



**Appeal Number: EA/2021/0034**

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

**Between:**

**GARY SHIPTON**

**Appellant:**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent:**

**and**

**DORSET COUNCIL**

**Second Respondent:**

**Date and type of Hearing:** 27 July 2022 and 17 August 2022 on GRC - CVP.

**Panel:** Brian Kennedy QC, Anne Chafer and Dan Palmer-Dunk.

**Representation:**

**For the Appellant:** Gary Shipton as a Litigant in person

**For the First Respondent:** Michael White of Counsel in a written Response, to the Grounds of Appeal, dated 16 March 2021.

**For the Second Respondent:** Roger Green, Lawyer within the Council

**Interim Decision 1 August 2022:** The Tribunal granted an application by the Second Respondent for an adjournment to produce further information and adduce witness evidence for the hearing.

**Final Decision 22 August 2022:** The Tribunal allowed the Appeal and issued a Substituted Decision.

## **REASONS**

### **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 7 January 2021 (reference IC-42416-N9Q3), which is a matter of public record.

### **Factual Background to this Appeal:**

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to works on a property by Dorset Council (“the Council”). The Council position is that any works previously carried out by the Council were by way of repair only. It denies carrying out various other works as alleged.
- [3] The Commissioner initially maintained the position set out in her DN; namely that the Council carried out reasonable searches for the information, and on the balance of probabilities the Council did not hold it. The Appellant appealed against the DN. The Commissioner initially opposed the appeal and invited the Tribunal to uphold the DN.

### **History and Chronology:**

- [4] On the 21 August 2019, the Appellant wrote to the Council with the following request:

*“...we now request all the information the council hold on ourselves (Mr Gary Shipton and Mrs Sylvie Shipton) and on the properties 47A the Esplanade and 16 Bond Street (former public conveniences) Weymouth”.*

- [5]** In response, the Council asked staff in its Assets and Property Department and Legal Department for this information. The Council’s initial conclusion was that it did not hold information beyond what it had already supplied to the Appellant during conveyancing and was readily available to the Appellant from elsewhere.
- [6]** The Council responded to the Appellant to that effect on the 6 September 2019 but no specific reference was made to s21 FOIA in their response.
- [7]** On 8 September 2019, the Appellant requested an internal review, implying that the Council would have records on various aspects of ownership, such as work done, especially in 1987 and 2012. On 10 September 2019, the Appellant emailed the Council to restate his request for an internal review. The Council duly conducted this.
- [8]** On 17 December 2019, the Council met with the Appellant and his wife and discussed the request. The parties agreed that the scope of the Request should be narrowed to all information on works carried out on the building from 1985 to 2019. Further searches of both electronic and archived manual files, which included those relating to the Assets and Property Department yielded information relating to works undertaken on the building from 1985 to 2019. Most of the information was recent, due to the Council’s policy of retaining documents for up to six years.
- [9]** On 24 March 2020, the Appellant complained to the Commissioner about the Council’s failure to conclude its internal review. The Commissioner wrote to the Council on 24 April 2020 making them aware that a complaint had been received.
- [10]** On 27 May 2020, the Council wrote to the Appellant with the outcome of the internal review disclosing documents and information from Property and Building Services assuring the Appellant that these were the only documents that could be located.

[11] During the course of his complaint to the Commissioner, which included a number of allegations, the Appellant alleged the Council had concealed information with the intent of blocking their access to it under FOIA. The Commissioner referred this to her Criminal Investigations Team which found that there was no evidence to suggest that a s77 offence had been committed.

[12] On 5 October 2020 the Commissioner, as part of their investigation, sent the Council a list of questions. The Council replied on 30 October 2020 with a substantive response. The Commissioner asked if consideration had been given to handling some or all the request under the GDPR as a subject access request. The Council stated that it had not done so and acknowledged that other departments may hold personal data. They said they would write to the requestors to confirm whether they wished to exercise this right. The Council explained that when the request had first been received staff in Legal and Planning had been asked to check what information they held and it had decided all relevant information had already been provided to the requestor's solicitor and was therefore exempt from disclosure under section 21 FOIA. Following the internal review and meeting, additional information was located which was not exempt under s21.

This ultimately has led the Commissioner to concede the appeal and the Tribunal in our conclusion to allow the Appeal (see Paragraph 21 below).

[13] **Legal Framework**

**S1 FOIA – General right of access to information held by public authorities**

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

## **S12 Where cost of compliance exceeds appropriate limit**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

Regulations made under section 12(4) and 12(5) FOIA, namely the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 (“the Fees Regulations”, make the following provisions in relation to the “appropriate limit”, and the costs which can be included when calculating that limit:

a. Regulation 3 of the Fees Regulations, read in conjunction with Schedule 1 FOIA, provides that ‘the appropriate limit’ for the purposes of section 12(1) FOIA is £600 for central government departments (reg.3(2)), and £450 in the case of any other public authority (reg.3(3)).

b. Not all costs which may be incurred in complying with the request may be taken into account. Regulation 4 of the Fees Regulations sets out the activities which can be taken into account when estimating the cost of compliance with section 1(1) FOIA for the purposes of the appropriate limit, together with the estimated cost for the time spent in undertaking those activities:

“(3) *In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account*

*only of the costs it reasonably expects to incur in relation to the request in-*

- (a) determining whether it holds the information,*
- (b) locating the information, or a document which may contain the information,*
- (c) retrieving the information, or a document which may contain the information,*
- (d) extracting the information from a document containing it.*

- (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”*

Section 12 FOIA is not an exemption under Part II of FOIA, and therefore is not subject to the public interest test.

## **S21 Information accessible to applicant by other means**

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the

public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## **Regulation 2(1) Environmental Information Regulations ("EIR")**

In these Regulations—

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

## **Regulation 12 EIR - Exceptions to the duty to disclose environmental information**

12.—(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.

#### **Regulation 14 EIR - Refusal to disclose information**

14.—(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).

#### **GDPR European Regulation Article 15 – Right of access by the data subject**

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

(a) the purposes of the processing;

- (b) the categories of personal data concerned;
- (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
- (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
- (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
- (f) the right to lodge a complaint with [the Commissioner];
- (g) where the personal data are not collected from the data subject, any available information as to their source;
- (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

### **Commissioner's Decision Notice:**

**[14]** The Commissioner investigated the matter and held that:

- (1) the scope of the Request, was agreed between the parties at their meeting;
- (2) the Council had carried out reasonable searches for the information, and on the balance of probabilities did not hold it.

[15] The Commissioner also considered the time that the Council had taken to respond to the Request. She found that the Council had exceeded the statutory time limit. There is no appeal against this finding. The Commissioner also made a finding in respect of the timing of the Council's response to the internal review request. They found that the Council had been too slow to respond. There is no appeal against this finding.

**Grounds of Appeal:**

[16] The Appellant's Grounds of Appeal questioned the credibility of the Council. The Appellant argued that the Council failed to disclose the truth as it does not want to be found to have mis-sold a property or breached various laws. Further, the Appellant contended that the Council were deliberately withholding and destroying information relating to his request.

**The Commissioner's Response:**

[17] On 16 March 2021, the Commissioner maintained their position as outlined in the DN and continued to resist the appeal. The Commissioner was satisfied at that time that the Council did not hold further information. In particular, that:

- (1) the Council says that it carried out searches of the several locations in which it considered that the information might exist;
- (2) it did find a significant volume of information, suggesting that it was looking in the right places. It disclosed this;
- (3) it did not find further information. The Council made plain in its correspondence that it felt that it had searched all relevant places;
- (4) the Council had document retention policies that made it likely that much of the historic information sought would no longer exist.
- (5) the Council had been relatively recently formed from a merger of predecessor authorities and some of the records may have been lost as a result.

[18] Further, the Commissioner opined that the Council is a public body, which in the absence of evidence to the contrary ought generally be expected to be acting in good faith in view of its role and public law duties. In addition, the Commissioner

noted that much of the Council's correspondence with the Appellant was conducted through an in-house solicitor, who will be strongly bound by ethical obligations to be truthful.

**[19]** The Commissioner opined that the Tribunal need not take account of alleged wrongdoing by the Council. The Appellant had not surmounted the burden on him, in terms of either pleadings or evidence, to raise this serious allegation as one that the Tribunal should consider. Furthermore, the Commissioner opined that even if the Tribunal were to take account of the allegations, there is no basis for them and they were not, on the balance of probabilities, true. It followed the Commissioner argued, that the Council had no incentive to cover up wrongdoing by withholding or destroying information, as alleged.

**[20]** The Commissioner was satisfied in this instance, at that time, that any further searches, at least, would exceed the time limit. The Commissioner therefore submitted that the Council had no obligation to conduct further searches for the purposes of complying with section 1 FOIA and had not breached the duties therein. *[The Tribunal take the view that clearly, events overtook the Commissioner's view in this regard as further searches were carried out which identified information in scope which could and should have been disclosed. In any event we have no evidence of any calculations to identify the time spent on handling the request so are not able to identify on what basis the Commissioner came to this conclusion. There was no evidence brought before this tribunal to allow us to determine whether any time limit would have been exceeded.]*

**[21]** The Commissioner informed the Council on 2 December 2021 that they did not intend to defend the DN as on the balance of probabilities further information was held by the Council within the scope of the request at the time the request was made. On this basis the Tribunal reached their conclusion below that the Appeal should be allowed.

### **Proposed Consent Order:**

- [22]** The Commissioner then wrote to the Tribunal on 24 November 2021 proposing that the appeal was ended by consent pursuant to rule 37 on the basis that the Commissioner understood that during the appeal further information was provided to the Appellant by the Council in response to a different information request. This information appears to fall within the scope of the information request which is the subject of this appeal. This consent order would have substituted the DN and would have required the public authority to issue a fresh response.
- [23]** The Appellant indicated on 26 November 2021 that he was agreeable to the Commissioner's request. However, the Appellant stated that the Council suppressed evidence requested under FOIA and misled the Planning Inspectorate. The Appellant alleged the same in relation to the Valuation Office. The Appellant did not believe that the Council would comply.
- [24]** The Commissioner replied to the Appellant on 2 December 2021 and stated that the allegations fell outside of the jurisdiction of the Tribunal. Further, that the Commissioner could not provide any assurance that they would take action against the Council if they continued to refuse to supply the requested information.
- [25]** The Appellant wrote to the Tribunal on 14 December 2021 indicating that he would not agree to the consent order in light of the Commissioner's response. He also contended that the Council has further information which it has not yet provided to him. Hence the Appeal has proceeded to a full hearing.
- [26]** The Tribunal vacated the original hearing date on 6 January 2022 and Judge Buckley issued an Order:
- (a) Joining the Council;
  - (b) Instructing the Appellant to state whether or not he accepts that he has now been provided with all the information held by the Council within the scope of his request and describing any additional information he thinks may still be held by the Council;

(c) Instructing the Council to confirm whether or not the information provided to the Appellant in response to his request for information held on the Anite system fell within the scope of his original request, indicating if it holds any additional information which it has not already provided and explaining, if applicable, why it does not hold the information identified in the Appellant's response to this Order.

**Appellant's Response:**

**[27]** The Appellant's response to the Tribunal dated 19 January 2022 stated that the Council have, in summary:

- (a) spread misinformation about the Appellant through the media;
- (b) failed to disclose the requested information;
- (c) perverted the course of justice by misleading public bodies and withholding evidence. Thus, breaching the Appellant's Article 6 rights;
- (d) breached section 77 FOIA;
- (e) mis-sold the property per the Misrepresentation Act 1967;
- (f) breached section 10(1) FOIA;
- (g) breached the Appellant's Article 1 Protocol 1 rights;
- (h) breached the Appellant's Article 8 rights; and
- (i) breached the Appellant's wife's Article 14 rights.

**[28]** The Appellant asserted that the Council held the following:

- a) A Structural survey completed on the property, most likely in 2016;
- b) The Council's Pre-sale survey that determined the cost of the works to bring the property to a habitable state at £40,000;
- c) Details of works on the property, including but not limited to, the refurbishment done in 2012 which included re-pointing and new concrete tiles to the balcony;
- d) Reports by Mr Morgan, Estates and Property Officer, who prepares the Dorset Council properties for sale, oversaw the tender in this case and instructed Goadsby as the agent to organise the viewings and who visited the property weekly in the months before the sale and showed around prospective purchasers, even after the Appellant had been awarded the tender and had paid the deposit.

## **The Second Respondent's Response:**

[29] The Council provided a response dated 11 February 2022 to the order of 6 January 2022. The Council confirmed that the information held on the Anite system did fall within the scope of the Appellant's request dated 21 August 2019 and set out its position as follows:

*"a) Structural Survey*

*The Council has carried out thorough searches of all relevant information systems for the existence of a structural survey and has not been able to locate such a document, nor has it seen any evidence that the former Weymouth & Portland Borough Council ("WPBC") actually commissioned a structural survey of the property.*

*b) Pre-Sale Survey*

*The Council believes that it does hold a report containing information about the cost of bringing the upper part of the property into a serviceable state which has not at any stage been provided to the Appellant. The report would therefore not fall under the section 21 exemption (information reasonably accessible to the applicant) and should have been released under the appellant's request.*

*c) Details of works on the property*

*The Second Respondent has carried out proportionate searches for records relating to the works the appellant says took place in 2012, but has not been able to find any information.*

*d) Reports by Mr Morgan, Estates and Property Officer*

*Mr Morgan was fully consulted about this request and assisted in carrying out information searches for the appellant's request. Mark Evans, the council's 'Lead Manager, Facilities Management' has confirmed to the best of his knowledge "all information that is held and relevant to the property concerned has been identified and provided".*

*The Council submits that information relating to property viewings, bids made by prospective purchasers and similar does not constitute information within scope of the Appellant's request."*

The Council also admitted that the information disclosed to the Appellant in response to another request made on 30 March 2021 which consisted of 17 photographs held on Anite, the Council Tax system should have been disclosed under the original request. *(The Appellant became aware through disclosures made by the Council in connection with a Valuation Tribunal hearing that 17 photographs were held by the Council. When the information was disclosed on 21 April 2021, the Appellant immediately sent a copy of this additional information to the Commissioner.)*

**Issues for the Tribunal:**

**[30]** Judge Buckley outlined the relevant issues for the Tribunal's consideration in a further Order dated 7 March 2022:

*"1. On the balance of probabilities, at the date of the request did the Council hold a structural survey completed on the property.*

*2. On the balance of probabilities, at the date of the request did the Council hold details of works on the property.*

*3. Does information relating to property viewings, bids made by prospective purchasers and similar fall within the scope of the request? If so, on the balance of probabilities, at the date of the request did the Council hold any such information?*

*4. On the balance of probabilities, at the date of the request did the Council hold any other information within the scope of the request that could be described as 'reports by Mr. Morgan'.*

*5. Whether to issue a substitute Decision Notice and if so, in what terms."*

*[This Tribunal have considered and accept Judge Buckley's identification of the relevant issues as set out above]*



### **The Second Respondent's Response to Notice of Appeal dated 11 April 2022:**

- [31] In response to issue 1, the Council submitted that at the date of the request it did not hold a structural survey completed on the property. The Council argued that it consulted relevant staff who are responsible for managing information of this nature before coming to this conclusion. The Council stated that the searches it carried out of its relevant information systems are sufficient to demonstrate that on the balance of probabilities, it does not hold the requested information.
- [32] In response to issue 2, the Council considered it unlikely that any maintenance works undertaken on the property would have been deemed large scale or high value and this is supported by the absence of listed building consent in relation to such works, given that the nature of such works would be more likely to require listed building consent to implement.
- [33] In response to issue 3, the Council argued that information relating to *'property viewings'* and *'bids made by prospective purchasers and similar'* is not within the scope of the Appellant's request for *'information on the properties'*. Instead, such information is more accurately categorised as *'information about other potential bidders'* or *'information about the bidding process'* which does not directly relate to the properties.
- [34] In response to issue 4, The Council consulted Mr Morgan about this request. The Council's *'Lead Manager, Facilities Management'* has confirmed to the best of his knowledge *"all information that is held and relevant to the property concerned has been identified and provided"*.
- [35] Further, the Council denied the allegations made by the Appellant.

### **The Hearing on 27 July 2022:**

- [36] A CVP hearing was arranged for 27 July 2022 however, unfortunately, no witness statements or evidence were supplied by the Council prior to the hearing although three members of staff were present to answer questions. This placed both the

Appellant and the Tribunal at a disadvantage as there was no opportunity to prepare for cross examination or questions. Evidence was presented by the Appellant which showed several pieces of information within the scope of the Appellant's request dated 21 August 2019 and the refined request of 17 December 2019 which indicated that the information was located by the Council but was not immediately disclosed to the Appellant. For example, 17 photographs were submitted by the Council for the Valuation Tribunal but were not provided to the Appellant when they were located nor immediately when the Appellant e-mailed to remind the Council these fell within the scope of his request.

- [37]** Regarding b) The Pre-Sale Survey, the Council told the Tribunal on 11 February 2022 that they believed they held a report which they said should have been disclosed to the Appellant but no attempt had been made to retrieve this report by the date of this hearing. Re d) reports by Mr Morgan following visits to the property. Mr Morgan informed the Tribunal that these were prepared as e-mails rather than reports and it was agreed at this hearing that Mr Morgan would find and disclose all these emails with personal data redacted.
- [38]** During the hearing on 27 July 2022 the Parties made further efforts to draw up a Consent Agreement for approval, which unfortunately proved elusive. However, the parties seemed to make considerable progress toward that laudable goal. The Council has openly again apologised for its errors and delays. However, despite clear Directions provided by the Tribunal on 6 January 2022 and 7 March 2022 the Council remained unable or unwilling to determine the nature and extent of the relevant requested information that they hold and provide it to the Appellant or rely on any other exemptions (exceptions if EIR is the appropriate access regime). The Council indicated that this would be done within three weeks and that they could and would provide detailed witness statements from James Fisher, John Morgan and Trevor Ford, or others as necessary, who were to appear for cross-examination and allow the appeal to be properly and fairly determined.
- [39]** The Tribunal reminded the parties of their obligations under Rule 2 and the Tribunal was persuaded by the Second Respondent that it was their intention to try to reach an appropriate arrangement or agreement with the Appellant, if at all possible or

be ready for a full oral hearing with their witnesses and adequate evidence to commence on the 17 August 2022.

### **PRELIMINARY DECISION ON AN APPLICATION TO ADJOURN**

- [40] On the basis of the above reasons and the spirit of co-operation between the parties the Tribunal allowed the Second Named Respondents' application for a peremptory adjournment.

### **Directions of the Tribunal dated 1 August 2022**

- [41] All Parties (including the First Respondent) will address the issue of engagement under FOIA or EIR. The Tribunal wish to hear submissions on whether this request should have been dealt with under EIR rather than FOIA, and if so, submissions on doing so and in the case of the Second Respondent, specifically which forum pertains and exemptions or exceptions are being claimed.
- [42] The Appellant and Second Named Respondents should define and preferably agree the remaining issues to be decided by the Tribunal as referred to at Paragraphs 25 & 28 above and any other issues they wish to canvas before this Tribunal.
- [43] The Appellant and Second named Respondents should address the CMD dated 16 May 2022 in relation to the Parties not being able to agree whether the document 05 Kevin Perry, racist Facebook Postings should be included in the bundle or not. The Tribunal is of the preliminary view it could be relevant and should be included and dealt with by way of further submission.
- [44] The Second Respondent will address all matters and issues set out above and provide adequate evidence, if necessary, by further witness statements, to allow the Tribunal to make informed decisions on the issues identified and agreed upon.
- [45] Without prejudice to the generality of the above issues, the Tribunal require further information and evidence on the items of work that appear to have been required

for “*Listed Buildings Consent*”. Mr Greene did offer to provide evidence from Alison Turnock and this will be necessary for the hearing on 17 August 2022 if a consent order cannot be agreed by the parties. There do appear to have been works carried out at the property in question, which to an uneducated observer, would appear to have fallen into the category of needing LBC. In addition, some of these works were the ones for which it appears that the Council served a Listed Building Enforcement Notice dated 21 August 2019 and failure to comply with this could have resulted in prosecution. In order to make an informed decision, the Tribunal will require clarification and explanation on what type of works fall into the category of requiring LBC and why any such work/s might go ahead without LBC or a record thereof.

- [46] The Council as Second named Respondent will provide to the Tribunal and all parties detailed witness statements, as indicated, and a detailed skeleton argument as soon as possible and no later than 16.00 hours on Monday 15 August 2022. This is the latest possible date and in order to facilitate all parties in accordance with Rule 2 any document which is completed prior to this date should be circulated to all parties as soon as possible.
- [47] The Appellant may respond to the Second Respondents skeleton argument on or before 16.00 hours on Tuesday the 16 August 2022.
- [48] The parties will be prepared to complete this hearing on Wednesday 17<sup>th</sup> August

#### **Hearing of 17 August 2022:**

- [49] The Tribunal sat on the 17 August 2022. I sat with Mrs Chafer in the absence of Mr Palmer-Dunk with the consent of the parties that Mr Palmer-Dunk would be absent to hear the evidence and questions arising from the witness statements as summarised below. It was also agreed that Mr Palmer-Dunk would be part of the Panel for their deliberations following this hearing.

## **Witness Statement of Jon Morgan**

- [50]** Jon Morgan provided evidence to the Tribunal by way of witness statement. Mr Morgan is employed by Dorset Council as the Development Manager and has been since May 2021. Mr Morgan's evidence was on the disposal process of 47a Esplanade / Bond Street.
- [51]** The 47a Esplanade / Bond Street toilet disposal process was triggered by a report taken to Management Committee by the Assets and Infrastructure Manager on 20th September 2016. Shortly after this approval, he was asked to take up the disposal on behalf of the team, reporting to the Estates Manager.
- [52]** Mr Morgan inspected the property with Building Surveyor Jason Hall. Two agents viewed with him and following a selection process, Goadsby Ltd were appointed as the sales agent. Emails were attached showing questions from the communications team following BBC interest. The agent asked for any surveys and there is correspondence with the Building Surveyor Jason Hall and the Building Surveying Manager John Paton regarding any reports. There was reference to an Asbestos Report but no other survey. The agent was instructed with no survey Structural Report as Mr Morgan did not have one to use. This was like the other property sold at that time, for example Portland Town Council offices. Mr Morgan had no report or information as to the "£40,000" figure detailed in the Management Committee Report. Due to safety issues he took the advice of the surveyors re asbestos and did not go in to the basement area. He was instructed to sell the property 'as is' so there was not an issue.
- [53]** Following the first Tribunal hearing, Mr Morgan explained that he carefully searched for relevant records and specifically for a) structural survey; b) pre-sale survey; and c) reports completed by himself in relation to the property concerned in this FOIA request. He said that many of the emails and documents are not in the usual S drive storage area but in a Y drive which was mainly for the former West Dorset Council Area but it also contained some Weymouth files. He found a toilet survey - handwritten notes dated 09/04/15 made by a predecessor, Mr Bill Wilberforce, a refurbishment specification for the toilet block dated February 2012

and a spreadsheet in various obscure drives and folders including one named 'Closed Toilets'. Mr Morgan stated that there are no figures within the toilet survey inspection notes.

**[54]** Mr Morgan stated that he has now been able to retrieve the emails he thought had been deleted when the Council updated the email system and in his Inbox is an email after the disposal dated 17 October 2017 - it refers to a '*Declaration of Interest // DB*'. That email is to the Auditors summarising the background to the Management Committee Report. Bill Wilberforce is mentioned and the Head of Housing Clive Malone, the Bill Wilberforce notes referred to above are probably Bill's involvement for a future sale. There is no reference to a Structural Survey in the Management Committee Report and Clive Malone retired at Dorset Council's creation. Although Mr Morgan cannot prove it, he expects that the figure was an assessment by Bill / Clive possibly after a conversation with John Paton. Mr Morgan claimed that this is his response to point 6 'an internal report, 'structural report'. Mr Morgan asserted that if a structural survey existed, he would have seen it.

**[55]** Mr Morgan stated following completion there were some property management issues. Unfortunately, the meter reading team attended site after completion with his spare set of keys. The Council apologised to the Appellant and these keys were duly handed over. The solicitors dealt with a neighbour issue re painting doors and locks. There was a licensing issue for the pavement area that became an issue, (an existing Licence ending 31 July 2017) for the licencing team as the area in question was outside the disposal demise. All these were resolved with the purchaser through the respective legal teams. There were questions regarding the viewings and where named Companies or individuals connected to a Councillor existed. Mr Morgan attached the emails at the time.

- [56] Mr Morgan was subsequently asked to attend a meeting at the Council's Head Office on 19 December 2019 with their Litigation Solicitor and various planning colleagues with Mr and Mrs Shipton. Most of the meeting was about Planning and Conservation matters.
- [57] Mr Morgan stated that there were questions asked of him as to the preferred purchaser. He answered that you ( the Appellant) were the preferred purchaser, cash buyer. He has subsequently found an email from the Estates Manager, Greg Northcote dated 7 January 2019, relating to interest before his employment. He did not know of this interest before marketing, and he does not believe they were on the viewing list and as he dealt with the transaction process they were 'not a preferred cash buyer'. Reviewing back through the emails Mr Morgan said the applicant appeared to be 1 of the 2 applicants he rejected for a viewing as they were after the closing date and were not offering toilet continuation.
- [58] Mr Morgan stated he was also asked how often he normally inspects vacant properties. At that time, he had Real World security cover for once-a-week inspections. He occasionally viewed as a check when in town but there were no issues so there appears to be no email report. Mr Morgan thought he emailed once as a seagull was nesting in the ground floor corridor. There may have been a conversation with Real World security instructed to view weekly and the meter reading key holder. Other than the basement door asbestos removal, he is not aware of any repair works during his period of involvement (a window may have been replaced / sign removed) and no reports would be issued if there was nothing to say.
- [59] Mr Morgan said after the meeting he did try to assist by asking whether the agent could assist re possible buyers, the failed purchasers may still be interested. In addition, whether the Town Council were interested in the toilets but these efforts came to nothing. He averred that his emails were sent direct to the Applicant.

### **Witness Statement of Trevor Ford:**

[60] Trevor Ford provided evidence to the Tribunal by way of witness statement. He is currently employed by Dorset Council as a Regional Property Surveyor and has been since April 2019. Following the Tribunal on 27 July 2022, Mark Evans (Lead Manager for Facilities Management) requested that he carried out a search of any relevant documents relating to either a structural survey (pre-sale) or a pre-sale condition schedule that totalled around £40,000 at the property(s) 47A The Esplanade / 16 Bond Street concentrating on the period of documents recorded in 2016. To complete this request, he undertook extensive searches of both physical archived documents and a search of electronic data, no documents were located.

### **Witness Statement of James Fisher:**

[61] James Fisher provided evidence to the Tribunal by way of witness statement. He is the Data Protection Officer for Dorset Council and has been since January 2020. Mr Fisher acknowledged that there have been several errors in the Council's handling of the Appellant's information request and would like to reiterate his apology to the Appellant for this. Despite the mistakes, save for the 3 small outstanding searches which Mr Ford had been delayed in completing (prior to him writing this statement) due to requiring changes to file access permissions, the Council has now done all it reasonably can to locate the outstanding information the Appellant thinks the Council should hold. Mr Fisher stated that the officers dealing with the first response to the request only considered the information under the FOIA regime and not under the Environmental Information Regulations 2004 despite the property forming the subject of the request being a listed building of historic interest. He explained that the two errors, not clarifying the information sought by the Appellant and failing to consider the matter under the EIR, were most likely the result of the under-developed and provisional procedures that were in place at the time when the Appellant made his request. He pointed out that the Council was under five months old at the time and had not at that point converged its teams, staff training, processes or information systems although it has since made improvements in all of these areas.



### **Appellant's Final Submission:**

- [62] The Appellant stated that the Second Respondent has deliberately prejudiced the Appellant, causing his financial loss and loss of enjoyment of property. The Appellant argued that the case for public interest is clear. The Appellant claimed that for reasons of transparency and fairness the outstanding requested information should be disclosed or alternatively contempt proceedings should be directed.
- [63] The Appellant averred that the Second Respondent has been procedurally unfair, negligent, committed misconduct and malfeasance in public office. The Appellant claimed that the Second Respondent acted to protect itself from any liabilities arising out of the racism of one of its officers and the mis selling of the property.
- [64] The Appellant claimed that the Second Respondent still holds further information that falls within the request (the Pre-sale Survey and Structural Survey), if not this information has been destroyed by the Second Respondent. The Appellant stated that the bulk of the requested information falls under EIR and therefore should be disclosed, no exceptions or exclusions should be allowed in respect of the requested information.
- [65] The Appellant contended that the Second Respondent failed to apologise to the Appellant, the Commissioner and the Tribunal for both delays and failure to disclose. The Appellant argued that the Second Respondent's failure amount to contempt of court:

*"It is a well-established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer (1846) 1 Coop temp Cott 338; 47 ER 884*, in terms which have been repeated time and again in later authorities"*

- [66] The Appellant claimed that the omission on the part of the Second Respondent amounts to contempt of court. The Appellant averred that the Second Respondent

intended to withhold the information and defy the directions of the Tribunal. The Appellant stated that the Tribunal, given the circumstances, must exercise its discretion to certify a contempt to the Upper Tribunal or grant leave to appeal should the Tribunal's findings be contrary to that of the Appellant.

**The Second Respondent's Final Submission:**

- [67] The Second Respondent outlined the history of the Appellant's request, the witness statements provided by James Fisher, Trevor Ford, and Jon Morgan alongside the Second Respondent's position in relation to this request. The Second Respondent confirmed that further searches for two documents known as "an internal report" and a "full structural survey" were unsuccessful.
- [68] The Second Respondent stated that the original request was a mixture of FOIA, EIR and DPA/GDPR and should have been declined. The Second Respondent relied on the authorities of *Moss v Information Commissioner* [2020] UKUT 242 (AAC) and *Doreen King v Barking and Redbridge University Hospital NHS Trust*.
- [69] The Second Respondent stated that this case has been ongoing for a considerable period of time and should be concluded. The Second Respondent outlined that in 2017 Mr and Mrs Shipton bought a commercial property in Weymouth that had been public toilets for many years. The Second Respondent argued that they were fully advised by Solicitors to use a surveyor and were put on strict notice to make all the required inspections/searches.
- [70] The Second Respondent contended that the Appellant knew the building was listed and they knew exactly what they were purchasing. The Second Respondent averred that the Appellant's mood changed when application for Listed Building Consent was refused. All relevant contract and conveyancing documents were exhibited to the Second Respondents skeleton argument. In 2019 the first FOIA request was submitted and later at a meeting in December 2019 a Second Request was made.

[71] The Second Respondent argued that the errors and delays are clear but have not been dishonest or intentional. The Second Respondent has offered repeatedly their apologies and endeavoured to make all possible and reasonable attempts/searches to find any documentation that may be of assistance. The Second Respondent submitted that they could do no more.

**Conclusions:**

[72] The Tribunal allow the Appeal (See § 21 above).

Note: where, following a s.50 decision notice or s.58 substituted decision notice, a public authority provides a subsequent response to the information request, nothing in the Act prohibits the information requester from making a further s.50 complaint, or the Commissioner from issuing a successive decision notice. See: Dr Michael Smith v Information Commissioner: [2022] UKUT 261 (AAC)

[73] We accept the issues as identified by Judge Buckley at § 31 above and comment as follows:

*“1. On the balance of probabilities, at the date of the request did the Council hold a structural survey completed on the property.*

In the course of the Tribunal hearing, the Council agreed with the Tribunal’s suggestion that one might expect a structural survey to be held on the property. However, on hearing the evidence of Jon Morgan (§ 51-54 above) following the searches he had carried out there was no indication that a structural survey had ever been commissioned despite several written notes/suggestions that one should be done. The Tribunal understand this to be the handwritten notes referred to in § 53 and 54. § 52 refers to emails between Jon Morgan, the Building Surveyor Jason Hall and Building Surveying Manager John Paton and Goadsby Ltd during the marketing of the properties and copies were exhibited. This includes one from Goadsby’s on Friday 6 January 2017 which specifically asks Jon Morgan if he has any survey reports on 47a The Esplanade, a reply from Jon Morgan on Monday 10 January 2017 in which he says *‘Building surveyor coming back on 47a tomorrow, he should have reports.’* An email later that day from John Paton to Jon

Morgan tells him to get Jason Hall to show him where on the S drive the asbestos register lies and states '*... you can look directly to see if we are likely to have a survey report.*' Jon Morgan replies the following day advising that he has already sent the Asbestos records and '*If that is all we have then they have it.*' On the evidence before us, we accept that on the balance of probabilities the Council did not commission a structural survey and so do not hold a structural survey on the property.

*2. On the balance of probabilities, at the date of the request did the Council hold details of works on the property.*

The witness statements specified an extensive range of searches covering both electronic and hard copy files over and above those which had been searched by the Council previously (see §51 – 54). The Tribunal accepts that this additional information was disclosed direct to the Appellant as a result of these searches. We have no evidence that any additional information is held on these systems by the Council and on the balance of probabilities we find no further information on works on the property is held.

*3. Does information relating to property viewings, bids made by prospective purchasers and similar fall within the scope of the request? If so, on the balance of probabilities, at the date of the request did the Council hold any such information?*

The Tribunal do find that information relating to property viewings, bids made by prospective purchasers and similar do fall within the original request. The Council did hold this information at the time of the request. We were informed that this further information has been provided in full to the Appellant with names redacted and we have no evidence that any additional information is held on these systems by the Council and on the balance of probabilities we accept that the Council hold no further or additional information under issue 3.

*4. On the balance of probabilities, at the date of the request did the Council hold any other information within the scope of the request that could be described as 'reports by Mr. Morgan'.*

The Tribunal find that information relating to ‘reports by Mr Morgan’ was identified as being held by the Council at the time of the request. During cross examination, Mr Morgan explained that he did not do any formal reports following his visits to the properties but he had, when necessary, sent emails to colleagues reporting any issues relating to the subject matter of the request. The Tribunal accepts that these have been disclosed to the Appellant and on the balance of probabilities, we accept that the Council hold no additional information under issue 4.

### **Racist Postings:**

**[74]** In Case Management Directions issued by Mrs A Arnell on 16 May 2022 the following points were noted:

The Tribunal was notified that the Parties were unable to reach agreement on the contents of the Appeal bundle. In particular the Appellant was seeking permission to include a document entitled “05 – XXX Racist Facebook Postings” on the basis that this person had significant involvement in their dealings with the Council. The Council objected stating that he had only limited involvement and it is not relevant because there is no connection between this private social media activity and the Council's handling of the Appellants request.

The Parties were invited to give submissions on whether this point should be included in the bundle. Neither of the parties addressed this point in their response to the Tribunal Directions and during the course of the hearing the Appellant indicated that he did not wish to progress this matter.

Other than adverse comment, it is difficult to see what this Tribunal could do to in relation to such allegations as this is not within our remit. There will no doubt be other public bodies who may be able to address any such live issues.

### **Which Regimes Apply to the Information Requested:**

The Second Respondent suggested that three regimes are engaged i.e. FOIA, EIR and GDPR but failed to expand on this. The Commissioner identified EIR as the

relevant regime for the external parts of the building, but submitted that for internal parts of the building, FOIA should apply.

The Tribunal agree that because of the status of the listed building in question EIR is engaged. However, we are of the view that because of the issue of the release of asbestos from the building, and works relating to same, into the surrounding atmosphere that the EIR is the regime that should be applied to the internal aspects of the building also where asbestos is found. The significance of this of course, is that the onus is on disclosure from the outset – see Regulation 12(2). FOIA is the regime for any other internal works not relating to asbestos or other categories within Regulation 2(1).

[75] The Council did agree, in response to a question from the Commissioner during her investigation, that the original request did include a subject access request under the GDPR which had not been identified or dealt with. The Council told the Commissioner that they would write to the Appellant and his wife to ask if they wished to continue with their subject access request. It seems that this did not take place. This Tribunal directs that this should be pursued as a matter of urgency and in the spirit of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

[76] The Tribunal would remind the Second Respondent that if a public authority is going to rely on exemptions or exceptions they should be specific and indicate clearly for each type of information which regime applies and what exemption/exception is being claimed and why.

[77] The Tribunal wish to record their concern about the poor manner in which this request has been handled since it was received in 2019 and note the repeated apologies by the Public Authority. In all the circumstances the Tribunal find that the Council had an inefficient and ineffective system for retrieving information. We do not accept that the amalgamation of a number of Councils is an adequate excuse for this and we find evidence that the Council was either incompetent or unwilling to properly facilitate this request from the outset. The Tribunal also note their concern in relation to the lack of understanding regarding claiming a FOIA s12

exemption and particularly the activities which can be included in the preparation of a cost estimate.

- [78] The Commissioner has pointed out in their submission dated 10 August 2022, that EIR is engaged and Regulation 12(4)(a) (the public authority does not hold that information when an applicant's request is received) was not engaged at the time of the request. The Commissioner also considers that the Second Respondent had breached Regulation 14 EIR by only responding to the request under the FOIA. The Tribunal agree that Regulation 12(4)(a) was not engaged and that Second Respondent breached Regulation 14.

**The Tribunal issue the following substituted Decision:**

- [79] It has been established that the Second Respondent did hold further relevant information at the time of the request under Regulation 2(1)(b) and (f) EIR, FOIA Section 1(4) and GDPR Article 15. The Tribunal direct that a fresh response must be issued by the Second Respondent herein as soon as possible and no later than one calendar month from the date of this decision .
- [80] The Tribunal direct that the Second Respondent disclose all further information which they locate which is within the scope of the original request and which was held at the time of the request immediately it is located, in particular and without prejudice to the generality of the above, held at the time of the request
- [81] The Second Respondent, having identified the possibility of personal data relating to the Appellant and his wife being held in any of their systems, in particular the Council tax system 'Anite', the Tribunal further direct that the Second Respondent should progress a subject access request (under GDPR Article 15) as they informed the Commissioner they would do on 30 October 2020 and as they were invited to do in the Decision Notice dated 7 January 2021 as soon as possible and no later than one calendar month from the date of this decision and ensure that their response is in accordance with the time limit specified in the legislation.
- [82] The Second Respondent should be aware of their duties under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules

2009 and of disclosure under EIR principles. The Appellant has listed a number of people in his final submission whom he believes would have been more relevant to ask if there was ever a Structural Survey and any additional pre-sale survey than those the Council identified. This may be a relevant matter in any such further information requests.

Brian Kennedy KC

28 November 2022.

Promulgated on : 29 November 2022