EA/2018/0273

Between:

NICK QUINN

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

MID DEVON DISTRICT COUNCIL

Second Respondent:

Before: Brian Kennedy QC,

Paul Taylor LLM BA (Hons.) & Anne Chafer LLM BA (Hons.).

Sitting in London on 28 May & 3 July 2019.

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 15 November 2018 (reference FER0742219). The Appellant requested that this Notice not be published prior to the conclusion of the appeal, as in his view it contained personal information, the publication of which he had not provided consent and **the Tribunal orders no publication of this Decision until such times as all appeals as are entitled to be sought have been exhausted.**

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the request for information and the Commissioner's decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Mid Devon District Council ("the Council") was correct to determine that the request was manifestly unreasonable under Regulation 12(4)(b) of the Environmental Information Regulations.

CHRONOLOGY:

3 Dec 2017	Request for minutes of all meetings of the Council's Capital Strategy Asset Group since its inception, to include any documents referred to
3 Jan 2018	Council rejects request on the basis that compliance would exceed FOIA time limits, but advised it could provide 2 years worth of information within the time limit
4 Jan 2018	Appellant refines request to include all minutes already in electronic form from 2012, or in the alternative just the minutes with the option of later requesting specific reports
11 Jan 2018	Council indicates to Appellant that it will consider the revised request
23 Feb 2018	Council refuses, citing EIR reg.12 (5)(e) commercial confidentiality and

	12(4)(e) internal communications. Appellant immediately requests an internal review.
26 April 2018	Internal review refuses disclosure and adds reliance on reg.12 (4)(d) material in the course of completion and 12(5)(d) confidentiality of proceedings
29 April 2018	Appellant complains to the Commissioner
15 Nov 2018	Decision notice holding that the Council breached regs.5 (2) for delay in responding to the initial request, reg.14(2) for the delay in citing the correct exception and reg.9(1) in failing to provide adequate advice and assistance

RELEVANT LEGISLATION:

Environmental Information Regulations 2004

9. Advice and assistance

(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall -

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

(4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.

(5) The provisions referred to in paragraph (4) are -

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).

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.

14. Refusal to disclose information

(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

(5) The refusal shall inform the applicant

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

COMMISSIONER'S DECISION NOTICE:

[3] The requested minutes represent a record of transactions and decisions regarding sites sold or developed within the Council district. The minutes were not intended for publication. The Council argued that while it had not explicitly cited reg.12 (4)(b) to the Appellant initially, it had stated in February 2018 that acquiring the necessary consents to release "historic minutes" would exceed the time limits. It also informed the Commissioner that the minutes in question contain information pertaining to numerous properties belonging to various parties; it also advised "*the items are regarding matters that may not have yet or may never happen and pertaining to complex legal negotiations".* Reviewing and redacting the minutes would, in the view of the Council, run in excess of 50 hours work.

[4] The Commissioner reviewed the material, and accepted that it would have to be manually reviewed. As specific sites and properties are identified within the minutes, a review of each set of minutes would have to carry out in regards to 3rd party personal data, and the Commissioner accepted that the Council's time estimates were reasonable. As such, this would exceed the FOIA time allowance for the consideration of requests. The Commissioner detailed how this provision, while not directly applicable to the Appellant's request, was instructive for how public authorities could consider the burden of requests under EIR. In this instance, the Commissioner was satisfied that compliance with the request would require a "significant diversion" of resources, leading to a "*disruption in the delivery of core services"*.

[5] Turning then to the public interest test, the Commissioner considered the arguments put forward by the Appellant, namely the importance of ensuring that elected officials engage in robust and meaningful discussions about the dealings with Council assets. He claimed that public confidence in the Council was low, and that the annual increases in Council Tax increase the importance of accountability for the Council in this regard.

[6] The Council focused its submissions on the public interest around the issue of commercial confidentiality; an issue that the Commissioner pointed out was irrelevant to the consideration of an excessive burden caused by compliance. The Commissioner considered that the burden would be excessive. She placed reliance on the Appellant declining the Council's suggestion to limit his request to two years' worth of minutes, deciding that this resulted in his request being "insufficiently targeted". She did however concede that narrowing the time frame would not permit

the Appellant to achieve his stated aim, namely tracking outcomes of the committee over a period of time.

[7] The Commissioner did criticise the Council for agreeing to consider the Appellant's request even after he had declined to narrow the time frame, as this did not help the Appellant to submit a less onerous request. Similarly, in citing the wrong exceptions, the Council failed in its duty under reg.9 to provide appropriate assistance. She also stated that, contrary to the Council's assertions, she was unable to find that the request had been vexatious as the Appellant's motivations were not sufficiently clear from the information she had been provided.

GROUNDS OF APPEAL:

[8] The Appellant argued seven broad grounds of appeal:

Ground I – Factual errors in the Decision Notice

The Appellant pointed out errors in paragraph numbering and dates, but also claimed that the DN repeated statements made by the Council that the Appellant considered "*factually incorrect and contain personal, and confidential information which is not relevant to the decision"*.

Ground II – procedural unfairness

The Appellant stated that the correspondence with the Council regarding his request never raised reg.12 (4)(b) and to allow the Council to raise it eleven months after the request and six months after the refusal was inappropriate. He criticised the Commissioner for failing to "find fault" with the Council's failure to identify the correct legislative exception, and was of the view that it was "wholly inappropriate" for the Commissioner to conduct a public interest balancing exercise as the Council had never purported to do one.

Ground III – failures in the Commissioner's investigation

In declining to characterise the request as vexatious, the Commissioner noted that she did not have enough information to determine whether the Appellant's motives were legitimate. The Appellant claims that the Commissioner did not attempt to clarify with him his motives, nor to check the accuracy of certain assertions by the Council with him.

The Appellant argued that the Commissioner had failed to consider adequately the Council's failings in the handling of his initial request, particularly in relying on the

incorrect legislation as a basis to refuse the request. He also stated that she had not given sufficient weight to his willingness to refine and reduce the scope of his request. The Commissioner appeared to have characterised his revised request as a 'rejection' of the Council's suggestion, and the Appellant disputed this; he stated that this was an attempt to engage with the Council, who had failed to provide him with adequate and meaningful assistance. This was also supported by the fact that the Council had 'accepted' the revised request.

Ground IV – request not manifestly unreasonable

The Council informed the Commissioner that 20 sets of minutes fell to be considered, and the work required to examine, redact and acquire the necessary consents would run in excess of 50 hours. The Commissioner had examined only one set of minutes, and had found 31 entries that would require review for 3rd party information or exceptions. The Appellant argued that in basing her determination in regards the reasonableness of the request on one single set of minutes, the Commissioner could not be satisfied that the sample she had been given was fair or representative of the remaining minutes. He referred again to the Council's "acceptance" of the scope of the revised request to argue that it shows that it was not unreasonable.

COMMISSIONER'S RESPONSE:

[9] The Commissioner began by outlining the EIR definition of environmental information and the stages of analysis for the determination of any request. She also referred the Tribunal to the well-known cases of *Dransfield* [2012] UKUT 440 (AAC), *Craven* [2012] UKUT 442 (AAC) and the combined appeal *Dransfield and Craven v ICO et al* [2015] EWCA Civ 454. In that line of case law, it was affirmed that the cost of compliance alone or in part could not render a request vexatious, but it was a factor for consideration in determining whether a request was manifestly unreasonable. In that situation, the decision-maker must balance the burden placed on the authority against the value or serious purpose of the request. There is therefore a higher threshold to be reached in order to justify refusing a request under EIR than FOIA, but the FOIA cost limits can be used as a guideline for the consideration of EIR requests.

Ground I – Factual errors in the Decision Notice

The Commissioner denied that she had made any errors, and the errors of which the Appellant complained were merely her reiterating the arguments of the Council about

why they considered the Appellant's request vexatious. She did not consider that the information contained in the reiteration of the Council's statements was the Appellant's personal information from which he was identifiable as he had "*neither particularised nor evidenced"* this.

Ground II – procedural unfairness

The Commissioner accepted that she had not criticised the Council for referring to the incorrect regime in its first response to the request, but noted that this error was rectified by the Council in the course of its dealings with the Appellant. The Council had explained to the Appellant in the outcome of the internal review that such matters could fall under either legislative regime.

As for the other exceptions that the Council had relied upon in refusing the request, the Commissioner determined that those had been "*effectively withdraw[n]*" by the Council's final reliance on reg.12(4)(b) and as such she was not obliged to consider them. It is settled practice that public authorities can claim reliance on new exceptions or exemptions during an appeal to the Tribunal: *Birket v DEFRA* [2011] EWCA Civ 1606, and *ICO v Home Office* [2011] UKUT 17 (AAC). It was this practice that allowed the Commissioner to consider reg.12 (4)(b) as raised by the Council, even at that late stage.

Even though the Council had not explicitly laid out its arguments in regards the public interest, the Commissioner is still obliged under the legislation to perform that balancing exercise, using the arguments about the costs that the Council put forward as well as her own analysis of the situation.

Ground III – Failures in the Commissioner's investigation

The request that the Commissioner considered was the Appellant's revised request of 4 January 2018; this is because she considered that the Appellant had appeared to accept the Council's refusal to consider the original request. The Decision Notice outlines the evolution of the Appellant's request and explicitly criticises the Council's failures to provide appropriate advice and assistance.

The Commissioner noted that she had explicitly declined to find that the Appellant's request was vexatious for want of evidence, so she did not see how contacting him to clarify his motivations would have advanced his case beyond the conclusion that she had already come to. She asserted that she was not required to clarify anything with the Appellant if she considered there to be sufficient evidence upon which to ground a decision, and in any event, should it be considered that there is any breach of

natural justice, this is remedied by a full rehearing before the Tribunal. The Tribunal's powers are limited to the consideration of whether the Decision Notice was in accordance with the law, and there is no mechanism for the regulation or review of how an investigation was conducted.

Ground IV – Request not manifestly unreasonable

A public authority is not required to collate all the requested information before refusing a request under reg.12(4)(b), and the Commissioner had no reason to doubt the Council's position after considering the sample minutes.

APPELLANT'S REPLY:

[10]

Ground I – Factual Errors in the Decision Notice

The Appellant asserted that the Council had failed to issue their refusals in compliance with the statutory requirements of either regime, and the Commissioner ought not to have accepted that they had done so. If the Council's allegations about the Appellant's motives were immaterial to the decision, he argued that they ought not to have been included in the DN. They were highly critical of the Appellant's conduct, and he took great issue with not only their necessity but also their accuracy. He went to great lengths in his reply to refute the various allegations repeated by the Commissioner in the DN.

The Commissioner also claimed that the Council had informed the Appellant in February 2018 that one of the reasons that the request would exceed the time and costs limits was because consent needed to be obtained for the release of information. The Appellant provided the communication in question, which showed that the Council never argued this. The Appellant cited the *Code of Practice on the Discharge of Obligations of Public Authorities under the Environmental Information Regulations 2004*, referring to Part VII on Consultation with Third Parties. This statutory instrument makes it clear that while public authorities may commit to consult relevant third parties about disclosure, they are not obliged to do so and this does not relieve their obligations of disclosure under EIR.

Ground II – Procedural unfairness

The Commissioner asserted that in refusing the request on 23rd February 2018 the Council had cited EIR – this is not entirely correct. The refusal document does make reference to "regulation 12(5)(e) and 12(4)(e)" but nowhere in the document does it cite the Environmental Information Regulations by name, and the covering email with which it was sent confirmed to the Appellant that his request "has been dealt with under the Freedom of Information Act 2000". It also did not cite cost as a factor for refusing the request.

While accepting that in principle a party can rely on an exception or an exemption late in the process, the Appellant quoted extensively from *APPGER v ICO and MoD* [2011] UKUT 153 (AAC) to the effect that time and cost limits are not to be treated as other exceptions are, and must be taken early in the process to have any meaning:

> *"[96]...Belated reliance on s12 is therefore inappropriate and inconsistent with the statutory purpose of protecting a public authority against the incurring of future unreasonable costs in meeting an information request. These costs have already been incurred."*

The Appellant argued that it was a necessary implication that the Council had already done the work, hence its purported reliance on the various exceptions it initially cited prior to its reliance on reg.12 (4)(b).

Ground III – Failures in the Commissioner's investigation

In finding that he had rejected the Council's offer of a revised two year time request, the Appellant argued that the Commissioner had ignored the wording of his communications with the Council, in which he explicitly queried whether his revised request "*has been reduced sufficiently to now be achievable"*. Rather than an outright rejection, the Appellant understood this to be a process of dialogue about advice and assistance. It was the Council's acceptance of the request without requesting or recommending further refinement that brought that process to a close, and it is therefore unfair to penalise the Appellant for the Council's approach.

Ground IV – Request not manifestly unreasonable

The Commissioner's assertion that the compilation of all material is unnecessary when an authority is relying on reg.12 (4)(b) does not apply in this instance, as the Council did indeed gather all the minutes subject to the revised request. It was inappropriate to take one sample as indicative, especially when the Council's own case was that this particular sample contained entries in excess of the average contained in the others. The Appellant was concerned that the Commissioner had decided the public interest question separately to the consideration of the Council's conduct in dealing with the request, especially when relying on the alleged burden it would place upon the Council without factoring in that the dialogue about narrowing the request was terminated by the Council.

COMMISSIONER'S RESPONSE:

[11] The Commissioner declined to serve a response to the Appellant's replies, save to cite *McInerney v ICO and Dept for Education* [2015] UKUT 0047 (AAC) to support the contention that s12 FOIA can indeed by raised at a late stage.

TRIBUNAL FINDINGS and REASONS:

[12] Although it does not appear to be an issue between the parties, the Tribunal agrees that EIR is the appropriate regime under which the Appellant's request should be considered. The minutes of the meetings in question refer to plans and policies for dealing with land, and thus fall under the definition in Reg.2(1)(c).

[13] We agree with the Commissioner that Mid Devon District Council breached Regulation 9 as it did not provide sufficient advice and assistance, so far as it would be reasonable to expect the public authority to do so. It is clear from the evidence that the Appellant was at all times prepared to negotiate with the Council. For example, having already restricted the scope of his request from fourteen to just five years, in his email of the 11th January 2018, timed at 10:06 (p.74), the Appellant enquires: "*Can you please let me know whether… this request has been reduced sufficiently to now be achievable within the FOIA timeframe?*" It was entirely open to the Council to respond to the Appellant, informing him that further reduction in scope would be necessary, but it did not do so.

[14] The Tribunal were provided with the copy of minutes from the Capital Strategy and asset Management Group Meetings dated 12 March 2014. These are the

minutes reviewed by the Information Commissioner in order to assess the accuracy of the time estimates provided by the Council.

[15] The Tribunal considered that it would assist their deliberations if they viewed additional copies of relevant minutes. Case Management Directions were issued on the 28 May 2019 to join the Council as Second Respondent and to require all minutes of any meetings of the CSAG between 01 April 2017 until 03 November 2017 (the date of the request). We would then be able to test the Council's claim that it would take 2.5 hours to review each set.

[16] Having assessed the minutes provided, the Tribunal firstly noted that on average it took circa. six minutes to read one set. The Tribunal then noted, from the sequential minutes provided, that many items continued to be discussed from one meeting to the next. Consequently the status of each specific item under the 'Key points discussed' or 'Actions' columns' was obvious; there would be no need therefore to separately review each item, taking account of the current situation, as claimed by the Council, particularly when starting to assess from the most recent minutes.

[17] We found that, due to the way in which the minutes are written, any entries which may need to be redacted could easily be anonymised by removing the name or location of the site under consideration, which is often just a road name and town/village. In our view this is not an onerous and time-consuming task, particularly taking into account the fact that only a brief synopsis is provided in relation to each item discussed.

[18] We noted that there was no reference to any additional reports or spreadsheets referred to in the minutes, apart from two relating to the Capital Programme for 2016/2017 and the Medium Term Financial Plan for 2017/18 – 2020/21. The Council has now published both these documents, although we are not able to determine the date of publication.

[19] It follows that we find the Council's assessment of the amount of time, it would take to process each set of minutes for disclosure, to be excessive. It seems to us that the minutes could easily be redacted at face value without the need for extensive background research as to arrangements, negotiations, discussions and so forth. Explanations of the redactions can be done on an exception-by-exception basis rather than individually for each item. We are satisfied that appropriate, fully justified redactions, could be applied consistently by knowledgeable staff, allowing 45 minutes per set, totalling circa.15 hours. As we find that this exception is not engaged,

considerations of the public interest test therefore do not apply in this instance, as refusal to disclose was based on an erroneous reliance on an excessive estimate of the time required. As we now consider the request to be achievable within the hourly limit, it is our view that the Commissioner was incorrect to uphold the Council's reliance on reg.12 (4)(b). and it seems to us has erred on the facts. For the reasons above, we allow the appeal, and direct the Council should reconsider the Appellant's revised request and issue a fresh response, which cannot seek to rely on regulation 12 (4)(b).

[20] We have not gone on to consider the propriety of any of the exceptions alleged by the Council throughout its initial dealings with the Appellant. The jurisdiction of the Tribunal is limited to an assessment of the legality of the Commissioner's Decision Notice, and reg.12 (4)(b) was the sole exception by which the refusal to disclose was upheld.

[21] That being said, we acknowledge the Appellant's disquiet in regards to the inclusion of the details of the Council's allegations of vexatiousness in the DN. Importantly, the Appellant hotly disputes their accuracy; hence we make the Order (at [1] above) pertaining to publication subject to any final appeal process being exhausted.

Brian Kennedy QC

(First Tier Tribunal Judge

Date of Decision: 15 July 2019

Date Promulgated: 19 July 2019

Amended under Sect 40, Slip Rule Corrections on 24 July 2019