



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2009/0092

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FER0237548 and FER0239845
Dated: 16 September 2009**

Appellant: DIANA EASTER

Respondent: THE INFORMATION COMMISSIONER

Additional Party: THE NEW FOREST NATIONAL PARK AUTHORITY

On the papers

Date of hearing: 28 April 2010

Date of Decision: 14 May 2010

Before

**Annabel Pilling (Judge)
Jacqueline Blake
and
Malcolm Clarke**

Representation:

For the Appellant: Diana Easter, Hugh Stoner
For the Respondent: Adam Sowerbutts
For the Additional Party: Barrie Foley, Interim Chief Executive

Subject matter:

EIR Definitions, Reg 2 – Environmental information
EIR Exceptions, Reg 12(4)(b) – request manifestly unreasonable
FOIA Vexatious or repeated requests s.14

Cases:

Carpenter v IC and Stevenage Borough Council (EA/2008/0046)
Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013)

Department for Education and Skills v IC and Evening Standard (EA/2006/0006)
Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030)
Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)
Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)
CAAT v Information Commissioner and Ministry of Defence EA/2006/0040
Department of Trade and Industry v Information Commissioner (EA/2006/0007)

DECISION OF THE FIRST -TIER TRIBUNAL

The Appeal is refused and the Decision Notice dated 16 September 2009 is upheld.

For the reasons given below we find that the Commissioner was correct to deal with the matter under the Environmental Information Regulations 2004.

We find that the exception provided for in Regulation 12(4)(b) is engaged and that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in favour of disclosure.

Reasons for Decision

Introduction

1. This is an Appeal by Diana Easter against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 16 September 2009. The Decision Notice relates to two requests for information made by, or on behalf of, Mrs Easter to the New Forest National Park Authority (the 'NPA') under the Freedom of Information Act 2000 (the 'FOIA'). The NPA considered that the information was environmental information and the requests fell to be considered under the Environmental Information Regulations 2004 (the 'EIR'). It determined that in the context and history of Mrs Easter's and her representative's dealings with the NPA, the requests were manifestly unreasonable and it refused the requests, relying on the exception in Regulation 12(4)(b) EIR and concluding that the public interest in maintaining the exception outweighed the public interest in disclosure.

Factual Background

2. The NPA took on its statutory powers and responsibilities on 1 April 2006 and at that date became the sole local planning authority for the New Forest National Park, taking over the statutory planning responsibilities from the five different Borough or District Councils¹. New Forest District Council had previously been the local planning authority responsible for the Grade II Listed Eaglehurst estate, which includes 1 and 2 Stable Cottage². Mrs Easter owns 1 Stable Cottage.

¹ These were: New Forest District Council, Test Valley Borough Council, Salisbury District Council, Hampshire County Council and what was then Wiltshire County Council.

² The NPA explained to us that Eaglehurst was listed Grade II in 1959 and the ancillary building now comprising 1 and 2 Stable Cottage is included within the listing by virtue of its attachment via a covered walkway to the principal building which is listed. In itself, 2 Stable Cottage is of little or no architectural or historical value; the buildings functional relationship to Eaglehurst was lost in 1966 when permission was granted for the stables to be converted to residential use, including the installation of large dormer windows.

3. At some point prior to 1 April 2006³ the interior of 2 Stable Cottage was removed and timber shoring to restrain structural movement was put in place. At 1 April 2006 there were two existing planning permissions and two listed building consents⁴ for 2 Stable Cottage; the expiry dates for these vary, the last being due to expire in July 2010. No work in respect of 2 Stable Cottage has been commenced and Mrs Easter submits that the owner has expressed an intention not to restore the property.
4. There were claims that Mrs Easter's property suffered minor consequential damage but her insurer's surveyor has informed her that there is a risk of the roof collapsing unless the adjoining property is rebuilt.
5. The key point at issue between Mrs Easter and her dealings with the NPA has been the extent of the NPA's planning authority powers to take enforcement action and the decisions of the NPA as to whether or not it considered it to be appropriate or expedient to utilise those powers in relation to 2 Stable Cottage. By section 38 of the Planning (Listed Buildings and Conservation Areas) Act 1990, where unauthorised works have been carried out to a listed building, a Local Planning Authority (the 'LPA') has the power to issue a Listed Building Enforcement Notice. Section 38(2) requires the LPA to specify the alleged contravention and the steps that must be taken.
6. In 2006 a NPA planning enforcement officer prepared a draft Enforcement Notice in respect of 2 Stable Cottage and sent Mrs Easter a copy. In early 2007, however, the decision was made not to take enforcement action. The NPA, having taken legal advice, concluded that it was not expedient or appropriate to issue an Enforcement Notice in light of consideration of the character of the building and its condition. In particular, the NPA was of the opinion that it should not initiate enforcement action while there is an extant planning permission or listed building consent in place.

³ According to Mrs Easter this was in May 2004. The NPA has no first hand knowledge of when this took place but has a record from the predecessor authority that shows this to be the condition of the building in October 2004.

7. Mrs Easter, either herself or through her representative Hugh Stoner, has been in communication with the NPA since and has submitted a number of questions and requests for information to the NPA that relate to this decision. Mrs Easter is not satisfied that the decision not to take enforcement action was properly made. She believes that the NPA are obliged to take enforcement action against the owner of 2 Stable Cottage in order to reinstate it. She submits that the NPA's failure to pursue enforcement action has caused her distress, ill health, financial prejudice and has compromised her human rights.
8. The NPA maintain that its obligations in respect of enforcement action are discretionary and, having considered the circumstances of this case, has concluded that it would not be expedient to take such action. It has pointed out to Mrs Easter that she could pursue an action through the civil courts should she wish.
9. Mrs Easter has also made a complaint to the Local Government Ombudsman as she remained unsatisfied with the outcome of the course of correspondence with the NPA. The Ombudsman investigated the complaints and notified the parties of his findings in March 2008. He did not find any evidence of maladministration on the part of the NPA, that its officers had acted outside of their powers or failed to discharge properly its enforcement responsibilities. He also reminded Mrs Easter that if she considered that her neighbour's actions had put her home or safety at risk, this was likely to be a private civil matter on which she should seek independent advice as to the options open to her.
10. It remains Mrs Easter's stated position that she wants the NPA to take enforcement action to force reinstatement of 2 Stable Cottage.

The requests for information

11. On 27 October 2008, Mrs Easter's representative, Mr Stoner, wrote to the NPA with the following requests:

⁴ Mrs Easter submits that the listed building consents were granted illegally. This is a matter outside our jurisdiction.

“The request concerns part of a letter from the NPA Chief Executive to Mr B Miles of the Commission for Local Administration dated 16 October 2007, which reads:

“The enforcement file does contain a situation report, dated 18 December 2006, in the form of an internal memorandum from the Enforcement Officer to the Solicitor which sets out the situation on site, but as this document is an internal memorandum concerning possible legal action and requesting advice this would not be disclosed, as a matter of course, on a routine inspection of the file. The Authority takes the view that this information would be classed as exempt information if requests were made under the Freedom of Information Act or Environmental Information Regulations.”

Please disclose the “internal memorandum” referred to above and the solicitor’s response.”

12. On 28 November 2008, the NPA informed Mr Stoner that the substance of the request was assessed as falling within the ambit of the Environmental Information Regulations 2004 (the ‘Regulations’) rather than FOIA and that the request was refused under the exception in Regulation 12(4)(b) in that it was considered to be manifestly unreasonable. It considered that the public interest in maintaining the exception outweighed the public interest in disclosure.

13. Mr Stoner appealed against this decision by letter dated 10 December 2008. This was treated as an application for an internal review. The NPA responded on 9 February 2009, upholding the initial decision to refuse the request.

14. On 1 November 2008 Mr Stoner wrote on behalf of Mrs Easter:

“Mrs D Easter telephoned the NPA to request access to Enforcement Case File 06/1263 during a forthcoming visit to South Efford House. In reply, she received a telephone message from Sandy Tolmay, NPA Senior Enforcement Officer, asking for a Freedom of Information Request for access to that file. This is that request.

I am making this request on behalf of Mrs D Easter and please reply to me. I have tried to make it as simple and clear as possible, but please contact me if any clarification is required.

Depending on the answer I receive, I may need to make further requests.

I am interested in relevant and specific information held by the NPA and in any qualifying information.

In conformity with the Act, please include in the case file a comprehensive list of its contents and their entry dates. Please indicate on that list what material, if any, was removed from the file before access was given. Please justify all removals, if any, with reference to the specific exemptions of the Act and provide a descriptive heading for each item removed, if any.

I may appeal any omissions or removals or any attempt to charge a fee for access to the file.”

15. On 28 November 2008, by a separate letter, the NPA informed Mr Stoner that the substance of the request was assessed as falling within the ambit of the Environmental Information Regulations 2004 (the ‘Regulations’) rather than FOIA and that the request was refused under the exception in Regulation 12(4)(b) in that it was considered to be manifestly unreasonable. It considered that the public interest in maintaining the exception outweighed the public interest in disclosure.
16. Mr Stoner appealed against this decision by letter dated 12 December 2008 and again this was treated as an application for an internal review. The NPA responded on 13 February 2009, upholding the initial decision to refuse the request.

The complaint to the Information Commissioner

17. Mr Stoner contacted the Commissioner on 27 February 2009 to complain about the way the NPA had handled both of the information requests.

18. The Commissioner commenced an investigation, receiving further information from both Mrs Easter (and her representative) and from the NPA, particularly with regard to the number of previous requests for information and other correspondence.

19. The Decision Notice was issued on 16 September 2009. The Commissioner concluded that:

- i) the requests fell to be dealt with under the EIR not FOIA;
- ii) the requests were appropriately viewed in the context of the lengthy course of correspondence between Mrs Easter and the NPA which had predominantly dealt with the issue of planning enforcement action at the adjoining property;
- iii) Mrs Easter remained unsatisfied with the outcome of both her correspondence with the NPA and the subsequent conclusions reached by the Ombudsman following her complaint, and it was reasonable to conclude that both these requests were a reflection of her dissatisfaction and as such were intended to reopen previously canvassed matters;
- iv) the requests could fairly be categorised as obsessive;
- v) overall, that the requests could fairly be considered manifestly unreasonable and the exception at Regulation 12(4)(b) EIR was engaged;
- vi) the public interest in maintaining the exception outweighed the public interest in disclosure.

The Appeal to the Tribunal

20. On 25 September 2009 Mrs Easter notified the Commissioner that she would be appealing against the Decision Notice, although no appeal was received by the Tribunal until 23 October 2009.
21. The Tribunal joined the NPA as an Additional Party.
22. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents. Although Mrs Easter requested an oral hearing, the Tribunal decided, under Rule 16 of The Information Tribunal (Enforcement Appeals) Rules 2005, that the appeal can properly be determined without a hearing.
23. Mrs Easter had submitted that an oral hearing would provide an opportunity for dialogue and understanding about the case which written correspondence barely does, and much more efficiently, and that the NPA would be more open “than heretofore”.
24. Additionally, she indicated that a planning and conservation consultant had agreed to attend an oral hearing “to present the technical and legal issues involved”. In particular, that she would say that the local planning authority has “knowingly, covertly and avoidably been operating illegally for the last five years and will describe the adverse consequences on Mrs Easter and the public interest”.
25. The issues in this Appeal had been identified early and were limited to considering the Decision Notice of the Commissioner. A number of matters raised by Mrs Easter were in large part, irrelevant to the issues before the Tribunal and outside the jurisdiction of this Tribunal. The Tribunal’s jurisdiction does not extend to reviewing any decision made by a LPA or revisiting issues that have been examined by, for example, the Local Government Ombudsman.
26. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We have considered in detail the written submissions from the parties although we do not begin to rehearse every argument in this Decision. In particular, although we considered them carefully, we do not

consider it necessary to reach a conclusion on every point raised by Mrs Easter in her lengthy Grounds of Appeal as many of these are outside our jurisdiction or matters of comment only.

The Powers of the Tribunal

27. By Regulation 18(1) EIR, the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

28. The Tribunal's powers in relation to appeals under section 57 of FOIA are set out in section 58 of the FOIA, as follows:

(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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

29. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact

from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the law has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

30. The questions of whether the exception in Regulation 12(4)(b) is engaged (and whether the consequential public interest test was applied properly) are questions of law based upon an analysis of the facts.

The Issues for the Tribunal

31. The issues for determination in this Appeal are

- i) Is the matter to be dealt with under the EIR or FOIA?
- ii) Is the exception provided for in Regulation 12(4)(b) EIR engaged? (Or was the NPA entitled to refuse to comply with the request for information under section 14 of FOIA?)
- iii) If the exception provided for in Regulation 12(4)(b) is engaged, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

32. Although we acknowledge the dissatisfaction Mrs Easter has with the approach adopted by the NPA in respect of planning enforcement issues, the Tribunal has no jurisdiction to investigate the wider ranging allegations raised in the Grounds of Appeal relating to the conduct of the NPA.

EIR or FOIA

33. EIR implements Council Directive 2003/4/EC on public access to environmental information.

34. "Environmental information" is defined in Regulation 2(1) as having the same meaning as in the Directive, namely any information 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 those 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 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).

35. Mrs Easter does not accept that the requests fell to be dealt with under the EIR but submits that they should have been dealt with under FOIA. The Commissioner and the NPA maintain that as the subject matter of the request concerns a planning enforcement case it falls within the definition of environmental information since it concerns measures such as policies or plans likely to affect or protect the elements of the environment which includes 'land'.
36. We acknowledge that we should not narrowly construe any factor on the duty to make environmental information available. While we would not accept unequivocally that planning matters would always fall within the definition of environmental information, we accept that information relating to the decision not to take enforcement action in respect of a Listed building situated within a National Park is information on the state of the land or landscape (Regulation 2(1)(a) EIR) and that it is information on a measure affecting or likely to affect the factors and elements referred to in Regulation 2(1)(a) and (b) EIR (Regulation 2(1)(c) EIR) .
37. We are therefore satisfied that the information requested falls within the definition of environmental information and agree that this matter should be dealt with under the EIR not FOIA.
38. We note, however, that the Commissioner submits that even if we did not accept that the EIR is the correct regime, in all the circumstances of this case, the applicable test on the main point in issue – whether the request was manifestly unreasonable or not within the meaning of Regulation 12(4)(b) EIR is similar under section 14 of FOIA. We would add that section 14 of FOIA, although not an exemption from disclosure, renders inapplicable the general duty of a public authority to provide information, while Regulation 12(4)(b) is subject to the additional public interest balance, in that respect making it a more stringent test to justify non-disclosure.
39. We are aware that the NPA had dealt with previous requests from Mrs Easter for similar information under FOIA rather than EIR, however that error does not have

the effect of requiring a public authority to perpetuate the error rather than apply the correct legislative regime.

Regulation 12(4)(b) EIR

40. Regulation 5(1) creates a duty on public authorities to make environmental information available upon request.

41. Regulation 12(1) (2) and (5) EIR provides:

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

- i. an exception to disclosure applies under paragraphs (4) or (5); and*
- ii. 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.

42. Regulation 12 (4)(b) EIR provides as follows:

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

(b) the request for information is manifestly unreasonable.”

43. The Commissioner recognises similarities between section 14 of FOIA⁶ and Regulation 12(4)(b) EIR, in particular he considers that a request that could be considered vexatious or repeated under section 14 of FOIA is likely to be manifestly

⁶ Section 14(1) of FOIA: Section 1(1) [the general right to access to information held by public authorities] does not oblige a public authority to comply with a request for information if the request is vexatious.

Section 14(2) of FOIA: where a public authority has previously complied with a request for information which was made by any person it is not obliged to comply with a subsequent identical or substantially similar request from that

unreasonable for the purposes of the EIR. Our attention has been drawn to the decision of a differently constituted Panel of this Tribunal in *Carpenter v IC and Stevenage Borough Council*⁷ in which the Tribunal reminded itself of the principles that have emerged from previous cases in relation to section 14 of FOIA, and set the context for the way in which Regulation 12 (4)(b) EIR should be applied:

- (1) It is important to ensure that the standard for establishing that a request is vexatious is not too high;
- (2) The various considerations identified in the Commissioner's Guidance on Vexatious Requests are a useful interpretive guide to help public authorities to navigate the concept of a "vexatious request". There should not however be an overly-structured approach to the application of those considerations and every case should be viewed on its own particular facts;
- (3) When deciding whether a request is vexatious a public authority is not obliged to look at the request in isolation, unlike the majority of cases which are said to be "motive blind" or "applicant blind". A public authority could consider both the history of the matter and what lay behind the request made in the past by the complainant. A request could appear, in isolation, to be entirely reasonable yet could assume the quality of being vexatious when construed in context;
- (4) Every case turns on its own facts. Considerations which may be relevant to the overall analysis include:
 - a) the request forming part of an extended campaign to expose alleged improper or illegal behaviour in the context of evidence tending to indicate that the campaign is not well founded;
 - b) the request involving information which had already been provided to the applicant;
 - c) the nature and extent of the applicant's correspondence with the authority and whether this suggests an obsessive approach to disclosure;

person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

⁷ (EA/2008/0046)

- d) the tone adopted in the correspondence being tendentious and/or haranguing;
- e) whether the correspondence could reasonably be expected to have a negative effect on the health and well-being of the officers; and
- f) whether responding to the request would be likely to entail substantial and disproportionate financial and administrative burdens.

44. NPA refused the requests on the basis that each was manifestly unreasonable set against the context and history of contact with Mrs Easter and Mr Stoner⁸. It analysed the considerations outlined in the Commissioner's Guidance in coming to that conclusion. It considered that these requests formed part of a series of requests made by them relating to the NPA's decision that it is not expedient to take enforcement action in connection with works at Stable Cottage, a decision that they had been informed will not be revisited by the NPA until the existing planning permissions expire. Although not all of the requests relate directly to the enforcement site, many of the other requests relate to the NPA's resources, capacity to take enforcement action and the discharge of its development control functions in general. Mrs Easter and Mr Stoner have stated that they believe the NPA's resources are inadequate and, inter alia, that is why the NPA has not taken enforcement action.

45. Both Mrs Easter and the NPA have prepared schedules of what each submits is the relevant correspondence in this case. They do not agree with the schedules prepared by the other party and we have had to study these schedules in some detail in order to form our own view of the context and history of this matter. It is not necessary for us to agree a particular number of requests or pieces of correspondence, nor to reach a conclusion whether Mrs Easter is correct to

⁸ The parties are in agreement that all correspondence received from either Mrs Easter or Mr Stoner should be treated together.

describe particular requests as “unanswered”, “incomplete”, “inconsistent” or “evaded”.

46. Although the NPA has included requests made after 27 October 2008 in its schedule, that is, after the first request that was refused on the basis of Regulation 12(4)(b) EIR, we consider that only the requests and correspondence up to that date can properly be considered when deciding whether the request was manifestly excessive or not. We also note that a “request” could in fact relate to more than one request made in the same letter. Some requests were dealt with by the NPA in the ordinary course of its business as the LPA rather than as a request for information under FOIA (or EIR).

47. Mrs Easter submits that the number of requests made by her or by Mr Stoner on her behalf is not excessive. She submits that the relevant number is 31 requests and that these two requests are the most important ones she has made to the NPA.

48. We note that Mrs Easter has continued to make requests to the NPA since the refusal of these requests. From the information provided to us in the agreed bundle of documents, it is clear that despite forming the view that the requests of 27 October 2008 and 1 November 2008 were manifestly unreasonable, the NPA did in fact answer some of these later requests. This appears to us to be an inconsistent approach, particularly in regard to what is said to be the “onerous burden” on the NPA in dealing with these requests, and could serve to lead Mrs Easter to believe that the NPA might no longer regard requests from her as manifestly unreasonable.

49. The NPA took the view that viewed in the context of the history of this matter, the requests can fairly be seen as obsessive; it has repeatedly advised that the NPA considers the matter closed but Mrs Easter and Mr Stoner continued to make requests for material that had been made available previously or to seek to reopen the closed issues. The NPA submit that letters have been written to a number of different officers within the NPA, often about the same matters or about matters that

had already been covered in earlier correspondence. Some letters repeat a request in respect of which the NPA had not yet had time to respond.

50. The frequency with which correspondence was sent varied. Taking two randomly selected examples, between April 2007 (around the time Mrs Easter became aware that the enforcement action was unlikely) and June 2008 there were approximately 26 requests for information and in excess of 100 other pieces of correspondence received by the NPA from Mrs Easter or Mr Stoner; in the month of August 2008 alone there were approximately 8 requests for information and in excess of 20 other pieces of correspondence.

51. Mrs Easter objects specifically to her requests being described as obsessive or vexatious and submits that to do so would be to disregard her position as a victim and her perception of the NPA in supporting what she regards as criminality. She describes her approach as “thorough but not obsessive”. She submits that on occasion enquiries had to be escalated through several layers of management which increased the number of letters and that other letters were sent to chase failures to respond. She also submits that the NPA took no part in preventing the problem about which it now complains, namely, excessive communication, and that it was often the cause of extra communication. This could have been avoided, she submits, if the NPA had appointed a case manager.

52. What is clear to us is that Mrs Easter has been in communication with the NPA over this enforcement issue since, at least, May 2006. Over the period from April 2007 until the time of the requests that are the subject matter of this appeal, there was an escalation in both the frequency and number of requests.

53. We have also been provided with a sample of requests and other correspondence to the NPA. This gives us a flavour of the correspondence and the type of information that was being requested. While Mrs Easter submits that the Commissioner was wrong to speculate that “correspondence will continue until planning enforcement action is taken”, we have also seen correspondence sent to the Ombudsman and we agree with the Commissioner that, while we have no remit

to comment of the findings of the Ombudsman, this correspondence is evidence to support NPA's view that Mrs Easter and Mr Stoner are unlikely to be satisfied until it takes enforcement action against the owner of 2 Stable Cottage.

54. While conceding that the language of the requests is not offensive in itself, the NPA submits that Mrs Easter and Mr Stoner have made a number of unsubstantiated and unpleasant allegations against particular staff members, including the then Chief Executive. The Commissioner referred to language that was "clearly hostile toward the organisation and critical of the actions of its employees". It is not necessary for us to repeat the allegations, which include challenging the competence of staff and accusing staff of altering records, changing decisions or making illegal decisions. We find that Mrs Easter has been highly critical in a number of letters of the individuals who she believes have made illegal or improper decisions with regards to 2 Stable Cottage. Mr Stoner also managed to find the contact details of an officer from the predecessor authority, New Forest District Council, who had retired and the NPA considers that contacting individuals whose employment with the public authority had ceased has the effect of harassment.

55. We have also been provided with evidence in the form of a witness statement from David Stone, Head of Member Services and Freedom of Information Officer of the NPA, which was not available to the Commissioner. This contains an overview of the various requests for information made by Mrs Easter and Mr Stoner and the factors taken into account by the NPA's staff in considering the application of the exception and the public interest test.

56. In particular, his evidence is that the requests and other correspondence from Mrs Easter and Mr Stoner have placed a substantial and onerous burden on the NPA's resources over a prolonged period and have disrupted the everyday work of the NPA. Many of the requests that were answered had the effect of generating additional requests.

57. NPA recognised that volume and complexity alone will not be sufficient to make a particular request manifestly unreasonable under the EIR. We are satisfied that in this instance it did not apply an arbitrary figure and refuse these requests on the basis that figure had been reached, but instead carried out an analysis of the entire context of Mrs Easter's dealings with the NPA.

58. We consider that the NPA has dealt with Mrs Easter's requests for information fairly and thoroughly. In many ways it seems to us that the NPA has provided as much information as it possibly could in an effort to assist Mrs Easter. While we have seen a sample of the correspondence, this contains lengthy explanatory letters sent to Mrs Easter by the NPA in May and June 2007 (in response to at least 12 separate letters from Mrs Easter to various members of staff of the NPA) which set out clearly the reason why the decision not to take enforcement action had been taken. For example, in the letter of 14 June 2007;

"... as explained previously the Authority has taken legal advice and is of the opinion that in this case it should not initiate enforcement action while there is an extant planning permission and listed building consent in place. As explained in the second paragraph of Sandy Tolmay's letter of 25 May, the Authority has the power to issue an urgent works notice, but all that this notice could require is to make the building stable, weatherproof and secure. This type of notice cannot require the restoration of the building." and "Steve Avery's letter of 4 May and Sandy Tolmay's letter of 25 May both set out the reasons why enforcement action has not been initiated."

The Chief Executive wrote to Mrs Easter on 7 April 2008 answering a number of matters that she had raised and concluding,

"I consider that all of the current issues concerning 2 Stable Cottage have been fully explored in the course of this complaint investigation; correspondence between the Authority and yourself; and more recently between the Authority and Mr Stoner. I consider the matter is now closed and that there would be no benefit to either party in further correspondence on issues which have been dealt with exhaustively over many months, albeit the outcome may not be as you would have wished."

59. We are satisfied that the NPA has explained to Mrs Easter on more than one occasion that the decision has been made not to take enforcement action while any existing planning permissions or listed building consents are still active. It has also explained that the decision to take enforcement action is discretionary and it is not expedient to take such action at the current time. There is no time constraint for initiating enforcement action and the NPA would not be debarred from taking such action in the future if necessary; the NPA will continue to monitor the situation. The Ombudsman has not found that there is any evidence of maladministration by the NPA in respect of its decision not to take enforcement action. There are civil avenues open to Mrs Easter if her home or safety is at risk.

60. In relation to the first request, the NPA suggests that the information requested might fall within another exception under the EIR as it may be subject to legal professional privilege. In relation to the second request, this was a request to have access to the enforcement file which Mrs Easter had been permitted to inspect previously. From the documents we have seen, this would have been on 14 May 2007, some 18 months prior to this request. As the decision not to take enforcement action had been made by that date, it seems to us unlikely that the file would contain anything additional of any significance of which Mrs Easter was not already aware, rather than the voluminous correspondence between Mrs Easter and the NPA.

61. The Tribunal finds that Mrs Easter's requests of 27 October 2008 and 1 November 2008 were manifestly unreasonable for the following reasons:

- i) Although the volume of requests of itself is insufficient to be conclusive on the question of whether a request is manifestly unreasonable, in the context and history of this case, we are satisfied that the requests were repetitive and sought to reopen issues in respect of which responses had already been given;

- ii) The requests placed a substantial and onerous burden on the NPA's resources over a prolonged period and disrupted the everyday work of the NPA;
- iii) The nature of repeated requests and the evidence that Mrs Easter and/or Mr Stoner sought to reopen dialogue that had been deemed closed by the NPA;
- iv) The language used including accusations of incompetence, malpractice or criminal behaviour;
- v) Efforts being made to contact staff who had retired;
- vi) The continued requests are evidence of the intent expressed by Mr Stoner on 21 April 2008 that *"[this matter] will not be closed until the owner of Number Two has been prosecuted and it has been rebuilt. Mrs Easter and I will continue to write to you [the then Chief Executive], as necessary, and we will also use the many other channels of communication open to us..."* We are satisfied that this represents a threat to continue to challenge the decision not to take enforcement action regardless of the information provided by the NPA.

62. Therefore we are satisfied that the exception in Regulation 12 (4)(b) EIR is engaged. If we are wrong about applicability of EIR and this matter should have been dealt with under FOIA, we are satisfied by the same reasoning that the exemption in section 14 of FOIA would be engaged and the NPA entitled not to comply with the requests.

The Public Interest Test: General Principles

63. As we have found that the exception in Regulation 12 (4)(b) EIR is engaged, we must carry out our own assessment as to where the balance of public interest lies. We have not been provided with the information that was the subject matter of the manifestly unreasonable requests as to require the public authority to do so would

expose them to the very burden that the exception is designed to protect. In respect of the request of 1 November 2008, this was for access to a file rather than for particular identified information to be disclosed and we would be imposing an unnecessary workload for no good purpose on the NPA to require them to provide all that documentation. We also do not consider that, having found these requests to be manifestly unreasonable, it is necessary for us to analyse each and every document contained within that file in order to assess where the balance of public interest lies in this case. It may be that there will be other cases falling within the exception in Regulation 12(4)(b) EIR in which it might be necessary to consider the disputed information in detail before reaching a conclusion on the public interest however we consider that those cases will be rare.

64. Mrs Easter has raised a number of objections in relation to the public interest which amount to a submission that the Commissioner wrongly concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure in respect of the disputed information.

65. We consider that the following principles, drawn from relevant case law, are material, both generally and in with particular reference to Regulation 12(4)(b) EIR, to the correct approach to the weighing of competing public interest factors. We note that the principles established by previous cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

- (i) A public authority shall apply a presumption in favour of disclosure, Regulation 12(2) EIR.
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exception outweighs the public interest in disclosing the

information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (*DfES*) at paragraphs 64-65).

- (iii) The balance of public interest factors must be assessed “in all the circumstances of the case” (Regulation 12(1)(b)).
- (iv) The assessment of the public interest in maintaining the exception should focus on the public interest factors associated with that particular exception and the particular interest which the exception is designed to protect (*Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030). In this case, to ensure that applicants for information did not, as a result of their unreasonable requests, either jeopardise sound and effective administration within public authorities or unjustly harass those working for public authorities.
- (v) The public interest factors in favour of maintaining an exception are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. “A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so.” (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).
- (vi) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of the freedom of information generally and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture*

Media and Sport v Information Commissioner EA/2007/0090 ('DCMS') at paragraph 28)

- (vii) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal (see *CAAT v Information Commissioner and Ministry of Defence* EA/2006/0040 at paragraph 53). In this case, the relevant time is November 2008.
- (viii) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner* EA/2006/0007 at paragraph 50).

The Public Interest Test: Factors in favour of maintaining the exemption

66. The Commissioner identified the following arguments in favour of maintaining the exception:

- i) the volume and nature of the requests submitted by Mrs Easter and Mr Stoner over a prolonged period have placed a significant burden on resources and to continue to respond would disrupt the everyday work of the NPA;
- ii) the burden placed on the NPA has been and would continue to be disproportionate to any public interest inherent in Mrs Easter understanding the reasons why planning enforcement action has not been taken in this case;
- iii) it does not seem likely that any information NPA discloses will satisfy Mrs Easter and there appears to be no meaningful response it can give . Continued correspondence could potentially have a negative impact on the wider public as it will divert resources away from other planning matters.

67. Mrs Easter rejects the suggestion that complying with the requests would place a burden on the NPA. She submits that the amount of work and skill required to satisfy these requests is very small and would not impose a significant burden on the NPA in terms of expense or distraction.

68. We agree with the Commissioner that where the impact (rather than the intention) of repetitive requests, in the context of the volume and history of this case, is to harass the NPA's staff and disrupt its everyday work, this is clearly detrimental to the general public interest.

69. We accept the evidence we have been given as to the burden placed on the resources of the NPA. As set out above, we are satisfied that Mrs Easter has continued to correspond with the NPA on the issue of enforcement action even after it has been made clear to her that the decision has been made and will not be revisited at this time.

The Public Interest Test: Factors in favour of disclosure

70. The factors in favour of disclosure were identified by the Commissioner in his Decision Notice as follows:

- i. the strong public interest in the disclosure of environmental information in general to promote accountability and transparency and to allow individuals to understand the decisions made by the NPA;
- ii. the inherent public interest in disclosure because the buildings in question are listed and it is in the public interest to see them maintained.

71. Mrs Easter submits that the Commissioner has been unfair to imply that she only has one argument about the public interest, that is, item ii) above. She submits that her needs for the information should have been considered by the Commissioner.

We have already indicated that the NPA has explained on more than one occasion the basis for its decision not to take enforcement action at the current time. We do not consider that there is further information that Mrs Easter needs to help her understand that decision or to take any action herself against either the NPA or the owner of 2 Stable Cottage.

72. Mrs Easter submits that the Commissioner appeared not to evaluate the potential utility of the information requested if it were put into the public domain and submits that the value of the information to the public is also a factor in favour of disclosure. We consider that the value of this information is limited; this is one file relating to one decision about one property. The property in question, 2 Stable Cottage, has acquired listed status as a result of its attachment to the main building at Eaglehurst. Since it was converted to residential use in the 1960s it would have less historical importance than it once did. We are also reassured by the fact that English Heritage has been made aware of the situation and has not considered it appropriate to take any action itself.

73. Allegations of illegality or improper decision making have been made by Mrs Easter but are unsubstantiated. The Ombudsman investigated and found no evidence of any maladministration. There is no evidence of any criminality by the NPA in this case which might have carried some weight in favour of disclosure.

74. Although Mrs Easter submits that there is more than one additional factor in favour of disclosure, we are satisfied that the only relevant public interest factors in favour of disclosure are those set out above as identified by the Commissioner in his Decision Notice.

The Public Interest Test: Where does the balance lie?

75. In making the exception in Regulation 12 (4)(b) EIR, unlike section 14 of FOIA, subject to the public interest test, Parliament must have envisaged that there could

be situations where a manifestly unreasonable request should be complied with. We have struggled with this as it seems to us logically absurd, although we acknowledge that the EIR gives effect to EU Council Directive 2003/4 EC which places particular importance on affording members of the public access to environmental information. If we had found that the information requested did not fall within the definition of environmental information, and consequently the NPA would have been entitled to refuse to comply relying on section 14 of FOIA, we would not have needed to consider the public interest test.

76. We consider that in relation to the exception in Regulation 12(4)(b) EIR there is an in-built public interest to ensure that applicants for information do not, as a result of their manifestly unreasonable requests, either jeopardise sound and effective administration within public authorities or unjustly harass those working for public authorities.

77. In deciding where the public interest lies, therefore, we consider that the appropriate approach is to give significant weight to that in-built public interest and then ascertain whether, at the relevant time, there are particular or further factors in the instant case which point to non-disclosure, and then consider whether the factors supporting disclosure are of equal weight at the very least.

78. As set out above, we consider that the NPA has dealt with Mrs Easter's requests for information fairly and thoroughly throughout. In many ways it seems to us that the NPA has provided as much information as it possibly could in an effort to assist Mrs Easter and has repeated explanations for its decision not to take enforcement action on several occasions. This has placed a considerable and disproportionate burden on the resources of the NPA. While we understand and acknowledge Mrs Easter's frustrations, we do not consider that there is any public interest in the NPA continuing to respond to her requests for information.

79. We are of the opinion that there is very little public interest in disclosure of the information that is the subject of this appeal. A large amount of information about

the enforcement action decision is in the public domain already and we are not satisfied that this would add anything of any significance.

80. While there is a presumption in favour of disclosing environmental information, the factors in favour of maintaining the exception in Regulation 12(4)(b) carry great weight and we do not consider that the factors in favour of disclosure come close to making the scales level.

81. We therefore conclude that the public interest in maintaining the exception overwhelmingly outweighs the public interest in disclosure.

Conclusion and remedy

82. For the reasons given above we find that:

- i) The requests were properly dealt with under the EIR;
- ii) The exception in Regulation 12(4)(b) EIR is engaged;
- iii) In all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in favour of disclosure.

83. The NPA was therefore entitled to refuse to comply with the requests of 27 October 2008 and 1 November 2008. We consider that the Commissioner's decision was correct and we therefore refuse this Appeal.

84. Our decision is unanimous.

Other matters

85. We acknowledge Mrs Easter's feelings of frustration that the NPA has decided not to take enforcement action but this Tribunal is not the appropriate forum to raise

issues as to whether the NPA reached a legal and proper decision with regard to 2 Stable Cottage.

Appeal

86. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed
Annabel Pilling
Judge

14 May 2010