



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

Appeal Reference: EA/2018/0054

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Mr John Randall
Mr Nigel Watson

Between

Peter Scott

Appellant

-and-

**The Information Commissioner (1)
Kirby Muxloe Parish Council (2)**

Respondents

Date of hearing: 11 September 2018

Attendances:

For the Appellant: In person

For the 1st Respondent: Did not appear

For the 2nd Respondent: Mr Greenwood

DECISION AND REASONS

BACKGROUND

Preliminary

1. At the start of the hearing the Appellant sought to renew an application objecting to the Kirby Muxloe Parish Council (the Council) being represented by Mr Greenwood. This matter has already been dealt with by the Registrar on 24 July 2018, and by the Chamber President, Judge McKenna, on 3 August 2018, neither of whom, having considered the Appellant's comments, saw any reason for preventing the Council from being represented by a person of their choice. We declined to reconsider the Chamber President's decision at the start of the hearing. During the hearing Mr Greenwood asked two questions of the one witness called by the Appellant and made short appropriate submissions on behalf of the Council.

2. The Appellant referred to papers in the hearing which the Tribunal did not think were in its bundles (pages 260-389). The Appellant provided these pages after the hearing. Upon considering these papers, it appeared to the Tribunal that it had had the vast majority of these papers in an unnumbered format prior to the hearing. The Tribunal had read and considered these documents prior to the hearing, and have considered them for the purposes of this judgment.

The request

3. The Appellant made a request for information from the Council on 25 November 2016. The request was as follows:-

Further to my letter of 15th November it has been suggested to me that I may have misjudged whether or not your predecessors have obtained on behalf of the parish council some or all of the qualified surveyors reports required in relation to disposals or leases of charity properties.

Therefore, further to Freedom of Information Act 2000, kindly arrange to supply copies of all surveyors' reports obtained by the parish council in respect of leases or tenancies or proposed leases or tenancies of the recreation ground from the purported leases to the County Council of land adjoining the school in 2006 to the present time. I am sorry to put you to this trouble, but I need the information, and hope the exercise will be informative in any event.

4. There was a very long delay before the Council responded substantively to the request, and indeed the Commissioner had to intervene before a response was sent on 5 December 2017 refusing the request and citing section 14(1) FOIA (vexatiousness of the request) and regulation 12(4)(b) EIR (manifestly unreasonable request). There was an internal review whereby the Council upheld its refusal dated 10 January 2018.

The decision notice:

5. The Appellant complained to the Commissioner, who produced a decision notice on 8 March 2018. The Commissioner decided that the information sought was environmental information for the purposes of regulation 2 EIR, as a surveyor's report in relation to leases of a recreational ground would be administrative measures likely to affect the state of the elements of the environment.
6. The Commissioner explains that regulation 12 (4) EIR states that a public authority may refuse to disclose environmental information where the request for information is 'manifestly unreasonable', and that on occasion at least there is very little difference between what this means and the meaning of a vexatious request for the purpose of s14(1) FOIA. It seems to us that this is one of those cases. Both these provisions are set out below,

along with a description of the main case law and guidance from the Commissioner.

7. The Commissioner records that the Council considers that the request is manifestly unreasonable because it is part of an ongoing campaign against it. The Commissioner asked the Council for evidence that the Appellant was acting in concert with others with previous requesters, and the Council referred to a letter sent by the Appellant on 15 November 2016 to the Council (shortly before his letter of request, which refers to the same 15 November 2016 letter) in which the Appellant wrote as a 'consultant' on solicitor headed notepaper (which describes him as a consultant solicitor) and in which he refers to concerns amongst parishioners about the way the Council has been run. He says he has been asked to advise some of the parishioners and that 'I have suggested to my clients that I write to you to outline some of those issues and difficulties', which the Appellant then proceeds to do over a number of pages, with many of the concerns relating to the recreation ground.
8. The Council's view was that the Appellant is acting as the solicitor for other requestors who have previously had their requests refused under s14(1) FOIA and reg 12(4)(b) EIR, and these refusals have been upheld by the Commissioner in a number of decision notices where it was accepted by the Commissioner that three residents were working in concert to disrupt the workings of the Council. The Council relies upon the reasoning in those decision notices. The Commissioner states that 'On reviewing the other requests, the Commissioner is satisfied that the council can rely on those reasons and findings [in the previous decision notices] as to why this request in this case is also manifestly unreasonable....The Commissioner upholds the refusal'.
9. Those decision notices are said to be FS50632398, FS50645635 and FER0636542, all of which are in the bundle. As they are appearing as

witnesses in the present case, we note that two of these cases relate to Mrs Wilkie and one to Dr Wilkie.

10. In FS50632398 (10 August 2017), the request related to a meeting between the Council, Sport England and others. In that case the Council said that in a small parish of 3390 residents and it was of the view that three residents were working in concert to disrupt the workings of the Council. The Council referred to a pattern of activities related to a list of queries made when the annual accounts are published. When information is provided a new request is made for documents and objections filed with the district auditor, and then information requests made to the Council in a bid to seek evidence to support the objections. The Council said that it had received 49 requests between August 2014 and April 2017 from the three residents in relation to the Council and the Recreation Ground Charity Business. The requests are often extensive with follow up emails and letters from solicitors, which creates a burdensome situation for the Council.
11. The Council explained to the Commissioner in this case that immense stress had been caused to parish councillors and the parish clerk, leading to staffing difficulties, because of reluctance of staff members to deal with FOI requests, and an adverse effect on the operating of the Council. The Council relied on the costs and staff time incurred, unjustified levels of disruption, the disproportionate burden in workload, distress caused to councillors and staff, and lack of willingness of these residents to work and co-operate with the Council.
12. Although the Commissioner was of the view that the Council's failure to properly deal with FOIA requests had contributed to the breakdown of relations between it and the three residents, it also noted that the three residents had not assisted by considering the modification of their behaviour to assist the Council. The Commissioner concluded by

accepting the points made by the Council and reached a conclusion that responding to the request would be unlikely to satisfy the complainant and may lead to further requests and further points of dispute. On that basis, and applying the appropriate case law and guidance, the Commissioner decided that this request was vexatious.

13. Decision notice FS50645635, dated 24 August 2017, relates to a request made by Dr Wilkie, which the Commissioner decided was made under the EIR. This was a lengthy request reproduced over five pages in an annex to the decision notice related to annual accounts of the Council, amongst which was a request for correspondence with Sport England in relation to renovation of the pavilion. The requests were found to be manifestly unreasonable for reasons similar to those expressed in decision notice FS50632398.

14. The third decision notice, FER0636542, is referred to in more detail in the present decision notice. At paragraph 25 of this decision notice the Commissioner says it relates to a request by a person whom the Commissioner considers is now represented by the Appellant as solicitor, and where the request was considered to be vexatious/manifestly unreasonable. That decision notice in the bundle shows that the complainant was again Mrs Wilkie. The decision notice is dated 19 September 2017 (which, as in the other cases, some time after the request in this case), and the request for information was made on 19 April 2016 (seven months before the request in this case). The request from Ms Wilkie concerned documents relating to the same recreation ground, (and transactions relating to it), as is referred to in the Appellant's request. The request was again found to be manifestly unreasonable.

15. The Commissioner notes that regulation 12(4)(2)(b) EIR is subject to the public interest test and notes the Appellant's arguments that the Council

was ignoring its statutory obligations under the FOIA in order to avoid scrutiny, and the Appellant's view that any solicitor making a request after having acted for clients whose requests have been found to be vexatious, will also face a finding of vexatiousness from the Council, and that cannot be right. The Commissioner in our case quotes directly from decision notice FER0636542 as follows:-

Although in the current case there is a value to the request this is significantly weakened by the overall effect which the complainants are having upon the council's ability to carry out its functions. It is not in the public interest to allow a situation to form where one, or a few parishioners effectively prevent a public authority from being able to carry out its functions. The Commissioner has also been made aware that the Charity Commission is investigating issues with the Recreation Ground Charity which works alongside the council, and she understands from the complainant that the council's external auditors are continuing to investigate issues relating to the 2015/16 accounts. These ongoing investigations weaken any value in further exacerbating the burden on the council with questions relating to the same issues.

16. The Commissioner said her view had not differed in the current case and found that the public interest lies in favour of the application of regulation 12(4)(b).

THE APPEAL

17. The Appellant lodged an appeal against the decision notice dated 12 March 2018. The Appellant argues that the EIR are not applicable; that it is wrong to exclude requests from a person associated with others who have made requests; and that it is of great importance that the Council is held to account. He disputes that the Charity Commissioner will deal with more than some of the issues involved, and says there will minimal effort in providing the information requested. He complains that the

Commissioner failed to take action concerning the delay of the Council in responding to the delay.

18. A number of submissions have been filed since the appeal was lodged. The Council did not make any submissions in writing but did attend at the hearing. The main arguments are summarised below:-

Commissioner's response

19. In the Response dated 12 April 2018, the Commissioner reasserted her position in the decision notice, stated that the Appellant should 'confirm who he is instructed by, or whether he is acting in his personal capacity' and to clarify the position as soon as possible. The Commissioner set out passages from the Appellant's correspondence that indicated to her that he was 'acting on behalf of other individuals either on a formal or informal basis'.
20. The Commissioner stated that even if the Appellant was not acting on behalf of other requesters (whose requests had been deemed to be vexatious) then she would consider his request to be manifestly unreasonable on the basis that the evidence available indicates that he is acting in concert with those other individuals. The Commissioner said that all the information had to be taken into account in deciding manifest unreasonableness, even where the request was 'specific, of value, and unlikely to be burdensome in isolation'.

Appellant's reply

21. The Appellant filed a Reply dated 31 May 2018. This confirmed that he had made the request in his own name, accepted that he had acted for requesters in the past, disputed that requests were affecting the ability of the Council to operate, emphasised that it was the Council's actions over

a number of years which had led to the need for parishioners to hold it to account, and criticised the Commissioner's dealings with the case.

Appellant's final written argument

22. This is dated 26 June 2018. The document underlines the importance of the FOI process in holding the Council to account. The argument disputes the burden which the Commissioner says has been placed on the Council by the requests, including the claims that councillors and staff have resigned as a result of the requests made. The background to the dispute between the Council and some parishioners is described, and the Appellant then describes his correspondence in November 2016 with the Council as an attempt to make a new start with a recently appointed clerk and describes his 'somewhat apologetic letter' requesting the surveyors' reports. The document details some of the Council's failings in dealing with bodies such as the Commissioner's office and the Charity Commissioner, and there is a long section about Mr Greenwood (who represented the Council before us).

Commissioner's skeleton argument

23. The Commissioner's skeleton argument of 28 August 2018 rehearsed the points made in the decision notice and the Response. The Commissioner accepted that the Appellant was not acting on formal instructions from his clients (the Wilkies) but says:-

The Commissioner simply fails to see how a request by a solicitor on the very subject matter in relation to which he is acting for clients, cannot be part of a concerted joint effort between solicitor and client. Mr Scott's use of FOIA amounted to an attempt to pursue the Wilkies' campaign against the Parish Council by another avenue, and was therefore a manifestly unjustified, inappropriate or improper use of a formal procedure, in particular as he has obfuscated the degree of his connection with the Wilkies.'

24. The Commissioner accepts that the vexatiousness decisions in relation to the requests from the Appellant's clients post-date the request from the Appellant, but the Commissioner does not in any event rely on these decisions, stating that:-

'...the unreasonableness of the Request at issue in this Appeal is procedural: it lies in the attempt to conceal the link between the Appellant and the Wilkies, and the link between his Request and their long-running campaign against the Parish Council.'

Appellant's skeleton argument

25. This is dated 3 September 2018 and is said to respond to the Commissioner's skeleton argument. The main points are as follows:-

- (a) The Wilkies have not been involved in a campaign against the Council;
- (b) There has been no obfuscation, as it is clear that the Appellant has acted for and continues to act for Dr and Mrs Wilkie and the Council is aware of this. The Commissioner is wrong to rely on the alleged concealment.
- (c) The purpose of the request was to attempt to resolve a dispute, not continue it.
- (d) There are implications that other arguments used by the Commissioner have now been abandoned (attack on the Council, association with other requesters), and the concealment is now the sole issue.
- (e) There is nothing wrong in acting in concert where the aim is to obtain and share information rather than cause an unreasonable burden.

(f) This is not a *Walberswick* case where the Council was overwhelmed.

The Hearing

26. At the hearing the Appellant emphasised that he had acted for complainants whose requests had been found to be vexatious or manifestly unreasonable (as discussed above), and that the Commissioner was wrong to allege that he had tried to hide this. Indeed, as noted, by the time of the hearing, two of those previous complainants had provided witness statements in support of the Appellant's appeal, setting out some of the background to the disputes that had arisen over the years between the Council and parishioners. These witnesses were Dr and Mrs Wilkie. We read both of their statements, and Dr Wilkie gave evidence (Mr Greenwood confirmed that he had no questions in cross-examination for Mrs Wilkie). Dr Wilkie annexed a list of 40 information requests about which he was aware between 2011-2018, and his statement gives a detailed analysis as to why the requests have been important to hold the Council to account.

27. Dr Wilkie accepted that a group of parishioners had been acting together but for the purpose only of ensuring the good management of the Council, he said. The reference to a 'battle' in one of Dr Wilkie's emails was only to a battle to ensure that proper elections for the Council were held.

28. Mrs Wilkie's statement says that it is a slightly shortened version of a document which she submitted in relation to previous complaints to draw the attention of the Commissioner to the seriousness of the concerns about the Council. It rehearses many complaints about the Council in its 51 paragraphs.

29. The Appellant's case, in a nutshell, is that any request he has made has been for limited information, and he has made his request politely. He questions whether the Council, and Mr Greenwood in particular have acted in the same polite fashion. He submits that his request should not be seen in the context of requests made by his clients in relation to similar subject matter. He argues that this is not a situation like that set out in the *Walberswick* case relied upon by the Commissioner where a group of people acted in concert to try to bring a much smaller council to a standstill, using intemperate language in communications and where the council acted with great restraint.

30. In response, Mr Greenwood supported the conclusions reached by the Commissioner in the decision notice. He said that great pressure had been brought to bear by a group of four people (not including the Appellant) making repeated requests for information, whom he referred to as the 'concert party'. He emphasised that the Council saw the Appellant's requests as part of the same concerted effort, and that the Council was concerned that, unless the Commissioner's decision was upheld, the Appellant and others would continue to make requests about the same subject matter. The Council had submitted witness statements from eight witnesses. Four attended the Tribunal, but the Council through Mr Greenwood elected not to call them, relying on the documentation and the findings of the Commissioner.

LEGAL FRAMEWORK

31. Regulation 12(4)(b) EIR provides: "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..."

32. Section 14(1) FOIA states that “(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”.
33. As stated above, the Commissioner’s view is that vexatiousness and manifest unreasonableness essentially have the same meaning in this case and we agree. Indeed, the appellate decision of *Dransfield & Craven v ICO* [2015] EWCA Civ 454 described the distinction between the FOIA and EIR regimes in regard to vexatiousness and manifest unreasonableness as “vanishingly small.” Therefore, we refer to the case law and guidance on vexatiousness for the purpose of considering whether the request is manifestly unreasonable.
34. We would note that vexatiousness is not defined in section 14, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.
35. The Commissioner’s guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
36. The emphasis on protecting public authorities’ resources from unreasonable requests was acknowledged by the Upper Tribunal in the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) when it defined the purpose of section 14 as follows:

‘Section 14...is concerned with the nature of the request and has the effect of disapplying the citizen’s right under Section 1(1)...The purpose of Section 14...must be 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).

37. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. 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’.

38. *Dransfield* was also considered in the Court of Appeal, as cited above, where Arden LJ observed:-

“...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... The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.’. (Para 68)’

39. The Commissioner’s guidance on section 14(1) of the FOIA states at paragraphs 91 and 92:

“If a public authority has reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted, then it may take this into account when determining whether any of those requests are vexatious. The authority will need to have sufficient evidence to substantiate any claim of a link between the requests before it can go on to consider whether section 14(1) applies on these grounds. Some examples of the types of evidence an authority might cite in support of its case are:

- The requests are identical or similar.
- They have received email correspondence in which other requesters have been copied in or mentioned.
- There is an unusual pattern of requests, for example a large number have been submitted within a relatively short space of time.

- A group’s website makes an explicit reference to a campaign against the authority.”

40. The Commissioner’s guidance also contains a list of indicators which we think are helpful in considering ‘all the relevant circumstances’ in this case. The indicators we have considered are as follows:-

Abusive or aggressive language

The tone or language of the requester’s correspondence goes beyond the level of criticism that a public authority or its employees should reasonably expect to receive.

Burden on the authority

The effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester.

Unreasonable persistence

The requester is attempting to reopen an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny.

Intransigence

The requester takes an unreasonably entrenched position, rejecting attempts to assist and advise out of hand and shows no willingness to engage with the authority.

Futile requests

The issue at hand individually affects the requester and has already been conclusively resolved by the authority or subjected to some form of independent investigation.

DISCUSSION

41. The Appellant disputes the Commissioner’s view that the EIR applies to this request rather than the FOIA. We agree with the Commissioner that the requested information in this case comes within the definition in regulation 2 EIR for ‘environmental information’ of ‘(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'. The factors in (a) and (b) in regulation 2 EIR refer variously to the state of the elements and factors such as substances and their discharge/emission/release.

42. Nevertheless, even if the Appellant is correct on this point, as we have decided that the issues of vexatiousness and manifest unreasonableness in can be addressed in essentially the same way, the result of the appeal does not depend on the correct identification of the statutory framework.

43. When the Appellant made his requests, it was in the context of having acted for clients in the past who had made FOIA requests about similar issues that formed the subject matter of the Appellant's requests, together with wider issues about the Council's efficiency and effectiveness.

44. The Appellant says that the correspondence with the Council that led to the requests was drafted as it was by him in the hope that he could help a new clerk (Ms Atkinson) employed by the Council, understand some of the background to the disputes which had written between the Council and some parishioners. The Appellant referred to his clients in that correspondence without naming them, which appears to have led to some confusion as to whether he was acting on his own behalf, or on behalf of clients (and who those clients might be).

45. It seems to us that the Appellant has stated clearly since, that the request was made on his own behalf and that he has acted for clients who have made requests. Dr and Mrs Wilkie attended at the hearing and provided witness statements in advance, and the Appellant made it clear that he has acted for them in making requests.

46. In these circumstances, although there has been some confusion, it does not seem to us that the Appellant has obfuscated or attempted to conceal his links with parishioners such as the Wilkies. If that was his intention it was unlikely that he would have involved them in his appeal in the way that he has done.
47. We also accept the submissions of the Appellant, the oral and written evidence of Dr Wilkie and the written evidence of Mrs Wilkie that there are very genuinely held concerns by all of them about the way the Council has been run and the way it has dealt with particular issues such as the recreation ground.
48. However, we cannot avoid the fact that the Appellant's requests in his own name continue the theme of a number of requests by other parishioners with whom he has worked closely and/or acted as solicitor in the past, and concern broadly the same subject matter as these other requests which have been held to be vexatious by the Commissioner (as described above). The relevant decision notices in those cases have not been appealed, and we are not in a position to re-open the conclusions of those decision notices in this appeal. The support given by Dr and Mrs Wilkie to the current appeal underlines the link between them and the Appellant, especially as their witness statements rehearse much of the background of the dispute between the small group of parishioners and the Council.
49. In relation to the *Walberswick* case referred to above and by the Appellant (*Harvey v IC and Walberswick Parish Council* EA/2013/0022, 21 January 2013), we note that that was a case where s14 FOIA was applied in a situation where there had been a large number of requests from a group of people to a parish council. The appellant in that case denied that there was any campaign to destabilise the council and, as in this case, argued

that the point of the requests was to hold an inefficient council to account. The FTT accepted that, on the evidence, it could not make a finding that there was express collusion between the appellant and other requesters. However, the appellant was aware of the 'flood of requests' targeted on the council, and must have foreseen that her request would have added to the burden on the council (which included the resignation of councillors).

50. Although the FTT found that the appellant's correspondence was not 'offensive or distressing' they did find it to be 'relentlessly aggressive, albeit lucid and precise'. Even though the council eventually provided the requested information prior to the appeal hearing, it is clear that the FTT had no hesitation in finding that the request was vexatious.

51. We agree with the Appellant in the present case that the situation does not appear to have deteriorated as much as it had done in the *Walberswick* case. This is not such a clear cut case. We do not describe there having been a 'flood' of requests in the present case, and as the Appellant says, his correspondence with the Council has been polite. However, simply because a *Walberswick* situation has not arisen does not mean that the current request in the context of the position of this Council is not vexatious or manifestly unreasonable. We note the previous decision notices described above (and relied upon by the Commissioner in this case) in which the Commissioner found that the number of requests from Dr and Mrs Wilkie and others over a period of time had caused considerable burden to the Council and that staff and councillors had resigned because of the stress caused by the level and nature of FOIA requests.

52. Applying the legal framework set out above, and the factors suggested by the Commissioner's guidance it seems to us that these requests are a continuation of the activities of the Appellant's clients (or those with whom he has worked closely over the past few years), driven by the fact

that, as a group, they believe that the Council has not, over a period of time, properly discharged its functions. As a continuation of previous activities, it seems to us that the Appellant's request must be viewed in the light of unchallenged decisions made in previous cases by the Commissioner that the requests by members of this group are vexatious or manifestly unreasonable.

53. Accordingly we find that, taking a rounded approach to the points raised (as we are required to so), the request is rightly described as manifestly unreasonable (or vexatious, if the requests should correctly be considered under the FOIA) because:-

(a) The request continues and exacerbate the burden on the time and resources of the Council already caused by the Appellant's clients and others he has worked closely with, as previously recorded by the Commissioner in the earlier decision notices.

(b) The evidence suggests strongly that response to the request is unlikely to satisfy the Appellant and likely to lead to requests for still further information from the Council.

(c) The request by the Appellant is part of the activity of a group of people to persist unreasonably in pursuing issues.

(d) The Appellant and others have taken an unreasonably entrenched position, and shows no real willingness to engage with the authority, even if on the face of the correspondence from the Appellant he has approached the Council using polite language.

(e) We agree with the Commissioner in the passage from FER0636542 cited in this case that as ' the Charity Commission is investigating issues with the Recreation Ground Charity which works alongside the

council, and she understands from the complainant that the council's external auditors are continuing to investigate issues relating to the 2015/16 accounts.....These ongoing investigations weaken any value in further exacerbating the burden on the council with questions relating to the same issues'.

- (f) In relation to the public interest test, we agree with the Commissioner's approach in paragraphs 29-34 of the decision notice that although there is value in the request and the stated aim of holding the Council to account, this is outweighed by the burden and stress placed on the Council by a manifestly unreasonable request.

CONCLUSION

54. For the reasons set out above we are satisfied that that the Appellant's request was manifestly unreasonable (and, if needs be, vexatious).

55. As a postscript, we note that that the Commissioner had suggested that if we found in the Appellant's favour then the Tribunal should decide whether the information at issue should be disclosed. Having made enquiries of the parties on this issue, Mr Greenwood said that there was only one surveyor's report. It transpired that the Council had actually included a copy of the report in the additional documents made available by the Council to the Tribunal and to the Appellant. Thus, for the purposes of the hearing at least, the Appellant has had sight of the information he requested.

56. We asked Mr Greenwood whether the Council would rely on any other exemptions in FOIA or the EIR for withholding the report if we found in the Appellant's favour. No possible exemptions were identified, but Mr Greenwood said that the Council would want to consult with the author of the report before deciding whether to disclose. It did not seem to the

Tribunal that this could form the basis of an exemption, and it seemed unlikely to the Tribunal that any exemption under the FOIA or the EIR could be relied upon by the Council if we had found in favour of the Appellant on this appeal.

57. However, as we have not found in his favour, the issue does not arise for determination.

58. We also accept the Commissioner's decision that no further action needs to be taken in relation to the delay caused by the Council, as it has now issued its refusal notice.

59. The Tribunal upholds the Decision Notice and dismisses the appeal.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 10 October 2018.

(Case considered by Panel on 11 September 2018).