IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2015/0107

Decision Notice: FER0564309

Timothy John Bright

Appellant

And

The Information Commissioner

Respondent

Hearing
Held on 5 November 2015 at Fox Court on the papers.
Before Mike Jones, Paul Taylor and Judge Taylor.

Decision
The appeal is unanimously dismissed for the reasons set out below. There are no steps to be taken by the public authority.

Reasons

The Request

1. On 12 August 2014, the Appellant requested from the City of York Council ('the Council') information related to a development plan for Earswick, York:

> *"I am a member of Earswick Action Group and I write further to the letter that was sent by the Action Group to the Council (along with Counsel's Initial Opinion) on 16 July 2014.*
> *In order that I can further consider the position in connection with the Council's proposed safeguarding of land in Earswick, properly liaise with appointed consultants and legal representatives and appoint and properly instruct additional consultants, I should like to request the production of the following information under Section 1 of the Freedom of Information Act 2000:-*
>
> ***Liaison with developers***
>
> - *details (including dates) of any officer or member dialogue, written or otherwise, with any agent, developer, housing association or other interested party regarding the proposed removal of 220 acres of green belt land at Earswick, which as part of the Local Plan further sites consultation, is to be re-categorised as 'safeguarded' land for future development*
>
> - *copies of all correspondence, minutes of meetings, transcripts, correspondence and other documents outlining concerns arising from the Local Plan Further Sites Consultation document and its Appendices discussed/outlined with site promoters and details of how it was proposed that these concerns would be addressed*
>
> - *copies of relevant minutes of meetings, other documents and correspondence involving conversations or discussions with the Get York Building Board*
>
> - *copies of all relevant meeting minutes, transcripts, correspondence and/or telephone conversations or discussions involving the HCA, the site sponsor, Leeds LEP and the North Yorkshire LEP, especially in connection with infrastructure works presented for consideration or the availability of funding for the required infrastructure costs*
>
> ***Discussions with Thirteen Group/other developers about development on greenbelt land at Earswick since 2010***
>
> - *copies of all meeting minutes, correspondence, transcripts and/or telephone conversations or discussions with Thirteen Group, Dartstone Properties, Fabrick Housing Group or any other developer about the proposal to 'Safeguard' the Greenbeft in Earswick*
>
> - *copies of all meeting minutes, correspondence transcripts and/or telephone conversations or discussions with Thirteen Group, Dartstone Properties, Fabrick Housing Group or any other developer about the possibility of building on the Greenbelt in Earswick, during the term of the Local Plan or otherwise*

Discussions with the owners or their servants or agents of the land in the Earswick greenbelt since 2010

- *copies of all meeting minutes, transcripts, correspondence and/or telephone conversations or discussions with any or all of the land owners, their servants or agents of land in the Earswick Greenbelt about the future use of this land"*

2. The Council did not reply until 24 October. In the interim, the Appellant had complained about this to the Information Commissioner (the 'Commissioner') who subsequently found that the Council had breached regulations 5(2) and 9(1) EIR by being too slow to respond to the request. (Decision Notice: FS50555609).

3. In its reply, the Council refused to comply with the request citing regulation 12(4)(b) EIR as exempting it, because it considered the costs of doing so would be '*manifestly unreasonable'*. It said that an initial search for the requested information held in emails had retrieved 21,065 items and that to identify specific information within this, relevant to the request, would be a disproportionate burden and cause an unjustified level of disruption to council services.

4. Matters progressed with a complaint to the Information Commissioner (the 'Commissioner'). He concluded that the request was manifestly unreasonable within the meaning of regulation 12(4)(b) EIR and that the public interest weighed in favour of non-disclosure. He also found that the Council had complied with the requirement to advise and assist the Appellant within the terms of the legislation, albeit outside the time limits set by statute.

5. The Appellant now appeals this decision. The issues for the Tribunal are:

    a. **Manifestly unreasonable:** Is the request manifestly unreasonable such that regulation 12(4)(b)EIR was correctly engaged? (As explained above, this includes whether the Council complied with the obligation to advise and assist the Appellant?)

    b. **Public interest:** If so, does the public interest in maintaining the exception outweigh the public interest in disclosure?

The Task of the Tribunal

6. The Tribunal's remit is governed by s.58 Freedom of Information Act 2000 ('FOIA'). This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently.

7. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. It is not within our remit to consider or comment on the Council's compliance with any legislation aside from the EIR or FOIA. In this case, our remit is limited to considering whether the Council complied with requirements under the EIR in responding to the Appellant's request. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

8. We have received a bundle of documents and submissions, all of which we have considered, even if not specifically referred to below.

The Law

9. Since the subject matter of the Appellant's request is considered to be 'environmental information' for the purposes of The Environmental Information Regulations 2004 ('EIR'), this is the relevant access regime to consider for our purposes.

10. Environmental information is defined in regulation 2(1) to include: "*any information in written, ... 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…*" The parties agree that the requested information, which relates to housing development plans for a greenbelt area of York, is environmental information as it relates to the state of the elements of the environment, and specifically 'land'. We accept this.

Duty to make available environmental information on request

11. Under the EIR, public authorities are under a general duty to disclose information where it is requested, under regulation 5:

> ***"5.*** *- (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request…*

Exceptions to Disclosure

12. There are exceptions to the general duty to disclose, but when considering whether exceptions apply and the weight of public interest test, there must be a presumption in favour of disclosure. This is derived from Regulation 12:

> *"12 (1)… a public authority may refuse to disclose environmental information requested if—*
> *(a) an exception to disclosure applies under paragraphs (4) or (5); and*
> *(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
> *(2) A public authority shall apply a presumption in favour of disclosure.*

13. The exceptions claimed to be of relevance to this appeal are where
> *(4)…(b) the request for information is manifestly unreasonable;*

14. We accept the Commissioner's description of this exception, set out in paragraphs 26 to 31 of his decision notice and do not repeat this here. We would note that we

accept and adopt a previous decision of this Tribunal[1] in our understanding of this exception, and in particular:

a. Where the cost of compliance is to be taken into account to determine this exception, the financial limits set by the Freedom of Information Act 2000 are not the dividing line between what is and what is not manifestly unreasonable.
b. A public authority will not be able to claim that a request is manifestly unreasonable where it has acted unreasonably in dealing with the request, for instance by failing to comply with its duty to advise and assist the requestor.

15. Even where a request is considered manifestly unreasonable, the legislation requires that for the exception to be appropriately relied on, we must be satisfied that in all circumstances of the case, the public interest in maintaining the exception outweighs that in disclosure.

Advice and assistance

16. Under regulation 9 EIR, public authorities must provide advice and assistance to applicants seeking information. This obligation is deemed to be satisfied where the authority has complied with a code of practice made under regulation 16 EIR:

> ***"9.— Advice and assistance***
> *(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*
> *…*
> *(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case."*

17. The Code[2] includes the following at paragraph 20:

> *"20.There is no EIR equivalent to the 'appropriate limit' under section 12 of the FOIA. A public authority is expected to deal with all requests for environmental information. However, cost may be relevant when considering whether to apply the exceptions relating to 'manifestly unreasonable' or 'too general'. . Where the applicant makes a request that is clear but which involves the provision of a very large volume of information, and specifies a cost ceiling, the authority should consider providing an indication of what information could be provided within the cost ceiling."*

Question 1: Is the request manifestly unreasonable?

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[1] *See Mersey Tunnel Users Association v IC and Halton BC, IT, 24 June 2009*

[2] See https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Our Finding

18. The submissions are lengthy and we do not repeat them here. We accept and adopt the Commissioner's submissions set out in paragraphs 28 to 39 and 49 to 75 of their response of 25 June 2015, save for that we do not accept the estimation that it would take 2 minutes to review each of 21,065 emails in order to determine whether they were relevant to the request. We would expect that the quickest it could take would be 20 seconds. This would take approximately 117 hours which is clearly an excessive amount of time to make an initial assessment of whether material was in scope for an individual request.

19. We note that the Council seemed to have done little to determine how long a search would take, and simply put in two search terms on a global search. However, the Commissioner sought to probe them by asking them to perform other searches. Their argument, which we accept, was that the material requested was so broad that more limited searches would not capture all of the information requested.

20. The Appellant argued that the Council failed to conduct an appropriate search and deliberately used search terms that would return large amounts of information, however, again, we accept the Council's explanation that the broad search was necessary because narrower ones would not have captured all of what the Appellant requested.

21. From reviewing the request (see paragraph 1 above), it is plain to us that the request is so broadly phrased that it would take an excessive amount of time to comply. There are seven limbs to the request, and just looking at the first:

> "*details (including dates) of any officer or member dialogue, written or otherwise, with any agent, developer, housing association or other interested party regarding the proposed removal of 220 acres of green belt land at Earswick",*

'any officer or member' is extremely broad.

22. The Appellant questions whether there could really be 21,065 items returned for Earswick given that it has such a small population. It is regrettable that the Council did not include in the bundle a 'screenshot' to show how the number was produced. However, we accept that it is fully plausible and do not find the Appellant's arguments sufficiently compelling for us to doubt the credibility of the total number.

23. It is not surprising that a global search of emails produced a large total number to review, so we have considered whether the Council could have approached the search differently to cut down the time for compliance. We would anticipate that if they had identified the key staff members who worked in the area, their files might have been organised their files in such a way that the material might have been retrieved more efficiently. Alternatively, they could have looked through their document files instead of email files. However, as the Council pointed out, this approach might not have captured all information requested since the Appellant requested, for instance, "*details (including dates) of <u>any</u> officer or member*

dialogue…with any agent.." [3] The Council stated in its internal review of 3 December 2014 that if officers had been asked to locate information using their own personal knowledge, given the general scope of the request it would still be expected to have taken an excessive amount of time. We accept this

24. The Appellant pointed out that the Council has about 8000 staff. As his request would potentially capture all of them, and staff may have left or been absent, using a global search would seem a reasonable way to capture all data. The wording of the request (i.e. "...*any officer*...") means that it would be insufficient to just search the email accounts of staff in the relevant department.

25. The Appellant argues that the Council is required to conduct a proper search in all locations where information would be retained or stored and disclose that information.
26. The Council's approach to the search would not have satisfied us had they not made efforts to advise and assist the Appellant so as to narrow his request. It is clear that they did from the following:

    a. "*As such the council may also be able to provide further information to satisfy your request should you wish to resubmit your request specifying a more limited period for the emails you require. For example a six month period, all for one or two month periods over different timescales up to a maximum of six months or between a limited number of officers.*

    If I can be of any other help in assisting you to understand what information maybe able to be provided, Please do not hesitate contact me. "
    (See Council's response of 24 October 2014)

    b. *"If you would like to reduce the scope of your request, perhaps by identifying what information you want, rather than the documents in which you believe it might be found, the council will consider it fresh"*
    (See internal review of 23 December 2014)

27. From what we have seen in the bundle, the Appellant did not contact the Council to properly engage in the process. He explained his position in an email of 9 February 2015:

    "*My earlier request from August is of a sufficient narrow nature to enable CYC to respond, the issue is, and I repeat this again, is that CYC undertook such a wide search… This is clearly a deliberate ploy to be obstructive as it is fairly obvious these search terms alone would return the vast amount of information given them an excuse*."

28. We consider that if the Appellant had discussed his needs with the Council, he would have been able to narrow his request, for instance by limiting it to material retrieved involving key staff members who worked on the project such that a search of their material would have been more viable.[4] On the other hand, nor did

[3] See page 113 of the bundle at paragraph 2.

[4] This is hinted at from the Appellant's submissions at page 45 of the bundle where at paragraph 54 he states: '*had they restricted their search to a small selection of specific staff email accounts, [it] would make the*

the Council go to extensive efforts to fully engage with the Appellant after having taken so long to respond. However, they did offer assistance on two occasions, and where a requestor is not willing to be assisted, it seems to us that the Council has satisfied the requirement to advise and assist.

Our Findings on Question 2: Does the public interest in maintaining the exception outweighs the public interest in disclosure

29. We did not find that the Appellant made extensive arguments addressing this point. However, we note the following public interests in disclosure:
    a. It would be useful to enable residents to be properly and fully informed of proposals so that they could respond in an informed way to the consultation as part of the democratic process; it would also assist them with any future appeal before the planning inspectorate.
    b. The Council has argued that much of the information requested would not provide useful insights regarding the proposals for the land or into the issues in question and therefore would not contribute to the process of enabling people to effectively engage in expressing their views on democratic procedures. However we have given little weight to this, because without sight of the information we cannot test the ability to know the veracity of this argument.
30. The public interests in maintaining exception are:
    a. It has been argued that identifying the relevant information for the request would divert Council resources away from being able to engage in consulting with people to agree the Local Plan. We accept this and that more generally it is not in the public interest to be responding to a request that is manifestly unreasonable due to the costs incurred in terms of staff hours spent on the task. (This is in the absence of the requester being willing to engage in the advice and assistance process so as to potentially narrow the request to enable staff to properly focus the search.)
    b. It has also been argued that a large amount of information regarding the proposals and reasons for them has already been published, including information about the greenbelt at Earswick. Since we did not find this information in the bundle, we have no way of verifying and have given no weight to this argument.
31. When weighing these public interests, we found that the arguments set out in paragraph 30(a) far outweighed those identified in paragraph 29 (a).

32. In conclusion, we find that the exception has been correctly relied on and that the public interest favours withholding the information.

33. Our decision is unanimous.

Judge Taylor

16 November 2015

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number of items returned at 21,065 equally unbelievable'. Since the request asked for 'any officer' such a search would not have fully satisfied the scope of the request, but had the Appellant engaged with the Council to agree to narrow the request a search of a small selection of staff may have been feasible.