IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0107
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0436438
Dated: 18 April 2012

Appellant:	**CHRISTOPHER BRAGG**
Respondent:	**INFORMATION COMMISIONER**
Additional Party:	**BABERGH DISTRICT COUNCIL**
On the papers on:	**24 September 2012**
Date of decision:	**16 October 2012**

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and PAUL TAYLOR
Tribunal Members

Written representations:

For the Appellant: in person
For the Respondent: Helen Davenport, Solicitor for the Information Commissioner
For the Additional Party: Karen Smith, Solicitor for Babergh District Council

Environmental Information Regulations 2004

Exceptions, Reg 12 (4) and (5)
- Request manifestly unreasonable 4(b)

Cases:

Rigby v IC and Blackpool NHS Trust (EA/2009/0103)

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 18 April 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. There is a long planning history to Nayland Airfield. It is situated in an area of Outstanding Natural Beauty in the Dedham Vale in Suffolk. There are two airstrips on the site: one known as the main airstrip and the other as the Eastern airstrip. Originally – because the area used for take-off and landing was open farmland – it was difficult to identify the separate areas.

2. The main airstrip was granted planning permission in 1985 (following an appeal and a decision by the Secretary of State) subject to various conditions including the restriction of the number of take-offs to 10 per day and no more than 5 per hour.

3. A further condition prohibited take-offs on Sundays or bank or public holidays. On 17 February 2000 the conditions of the 1985 permission were relaxed so that no aircraft could take off on the site on Christmas Day but Sunday flying was permitted between the hours of 10 AM and 2 PM.

4. In terms of the Eastern airstrip, the landowner (who is not the Appellant) applied to the Second Respondent on two occasions for a Certificate of Lawfulness for aircraft to take off and land on it. Those applications – made in 1998 and 2004 – were refused by the Second Respondent (the Council) on the basis that the use of the Eastern airstrip had not been proved and shown to have existed for the required 10 year period preceding the applications.

5. In the absence of an appeal against the 2004 refusal, the Council proceeded to issue an Enforcement Notice under section 172 of the Town in Planning Act 1980 against the landowner on 24 January 2005. The Enforcement Notice required the landowner to cease using that portion of the land for that purpose.

6. The landowner appealed against that Enforcement Notice on the basis that the land in question had been used on or before the 10 year period preceding the Enforcement Notice and was, as a result, immune from enforcement action.

7. A planning enquiry took place in November 2006 and the Enforcement Notice was upheld. In April 2007 complaints were received that the main airstrip was being used in breach of the Sunday restrictions and that the Eastern airstrip was being used again. The landlord acknowledged, under caution, that he was using the Eastern airstrip in contravention of the Enforcement Notice and that was confirmed by his log books.

8. Injunction proceedings were commenced by the Council in the High Court and an interim injunction was granted to stop unlawful flying activities. A final injunction was granted by the High Court on 22 April 2008. This was by way of a Consent Order where the landowner agreed to the terms and the issuing of the injunction and had been represented by Counsel and solicitors throughout the proceedings.

9. From June 2008 to the time of the Council's refusal there had been two information requests submitted to the Second Respondent by the landowner and 18 by the Nayland Flying Group.

10. The Appellant made 14 requests for information. At the heart of this appeal is his request of 3 July 2011 in the following terms:

> I wish to apply for information under the environmental information regulations 2004.
>
> I refer to your reference B04/254/ENF – planning inspectorate ref APP/D3505/C/05/C2001482 and specifically a proof of evidence from [name].
>
> Under section 2 of [name] statement entitled 'enclosures' there is a list and I specifically refer to subject matter under reference 'L' which is a letter dated 27 February 1995 addressed by [name] on behalf of the Solicitor to the Council to [name].
>
> The first paragraph of [name's] letter to [name] is as follows: 'I refer to previous correspondence regarding the Eastern runway, and am writing to let you know our conclusion in that regard'.

The information I seek is copies of that correspondence (which may consist of more than one letter).

11. The Council responded on 1 August 2011 and refused to deal with the Appellant's request citing regulation 12(4)(b) of the Regulations which states as follows:

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

(a) …

(b) the request for information is manifestly unreasonable.

12. On 19 September 2011, the Appellant requested an internal review. On 1 November 2011, the Council provided the outcome of its internal review in which it upheld its earlier position.

13. The Appellant then referred the matter to the Information Commissioner (IC) under section 50 FOIA.

14. The IC stated at Paragraph 14 of his decision notice that it was permissible to refuse requests under regulation 12(4)(b) EIR which would be considered vexatious under section 14 of FOIA. However, there was no statutory definition of the term "vexatious". Accordingly, when considering this area, the IC relied in part on his own guidance which explained that he would consider the context and history of the requests as well as the following five factors:

(1) Whether compliance would create a significant burden in terms of expense and distraction;

(2) Whether the request is designed to cause disruption or annoyance;

(3) Whether the request has the effect of harassing the public authority or its staff;

(4) Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and

(5) Whether the request has any serious purpose.

15. The IC found that the material requested was obsessive, that complying with the request would have the effect of harassing the Council, and would impose a significant burden. He also found that there was no serious purpose or value at the time of the request. The IC did not find that the request could be said to be designed to cause disruption or annoyance.

16. The IC went on to consider the public interest test and found that the public interest in protecting the Council's limited resources and in protecting the reputation of the Regulations outweighed the public interest factors in favour of disclosure.

17. On 15 May 2012, the Appellant submitted a Notice of Appeal.

18. The Appellant's position has been that the IC was wrong to conclude that his request could be categorised as obsessive, particularly in relation to the volume of requests since July 2009. He stated:

> I do not concede that the proper place in which to challenge the decisions made by the Council was in those forums…My position is that Babergh District Council failed to make proper disclosure when it had an opportunity during proceedings and that Babergh District Council deliberately and knowingly withheld documents in its possession which would have defeated its own case.

19. The Appellant stated that he has submitted numerous requests to avoid having one, much larger, request rejected on the grounds that it would be manifestly unreasonable to comply with that. On this point, he said:

> Tactically I choose that path to avoid the prospect of having a more compendious request declared manifestly unreasonable and thus having no prospect of a practical disclosure to any discrete aspects of a compendious request. The tactic has very little to do with a pattern of behaviour. The tactic was deliberately implemented to ensure the greatest chance of success in securing information. Tactical awareness and tactical implementation is something distinct from obsession.

20. The Appellant stated that the IC had

> made rather a leap of faith when he concludes that because I am a pilot I am unhappy that the Council's decisions have an impact on my activity as a pilot. … My assumption is that the Commissioner is drawn to the conclusion that my request for information is a private interest. The Commissioner has drawn an improper conclusion.

21. The Appellant – in response to comments by the Council that he has effectively questioned the honesty and integrity of its staff and made serious allegations of perjury, perverting the course of justice, conspiracy and malfeasance in public office – takes the position that the IC has made an

> …inappropriate assumption that evidence to support a criminal act is time based. There is no time limit to bring a case of perjury or perverting the course of justice, or misfeasance in public office.

22. The Appellant also appeals on the ground that

> …the Commissioner politely suggests that I do not make any further requests for information. …It cannot be right for the Commissioner to dissuade members of the public from applying for information to which they are entitled. I seek clear guidance on this point from the first tier tribunal.

23. The Appellant also disputed that complying with the material request would impose a significant burden on the Council. He stated that

> ….the Commissioner only has a remote understanding of the context of the issues. This specific request will amount to photocopying but a few pieces of paper which would take less than 10 minutes of an office junior's time; hardly a burdensome task. Additionally, I have made it clear that I would be happy to relieve any perceived burden on the Council and have offered my services as a professional investigator of some 37yrs to the Council free of charge. So far, the Council has not taken up the offer.

24. In terms of having a serious purpose, the Appellant states that

> ….My interest has very little to do with planning. It is to do with honesty and integrity of individuals who appeared as witnesses at a planning hearing. It is to do with a duplicitous approach from Babergh District Council achieving an outcome (the vehicle for which just happens to be planning) in circumstances where the Council took an action whilst it was in possession of evidence which, had that evidence been disclosed, would have destroyed its own case.

Conclusion

25. The Tribunal notes that the Appellant clearly sees things from a particularly personal viewpoint. It has considered the tone of his final written submissions – dated 22 September 2012 – in respect of this appeal and finds that it contains elements which support rather than refute the Council's decision to rely on Regulation 12 (4) (b) and the IC's subsequent Decision Notice.

26. In those final submissions, the Appellant states that he has been an investigator for over 37 years and that

> At the point of arrest, if a suspect claims that he did not do something, the Appellant does not just accept the situation and release the suspect, the Appellant searches for, collects, preserves and secures evidence pointing to innocence or culpability. It is a matter for a court to determine guilt. There is nothing in the Environmental Information Regulations which state that they cannot be used as an investigative tool to support a Criminal investigation. Babergh District Council has demonstrated a solid resistance to attempts by the Appellant to prove wrongdoing by the Authority and certain of its witnesses. The regulations provide a presumption to disclose. The Appellant has not been subject to this presumption and invites the Council to identify the percentage of applications he has submitted which have resulted in disclosure.

27. The Appellant has not challenged the High Court decision – that led to an outcome that was agreed between the Council and the owner of the land at Nayland Airfield (who was legally represented throughout the High Court proceedings and their conclusion) – by way of any of the routes of challenge such as judicial review or even direct complaint to the police and/or the Crown Prosecution Service.

28. He appears to have set himself up as an investigator of wrongdoing that he perceives but he has not allowed other more appropriate bodies to investigate and consider any of the issues he believes lie at the heart of his information requests.

29. It appears to the Tribunal that he is attempting, in effect, to re-litigate a matter that has already been concluded by agreement between the two prime parties (the landowner and the Council). It is one thing for an individual to be concerned that the truth has not been told in legal

proceedings and it is quite another thing to take on issues around this – on his own – and lose the kind of objectivity that others perhaps could have applied to more formal investigation based on his current, apparently baseless suspicions.

30. The Tribunal has concluded that he has crossed the line in terms of reasonableness and has become both obsessive and harassing in his tone of enquiry in his 14 requests to the Council. As the IC pointed out, there is a thin line between persistence and obsession. The Tribunal agrees. This distinction is particularly important so that those who make persistent and valid enquiries are not discouraged and blocked from doing so. In this case, however, the line in question has been crossed and demonstrates an obsessive and unfortunately hectoring tone in respect of the information requests.

31. In terms of there being a serious purpose in respect of the information requests, the Appellant has had ample opportunity to pass information to the proper authorities and there is no evidence that he has done so. The Council has said that the Appellant has questioned the honesty and integrity of its staff and has made serious allegations of perjury, perverting the course of justice, conspiracy and malfeasance in public office. The Council also advised that the Appellant said in October 2010 that he was preparing a case for criminal prosecution.

32. The Tribunal observes that no such action appears to have been taken by the Appellant despite the fact that matters have now moved on two years.

33. Babergh District Council is a small public authority, with limited resources to devote to information requests, and the context and history of the Appellant's engagement with the Council since 2009 meant that dealing with the Appellant's requests and correspondence has imposed a significant burden on the Council.

34. In the Commissioner's response to the fourth ground of appeal, he states that given his finding that the exception is engaged, the Appellant "...*is not entitled to receive the requested information or to seek the same information via future requests.*" With respect, we find the emphasised part

of this quotation too strong. If the request is made several years from the date of the original there may well be entirely different considerations in play. At the very least, whether the request could be regarded as manifestly unreasonable after the passage of several years without other requests on the same matter in the intervening period would have to be re-examined and judged on the facts at that time."

35. For all these reasons the Tribunal finds to the required standard - the balance of probabilities - that the appeal must fail.

Robin Callender Smith

Judge

16 October 2012