did not adopt the requisite 'holistic approach' given the Council's extensive failings to disclose information over a lengthy period of time;

dd. there was no 'tactical attempt' to pressure the Council in making the Requests but "*a strong desire to obtain information from the Council which was of concern (and requested by) residents, and which was being withheld or had only been published in a three day rush after the main public consultation had been held by [the Council] itself*";

ee. (in respect of the Bullivant Appellant) the Second Appellant was aware of the non-disclosure of documents by the Council relating to the NDP, being a former member of the Council's NDP Steering Group;

ff. (in respect of the Bullivant Appeal) the Second Appellant previously stood as a candidate for the Council elections, her company donated a significant sum to the Council for a Parish-wide Ecological Survey which was used in connection with the NDP and she assisted the Council's Clerk in connection with an independent information requested submitted by another Parishioner (which

took place 4 months after the Second Appellant received her 'vexatious ban letter' from the Council) and these all refute the suggestion that she was engaged in a campaign to 'bring down the council';

gg. regulation 7 of the EIR was never used by the Council throughout the course of dealings with the Appellants or others;

hh. the Commissioner stated that his decision "*does not suggest that documents could not be released earlier than regulation 16 stage of the NDP process*" – therefore if documents could be released by the Council earlier and there is no legal framework allowing it to delay publication then the Requests were not premature; and

ii. the Commissioner submitted an incomplete and incorrect account concerning the relevance and application of Articles 6(1) and 10(1) ECHR to the present case by applying the *Moss* case, including because - whilst appeal to the First-Tier Tribunal is consistent with the ECHR requirement that all domestic remedies are first exhausted - the Commissioner overlooked the fact that the Human Rights Act 1998 places obligations upon government bodies to make decisions consistent with Treaty obligations at domestic level first, which is a different issue to claiming that the ECHR does not apply simply because the appeal has not yet commenced.

44. In addition to the above, several submissions were made by the Appellants regarding the feedback of the HBBC Report and various issues relating to the NDP process and the application of the NDP Regulations.

45. In their replies to the Commissioner's responses, the Appellants accepted (as indicated in their grounds of appeal) that the EIR were engaged but argued that, for the reasons given, the Requests were not manifestly unreasonable within the exception under regulation 12(4)(b) of the EIR and that, in any event, the public interest in favour of disclosure outweighed the public interest in maintaining the exception.

## The Tribunal's powers and role

46. The powers of the Tribunal in determining the Appeals are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIR), as follows:

*"(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."*

47. For the purposes of the Appeals, therefore, the Tribunal's remit is to consider whether the Decision Notices were in accordance with the law, or whether any applicable

exercise of discretion by the Commissioner in respect of the Decision Notices should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notices were based and the Tribunal may come to a different decision regarding those facts.

48. Accordingly, the primary issues for the Tribunal to determine with regard to the Appeals are essentially whether or not the Commissioner was correct to decide, by way of the Decision Notice, that: (a) the EIR were engaged in respect of the Requested Information; (b) the Requests were manifestly unreasonably in accordance with regulation 12(4)(b) of the EIR; and (c) the Public Interest Test favoured maintaining that exception over providing the Requested Information.

## The law

### *The statutory framework*

49. Information which is within the scope of the EIR is exempt from disclosure under FOIA. Section 39(1) of FOIA provides:

"*Information is exempt information if the public authority holding it –*

*(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or*

*(b) would be so obliged but for any exemption contained in the regulations.*".

50. Accordingly, requests for environmental information held by a public authority must be dealt with under the EIR rather than FOIA.

51. The term 'environmental information' is defined in regulation 2(1) of the EIR as follows:

"*…any information in written, visual, aural, electronic or any other material form 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;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*".

52. Regulation 5(1) of the EIR provides individuals with a general right of access to environmental information held by public authorities. It provides:

"*…a public authority that holds environmental information shall make it available on request.*".

53. Accordingly, under regulation 5(1) of the EIR, a person who has made a request to a public authority (such as the Council) for environmental information is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIR, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) of the EIR (that is, the wording immediately preceding the extract quoted above) 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…*".

54. It is therefore important to note that regulation 5(1) of the EIR does not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in that regulation is subject to certain other provisions of the EIR. Part 3 of the EIR, referred to above, contains various exceptions to the duty to disclose environmental information which has been requested.

55. Within Part 3 of the EIR, regulation 12 is applicable for the purposes of the Appeals. So far as is relevant, regulation 12 of the EIR provides:

"*(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.*

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

*(b) the request for information is manifestly unreasonable;*".

56. Succinctly put, therefore, a public authority may refuse to disclose environmental information which is requested under the EIR if the request is 'manifestly unreasonable' and if, in the circumstances at the time of the refusal, the Public Interest Test favours withholding the information.

57. The term 'manifestly unreasonable' is not defined in the EIR, but has been interpreted by case law, to which we refer below. As we will explain, 'manifestly unreasonable'

in the EIR essentially means the same as 'vexatious' in section 14(1) of FOIA. That section provides: "*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*".

58. Regulation 12(1) of the EIR is subject to regulation 12(2) of the EIR, which provides: "*A public authority shall apply a presumption in favour of disclosure.*". Therefore, even where there is a potential exception to disclosure of environmental information which is requested under the EIR, that exception (and the application of the Public Interest Test) is subject to a presumption in favour of disclosure of the information.

59. So far as is relevant for current purposes, regulation 4 of the EIR provides:

"*(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds –*

*(a) progressively make the information available to the public by electronic means which are easily accessible; and*

*(b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*

*(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.*".

60. Therefore regulation 4(1) of the EIR places a duty on public authorities to progressively publish the environmental information which it holds, other than information which, if it were requested, the public authority would be entitled to withhold pursuant to any applicable exception in regulation 12 of the EIR.

61. The environmental information which is to be disseminated pursuant to regulation 4(1) of the EIR is specified in regulation 4(4) of the EIR, as follows:

"*(4) The information under paragraph (1) shall include at least –*

*(a)the information referred to in Article 7(2) of the Directive; and*

*(b)facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.*".

62. The 'Directive' referred to is the European Directive 2003/4/EC, which was implemented by the EIR. The information referred to in Article 7(2) of that Directive (and hence the information which must be disseminated pursuant to regulation 4(1) of the EIR) includes policies, plans and procedures relating to the environment, reports on the state of the environment, environmental impact studies and data taken from monitoring activities and risk assessments which affect or are likely to affect the environment.

*Case law*

63. We turn first to case law regarding the definition of 'environmental information' set out in regulation 2(1) of the EIR.

64. It is well established that 'environmental information' is to be given a broad meaning

in accordance with the purpose of the underlying European Council Directive which the EIR implement (Direction 2004/4/EC). The definition was explained by the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister fur soziale Sicherheit und Generationen* ([2003] All ER (D) 145) as follows:

*"The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2(a) of Direction 90/3134 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.".*

65. In the case of *Department for Business, Energy and Industrial Strategy v Henney and ICO* ([2017] EWCA Civ 8444), the Court of Appeal confirmed the appropriateness of a broad approach to defining environmental information, which may include information that is not directly connected to a measure. In that case, Lord Justice Beatson stated (paragraphs 42-43):

*"…Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole...*

*It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information… It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision making in a better way. None of these matters may be apparent on the face of the information itself.".*

66. Lord Justice Beatson also explained in the *Henney* case that identifying the measure which the disputed information is "on" includes applying the definition of 'environmental information' purposively. In essence, the Court of Appeal confirmed that determining whether, in a specific case, information qualifies as 'environmental information' (or, in other words, whether the information can be considered to be 'on' a given measure for the purposes of the definition of 'environmental information') should be decided by reference to the general principle that the EIR, Directive 2003/4/EC and the Aarhus Convention (which that Directive was designed to implement in EU law) must be construed purposively. In turn, this involves considering the purposes which they were trying to achieve. The Court of Appeal provided some general guidance, referring [paragraph 48] to the recitals to the Aarhus Convention and the Directive as a starting point: "*They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad*

*language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."*.

67. Therefore it is clearly established that the definition of 'environmental information' in the EIR should be construed purposively. Lord Justice Beatson also stated in the *Henney* case: "*It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).*" [paragraph 43]. He went on to state [paragraph 47]: "*Determining on which side of the line information falls will be fact and context-specific.*".

68. We also remind ourselves, that, at paragraph 52 of his judgment in the *Henney* case, Lord Justice Beatson warned against an "*overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition.*".

69. In summary, therefore, a purposive interpretation is required when considering what 'environmental information' is, but this will also be dependent on the specific facts in any given case. The Upper Tribunal in *Department for Transport and others v Information Commissioner and John Cieslik* ([2018] UKUT 127) put the point as follows: "*…the principle established by the Court of Appeal in Henney and in Glawischnig [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is <u>on</u> an environmental matter but whether a measure or activity has the requisite environmental effect.*" [paragraph 33].

70. In very broad terms, there are six fundamental principles which derive from the *Henney* case:

    a. the EIR must be interpreted purposively;

    b. the term 'environmental information' must be read broadly;

    c. a broad construction of that term does not, however, mean there is an unlimited right of access to environmental information;

    d. the focus should be on the statutory language;

    e. the test is not what the information is directly or primarily 'on';

    f. determining 'what a measure is on' may mean looking at the wider context.

71. We turn now to case law regarding the term 'manifestly unreasonable' in regulation 12(4)(b) of the EIR. As we have noted, it is not defined in the EIR. In FOIA, there is a parallel term of 'vexatious' and the courts have established that 'manifestly unreasonable' for the purposes of the EIR shares the meaning of that term. In the case of *Craven v Information Commissioner and Department for Energy and Climate Change* ([2012] UKUT 442), Upper Tribunal Judge Wikeley stated (at paragraph 30) that:

"*... in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" within FOIA. The conceptual structure for decision-making is different,*

*but the outcome will surely be the same, whichever route is adopted. Insofar as a request is for environmental information, it therefore follows that the meaning of the expression "manifestly unreasonable" is essentially the same as "vexatious"…"*.

72. The Court of Appeal, in the combined case of *Dransfield v Information Commissioner and Devon County Council* and *Craven v Information Commissioner and The Department for Energy and Climate Change* ([2015] EWCA Civ 454), dealt with the appeal from the Upper Tribunal's decision in the *Craven* case regarding the meaning of 'manifestly unreasonable' in the EIR at the same time as another appeal regarding the term 'vexatious' in FOIA. Whilst decided in the context of the facts of the *Craven* case, the Court of Appeal confirmed that to all intents and purposes 'manifestly unreasonable' in the EIR means the same as 'vexatious' in section 14(1) of FOIA.

73. Accordingly, we need to consider the meaning of the term 'vexatious' for the purposes of section 14(1) of FOIA in order to consider the meaning of 'manifestly unreasonable' in regulation 12(4)(b) of the EIR. There is no definition of 'vexatious' in FOIA but guidance on applying that term is given in the decisions of the Upper Tribunal and the Court of Appeal in the *Dransfield* case (*Information Commissioner v Devon County Council & Dransfield* ([2012] UKUT 440) and *Dransfield v Information Commissioner and Devon County Council* ([2015] EWCA Civ 454), respectively).

74. The judgment of the Upper Tribunal in the case of *CP v Information Commissioner* ([2016] UKUT 427) helpfully summarises the main principles in the *Dransfield* case and relevant extracts from that summary are as follows (omitting, for ease of reference, the paragraph numbers in that summary and the cross-references to the paragraphs in *Dransfield*):

*"(i) The Upper Tribunal in Dransfield*

*In the Upper Tribunal decision of Dransfield…, the Upper Tribunal gave some general guidance on the issue of vexatious requests. It held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied'…*

*The test under section 14 is whether the request is vexatious not whether the requester is vexatious. The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA. As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account. The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request.*

*Four broad issues or themes were identified by Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations were not*

*exhaustive and were not intended to create a formulaic check-list. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.*

*As to burden…, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. However if the public authority has failed to deal with those earlier requests appropriately, that may well militate against holding the most recent request to be vexatious. Equally a single well-focussed request for information is, all things being equal, less likely to run the risk of being found to be vexatious. Wide-ranging requests may be better dealt with by the public authority providing guidance and advice on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.*

*A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request.*

*Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests.*

*(ii) The Court of Appeal in Dransfield*

*There was no challenge to the guidance given by the Upper Tribunal in the Court of Appeal. In the Court of Appeal, the only issue relevant to this appeal was the relevance of past requests. Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the Dransfield case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority.*

*Arden LJ gave some additional guidance…:*

> *'In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced*

*conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available…'*

*Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor."*

75. The Upper Tribunal took the view in *Dransfield* that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. As the Upper Tribunal observed: *"There is…no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA."* [paragraph 82]

76. In the case of *Cabinet Office v Information Commissioner and Ashton* ([2018] UKUT 208), the Upper Tribunal stated: "*Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument*". [paragraph 27]

77. That view echoes that of the Court of Appeal in the *Craven* case we have referred to, where Arden LJ stated: "*there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request*". [paragraph 85]

78. Accordingly, a request for information can be vexatious under FOIA (and consequently manifestly unreasonable under the EIR) purely on the basis of the resource burden placed on the public authority by a request, even if there is a significant public interest in the information requested and there is a 'reasonable foundation' for the request. However, this should be considered in the context of the 'high standard' set by vexatiousness as referred to in the Court of Appeal's judgment in the *Dransfield* case. As noted above, Arden LJ stated that, with regard to the term 'vexatious': "*Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one...*".

79. It should also be noted that the Upper Tribunal in Dransfield concluded that the purpose of section 14 of FOIA was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" [paragraph 10]. However, the Court of Appeal in dealing with the appeal in that case, qualified that conclusion. Arden LJ stated: "*…I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA"... For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have…been carefully calibrated.*" [paragraph 72].

80. The *Ashton* case also confirmed the approach in *Dransfield* to the effect that the Tribunal

should, in assessing the application of section 14 of FOIA (and consequently the application of regulation 12(4)(b) of the EIR), undertake a holistic assessment of all the circumstances. Accordingly, the Tribunal should adopt a rounded approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is manifestly unreasonable.

## Evidence

81. In respect of the Watmore Appeal, the Tribunal read and took account of a bundle of evidence and pleadings comprising a total of 469 pages (including cover sheets and index pages). In respect of the Bullivant Appeal, the Tribunal read and took account of a bundle of evidence and pleadings comprising a total of 396 pages (including cover sheets and index pages).

## Discussion and conclusions

### *Outline of relevant issues*

82. It is common ground between the Appellants and the Commissioner that the EIR were engaged in respect of the Requested Information. However, the Appellants consider that the Requests were not manifestly unreasonable and accordingly that regulation 12(4)(b) of the EIR was not engaged. The Appellants also consider that, even if that regulation was engaged, the Public Interest Test favours disclosure of the Requested Information.

83. Accordingly, the fundamental issues which we need to determine in the Appeals are:

    a. whether the Requests were manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR;

    b. if they were, then whether the Public Interest Test should favour disclosure of the Requested Information or maintaining the exception in that regulation.

### *Preliminary findings*

84. As noted in paragraph 14, the Council's letter to the First Appellant dated 14 July 2021 did not specifically refer to the Watmore Request, nor to the reviews that had been requested by the First Appellant in connection with that. However, the parties appear to have accepted that such letter constituted the Council's refusal to provide the information requested by way of the Watmore Request and we are also of the view that that is the case. Our decision is therefore based on that conclusion.

85. Likewise, as noted in paragraph 25, the Council's letter to the Second Appellant dated 14 July 2021 did not specifically refer to the Bullivant Request, nor to the reviews that had been requested by the Second Appellant in connection with that. Again, the parties appear to have accepted that such letter constituted the Council's refusal to provide the information requested by way of the Bullivant Request and for our part we are also of the view that that is the case. Our decision is therefore based on that conclusion.

86. In respect of the Watmore Request, as we have noted, the Council originally provided some information in response to it before subsequently asserting that the First

Appellant's recent requests for documents were vexatious. Given the fact that the First Appellant had also complained about the information which was provided by the Council and that, partly in response to that complaint, the Council informed the First Appellant that it was treating the recent requests as vexatious, then in our view the Council's position was that all of the information requested by way of the Watmore Request was ultimately treated as vexatious. Indeed, this appears have been the position adopted by the Commissioner.

87. In respect of the Bullivant Request, we are of the view that only part 5 of it was treated as vexatious by the Council. This appears to be consistent with the Commissioner's position, as stated in his letter to the Council dated 7 December 2021: "*Although the council does not state in the letter which of the requests it considers vexatious, as it has applied section 14(1) of the FOIA to part 5 of this request in its initial response, the Commissioner considers the council is maintaining this position for this request.*". However, as noted, the Council's letter to the Second Appellant dated 14 July 2021 did not address the reviews that had been requested by the Second Appellant in connection with the Bullivant Request (and the requested reviews were not limited to part 5 of the Bullivant Request).

88. We have also come to the conclusion, as part of our assessment of all of the circumstances applicable to the Requests, that (on the balance of probabilities) the Council has not published some environmental information as required under regulation 4(1) of the EIR (which, given the applicable scope noted in paragraph 62, would include information relevant to the NDP) and/or some relevant information as required under the NDP Regulations. We have reached this conclusion because:

    a. various assertions have been made by the Appellants that certain such information has not been published as it should have been;

    b. there is no material evidence in the bundles which rebuts those assertions (including by way of submissions from the Council to the Commissioner);

    c. the HBBC Report concluded that the Council had not been disseminating information as it ought to have done in respect of the NDP (and this is a point which was accepted by the Commissioner);

    d. decision notices have been issued by the Commissioner against the Council following previous failings of the Council to respond to information requests on time; and

    e. there is evidence in the bundles to the effect that the Council was not aware of the EIR and, once the EIR were brought to its attention by the Commissioner, the Council nevertheless considered that the Requested Information fell outside of the scope of the EIR. Consequently, if the Council was not aware of the existence of the EIR at the time of the Requests and has since not accepted that the Requested Information would fall within the scope of the EIR anyway, it is likely that the Council would not have been publishing all of the information as required pursuant to regulation 4(1) of the EIR.

89. In coming to the above conclusion, we recognise that the Council would not be under a duty to publish environmental information pursuant to regulation 4(1) of the EIR if

it would be entitled to withhold such information pursuant to any applicable exception in regulation 12 of the EIR (which, for current purposes, would be the 'manifestly unreasonable' exception). For the reasons we will come to, we find that that exception does not apply, such that the Council's duty to publish the relevant information under regulation 4(1) of the EIR would therefore have been unaffected insofar as the majority of the Requested Information is concerned.

90. We should make it clear that the above conclusion is relevant only as a finding of fact as part of our consideration of all of the circumstances, specifically for the purposes of the remit of the Tribunal in the context of the Appeals. This is not a decision purporting to determine that regulation 4(1) of the EIR was breached by the Council; that is not within the jurisdiction of the Tribunal in respect of the Appeals. Likewise (as noted in paragraph 35) this is not a decision relating to compliance with the NDP Regulations. Rather, we are taking into account our conclusion that at least some relevant information was not published under regulation 4(1) of the EIR and/or the NDP Regulations as a relevant factor in our assessment as to whether or not the Requests were manifestly unreasonable in all of the circumstances.

*Analysis and discussion; application of the law*

91. For completeness, we should briefly address the issue of the application of the EIR to the Requests, notwithstanding that there is no dispute between the parties on this point. As we have mentioned, the Council initially refused to supply the Requested Information on the basis that the Requests were vexatious under section 14 of FOIA. Therefore the Council treated the Requests as falling within the scope of FOIA, rather than within the scope of the EIR, and the Council subsequently maintained its position in that regard. As noted, though, the Commissioner decided that the EIR applied and the Decision Notices were issued on that basis.

92. We agree that the EIR applied in respect of the Requests. The Requested Information fundamentally relates to the NDP and associated matters. There is no doubt in our minds that neighbourhood development plans, in dealing with (amongst other things) planning policies for the use and development of land, relate to information 'on' the environment for the purposes of the definition of 'environmental information' in regulation 2(1) of the EIR. At face value, some distinct elements of the Requested Information, such as the terms of reference for the Council's NDP Steering Group or information about any advice that the Council received relating to its non-disclosure of minutes, might (in isolation) be seen as falling outside of the scope of the EIR. However, when looked at in the wider context, all of the Requested Information relates to matters connected with the NDP and those elements of information are clearly being requested for the purposes of, and as part of, that wider context. In saying this, we are also mindful of the purposive approach which is to be adopted, together with the other factors we have outlined, when considering what is meant by environmental information. Accordingly, we are satisfied that all of the Requested Information falls within the scope of the EIR.

93. We therefore turn now to the question of whether the Requests were manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. Given the legal framework which we have outlined above, we consider that the consideration of the four broad issues or themes outlined in the case of *Dransfield* are a useful starting point for our consideration of this issue.

94. We acknowledge that those issues or themes are not exhaustive and are not intended to create a formulaic checklist for the Tribunal to address when considering whether or not the Requests were manifestly unreasonable. However, we recognise that those issues or themes are a helpful tool in considering potentially relevant issues as part of our broad assessment of all the circumstances. In that regard, we considered those issues or themes in our deliberations, but we should stress that we have not been constrained or confined in any way by considering them. On the contrary, we have adopted a holistic approach, taking into account all of the relevant circumstances, and we have been mindful that the fundamental consideration was whether or not the Requests were, essentially, a manifestly unjustified, inappropriate or improper use of the EIR.

95. We have not been assisted in our deliberations by the decisions of the First-Tier Tribunal in the various cases which the parties have referred to. This is because other First-Tier Tribunal decisions are not binding on us and, more importantly, each such decision turns on its facts. Our role is to determine the Appeals based on their facts and therefore fact-specific situations dealt with in other First-Tier Tribunal decisions have not assisted us.

96. The first issue or theme from the *Dransfield* case we considered was that of the burden placed on the Council by the Requests. In considering the question of that burden, we recognise that the Requests were part of a wider series of requests for information and correspondence between the Appellants and the Council. We have also taken account of the submissions made to the Commissioner by the Council regarding its size, resources and workload. We are also mindful of the point made by the Upper Tribunal in *Dransfield* that a person "*who consistently submits multiple FOIA requests or associated correspondence within days of each other…. is more likely to be found to have made a vexatious request*" [paragraph 32].

97. We also recognise the point made by the Upper Tribunal in the *Dransfield* case that the purpose of section 14 of FOIA (and consequently regulation 12(4)(b) of the EIR) was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" [paragraph 10]. However, the Court of Appeal's qualification to that (as we have noted) is important – namely that such aim is one only to be realised if the high standard set by vexatiousness (or, for current purposes, 'manifestly unreasonable') is satisfied. Likewise, we remind ourselves that (as noted above) the Court of Appeal stated that there is a high hurdle for satisfying the 'manifestly unreasonable' concept.

98. In our view, a highly material factor in assessing whether or not a public authority's resources are being squandered or abused by requests for information is whether the public authority was under a separate duty to publish that information and, if so, whether it had indeed done so. The Appellants have essentially argued that allowing the Council to refuse to provide information in response to the Requests is tantamount to allowing it to avoid disclosing it at all, including under the NDP Regulations and pursuant to its duties to disseminate environmental information under regulation 4(1) of the EIR. Or, to put another way, the Appellants have argued that the Council should not benefit from its failure to disseminate the information by then allowing it to refuse to provide the information when it is separately requested.

99. We consider that those arguments have some force. We recognise that the

Commissioner has certain enforcement powers relating to non-compliance by a public authority with applicable obligations under FOIA or the EIR. However, in this instance the Commissioner has given no indication that it intends to take any enforcement action in respect of the Council. We are therefore faced with a situation where a public authority has not disseminated certain information as it is required to do and then, when that information is separately requested by members of the public, the Commissioner (by way of the Decision Notices) is permitting the public authority to withhold that information. A significant part of the Requested Information is information in respect of which the Council's statutory duty of dissemination under regulation 4(1) of the EIR applies and/or which should have been disclosed by the Council under the NDP Regulations. The Commissioner's rationale for permitting the Requested Information to be withheld is that the Requests were manifestly unreasonable, primarily based on considerations that other requests for (unpublished) information have also been made and that there would be a "disproportionate and unjustified burden" on the Council, given its limited resources. Following this principle could mean that public authorities could avoid publishing relevant environmental information pursuant to their statutory duties and then refuse requests for that same information based on the burden that this would place on them. In our opinion, that is a highly unsatisfactory situation.

100. It cannot be right that a public authority can fail to comply with statutory obligations to publish relevant information and then in turn deny members of the public access to that information when they subsequently request it. In this case, the Commissioner is relying, quite considerably, on the issue of the burden in complying with the Requests as justification for the Requests being manifestly unreasonable, notwithstanding the fact that the Council was already under the duties we have mentioned to publish a significant part of the Requested Information anyway. We understand that applying for a NDP is optional for a parish council, but in our view any public authority which does so should anticipate additional work arising from this and should accept the associated responsibilities for publication of relevant information.

101. As we have mentioned, if the Council was not aware of the EIR and did not recognise what would fall within the scope of the EIR as environmental information, then it is likely that the Council would not fully comply with its obligation to disseminate that information as required by regulation 4(1) of the EIR. We have also noted that the HBBC Report concluded that the Council had not been disseminating information as it ought to have done in respect of the NDP and that the Commissioner accepted that point. The lack of available information was a material point in the Appellants' complaints to the Commissioner. However, the Commissioner does not appear to have taken into consideration the duties of the Council to proactively disseminate environmental information when issuing the Decision Notices; there is nothing addressing this issue in the Decision Notices or in the Commissioner's submissions in the Appeals. Likewise the Commissioner has not addressed the fact that other decision notices had been issued by it against the Council following previous failings of the Council to respond to information requests on time. However, in our view these are material issues relevant to the overall circumstances and which should therefore have been taken into account in assessing, on a holistic basis, whether the Requests were manifestly unreasonable.

102. To the extent that there is a burden on the Council in complying with the Requests,

that burden (in respect of a significant part of the Requested Information) is either a burden which already existed as statutory duties pursuant to regulation 4(1) of the EIR and/or the NDP Regulations or is a burden created, or at least exacerbated, by the Council's own making - namely, a failure to discharge those statutory duties (to some degree, at least). In either case, we feel that the issue of the burden placed on the Council by the Requests does not justify withholding the Requested Information. We also note that the Council's Clerk indicated at a Parish Council meeting on 10 June 2021 that she had all the information she needed to respond to requests submitted in respect of the NDP and the Commissioner does not appear to have taken that into account (or at least to attach any weight to it) in assessing the burden placed on the Council.

103. In saying this, we accept that other requests and correspondence can be relevant considerations regarding the burden placed on the Council, as well as the fact that the burden of the Requests is not a single determinative factor in assessing the question of whether they were manifestly unreasonable. We took account of the volume and timing of the Requests, taken together with other requests for information made by the Appellants, but we also recognised that such features of the Requests may have been exacerbated by the Council's management of the Requests and/or previous requests for information. We also considered the Appellants' arguments that some requests for information were necessary due to incomplete or inaccurate information having been supplied following earlier requests. We also took account of the evidence regarding the Second Appellant being identified as a potential vexatious or habitual complainant in accordance with the Council's 'Habitual and Vexatious Complaints Policy', as part of our broader assessment of all the circumstances. However, we also recognise that such policy is for the Council's own administrative and other purposes and, of itself, it (as with any findings made by the Council under it) has no bearing on what constitutes a 'manifestly unreasonable' request for the purposes of the EIR - including the fact that under the EIR/FOIA it is the request which must be vexatious/manifestly unreasonable, not the person making the request. We additionally took into consideration the submissions made by the Commissioner and the information provided by the Council regarding other relevant considerations, including the concerns that the Appellants and others are part of a 'campaign' group acting against the Council.

104. All things considered, though, a compelling argument made by the Appellants is that if the Council is not making information available as it should be, in respect of matters potentially affecting the entire community, then it is unsurprising, if not inevitable, that this would generate a significant increase in requests for that information – and that the Requests (and other requests) have been made as a result. It follows that it must be inequitable to then treat those requests as manifestly unreasonable – or, adopting the words from the *Dransfield* case, to regard those requests as being a disproportionate, manifestly unjustified, inappropriate or improper use of the EIR.

105. We also consider that the Commissioner attached inappropriate weight to the HBBC Report in drawing conclusions regarding the ability of the Council to still ensure full transparency and openness within the NDP process, which formed part of the rationale in the Decision Notices as to why the Requests were manifestly unreasonable. In our view, it was wrong of the Commissioner to take account of the HBBC Report concluding that the Council still had time to disclose information under the NDP

process (even if that interpretation is correct, which was disputed by the Appellants) in support of the view that the Requests were manifestly unreasonable. We acknowledge that this may be a relevant factor to take into account when considering the Public Interest Test, but the Public Interest Test would only be relevant if the Requests were manifestly unreasonable.

106. Moreover, this appears to have been a significant factor in the Commissioner's assessment of the Public Interest Test; namely that the public interest in openness and transparency would be met on the basis that the Council could still disclose information pursuant to the NDP process. Evidentially, this was a contingency which may or may not happen and not an actual fact or circumstance that could be taken into account. In any event, for the reasons we have given, potential future disclosure (even if it happens) should not be a material factor in support of the view that the Requests were manifestly unreasonable at the relevant time.

107. In respect of the Appellant's motives behind the Requests, we note the words of Upper Tribunal Judge Wikeley in the *Dransfield* case that section 14 of FOIA (and consequently regulation 12(4)(b) of the EIR for current purposes)*: "serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources"* [paragraph 35]. We are also mindful that consideration of the motive of the requester could be a significant factor in assessing whether a request is manifestly unreasonable in all of the circumstances.

108. However, we are satisfied that there were proper and appropriate motives behind the Requests, even when considered in the context of the broader dealings between the Appellants and the Council. As stated by the Second Appellant in her reply to the Commissioner's response: "*There has been literally no other enforceable means of finding out what WPC and its landowner Councillors have been doing and how they have made development site selections or other uses/classifications of land.*". It is clear to us that the main motivation behind the Requests was to ensure transparency and openness and to access information which the public generally would normally be entitled to pursuant to the Council's duties to disseminate environment information pursuant to the EIR and/or as part of the NDP process.

109. Linked to that, we are also satisfied that there was a broader and substantial public interest in seeking the Requested Information. In the words of the Second Appellant (in her reply to the Commissioner's response): "*the request relates to policies within an NDP which will directly affect the lives and environment of 1300+ residents for the next 18 years and serve as a core document for co-ordinated decision-making more widely by HBBC across its entire Borough of +110,000 residents.*". We also note that the Commissioner accepted in the Decision Notices that there was "*a strong interest in disclosure of environmental information in general as it promotes transparency and accountability for the decisions taken by public authorities relating to environmental matters*". In the Decision Notices, the Commissioner also recognised the Appellants' reasons for making the requests as being legitimate, in terms of ensuring that the Council is "*conducting the correct process and that it is transparent and open about how decisions are being made in relation to the NDP*".

110. We acknowledge that a compelling public interest in the disclosure of information held by a public authority does not necessarily prevail over the issue of the burden involved

in complying with a request for the disclosure of that information. As we have mentioned (paragraphs 76 and 77), it was stated in case of *Ashton* that: "*a substantial public interest underlying the request for information does not necessarily trump a resources argument*" and likewise in the *Craven* case: "*there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request*". In other words, even if there is considerable public interest in the information which is the subject of a request, that does not (of itself) take precedence over, or override, any consideration that there is a such a burden placed on a public authority by the request that it might be manifestly unreasonable wholly or partly because of that burden.

111. Accordingly, we accept the Commissioner's position that he must have regard to the resources available to public authorities for dealing with requests for information. Likewise, we agree with the Commissioner's assessment that even though the Requests related to matters of public interest, the impact of the Requests on the Council's resources must also be taken into account. However, in the context of the Appeals and in our assessment of the wider circumstances, we find that, as noted in paragraph 102, any burden on the Council was existent largely because of factors other than the Requests themselves and accordingly the Requests were not manifestly unreasonable due to any perceived burden that they placed on the Council.

112. For all of the reasons we have given, in our view the Requests were not manifestly unreasonable. As noted in paragraph 83, if we had concluded otherwise, then we would need to go to consider whether the Public Interest Test should favour disclosure of the Requested Information. However, having reached the conclusion that the Requests were not manifestly unreasonable, it is unnecessary to address the issue of the Public Interest Test in respect of the Appeals. We would, though, just observe in passing that (for reasons we have touched on) we consider that there is a strong public interest in the Requested Information and, in assessing the Public Interest Test, arguments in support of disclosing information are likely to be strengthened where the information should otherwise have been disseminated pursuant to regulation 4(1) of the EIR, the NDP Regulations or any other statutory duty. Of course, the presumption in favour of disclosure under regulation 12(2) of the EIR is also a relevant factor.

113. We end our analysis with some further points of note. This was a finely-balanced decision, coming out in favour of the underpinning principles of transparency behind the EIR, taking into account our conclusions regarding the lack of dissemination of some information by the Council prior to the Requests, based on the specific facts of the Appeals and our assessment of all of the relevant circumstances.

114. We also appreciate that the Requests would have placed a considerable burden on the Council and we accept that some level of distress is likely to have been experienced by the Council's Clerk in dealing with the various requests for information which she was receiving, in addition to managing her other workload (and given her part-time hours). However, as noted in paragraph 102, we consider that the burden was not solely caused by the Requests and/or previous requests - and the Council's compliance with its broader duties of dissemination of information would evidently mitigate or negate the further burden of responding to individual requests for that information. We were also mindful of the size of the Council and its relatively limited resources, but we considered that this needed to be assessed with regard to the

principles of accountability and transparency, particularly in relation to environmental issues (given the public interest therein) and other duties to disseminate relevant information.

*Closing summary*

115. We have had regard to the four issues or themes referred to in the *Dransfield* case, reminding ourselves that they are for guidance only and are not intended to create a formulaic checklist for the Tribunal. We have taken into consideration the contents of the Decision Notices and the submissions of the Commissioner (and the information provided by the Council), including regarding the Council's resources and the burden that the Requests would place on it, especially when considered as part of the wider background and other previous requests for information. We have also considered the arguments regarding the impact on and distress caused to the Clerk and the allegations regarding the Appellants being involved in a campaign against the Council. In turn, we have also taken into account the motives behind the Requests and the value or serious purpose of the Requests in terms of the public interest in the information sought.

116. Crucially, we have adopted a holistic approach and reminded ourselves that ultimately the fundamental question before the Tribunal is whether or not the Requests were manifestly unreasonable in all of the circumstances, as a "disproportionate, manifestly unjustified, inappropriate or improper use" of the EIR. We find that they were not, for all of the reasons given.

*The Substituted Decision Notice*

117. We should briefly comment on the Substituted Decision Notice in respect of the Bullivant Appeal. As we noted in paragraph 87, whilst we considered that the Council had only treated part 5 of the Bullivant Request as vexatious, the Council did not address the reviews that had been requested by the Second Appellant on other aspects of the Bullivant Request. We therefore consider it appropriate that the Substituted Decision Notice requires a fresh response to all of the Bullivant Request.

*The Commissioners' responses to the Appeals*

118. For completeness, we turn now to briefly address the points raised by the Commissioner in his responses to the Appeals (as we have summarised them in paragraph 41):

    a. *The Commissioner correctly applied the EIR and took into account the intention of the underlying European Council Directive (which we refer to below). It is outside of the Commissioner's remit to determine whether the Requested Information should be published in accordance with other obligations or requirements outside of the EIR. In applying the Public Interest Test, all relevant considerations were taken into account.*

    We agree that it was correct to apply the EIR rather than FOIA to the Requested Information. We do not disagree with the Commissioner's assertion that it is outside of his remit to determine whether the Requested Information should be published in accordance with other obligations or requirements outside of the EIR. However, we consider that the Commissioner has overlooked, in his assessment of all of the circumstances as to whether or not the Requests were

manifestly unreasonable, the question of whether any of the Requested Information should have been published in accordance with the requirements of the EIR themselves or the NDP Regulations. For the same reason, we also consider that this issue was not taken into account for the purposes of the Commissioner's application of the Public Interest Test.

b. *The Commissioner recognised that there are differences between FOIA and the EIR but the application of the EIR in respect of manifestly unreasonable requests operates in the same way as a vexatious request under FOIA. All appropriate factors were taken into account in determining whether regulation 12(4)(b) of the EIR was engaged and when balancing the Public Interest Test.*

We agree with the statement that, whilst there are differences between FOIA and the EIR, the application of the EIR in respect of manifestly unreasonable requests operates in, essentially, the same way as vexatious requests under FOIA. As we have noted, though, we do not accept that all appropriate factors were taken into account.

*The parts of the EIR Code of Practice referred to by the Appellants were not relevant. This was because they relate to the provision of advice and assistance and clarifying requests, which were not applicable in the context of the Requests. The Council refused to provide the Requested Information on the basis that the Requests were vexatious/manifestly unreasonable due to the previous context and history; the Council did not refuse based upon costs or upon burden alone and there was no indication that the Council needed clarification regarding the information sought.*

We accept the Commissioner's assessment as to the relevance of the code of practice referred to, in the context of the conclusions of the Council and the Commissioner regarding the Requests being manifestly unreasonable – but, for the reasons we have given, we disagree with those conclusions. However, we do agree that there was no indication that the Council needed clarification regarding the Requested Information.

*The Commissioner was correct to consider the size of the Council and its limited resources in assessing the burden imposed by each of the Requests. The Commissioner accepted the Council's position that it has been placed under a disproportionate and unjustified level of disruption by each of the Requests and that this impacted on its ability to function.*

We agree that it was appropriate for the Commissioner to take into account the representations from the Council regarding its size and resources and its view on the burden imposed on it by the Requests. These are part of the factors which should be taken into account in a proper assessment of all of the relevant circumstances – albeit we disagree with the conclusions ultimately reached by the Commissioner, for the reasons we have given.

*Extending the time to comply with either of the Requests under regulation 7 of the EIR was not a relevant factor given that the Council refused to provide the Requested Information on the basis that the Requests were vexatious/manifestly unreasonable.*

We agree with this analysis, in respect of the position at the time the Council was refusing to comply with the Requests.

c. *The Commissioner acknowledged that HBBC recognised the Council's failings regarding transparency and openness at the 'Regulation 14' stage of the NDP process (namely regulation 14 of the NDP Regulations), however the Commissioner noted that the HBBC consultation response explained that there was still time (at the time of the Requests) for the Council to ensure full transparency and openness within the NDP process. The Commissioner was correct to take this into account when assessing all of the circumstances of the case to determine whether the Requests were manifestly unreasonable.*

   We have set out our comments above regarding these matters being taken into account by the Commissioner.

d. *It was outside of the Commissioner's remit to assess the Council's actions within the NDP process, but he took into account the findings of the HBBC Report when assessing all of the circumstances of the case.*

   Again, we have set out our comments above in this regard.

e. *The Decision Notice does not suggest that documents could not be released earlier than 'Regulation 16' stage of the NDP process (namely regulation 16 of the NDP Regulations).*

   We agree with this statement.

f. *Article 10 of the ECHR does not have a bearing upon the Decision Notice in accordance with the case of Moss v Information Commissioner and the Cabinet Office ([2020] UKUT 242), in which the Upper Tribunal determined that Article 10 of the ECHR does not create a right in domestic law to request information from a public authority and does not have any bearing upon FOIA.*

   *The Decision Notice does not contravene the Appellant's rights under Article 6 ECHR and the Appellants have exercised their right to appeal the Decision Notice to the Tribunal.*

   We agree with the Commissioner's position on these points.

g. *The Commissioner considered the case of Betts v Information Commissioner (EA/2007/0109) and the arguments of the Appellants and the Council in relation to that case in his assessment of matters pertaining to the Decision Notice. The Commissioner determined that the volume of requests for information, coupled with the volume of emails from the Appellants imposed a disproportionate and unjustified burden on the Council.*

   *With regard to the case of William Thackerary v Information Commissioner (EA/2011/0082, EA/2011/0083), the Commissioner did consider whether the persistence of each Appellant was reasonable on the facts of each case. The Commissioner considered that, because the HBBC Report had already suggested a timeframe for the Council to make the relevant information available, the Requests were not proportionate.*

   For the reasons we have given, we were not assisted by reference to the decisions of the First-Tier Tribunal in other cases.

h. *The 'other matters' raised by the Appellants fell outside of the remit of the Decision Notice and therefore outside of the remit of the Tribunal.*

We agree with this statement.

*Final conclusions*

119. For all of the reasons we have given, we conclude that the Commissioner was wrong to conclude that the Requests were manifestly unreasonable. Therefore we find that regulation 12(4)(b) of the EIR was not engaged and accordingly that the Commissioner erred in law in concluding, in the Decision Notice, that the Council was entitled to withhold the Requested Information.

120. We therefore allow both of the Appeals and make the Substituted Decision Notice above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 23 February 2023

(Amended under the slip rule – 25 February 2023)