IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2016/0112

MR NIGEL CHARLTON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 6 October 2016 at Fleetbank House, London
Before Roger Creedon, Narendra Makanji and Judge Taylor.

Date of Promulgation 29th December 2016

Decision

This appeal is unanimously upheld for the reasons set out below, such that we find in favour of Mr. Charlton.

Steps to be taken

The Council is required to provide the Appellant with the requested information within 20 working days of the date of promulgation of this decision. The decision is to be treated as a substitute for the Information Commissioner's Decision Notice FS50596211.

Reasons

Background

1. The Appellant used to be employed by the Metropolitan Police as a licensing sergeant where he worked closely with Ealing Council's ('the Council') licensing department. He now works as consultant in licensing matters for Joshua Simons and Associates Ltd.

2. Prior to the request that is the subject matter of this appeal; the Appellant had made earlier information requests from the Council as a public authority for the purposes of EIR.

    a. On 16 January 2015, a request about the Wanasah Hall licence application;
    b. On 31 July 2015, a request about the Rickyard licence application; and
    c. On 26 August 2015, a request about the Sukarah Lounge licence application.
    d. An additional request was then made related to an earlier request.

3. In response, the Commissioner explains that the Council disclosed over 270 pages.[1] In June 2015, Joshua Simons and Associates Ltd sought judicial review of the Council's decision to issue a licence for Wanasah Hall on the basis that the Council had not complied with the Licensing Act 2003. The proceedings were disposed of by way of a Consent Order on 2 November 2015 and the licence for Wanasah Hall was quashed.

The Request

4. On 10 October 2015, the Appellant made a request for information from the Council for:

    "1. The number of premises license applications received in the last twelve months.
    2. The number of those applications that were resolved within the 28-day consultation period.
    4. The number of those applications that were not resolved within the consultation period and were dealt with by way of a licensing sub-committee hearing.
    5. The number of those licensing sub committee hearings that have been opened within the 20 working days post consultation period."

    (the 'request')

5. On 6 November 2015, the Council refused to comply with the request relying on section 12 of the Freedom of Information Act 2000 ('FOIA') *(costs exemption).*

[1] It is noted that the Council's letter of 19 February stated that it had disclosed 68 pages after redaction relating to the Wanasah Hall request and 166 pages after redaction related to the Sukarah Lounge request.

The Council explained that it had spent over 18 hours responding to the Appellant's previous requests. The Appellant progressed the matter, and following an internal review, the Council additionally relied on s.14 FOIA *(vexatious requests)* in its response to the Appellant.

6. The Information Commissioner (the 'Commissioner') then investigated the matter and decided in its Decision Notice of 23 March 2016 *(ref. FS50596211)* that the Council had correctly relied on section 14 such that it was not obliged to comply with the request. Having already decided for the Council, it did not consider whether section 12 had been correctly relied upon. The Commissioner's reasoning was that:

    a. The Council had tried to assist and advise the Appellant particularly when some of the requests had been extensive; and had guided him to its website regarding information relating to licensing committee and licensing applications.
    b. There had been a series of persistent and repeated information requests and an unnecessary use of the FOIA legislation.
    c. The repetitive nature of posing the same or similar requests imposed an unreasonable burden on the Council.

7. The Appellant now appeals this decision on the basis that the Commissioner erred in law in finding the request vexatious so as to withhold the requested information.

The Task of the Tribunal

8. The task of this Tribunal is to consider whether the decision made by the Commissioner is in accordance with the law, or, where the decision involved exercising discretion, whether it should have been exercised differently. This is the extent of the Tribunal's remit as set out in s.58 FOIA. (This applies equally to environmental information appeals as a result of regulation 18 of The Environmental Information Regulations 2004 ('EIR')).

9. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and make different findings of fact.

10. The Council has not sought to be a party to this appeal, and has advanced no submissions. We have received submissions from the parties and a bundle of documents. We have also received an addition to the bundle made pursuant to the Registrar's Case Management Note of 28 September 2016. The Appellant explained at the hearing that he had only received the bundle in the afternoon of 4 October, (as it had been wrongly addressed), and had thought it would contain other documents. Accordingly, he submitted these at the hearing. The Commissioner chose not attend the hearing, but was sent these additions. We have considered everything before us, even if not specifically referred to below.

Issue 1: Applicable law to apply: FOIA or EIR?

11. The first issue must be to determine which legislative regime applies to the request.

The Law

12. The effect of s.39(1) FOIA, is that requests for 'environmental information' must be decided by reference to EIR instead of FOIA. The definition of "environmental information" is found in regulation 2. It includes:

> *"(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".*

Finding

13. It is important to ensure the proper regime is applied. In some cases, there are differences between the two regimes. No arguments were presented to us at the hearing as to the operative regime, and the Decision Notice did not address it, applying FOIA. Pursuant to directions, the Commissioner explained that it considered that this to be a grey area and that the request was for procedural or statistical information that was not a 'measure' so as to fall under EIR.

14. We find that whilst the request concerns certain statistics, which relate to licence applications where the 'bigger picture' is that the requester is interested in understanding the Council's handling of applications for licences.[2] The application for and granting of licences is a 'measure' likely to affect an environment including noise levels in the surrounding area[3]. In other words, there is more than a remote possibility that factors such as noise are not incidental aspects when considering licences. Accordingly, we consider the request to be for environmental information and proceed to decide this appeal by reference to EIR.

15. The Commissioner's view is that nothing turns on the request being dealt with under the FOIA rather than the EIR in accordance with the Court of Appeal decision in *Craven v Information Commissioner and another [2015] EWCA Civ 454 (14 May 2015) ('Craven') at paragraph 7,* and has provided no amended submissions. In view of this, to the extent that the Commissioner has made arguments below related to section 14 FOIA *(vexatious request),* we shall consider their application to the analogous regulation 12(4)(b) *(manifestly unreasonable)*.

Issue 2: Manifestly Unreasonable

[2] See Upper Tribunal decision in *The Department for Energy and Climate Change v The Information Commissioner & Anor (Information rights: Environmental information - general) [2015] UKUT 671 (AAC)* for consideration of whether EIR or FOIA applies and the need to consider the bigger picture.

[3] This is consistent with submissions from the Appellant and evidence in the bundle that the licenses could be issued to nightclubs and relate to hours permitted to play live music and serve alcohol. This could affect parking and noise in the area.

16. The next issue before us is whether the request is manifestly unreasonable for the purpose of regulation 12(4)(b)EIR.

The Law

17. 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… "*

18. 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."*

19. The exception claimed to be of relevance to this appeal are where:

> *"(4)…(b) the request for information is manifestly unreasonable;"*

20. We have the benefit of higher court decisions[4] to direct us in how to apply this section. LJ Arden in the Craven case stated as follows:

> *"In Mrs Craven's case, the principal question is whether the tests under section 14 FOIA and regulation 12(4)(b) have the same meaning ("the two-tests-one-meaning issue"). I conclude that to all intents and purposes they do." (See para.7 of Craven)*
>
> *"That leads to the question whether there is any difference between "vexatious" (section 14 FOIA) and "manifestly unreasonable" (regulation 12(4)(b) EIR). The expression "manifestly unreasonable" has to be interpreted so as to give effect to the objectives of Directive 2003/4. It differs on its face from "vexatious" since it clearly imposes an objective test and appears alongside a requirement in regulation 12(1)(b) … for the authority to be satisfied as to the public interest in the disclosure. Leaving the word "manifestly" to one side for a moment, if I am right that the approach to section 14 should primarily be objective and should take as its starting point the approach that "vexatious" means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public or any section of the public, then the difference between the two phrases is vanishingly small. It is difficult to see how they would differ in practice, though it cannot be discounted that EU jurisprudence may develop in the future in a different way to our own, and in addition that the public interest requirement in regulation 12(1) might lead to a different outcome from that under section 14. The word "manifestly", which I put to one side, means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain. I doubt whether "manifestly" in practice adds much since*

[4] Known as 'caselaw'.

before it uses section 14 FOIA or regulation 12, the authority would have to be confident that the request was vexatious or as the case may be manifestly unreasonable before it rejected it. (See para.78 of Craven)

"I have summarised the UT's decision on this issue in para. 29 above. I agree with its conclusions. In relation to the EIR, there is no provision which prevents the decision maker from taking the costs of compliance into account in considering whether the request was manifestly unreasonable, but he would have to balance those costs against the benefits of disclosure under regulation 12(1)(b) EIR.

I would add the point, not made by the UT, that the Aarhus Convention: an Implementation Guide referred to in para.54 above, states that "the volume and complexity alone could not justify withholding information on the grounds that the request is 'manifestly unreasonable.'" There is no equivalent guidance in relation to section 14. This may mean that a higher hurdle has to be passed before a decision maker can conclude that a request should be rejected on the grounds of the costs of compliance under the EIR than under FOIA. That in turn may depend on the precise status of the Implementation Guide. These points were not fully argued and so I express no concluded opinion on them." (See para.s 83 and 84 of Craven.)

21. Paragraph 20 above sets out the extent to which "vexatious" (section 14 FOIA) and "manifestly unreasonable" (regulation 12(4)(b)) can be said to have the same meaning. Keeping this in mind, we next consider the caselaw that instructs us that a request is vexatious if, having taken into account all the material circumstances of the case, it demonstrates a '*manifestly unjustified, inappropriate or improper us*e' of the FOIA procedure[5]. The cases show us that an important aspect of the balancing exercise may involve considering whether or not there is an adequate or proper justification for the request, and whether or not it lacks proportionality, having borne in mind the context of a statute designed to ensure greater public access to official information and to increase accountability and transparency.

22. L.J. Arden stated in the Craven case:

    a. *"I consider … 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." (Craven, para. 68.)*

[5] See the Upper Tribunal decision in *Information Commissioner v Devon County Council and Dransfield [2012] UKUT 440 (AAC) ('Dransfield'), para.43.* This approach was upheld by the Court of Appeal in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 545 ('Dransfield CA').

b. *"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" (UT, Dransfield, Judgment, para. 10). 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, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated." (Craven, para. 72.)*

23. In the Upper Tribunal consideration of Dransfield, Judge Wikeley stated:

> *"… It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (**1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff).** However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all encompassing definition upon an inherently flexible concept which can take many different forms." (Emphasis added).*

24. As regards the 'value or serious purpose', Judge Wikeley explained

a. *"… Usually bound up to some degree with the question of the requester's motive, is the inherent value of the request. Does the request have a value or serious purpose in terms of the objective public interest in the information sought?... In some cases the value or serious purpose will be obvious – say a relative has died in an institutional setting in unexplained circumstances, and a family member makes a request for a particular internal policy document or good practice guide. On the other hand, the weight to be attached to that value or serious purpose may diminish over time. For example, if it is truly the case that the underlying grievance has been exhaustively considered and addressed, then subsequent requests (especially where there is "vexatiousness by drift") may not have a continuing justification. In other cases, the value or serious purpose may be less obvious from the outset. Of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14, unless there are other factors present which raise the question of vexatiousness. In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident."*
(Craven, para. 38.)

Evidence and Submissions

25. The Commissioner submissions include the following:

Motive of the requester

a. The Appellant's motive in making the request was (a) a belief that the Council was not complying with the Licensing Act 2003 and to confirm whether it was; and (b) to ascertain the scale of this alleged non-compliance.

a. The Appellant considers that the licence for Wanasah Hall was issued unlawfully. The lawfulness of the Wanasah Hall licence has been determined since the judicial review proceedings concluded on 2 November 2015.

b. The Appellant has provided no evidence to support his suspicion that the Rickyard licence was administered unlawfully. He considers that the scarce information provided in response to the Rickyard request gave him cause to suspect the application was not dealt with properly and not in accordance with the statutory time limits[6].

The value and serious purpose of the Request

c. The Appellant argues that the request was necessary since (a) the Council failed to provide the requested information resulting in repeated requests; and (b) the Council insisted that the Appellant submit a request for an email. The Commissioner understands this to refer to the Wanasah Hall request. After the Council had responded to that request, the Appellant discovered a 'deemed grant' letter on the Council's website and noticed an email dated 8 December 2014 referred to in the Council's correspondence concerning the judicial review proceedings. The Appellant asked the Council why both documents had not been included its response to that request. On 15 October 2015, the Council explained to the Appellant that the 'deemed grant' letter had been made "accessible by other means" and suggested that he make a separate request for the relevant email, which he did on the same day. In response, the Council disclosed the email in word format but the Appellant requested the email and the email thread. The Council disclosed this information to the Appellant with redactions but he submitted a complaint to the Council alleging that the information disclosed had been fabricated. The Council responded to the complaint on 8 March 2016.

d. This correspondence demonstrates that the Appellant remained dissatisfied even when the Council has provided the information requested and his unreasonable persistence in attempting to re-open an issue that has been addressed by the Council and determined by the High Court.

e. The Appellant also argues that not all of the requested information was available on the Council's website. The Commissioner submits that much is. In emails dated 19 November 2015 and 17 January 2016, the Appellant informed the Commissioner that he had discovered from the Council's website that between 16 July 2014 and 14 August 2015, there had been 22 premises licence application or variation hearings, only one of which was heard within the statutory timeframe. The remaining 21 hearings were held within 5 days to 3 months. Accordingly, the Commissioner submits that the Appellant already has some of the information in relation to request for almost 10 of the 12 months (12 months proceeding 10 October 2015). Since this information is accessible to the Appellant by other means, the Council would be entitled to refuse future requests from the Appellant for this information under section 21 FOIA. The Commissioner submits that the fact that this information is publicly available, limits the value of the requested information as the extent of the Council's compliance with the Licensing Act 2003 is already available.

[6] See email to the Commissioner dated 17 January 2016.

f. It is not within the Tribunal's jurisdiction under section 58 FOIA to determine the Council's compliance with the Licensing Act 2003 or the accuracy of information published on the Council's website.

g. The Commissioner submits that the request taken as a whole is an inappropriate use of the Information Rights regime. There are other mechanisms available to the Appellant, including judicial review, by which to challenge the lawfulness of the Council's conduct concerning licensing applications.

Burden on the Council

h. If the Tribunal find that the request has a serious purpose and that FOIA is an appropriate means by which to achieve that purpose, despite the information available on the Council's website concerning its compliance with the Licensing Act 2003, the Commissioner submits that the value and purpose of the request is outweighed by the unreasonable burden on the Council in dealing with the Appellant's request and associated correspondence. The Commissioner accepts that the request at issue in this appeal is specific. The Commissioner submits that although the request is unlikely to be regarded as vexatious in isolation, account should be taken of the previous requests and dealings, with the underlying purpose being the Council's compliance with the Licensing Act 2003, and the impact of the communications as a whole on the Council's resources.

i. The Council has explained the burden that complying with the Appellant's requests and correspondence would have on its resources:

    i. The Appellant's requests would have a detrimental impact on the licensing team's ability to conduct their daily tasks, where the team comprised of five officers handling a high volume of licensing work given the size of the borough. Dealing with his requests and correspondence had caused an undue burden in terms of staff time and expense far beyond the "appropriate limit" under section 12 FOIA. The Council submitted that there was a risk of other licensing applications being processed incorrectly because of the demands the Appellant has placed on the licensing team.

    ii. Between September 2015 and particularly October 2015, when the request was submitted, the Appellant's requests had become the main part of a Senior Licence Officer's work spending 10 to 14 hours per week (two days out of their four day week) gathering information for the requests and responding to the Appellant's emails.

iii. The Council estimated that dealing with the request would take 65 hours in total[7]:

(i) 5 hours to read and interpret the correspondence and requests;
(ii) 42 hours to gather relevant information, collate and check responses, scan documents, redact information and send it to the Council's FOI team;
(iii) 3 hours involving meetings with colleagues, the line manager, legal advisor and FOI team; and
(iv) 15 hours looking into email queries, gathering and collating information and responding to email queries.

j. The Appellant argued that the requested information *"…should be easily and readily available electronically to the Council and therefore easily provided";* and the requested information would be held on a spreadsheet or similar programme. However, regardless of how the requested information is held; the Commissioner was entitled to rely on the Council's submissions to reach the conclusion that the repetitive nature of the Appellant's requests imposed an unreasonable burden on the Council.

k. The Appellant argued that he made no more than four information requests since the original request (relating to Wanasah Hall). He appears to have made five formal information requests between January 2015 and October 2015 as per the Council's timeline provided to the Commissioner during his investigation.

l. The Council explained to the Commissioner that the Appellant repeatedly sought an unredacted version of a document that he claimed was published and accessible in its entirety.

m. The Council submitted that the licensing team leader had tried to assist the Appellant but he would request further information once the response was issued. The Appellant accepts that in relation to his request concerning the Rickyard application, he contacted the Licensing Team after the Council's response.

Other Grounds of Appeal

n. The Appellant also argues that the Council has not assisted him in obtaining information. The Commissioner refutes this assertion noting that the Council directed the Appellant to the relevant parts of its website where the Appellant found further information. The Commissioner submits that the Council did not immediately dismiss the Requests as vexatious, instead the Council sought clarification concerning

[7] This did not take into account the time previously spent in dealing with the Appellant on previous requests.

the requests and only relied on section 14 FOIA after conducting an internal review.

o. The Council argued that there may be a personal grudge from the complainant towards the licensing team. The complainant was the Licensing Sergeant for the Metropolitan Police working closely with the Council's licensing team on a daily/weekly basis. The police licensing teams were located within the same building and area of the council as the licensing team. Therefore, the Council considered that as the complainant had worked closely with the licensing team previously and it may be argued that there was a personal grudge towards the licensing team and/or that the complainant may be using inside information for commercial purposes working for a private licensing company. Similarly, the Council had submitted that the requests were futile on the basis that it had conclusively resolved the issues and requests raised by him.

26. Amongst the papers in the bundle was a 'timeline' of email contact from the Appellant to the Council.[8] This described showed 18 emails sent over a ten-month period. This included the information requests, a request for internal review, and two emails made chasing for a response to emails made a week earlier. It also noted on 15 October 2015 'numerous emails' between the FOI Officer and Mr Charlton.

27. We had the benefit of hearing from Mr Charlton. His evidence and submissions at the hearing and/or from the bundle included the following:

a. Under the Licensing Act 2003, when an application for a premises license is submitted and accepted there is a 28 day consultation period during which representations against that application may be made. If representations are not resolved within that period a hearing 'must' be held within 20 working days after the consultation period to decide the application.

b. He had retired as a police sergeant in April 2011, having worked in licenses. Contrary to the Council's assertion, he had no personal grudge towards the licensing and had not been located within the same building.

c. He did not consider his approach to have been vexatious or scattergun. He explained the rationale and focus of request as follows:

Request: Wanasah Hall

i. In 2014, he had been informed by a client that a premises licence for a nightclub had been issued after the application had been withdrawn. In February 2015, he requested documents related to the premises licence and all other documents related to the grant of the licence. It became clear when reading the papers that the licence had been issued without an application and that the Council and police had acted unlawfully in issuing the license. A judicial review then held that the license had been issued unlawfully and was to be quashed. A police complaint was still being investigated. He had considered it of some concern that a licence could be

[8] See page 155 of the bundle.

issued without due process and decided to make enquiries. He did this at his own expense and had nothing to gain from doing so.

ii. By an email of 14 July, the Appellant asked for an unredacted response to his initial request. He indicated that he was not fully satisfied with the Council's response where names and individual details were redacted. He considered that under the Licensing Act that information should be in the public domain. He also noted he had found out that a related document had been published in the public domain, which he considered should have been provided in response to the request.

Request: The Rickyard

iii. On 31 July 2015, he made a second request as he had wanted to see if another licence had been issued correctly. It was a council application for one of the Council's premises. He saw from the Council's website that it had not complied with the time limits required by s.77 of the Licensing Act. He considered that the information provided made him suspect that the application had not been dealt with properly and that as it was so scarce he suspected that some documents were missing, as with the Wanasah Hall request. Accordingly, he had contacted the Council's licensing department to clarify details not included in the response but did not receive clarification.

Request: Sukarah Lounge

iv. On 26 August 2015, he made a third request. This was because it related to the same licensing agent and premises as Wanasah Hall. He saw that this had appeared to follow due process. It became apparent that he was not being provided with all the information as there was information missing from the emails.

Request: missing emails from earlier request

v. His fourth request of 21 October 2015 arose when he had found out through the judicial review process that the Council had not disclosed at least two documents in response to his first request. He was concerned that other documents might also have been omitted. He asked about this and was told by the Council to submit another request for the email he required. The Council provided the email but in the form of a word document and the Appellant remained concerned that it was missing certain details such as the trail of previous emails being missing from it. After requesting it again, he was sent an email and the trail but suspected it to be fabricated in some way.

Current Request

vi. The current request asked for the number of applications received for liquor licenses. This was made where it was apparent that the Council were not correctly administering licensing applications where two requests showed this had happened at least twice and

the Council's own website was failing to comply with legislation. A previous request had provided that an application was submitted and several months later had not been resolved nor had a hearing been held. There was a public interest in determining the scale of non-compliance.

d. As regards the burden on the Council:

   i. The only licensing officer contacted in the licensing team had been the team leader, and there had not been regular contact, but rather a request for clarification relating to the second request.

   ii. It was likely that the requested information would be held on a spread-sheet or similar programme which should make such information quickly accessible.

e. The website does not provide this information. It is only possible to see applications which have progressed to a hearing and then work out which had been dealt with outside the consultation period.[9] Of the 22 applications he could see between 16 July 2014 and 14 August 2015, only one had been held in time. The remaining had been outside the 20 working day period by between five days and three months. He had only requested the information because he could not find it himself. Since the Licensing Act requires it to be available for anyone to see, the Council was not compliant with the Act. The website had the licensing register, but the system did not allow for a search such that of the 1000 licences he would have to go through each one and often the system was down. He said that other Councils he dealt with, such as Hillingdon, Harrow and Brent had better websites and were "very hot" on timing.

f. This was not a fishing expedition. He was concerned with the maladministration of the licensing system. He considered it important that everyone was playing on a level playing field, which required everyone that submitted a license application to know the law would be followed, and not that a licence could be issued without an application. The system allowed local residents potentially affected by proposals in a licence application to have a set amount of time to object and then attend a hearing of the objections are not resolved. Without due process, residents may have less say in what happens in their street where may not want, for instance, noise at 2am. Had the original request not shown a problem, his other requests would not have followed.

g. As regards the estimated burden on the Council, he did not accept it, and thought the estimated 65 hours to be "laughable".

Our Findings

28. We found the testimony of the Appellant at the hearing and in his submissions persuasive and prefer these to the arguments made by the Commissioner. On the basis of the information before us, we found no reason to conclude that his request was manifestly unjustified, inappropriate or an improper use of the EIR.

[9] At page 144 of the bundle, the Appellant explained that he had been able to find agendas of premise license application hearings and ascertained the information from this.

29. Whilst we were able to infer a motive for the request, we did not think it had no reasonable foundation or that the Appellant's actions had reached the point of being a disproportionate use of the Information Rights legislation. Mr Charlton had explained that the Council had not been complying with the legislation by not providing online certain information on license applications, and in his experience other councils did so and seemed to be more effective in keeping to the deadlines provided by the legislation. On balance, we accept this to be accurate and in any case, in the absence of the Respondent disputing this, we have no reason not to do so.

30. The Appellant also argues that based on information from previous requests, he was concerned to determine the scope of non-compliance with the legislation. We found this to be a slightly weaker argument than those in paragraph 29 above. The Council has stated that the mistakes related to Wanasah Hall were made in good faith and 'with pragmatic intentions', and this seems to us to be credible. Nonetheless we consider there to be a public interest in knowing the degree of compliance with deadlines stipulated in legislation.

31. Certain documents were not included in the bundle[10]:

    a. It did not contain a complete set of all previous requests and responses. Accordingly, it was not clear whether the earlier requests had been properly dealt with. In their absence, it would be difficult to draw a conclusion that the present request was manifestly unreasonable within the context of the previous requests. Mr Charlton had made clear his dissatisfaction with how the earlier requests had been dealt with, (for instance in not being provided with the redacted information), and that this was what had resulted in a further request and correspondence. It is possible, that a more appropriate avenue may have been for him to complain to the Commissioner in relation to any request he considered had not been handled correctly.[11] However, we have found nothing to show that the Council sought to inform the Appellant of the appropriate procedure where not content with the Council's response to the earlier requests. In all the circumstances, when considering all requests sent, we do not consider the present request to be manifestly unreasonable.

    b. We were not provided with a complete set of emails identified in the Council's timeline. Based on the information provided, we do not conclude that the Appellant has been unreasonably persistent or has sent a particularly large number of correspondences. He had been persistent, and perhaps at times could have been more patient - for instance in sending chasing up emails a week after the original. However, this is far from being manifestly unreasonable. We accept the Appellant's evidence explained above as to the focus and purpose of his requests, and in the context of his dissatisfaction the emails sent by him seem reasonable. The

[10] Since the Respondent did not attend the oral hearing, it was for it to be satisfied that it had provided all relevant documents were provided for the Tribunal prior to the hearing. Amongst other things, this accords with the party's duties under rule 2(4) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009 No. 1976 (L. 20)).

[11] For instance, the Appellant had sought an unredacted copy of material and the Council had claimed that he was repeatedly asking for it despite having subsequently said it had been published in unredacted form. In that instance, it seems that the Appellant was concerned that the Council had not complied properly with his original request, such that he might have considered proceeding with a complaint to the Commissioner.

Commissioner found that there had been a series of persistent and repeated information requests and an unnecessary use of the FOIA legislation. We do not accept this for the reasons set out in this sub-paragraph 31.

c. Where the Respondent had argued that material was available to find on the Council's website, we were not shown any of this. To the extent that it is argued that the information requested information is available elsewhere, we do not accept this for the reasons given by the Appellant.

32. We do not consider the Appellant's motive to be vengeful. We were satisfied at the hearing that he had a keen and genuine interest in understanding the extent to which the licensing system was operated in the manner sought by the legislator to be appropriately fair to all interested parties. (We note that the material placed in the confidential annex to the Decision Notice did not seem to be properly confidential. It appertains to an alleged personal grudge by the Appellant, who had a right to know what the Council was claiming and to be able to address it. The allegation itself seems baseless.)

33. As regards the burden of the request on the Council, we do not accept that the costs would or have been substantial. Taking into account all information provided, on balance, we conclude:

    a. the Council's estimation of costs as 65 hours seems excessive and in the absence of fuller analysis tends towards a mere assertion. If the Council do not already have the information on its performance readily to hand, it is more likely than not that the information would be relatively easy and quick to retrieve.

    b. the estimation of 18 hours similarly lacked analysis. Further, providing the total number of pages previously disclosed, whether 236 or 270 does little to assist in assessing the burden in the absence of more information. In any event, we do not accept that it has been shown that there was a repetitive nature to the Appellant posing the same or similar requests - so as to conflate the burden for past and present requests. We do not accept they had imposed an unreasonable burden on the Council for reasons given above. [12]

34. In short, we consider the benefits of disclosure outweigh the burden on the Council of providing the material requested.

35. To conclude, we consider that the Commissioner erred in applying FOIA instead of EIR. We also do not accept that the request was manifestly unreasonable. We note that had we considered that FOIA was the applicable regime, we would not have found the request to be vexatious or to have exceeded the appropriate limit for costs set out in section 12 FOIA.[13] In the circumstances of this case, the same reasoning would have applied.

36. Our decision is unanimous.

[12] Based on the information before us, our conclusion here is the same regardless of whether we apply regulation 12(2) EIR or section 12 FOIA.
[13] See for instance paragraph 33.

Judge Taylor

Date of Promulgation: 23 December 2016