Appeal Number: EA/2021/0106

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

BETWEEN:

SIMON WATSON

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

LANCASHIRE COUNTY COUNCIL

Second Respondent:

Tribunal: Brian Kennedy QC, Paul Taylor and Kate Grimley Evans.

Date of Hearing: 4 February 2022 – On GRC - CVP.

Decision: The Tribunal allows the Appeal.

SUBSTITUTED DECISION NOTICE

The Substituted Decision:

We substitute the Decision Notice and direct the Second Respondent take the following actions;

1. The Lancashire County Council must locate, retrieve and disclose the underlying raw data upon which the "Broughton Bypass Noise and Vibration Report ("the Report") *141216_B2237204 BB 2014 Noise and Vibration (Combined) doc) anticipated /modelled decibel (db) impact)"* - was based and which resulted in the impact on the appellant's residence being described as 'Minor and Negligible Adverse'.

2. This raw data shall include but is not to be restricted to; a) *evidence of wind speed and wind direction during the period of measurement and b)* the modelling methodology as applied to the relevant location and as applied to individual facades including the appellant's residence. This information will include other relevant measurements such as vibration and noise levels as recorded by or on behalf of the Council for the purposes of the report.

Action Required:

The Lancashire County Council is required to disclose the above-withheld information, within 28 days.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") and more precisely under r18 EIR. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 30 March 2021 (reference IC-76780-V3N8 - Page EE225 of the Open Bundle ("OB") and which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the Decision Notice ("DN") and not repeated here, other than to state that, the appeal concerns the question of whether Lancashire County Council ("the Council") is entitled to rely upon regulation 12(4)(b) of the Environmental Information Regulations ("EIR") and therefore under reg. 18 EIR, revert to the test set out in s58 of FOIA which states:

(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2)On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Chronology:

9 November 2020	The Appellant wrote to Lancashire County Council and requested information in the following terms: *"I simply wish to understand the report's methodology: specifically, (i) confirmation that the relevant equipment was properly calibrated and a calibration certificate produced as evidence from the manufacturer within 12 months of the tests, (ii) evidence of wind speed and wind direction during the period of measurement and (iii) whilst the precise locations of actual measurement are known, the modelling methodology when predicted and applied to* (the Appellants residence herein redacted) *is not known nor the location applied specific to individual facades of*(the Appellants residence herein redacted)*. To be clear the summary document produced will have the raw data behind it, it is the raw data that is requested in each of the above questions that we need. I also have requested confirmation as to the qualifications of those operating measurement equipment.*
11 December 2020	The Council responded stating that they refused to provide the raw data on the grounds of regulation 12(4)(b) and that refusal is subject to an ongoing investigation. Further, until such time as the ICO issue a Decision Notice on that matter their position remains unchanged.
12 December 2020	The Appellant requested an internal review.
15 December 2020	The Appellant contacted the Commissioner raising concerns in relation to how his request was handled.

12 January 2021	Following an internal review the Council wrote to the Appellant stating that the request was manifestly unreasonable on the grounds of costs.

Legal Framework:

[3] A Public Authority that holds Environmental Information is required to make it available on request - Reg. 5(1) EIR). However a Public Authority may refuse to disclose information to the extent that: *"the request for information is "manifestly unreasonable"* Reg. 12(4)(b) EIR. Furthermore even if the exception is found to be engaged, a public authority can only refuse to disclose the requested information if: *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."* r.12(1)(b) EIR. There is a presumption in favour of disclosure Reg.12 (2) EIR. In Craven v IC and DECC [2012] UKUT 442 (AAC) the Upper Tribunal equated *"manifestly unreasonable"* to *"vexatious"* in terms of an assessment of the request.

Commissioner's Decision Notice:

[4] The Commissioner highlights that Regulation 12 of the EIR will allow public authorities to refuse a request for information that is manifestly unreasonable when the cost of compliance of the request is too great a burden on the public authority's resources. Further, there is no requirement on a public authority to provide partial answers to a request that is refused on the above grounds as the exemption can be applied to a request in its entirety.

[5] The Commissioner stated that as both this request and request IC- 42805-P2P2 refer to essentially the same raw data and in a previous decision regulation 12(4)(b) was engaged, the position, the Commissioner maintains, remains unchanged due to excessive costs that would be incurred. Further, the Commissioner found that the public interest rests in maintaining this exemption.

[6] The Commissioner referred to regulation 14 subsections 1 to 3 of the EIR to illustrate that the Council failed to issue an adequate refusal notice and therefore are in breach of regulation 14 EIR. However, as the Commissioner reached a decision on this case, the Commissioner did not require any further action from the Council.

Appellant's Grounds of Appeal:

[7] The Appellant disputes the Commissioner's findings and comprehensively sets out his case in detail (at Page A4 of the OB), which is pertinent and we accordingly repeat verbatim thus; -

"I live at [Redacted – the Appellants home address] *which has been affected by the construction of a 4 & in part 6 lane Bypass to Broughton village.*

(The Appellants residence herein redacted)*, St John's Church and the Bypass map are shown on documents Pre-Bypass map. Bypass* – (The Appellants residence herein redacted)*, & St. Johns Church labelled. Aerial view, St. John's Bypass under construction* (the Appellants residence herein redacted) *attached to this appeal.*

A significant part of our claim will focus on the noise impact of the road/bypass. A Noise and Vibration report was produced on behalf of the Lancashire County Council, (LCC) by Jacobs U.K.Limited ("JUKL"). The report was produced pre-Bypass construction and was referred to at the public inquiry held April 2015.

The report documented the noise readings undertaken at various locations along the intended route. JUKL then used modelling to predict the noise levels on properties where sound recordings were not taken (pre-Bypass) and then all locations were modelled to predict the affects of the Bypass post completion.

Interestingly, (The Appellants residence herein redacted) *is the nearest property (25m) to the Bypass at the Southern end of the Bypass yet LCC/JUKL did not contact me or indeed ever take any noise measurements at or near my property. Instead they modelled what they expected to be the effect pre and post Bypass.*

*The resultant report produced (141216_B2237204 BB 2014 Noise and Vibration (Combined) doc) anticipated /modelled decibel (db) impact and derived a descriptive effect on the property as "**Minor & Negligible Adverse"**.* (Our emphasis).

Whilst starting to consider my claim the various professional assisting (the Appellants residence herein redacted) *and witnessed the sound impact and questioned the report/forward data. Having employed my own sound and noise engineer (S. Ellis – a member of the Institute of Acoustics), he too questioned the information provided by LCC/JUKL. In deed he was most puzzled as even before he took any readings, he was convinced the impact was much greater than the descriptions detailed above.*

Having undertaken detailed recordings he concluded that his findings differed from those of the LCC - JUKL report resulting in our property falling into the highest rating of "Major" adverse.

He stated that we should look to determine how the LCC - JUKL report came to their findings and he suggested I approach LCC - JUKL with some simpler questions.

I approached JUKL and they confirmed they could provide the requested data but were later instructed by LCC to provide no further information and cease any communications.

My first set of questions requested under the FOIA was not very specific and I was advised by my sound and noise engineer to refine the focus to our property alone. The first approach was refused by LCC which I did not appeal. The FOI officer did not believe the second request should be affected by the first.

I will detail below why I fee the Decision Notice warrants appeal. I would look forward to a hearing accordingly.

Under Land Compensation Act 1973, Part 1 Claim for Compensation in respect of Highway works we would be seeking appropriate compensation of the affects of the road is the use of the raw data behind the published JUKL report."

The Appellant distinguishes this complaint from that dealt with under an earlier DN: IC-42805-P2P2, on the basis that this request concerns one property making it simpler for the Public Authority ("PA") to extract. In fact it is clear that the Second Respondent has previously undertaken this task.

The Commissioner's Response:

[8] The Commissioner resists this appeal and invited the Tribunal to strike out the appeal under rule 8(3)(c) of the Tribunal rules on the grounds that it has no reasonable prospect of succeeding. In the alternative, the Commissioner stands by the conclusions provided in both the DN and the earlier decision notice of 11 January 2021 (IC- 42805-P2P2). This matter was dealt with by the Tribunal in its Case Management Directions dated 2 July 2021 (at B109 to 110 in the OB) whereby the Tribunal ruled that the appeal would be considered on a "full merits" basis including the Appellant's representations against the Strike out application. Those representations can be summarised as follows:

1. The Appellant referred to each section from the Chartered Legal Executives reply to argue that an attempt had been made to determine the request as manifestly unreasonable or vexatious.
2. The Appellant asked the Tribunal to take a holistic approach to the issues as opposed to the individual request.
3. The Appellant provided the communication regarding the application to build the Bypass, which began soon after the Appellant moved into the property in 2001.
4. The Appellant submitted that the public interest favours disclosure.
5. The Appellant contended that the noise levels before the bypass was erected were taken from St Johns Church and modelled to predict the noise levels at (the Appellants residence herein redacted). The Appellant averred that in all likelihood other properties differed from what was recorded in (the Appellants residence herein redacted) and that during day 1 of the Coronavirus Lockdown there were instances where there was no traffic on the road. The Appellant argued that this suggests a problem with the calibration of equipment, weather conditions, location of St Johns Church, experience and

or skill of the operator, and the potential poor handling or modelling of the data.

6. The Appellant indicated that it does not simply affect him but potentially every property influenced by the construction of the bypass and data collected in this manner affects readings throughout the country then there is a significant public interest in disclosure.

[9] The Commissioner adopts the representations of the PA, both with regard to the engagement of regulation 12(4)(b) EIR and the public interest in respect of regulation 12(4)(b) EIR. The Commissioner is satisfied that, notwithstanding the Appellant's claim that he narrowed his request herein (in DN: IC-76780-V3N8) to target just his own property, both requests essentially ask for the same raw data from the same published JUKL report, *(although we note the evidence from which this is drawn is not obvious)* and accordingly the Second Respondent is of the view that time estimates provided in relation to DN: IC-42805-P2P2 would appear to apply equally in respect of DN: IC-76780-V3N8.

[10] The Commissioner also maintains that regulation 12(4)(b) EIR is engaged for the purposes of the present request made by the Appellant. Further, that despite what she regards as the limited public interest factors advanced by the Appellant, on the balance of the public interest, the exception should be maintained.

[11] The Commissioner states that the Tribunal should be extremely mindful of the need not to overburden public authorities inappropriately. Furthermore, that there is a balance to be struck as expressed by the First Tier Tribunal in *Havercroft v Information Commissioner* (EA/2012/0262) at §30 (later reiterated in I*nformation Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 at [26]):

> "*Public bodies are responsible for the delivery of vital services and the use of large sums of public money: they are under a duty to deliver those services effectively and use their resources economically and efficiently. In carrying out their roles they must be publicly accountable and the FOIA regime is intended to enhance that accountability. However, there are many aspects to accountability, and FOIA is not the sole means, nor can it substitute for the others. The primary function of public bodies is the delivery of services and if*

management time and resources are disproportionately spent in dealing with FOIA requests then those services, and the decision-making around the delivery of services, may suffer to the detriment of the public."

[12] The Commissioner requests that for the reasons provided, and as the Appellant has advanced no new argument of substance, which challenges her finding, the appeal should be dismissed.

Appellant's Response:

[13] The Appellant confirmed that guidance was provided by the Commissioner to make the request under the EIR. This allowed the Appellant to focus the second request on the pertinent issues. The Appellant made efforts to focus only on his property to prove the inaccuracy of the modelling. As other properties were subjected to similar modelling this would likely expose the flawed data. The Appellant stated that whilst he has always followed the Commissioner's advice, it appears that said advice is being used against him as the Commissioner alleged that his request was vexatious.

Joinder:

[14] The Appellant suspects that the Council do not want judicial intervention into their conduct. The Appellant submitted that this case is very much in the public interest. The Tribunal were not persuaded that the Commissioner had sufficient evidence to be satisfied that the request was manifestly unreasonable under regulation 12(4)(b) EIR. The Tribunal wished to explore this finding having directed that Lancashire County Council be joined to these proceedings to illustrate the reasoning behind their use of regulation 12(4)(b) EIR. The Tribunal directed the Second Respondent provide;

a) Details of the steps they took to assist the Appellant in refining his request, and b) evidence relating to the nature and extent of their argument that the request is manifestly unreasonable.

Further, that the Appellant provide such evidence in support of his submissions to further rebut the Second Respondent's arguments.

[15] The EIR does not provide any explicit requirement for a refusal notice to include advice and assistance for the requester. However, under regulation 12(4)(c) EIR, requests can only be refused after reasonable advice and assistance has been provided in order for the Applicant to refine their request. To refuse the request under regulation 12(4)(b) EIR as manifestly unreasonable for reason of burden or cost, reasonable advice and assistance must also be provided to allow the Applicant to submit a less onerous request. Whilst a failure to provide appropriate advice and assistance does not necessarily invalidate the use of this exception, the Tribunal are unwilling to support the use of regulation 12(4)(b) EIR when the public authority did not give the applicant appropriate or sufficient advice and assistance.

[16] The Second Respondent has chosen to rely upon the DN, the Commissioners' Response and their own written submissions and witness statements in relation to the appeal hearing.

[17] The Decision Notice dated 30 March 2021 (reference IC-76780-V3N8) refers back to Decision Notice dated 11 January 2021 (IC-42805-P2P2), stating; *"the complainant requires 'the underlying raw data'"* The contractor's time points to a level of review, analysis and quality checking of the data. There is insufficient evidence to persuade the Tribunal that this is a pre-requisite for a 'raw data' request. The Appellant requests the following: " - *the operators qualification; the calibration certificate; the software used; and the inputs, adjustments or parameters used on the modelling software for the purposes of calculating the expected level of noise*.'

[18] We find that there is a significant public interest in this case as the Appellant, in evidence indicates to the Tribunal the methodology is commonly used and the implications arising would be potentially far reaching. We are of the view that Lancashire County Council have misinterpreted the request. Furthermore, we are persuaded that the misinterpretation has resulted in an inflated calculation of time invested by the contractor which will cause the burden to be considerably lower. The Appellant is content to receive unrefined data to assist the contractor and Lancashire County Council. (See below)

Second Respondent's Submissions:

[19] The Second Respondent submitted that the Commissioner was entirely correct in her determination that the exception provided by regulation 12(4)(b) was applied correctly and that there is an obvious or clear quality to the unreasonableness of the request based on the onerous task of extracting the information requested from the data held by Jacobs.

[20] The Second Respondent provided the following information in order for the Tribunal to undertake the *'holistic assessment of all the circumstances'* in line with *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 208 (AC).

Steps taken to assist the applicant

1. The Second Respondent stated the Appellant was advised that due to the nature of his request and the way in which the information was held it was not possible to narrow the request to bring it within the realm of reasonableness. The Second Respondent argued that the Appellant does not appreciate the level of work required.
2. The Second Respondent submitted that they have gone to great lengths despite the disproportionate amount of correspondence received from the Appellant.

Further evidence relevant to the reasonableness of the request

3. The Second Respondent referred to an enclosed statement of Mr Michael Sayles, a Senior Information Access Officer in the Council's information governance team and exhibits MS1 & MS2.
4. The Second Respondent submitted that asking Jacobs to embark on test extractions would be contrary to the very purpose of regulation 12 (4) (b). Further, the Second Respondent sought further clarification from Jacobs as to the level of work involved in determining the modus operandi and methodology.
5. On the advice of Jacobs, the Second Respondent stated that the same level of work is required to 'unpack' the data held and therefore, it is not 'very simple' to extract the information. Further, that the matter is complicated by the volume of requests from the applicant and the fact that there is overlap

with previous requests. On this basis, the Second Respondent submitted whilst that an average FOIA/EIR request would involve 2-3 hours of time to register the request, open a file and liaise as to how to collate the information the Appellant's request would take in excess of 10 hours total.

Witness Statement of Michael Sayles:

[21] Mr Sayles, Senior Information Access Officer with t4h Second Respondent) stated in his witness statement of 22 September 2021, (page 438 OB) that upon receipt of the request he made enquiries with the relevant departments regarding the request. It was determined that the noise data was held by Jacobs and it would cost in excess of £2000 to retrieve the information. Resultingly, the request was refused under regulation 12(4)(b).

[22] Mr Sayles submitted a request that Jacobs provide a bill of costs, marked exhibit MS1. The information provided by Jacobs was supplied to the Commissioner and is marked MS2. Mr Sayles noted that the costs/time detailed by Jacobs does not include the Second Respondent's costs/time required, which would amount to several hours. Therefore, Mr Sayles argued that the cost of complying with the request far exceeds what is reasonable in the circumstances.

[23] Where so much depends on the Second Respondent establishing precisely how the request is manifestly unreasonable, the Tribunal are of the view it is surprising and disappointing that the Tribunal have not had the benefit of oral evidence. In most civil litigation it is understood that, if the facts stated by a witness are not challenged in cross-examination, they are taken to be accepted by the opposing party. This rule of practice does not have automatic application in the Tribunal. The Tribunal often allows facts to be challenged by submissions or by other evidence. The Tribunal is unlikely to insist that a requester who is not legally represented cross-examines the public authority's witnesses. But though cross-examination may not be essential, it can still help the Tribunal. The experience of the First-tier Tribunal has been that, where there are witnesses, whose evidence goes to the application of exemptions/exceptions, or to the balance of public interest, oral evidence and cross-examination can often be of considerable assistance to the Tribunal in reaching its decision because it materially alters, whether for better or for worse, the strength of

the public authority's written case. The usefulness of cross-examination will of course depend upon the nature of the issues. In a case like the present, where the issues involve a difficult judgment on a balance of public interest, which includes assessing the nature, degree and likelihood of future harm, it will often be important for the Commissioner (and, if participating, the requester) to have the opportunity to test the public authority's evidence in cross-examination. Written questions may be of limited usefulness for this purpose since they provide little or no opportunity for follow-up questions and are generally suited to eliciting answers only on specific points of detail where clarification is required. We take cognisance of the absence of such opportunity for cross-examination in our deliberations. The Second Respondents too have missed the opportunity of putting the evidence to, and testing the evidence given by, the Appellant.

Appellant's Response to the Second Respondent:

[24] The Appellant submitted that as the summary data is publicly available, upon review he is convinced that the published data is wrong and should be rectified with an explanation. The Appellant contended that the Second Respondent and Mr Sayles have misunderstood and/or misrepresented the issues and have failed to identify manifest unreasonableness. He argues they are searching for excuses in this case as opposed to providing the data requested. He is in our view essentially arguing obfuscation on the part of the Second Respondents. If this is correct (and without oral evidence to rebut it, it cannot be said to be erroneous), it is of significant weight in the balance in favour of Disclosure being in the public interest.

[25] The Appellant argued that the poor practice of the Second Respondent in handling data is a matter of public interest. Further that the refusal of proper dialogue prevents the evolution and improvement of such practices. The Appellant averred that the Second Respondent wishes to prevent the discussion of their continued failure in undertaking appropriate noise surveys and providing such relevant evidence in a spirit of transparency and envisaged by the EIR.

[26] The Appellant argued that the data does not need to be explained but ultimately corrected if erroneous and given the conflicting data alluded to in the reports for the assessment of damages (see report for LCC page 16 - 57 OB and report from S.

Ellis on behalf of the Appellant at Page C127). The Appellant referred to several contraventions of the original planning permission. The Appellant stated that the Development Control Committee published a report on 12 June 2020 stating that a report should be provided on the 12th of August 2020 and to date no tangible work has been completed. Furthermore, that the original report was based on data taken before a bypass was built and could have added additional traffic into the modelling. However, the report conditions were set during the Coronavirus lockdown when there were lower levels of traffic. Therefore, it is questionable why a publicly available document is accepted as representative of the scheme but not produced to the wider public.

Conclusions:

[27]. In order to determine if the request was manifestly unreasonable, and although we recognise that it is not determinative, we look to the appropriate limit within FOIA as a useful starting point, as a concept in the case at hand. We count as follows:

> Determining whether the information is held;
>
> Locating the information, or a document containing it;
>
> Retrieving the information, or a document containing it; and
>
> Extracting the information from a document containing it.

In EIR we do not need to be restricted to that list and are conscious that other criteria are relevant.

[28] We find that in the context of the EIR the issue of whether or not dealing with the request would in fact take 18 hours or more is not determinative and we are entitled to take other factors into account. We find, even were the evidence from the PA to be accepted, other factors, which we deem relevant (see below) determine that the request is not manifestly unreasonable on the basis of time.

[29] We now turn to other evidence that the request is manifestly unreasonable. This evidence would have to be that the request equates with a vexatious request under

FOIA, in the ordinary meaning of the word. Based on the submissions put before the Tribunal, this argument was not made out. Whilst there is reference to a communication plan, no case has been built upon a vexatious claim nor is it quantified how many needless or otherwise distressing or unduly cumbersome requests have been made.

[30] The reasonableness test to be applied is contextual and is to be assessed in the circumstances so that the wider public interest, which the Appellant has identified, can be taken into account for the purposes of that assessment. Further, we must be mindful of case law when considering reasonableness.

[31] Turning to the burden on Jacobs, they have no duty to advise and assist. The initial reaction of Jacobs to the request (see message by email from Peter Simcock, dated 12 February 2020, (Page 14 OB) may not be indicative as to the exact time required, however, it is relevant to the concept of burden. Additionally, if it is easier or more practical for Jacobs to extract the information in aggregate form then the Second Respondent owed the Appellant a duty to inform him of the same as opposed to notifying him that there was no way in which narrowing the request would help. We find this to be misleading in the circumstances. It seems obvious that this information was and remains available, as it must have been extracted in some form for the “Noise and Vibration Survey”.

[32] The Tribunal is further directed to exhibits MS1 & MS2, which provides further particulars of the steps and time that Jacobs, would require in order to facilitate the request. The Tribunal is respectfully asked to note the nature of the storage of that information and that substantial work would be required in order to extract such information from the multitude of files/folders. Given the nature of this task, alongside the Tribunal’s request for further information, the Second Respondent has been keen to assist the Tribunal and considered whether it was practicable for Jacobs to run test extractions. This, they suggest would involve embarking on the task as to further illustrate the onerous nature of the request. The Second Respondent argues that such extractions would run contrary to regulation 12 (4) (b) EIR. The Tribunal cannot accept this suggestion, as on the evidence before us, this information must already have been retrieved, even if only, for the purposes of the Noise and Vibration report.

[33] We heard during the course of the appeal that significant time had already been spent in ascertaining the nature of the information held and the means by which it may be extracted. We were referred to the efforts made by the FOI team to discuss the request with Officers from the relevant service and the Complaints Manager. It was submitted that the matter is complicated by the volume of requests from the appellant and the fact that there is overlap with previous requests. We, however, see no actual quantification of "significant time" or in the "volume of requests". Neither is there credible evidence that any requests did not serve a purpose, or were otherwise vexatious in the ordinary meaning of the word.

[34] The Second Respondent, in calculating the time that they suggest it would require for the dealing with the request, maintain that many hours are required to check, verify and substantiate the results. We do not accept this. The request is for the results in raw data form. This has already been done for the report referred to above. There has been no evidence of the nature or extent of any checks. Verification or substantiation and we do not accept this suggestion.

[35] We accept a number of the submissions made by the Appellant before us, including; that searching within a spreadsheet should be a relatively simple matter – it has already been done, (to provide an assessment of damage); further, he argues, it is clear that not only do the Second Respondent not want him (Mr. Watson) to obtain the data but that the Second Respondent had no intention of ever releasing this data as their reasons for refusal changed as time went on. In addition to this the Second Respondent refused his request for the full spreadsheet and his narrowed request made, (made on the suggestion of the Commissioner), for just the data relating to his residence, both under regulation 12(4)(b) EIR.

[36] In relation to the surveys conducted, the Appellant argues that the Second Respondent should be aware that accuracy checks are not required and there can always be a caveat issued with the data. Moreover, there is no need to create information in order to satisfy a request. The Second Respondent can provide any necessary information in the response letter and can refer to information already collated from the assessment of damages report.

[37] In addressing the witness statement of Michael Sayles (senior information Access Officer with The second Respondent) dated 22 September 2021. which concerns the public interest, we do not feel that appropriate reasoning has been provided. Further we find no balance of competing arguments have been suggested. There is clearly some public interest in ensuring the veracity of the data and methods used given that these ultimately impact on claims for compensation and have a bearing on the assessment of the impact on health and wellbeing of citizens. The Tribunal are persuaded that the view that the latest World Health Organisation figures (as provided by the appellant and remain unchallenged) which estimate 16,000 premature deaths and at least 1 million healthy life years lost across western Europe each year because of environmental noise pollution goes toward the public interest in disclosure.

[38] We are persuaded that factors such as explaining how figures were derived, providing a suitable format for ease of understanding and the review of inputs by a senior team member should not be taken into account as they are superfluous. We are further persuaded that it is not necessary to undertake further cross-referencing to check or consider any prior noise level result modelling that may have been undertaken.

[39] We accept the Appellant's argument where he refers to *McQuire v Western Morning News Co.* [1903] 2 K.B. 100 and stated that the Second Respondent has frustrated discussions as they lack the desire to provide timely answers. The Second Respondent has provided no evidence to refute this argument. The Appellant stated "*plainly LCC considered some lesser steps that may be taken"*, but we see no evidence of this ever being explained. We feel the Appellant has exercised rational thinking and patience when making his request and that there is no sign of unreasonable conduct on his part. Further the Appellant provided a reasonable explanation for contacting the Second Respondent more often than otherwise necessary. This can be evidenced through his solicitor's correspondence and appeals for assistance from his then local councillor. The fact that numerous emails were sent (G468 Open Bundle) goes against the claim that the appellant's request is manifestly unreasonable. Similarly, with reference to the letter from Ben Wallace MP on 21/6/21, in relation to the Second Respondent's stance and conduct, we find this

clearly indicates the nature and significant weight to be given to the Public Interest in disclosure, and also undermines the claim on behalf of the Second Respondent that the request is manifestly unreasonable.

[40] We note the comments of JUKL in an email dated 13/10/21 (p.G473) in which it is stated that "***...****it is true that in other situations it may take less time, but they provided an honest, yet precautionary, estimate of time to provide the information requested based on the situation they faced*." The Tribunal do not accept that the process of disclosing the "untested" raw data, as requested, need any such investigative or precautionary process.

The Request:

[41] The request (see P E226 OB), after such guidance and assistance given to information relating to *'the underlying raw data'* to be extracted from the "Broughton Bypass Noise and Vibration Reports" was in four parts summarised thus;

, (ii) evidence of wind speed and wind direction during the period of measurement and (iii) whilst the precise locations of actual measurement are known, the modelling methodology when predicted and applied to (the Appellants residence herein redacted) *is not known nor the location applied specific to individual facades of* (the Appellants residence herein redacted)*. To be clear the summary document produced will have the raw data behind it, it is the raw data that is requested in each of the above questions*

(i) related to the calibration certificates of equipment uses to take measurements.

(ii) related to *evidence of wind speed and wind direction during the period of measurement and*

(iii) related to the modelling methodology as applied to location and as applied to individual facades, and *whilst the precise locations of actual measurement are known, the modelling methodology when predicted and applied to* (the Appellants residence herein redacted) *is not known nor the location applied specific to individual facades of* (the Appellants residence herein redacted)*. To be clear the*

summary document produced will have the raw data behind it, it is the raw data that is requested

(iv) the qualifications of those operating measurement equipment.

[42] The Second Respondents have indicated that they do not hold (and impliedly therefore have no control of, the information in (i) and (iv) above and have directed the Appellant to other sources. It seems to us that this information would be necessary information in the defence to a damages claim and ought to have been in the minds of the Second Respondent when retaining the information collated on their behalf for the purposes of making the assessment they made in the "Noise and Vibration Survey" at the relevant location/s. This report has been clearly identified as "*The resultant report produced (141216_B2237204 BB 2014 Noise and Vibration (Combined) doc) anticipated /modelled decibel (db) impact and derived a descriptive effect on the property as "Minor & Negligible Adverse".*

In any event it seems the Second Respondent has warned other such sources, and Jacobs in particular, not to provide the requested information to the Appellant. This again raises the Public Interest in the issues of transparency and accountability of the Second Respondent in and about the conduct of their affairs. We are satisfied therefore that Jacobs hold the requested data in (ii) and (iii) above on behalf of the Second Respondent.

The Public Interest:

[43] The Appellant has explained at length to the Respondents and to the Tribunal the nature and extent of the Public Interest. He has referred to the Bypass and how it has caused significant loss and damage to his home property and the nature and extent of the loss and damage it seems will be contested. He refers to a significant difference on the assessment of such loss and damage made on behalf of the Second Respondent than an assessment he has commissioned from his own funds on behalf of the Second Respondent. The Appellant asserts that the difference arises because the methodology and/or calibration and/or qualifications of personnel engaged in recording the relevant data on noise, vibration and wind in the "Noise and Vibration Survey" measurements are probably incorrect or inaccurate in some

way. The Appellant has been informed that the methodology and procedures are similar as used by all such assessments made for other Road authorities in the country and therefore there is significant weight to be attached to an understanding of how the assessments are reached by the Public Authorities relying on the system used by the Council in this case. The Appellant implies the cost of this will ultimately arise for the Council when litigation ensues, (as it seems it will,) and this is a matter of extreme importance to Council taxpayers, including the Appellant. The Appellant has made clear the importance of establishing that determining the veracity of the modus operandi and methodology relied upon by the Public Authority is reliable and either accurate or effective in informing important decision making within the Council's remit. The Council seem to recognise the import of this argument made by the Appellant and refer the Tribunal to an email from Andrew Sellers (See Paragraph 10 of their response dated 1 October 2021.)

[44] However, in contrast the Council have not identified any Public Interest in withholding the information sought. Nor it seems do they clearly undermine the Appellants concern other than to say it is "*plainly misconceived"* (see page G433 Paragraph 9 of the Response dated 1 October 2021). The Tribunal notes in the email from Andrew Sayers (dated 30 September 2021 to David Leung at the Council, at the penultimate paragraph on Page G436) he confirms *"We did not intend on this being a full report, but in essence a blank document with the relevant data included and some context/commentary around it to make it clear. We did not intend on sending the raw data spreadsheet to reply to the original request, hence we had to create some other media to issue the data".* In fairness to the Appellant he has indicated he seeks only such raw data and is prepared to shoulder the expense of the interpretation of that rather than expect the Council to do so.

[45] Throughout this appeal we remain conscious of the Commissioners warning that the Tribunal should be extremely mindful of the need not to overburden public authorities inappropriately (see Para.10 above). However, the balance we have to consider includes the fact that the requested information has been retrieved previously for the purposes of assessing a damage report (the "Noise and Vibration Survey") and the Public interest in disclosure seems to us to carry much greater weight than the Respondents have attributed to it (particularly where the EIR favours

disclosure). In fact it seems to us that the Respondents have given scant regard at any time to the Public interest favouring disclosure. We have found the Appellant to be courteous and respectful throughout the hearings he has attended. We have found him to be a conscientious citizen who has been reasonable in his quest for transparency and accountability and he has made every effort to minimise his demand on resources in doing so.

[46] Taking a holistic view of the papers and on the evidence before us, we find that the request is not manifestly unreasonable and the Second Respondent has demonstrated reluctance to provide transparency and accountability as is expected through a request under the EIR regime. While the Appellant has suggested that the Council have a conflict of interest in that they are likely to have to defend civil proceedings for damages, and the withheld information may be likely to undermine any defence they wish to rely upon, we make no comment or judgment on that assertion. We do note however that it provides further weight to the public interest in disclosure of the withheld information and in thereby serving the transparency and accountability that underlies the purpose of the regulations.

[47] Having considered all the evidence before us and for the above reasons, we are persuaded that the request is not manifestly unreasonable and in any event we find that the public interest in withholding the information pursuant to the exception in section 12(4)(b) EIR does not outweigh the public interest in disclosing the information. Accordingly the appeal is allowed.

Brian Kennedy QC 28 February 2022.

Promulgated: 2 March 2022