EA/2018/0020

DR JAMES BENNETT

Appellant:

And

THE INFORMATION COMMISSIONER

First Respondent:

And

RUGBY COUNTY COUNCIL

Second Respondent:

Before: Brian Kennedy QC
Henry Fitzhugh
Andrew Whetnall

Appearances: Dr Bennett as Litigant in person for the Appellant
Jane Sarginson of counsel for the Second Respondent.

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") and Regulation 18 of the Environmental Information Regulations ("EIR"). The appeal is against the decision of the Information Commissioner

("the Commissioner") contained in a Decision Notice ("DN") dated 13 September 2017 (reference FER0666632), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to hear and consider this appeal on 18 July 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Dr Bennett's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Rugby Borough Council ("the Council") was correct to characterise Dr Bennett's request as manifestly unreasonable.

CHRONOLOGY:

18 Nov 2016	Request for information regarding a specific building project and any reviews arising from the project
19 Dec 2016	Appellant requests acknowledgment of receipt of request
20 Dec 2016	Council acknowledges receipt
19 Feb 2017	Appellant chases outstanding response to request
20 Feb 2017	Council refers Appellant to finding of Local Government Ombudsman regarding a decision on the project and stated that it considered the matter closed
27 Feb 2017	Complaint to the Council, demanding response to FOIA requests
13 March 2017	Appellant contacts Council again requesting response
1 April 2017	Complaint to the Commissioner
8 May 2017	Commissioner intervenes and requests response from the Council
9 May 2017	Council responds to Appellant, refusing request as "an unjustified and improper use of a formal procedure", citing s14(1) FOIA
25 May 2017	Appellant complains to the Council about treatment of his requests
12 June 2017	Appellant complains to the Commissioner
6 Oct 2017	Commissioner requests full explanation from Council for reliance on s14
8 Jan 2018	DN upholding the Council's refusal, but finding that the request should have been considered under EIR

Relevant Legislation:

Environmental Information Regulations 2004 ("EIR")

Regulation 2

"Environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, and electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

Regulation 5 - Duty to make available environmental information on request

(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.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Commissioners' Decision Notice:

[4] The Commissioner clarified that the request pertained to a planning application for the Appellant's home, and the Appellant appeared to be focusing on whether or not the Council's enforcement officer visited his property in March 2015. The Council confirmed to the Commissioner that such a visit had been made, but they held no notes about it. The Council also referred the Commissioner to the Local Government Ombudsman's ("LGO") finding that it was irrelevant to her investigation whether or not a visit had taken place.

[5] The requested information is evidently environmental, as it concerns plans to develop land. The Commissioner considered that there was no material difference between a request considered vexatious under s14 FOIA and a request considered manifestly unreasonable by reason of vexatiousness under reg.12 (4)(b) EIR. She referred to published guidance and the decisions in *Craven v ICO and DECC* [2012] UKUT 442 and *APGER v ICO and FCO* [2015] UKUT 0377 (ACC), noting that the same approach is to be taken whether considering this issue under FOIA or EIR.
She cited the four factors in *ICO v Devon CC & Dransfield* UKUT 440 (AC), but emphasised an holistic approach that considered the proportionality and justification for the request.

[6] The Appellant made an initial request in August 2014 for the relevant information about his case, and a further request in September 2015 regarding the handling of his case; the Council was satisfied that this was a legitimate pursuit of a genuine grievance, and stated that it had satisfied the requests by full disclosure. The Council's planning committee discussed the matter, but the Appellant referred the matter to his MP and the LGO in what they termed an "obsession" and a "refusal to relinquish the matter after over three years from his first complaint". The Council believed that the request was unnecessarily burdensome, and that the Appellant was "unreasonably persistent", "intransigent", "pursuing an unfounded allegation" and intended to "cause annoyance".

[7] The Council also explained that, as a small authority, they have only a few individuals dealing with FOIA and EIR requests. The planning enforcement officer has had to deal with not only the Appellant's planning application and correspondence, but also all of the

information requests and complaints, which has taken a “considerable amount of time”. While the Council accepts that the Appellant “may not be intentionally targeting” this officer, the effect is “an increasing feeling of harassment”. The Council implored the Commissioner to permit it to bring correspondence on a particular matter to an end where there is no genuine interest or need for the information.

[8] Conversely, the Appellant denied that his requests were repetitive or vexatious, positing that the Council’s unwillingness to provide him with the information is to conceal “mistakes and incompetence”. He states that his motivation is a desire to safeguard other ratepayers from the same incompetence.

[9] The Commissioner acknowledged the burden these requests placed on the Council, and noted particularly that despite receiving some disclosure, the Appellant had chosen to pursue the matter by raising complaints with third parties. However, the Commissioner did not consider the burden of the requests to be disproportionate *per se*. What justified the refusal of the requests, in the view of the Commissioner, was the intransigence of the Appellant in pursuing an unsupported allegation that was unlikely to lead to any satisfactory resolution. She was satisfied that the Appellant was misusing EIR in an obsessive attempt to sustain dialogue with the Council about the closed planning matter, and found that the balance of public interest lay in upholding the exemption under reg.12 (4)(b).

Grounds of Appeal:

[10] The Appellant posited a number of arguments as to why the Commissioner was mistaken in refusing his appeal.

I – Minimal burden

10. The burden has been “overstated”, and the Appellant strongly denies that the Planning Officer particularly was overburdened. He maintains that he communicated with eight other Council officials during his attempts to seek redress, and that he has only received two short emails from the Planning Officer referred to.

II – Information does not exist

11. The Appellant notes that the Commissioner claims to have been told by the Council that no notes of the site visit in question exist. The Appellant therefore suspects that there would be no internal reviews or any other documentation in existence, and it would not be unreasonable to expect the Council to confirm that this was the case.

III – Previous Information Rights Breaches

12. The Council had failed on numerous occasions since 2014 to comply with the Appellant's information rights, from falsely claiming information did not exist or providing incomplete responses to requests and ignoring some requests.

IV – Council's Malfeasance

[11] The Appellant claims that aspects of the Council's handling of the planning matter in question have not been addressed, and he wishes to obtain further information before making public allegations of incompetence and failings. He was dissatisfied with the level of information he had received and also with the manner in which the Council conducted itself throughout the planning process. He dismissed the LGO's investigation as insufficient, as it failed to criticise what the Appellant saw as "bad advice and incompetence" on the part of the Council. He noted that he had not received an apology or indeed any acknowledgement that he had been ill treated.

Commissioners' Response:

I – Minimal Burden

[12] The Commissioner is not satisfied that she has been misled as to the actual burden on the Council. The repeated and prolonged correspondence has already placed a considerable burden on a small authority, and would be likely to further add to the burden if allowed to continue.

II – Information does not exist

[13] Where reg.12 (4)(b) is engaged, the Council is not obliged to respond to a vexatious request in any way. Whether the information does or does not exist is not relevant.

III – Previous Information Rights Breaches

[14] The Commissioner found no reason to question the LGO's findings that there was no fault on the part of the Council in its handling of the planning matter. She did not address directly the issue of the alleged previous breaches.

IV – Council Malfeasance

[15] As the Appellant confirmed that he wished to pursue his grievance against the Council further; the Commissioner highlighted this as proof of the vexatiousness of the Appellant's requests.

Appellants' Reply:

[16] The Appellant responded at length, providing copy documents including the final report of the LGO.

I – Minimal Burden

[17] The Council cannot rely on its size to obviate its duties of transparency and ethical behaviour. Contrary to the Commissioner's acceptance of the Council's assertions that one planning officer was shouldering the burden of corresponding with the Appellant, the Appellant named ten individuals within the Council with whom he had corresponded on this matter.

II – Information does not exist

[18] The Appellant cited reg.12 (6), and argued that as the circumstances of his request do not engage reg.12 (5)(a), the Council cannot refuse to state whether they do or do not hold the requested information. The Council has recognised in its Constitution the importance of transparency, particularly in the planning process.

III – Previous Information Rights Breaches

[19] The burden created by the previous requests has been overstated, as the Appellant claims three requests from November 2016 remain unanswered.

IV – Council Malfeasance

[20] The Appellant alleged that the Council's officials had failed to ensure compliance with the requirements of the planning permission, something that the LGO did actually criticise in her report. The LGO's investigation did not consider staff training; that matter was only raised following the intercession by the Appellant's MP. Given that Council officials were labouring

under a misapprehension in regards to planning permission and compliance, the Appellant asks whether the Council has provided any retraining to its enforcement officers.

Conclusions & Reasons:

[21] The Appellant persuaded the Tribunal at the outset that there were issues that required evidence from the Council and the Tribunal joined the Council as a co-respondent (these arguments and Decision are available) and Jane Sarginson of counsel represented the Council at the appeal.

[22] No witness evidence was presented on behalf of the Council. Their oral submissions did little to add to the case made to the Commissioner in her investigation.

[23] The evidence before us demonstrates that when the Appellant raised his concerns with Council officials, both the Case Officer and Mr Gabbitas of the Council assured the Appellant that any departure from permissible development would be immediately investigated An inspection by way of site visit was arranged for 16 March 2015 and was carried out by Council employees.

[24] There was surprisingly little in dispute between the parties on the facts. It is clear that "notes" were made on or about that inspection. They are referred to in correspondence where there is a reference about the site visit to: "see notes". The Council confirmed they had carried out an inspection. At Page 40 of the Open Bundle we see Mr Back of the Council wrote to the Appellant on 4 September 2015, inter-alia; *"I can confirm that on 16 March 2015 the Council Enforcement Officers attended the site to check if the development was being built in accordance with the plans submitted with the prior approval notification."*. There is reference to notes being taken at or relating to that inspection (see Page 635 -01 to that visit.("see notes"). In deed, it would be difficult to accept that there were no notes made by Council employees at or about that visit. There is no dispute about this, or that these notes are now missing. However there is no evidence as to how or when these notes went missing. It cannot be determined whether or not they were present at the time of the Request. The Council have no answer to this. We accept the Appellants' submission that there is a significant public interest in these issues that he has raised. The issue is not with the Ombudsman's findings or the fact that the notes are missing per se. The issue for this Tribunal, as fairly and properly submitted on behalf of the Council is: Is there public interest in having a reg. 12(4)(a)

confirmation that the requested information, (or the notes in question) do not, or no longer exist.

[25] The Appellant has properly and comprehensively made the case that the Public Authority failed to give him adequate guidance or assistance in dealing with his claim. In particular, but not exclusively they did not state at the outset that the notes recorded as taken at the meeting were missing or did not exist. This position, he argues, was made much later on.

[26] The Tribunal is of the view that whether the notes referred to were ever recorded or were recorded and subsequently lost, is a matter of public interest. In our view the Council should have made it clear from the outset, which was the case. Had they done so the Appellant would not have had to persist in his pursuit of this requested information. We do not accept his pursuit was manifestly unrealistic in the holistic sense or within the Dransfield definition.

[27] We are further of the view that the choice to rely on the request being manifestly unreasonable is not in the public interest as the Appellant has argued and a finding under reg. (12(4) (a) would be more appropriate if the said notes were not in existence at the time of the request for the reasons submitted by the Appellant. Having considered all the evidence and submissions before us we prefer the Appellants' submissions on these issues. Accordingly we allow the appeal and direct that the Second Respondent (Rugby County Council) should conduct appropriate searches to determine if the notes in question were available at the time of the request and if not – explain why not. If not available then the Second Respondent may wish to consider the application of reg. 12 (4) (a) and communicate the outcome to the Appellant.

Brian Kennedy QC 29 October 2018.