IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0062**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0457873
Dated: 4 March 2013

Appellant: **Richard Harris**

Respondent: **The Information Commissioner**

"Paper hearing" at Field House

Date of Hearing: **23 January 2014**

Before

HH Judge Shanks

Judge

and

Marion Saunders and **Mike Jones**

Tribunal Members

Date of Decision: **27 January 2014**

Date of Promulgation: **28 January 2014**

Subject matter:

Environmental Information Regulations 2004

Reg.4(b)	Exception: *Request manifestly unreasonable*

Cases referred to:

Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC)

Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 4 March 2013.

SUBSTITUTED DECISION NOTICE

Public authority: Babergh District Council

Complainant: Richard Harris

The Substituted Decision

For the reasons set out below, the Tribunal finds that the Complainant's request for information dated 15 May 2012 was not dealt with in accordance with the requirements of the Environmental Information Regulations 2004.

Action Required

The Public Authority must make available to the Complainant by 16.00 on 28 February 2014 any report held by it on aircraft movements at Nayland airfield in 1998/9.

HH Judge Shanks
27 January 2014

REASONS FOR DECISION

Factual background

1. Nayland Airfield is situated in an area of outstanding natural beauty in the Dedham Vale in Suffolk. It has been in operation since 1962. It was built and is still owned and operated by the Appellant, Richard Harris, who has lived on the adjoining farm all his life. It is the home of the Nayland Flying Group whose members operate a wide variety of small aircraft from the airfield.

2. There is a long and controversial planning history to Nayland Airfield. 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 airstrip. 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 ten per day and five per hour. A further condition prohibited take-offs on Sundays; on 17 February 2000 that condition was relaxed so that aircraft could take off on Sundays between 10.00 and 14.00.

3. As to the Eastern airstrip, Mr Harris applied to the planning authority, Babergh District Council, for a certificate of lawfulness for aircraft to land and take off on it on

two occasions, once in 1998 and again in 2004. Both these application were refused by Babergh DC on the basis that sufficient use of the Eastern airstrip had not been shown to have existed for the required ten year period preceding the applications.

4. On 24 January 2005 Babergh DC issued an enforcement notice against Mr Harris to prevent use of the Eastern airstrip. Mr Harris appealed against the enforcement notice on the basis that it had been used for the landing and taking-off of aircraft during the 10 years preceding the enforcement notice. There was a three day planning enquiry held in November 2006 which involved site visits and written and oral evidence from numerous witnesses. The Inspector found in his decision letter dated 16 December 2006 that he was not satisfied that there had been sufficient continuous use of the Eastern airstrip for taking off and landing in the ten years 24 January 1995 to 24 January 2005 for such use to have become lawful. He therefore upheld the enforcement notice.

5. In 2007 complaints were received by Babergh DC that the main airstrip was being used in breach of the Sunday restrictions and that the Eastern airstrip was being used again. Mr Harris acknowledged that the Eastern airstrip was being used in contravention of the enforcement notice. Babergh DC brought proceedings against Mr Harris in the High Court for an injunction to stop the unlawful flying activities. A final injunction was granted on 22 April 2008; the final injunction was granted by consent and Mr Harris was represented in the proceedings by solicitors and counsel. It seems clear that notwithstanding that the final injunction was granted "by consent" Mr Harris and the Nayland Flying Group remained unhappy about the restrictions on the use of the airfield and the conduct of Babergh DC in seeking to control it.

6. In the four years following the grant of the injunction there were about 20 requests for information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 (many containing multiple and complex requests) about the airfield made to Babergh DC by members of the flying club and one by Mr Harris himself. Many were followed with complaints to the Information Commissioner and we understand that two have resulted in earlier appeals to this

Tribunal. One such involved a request made by a Christopher Bragg, who apparently made 14 requests in all (though we are not clear whether this is a reference to 14 letters or 14 individual pieces of information being requested). Babergh DC refused a request he made on 3 July 2011 on the grounds that it was "manifestly unreasonable" under regulation 12(4)(b) of the 2004 Regulations. That led to an appeal to this Tribunal which upheld Babergh DC's position in a decision dated 16 October 2012. (We have gratefully taken much of the background summary in paras 2 to 5 above from Judge Callender Smith's decision in that case which is in our papers.) It was an important finding of the Tribunal in that case that Mr Bragg was attempting in effect to re-litigate a matter that had already been concluded by agreement between the two prime parties (ie Mr Harris and the Council) (see: para 29 of the Tribunal's decision).

7. On 15 May 2012 Mr Harris made the request for information under the 2004 Regulations which is at the heart of this appeal. He enclosed with his request two letters which he stated had only recently been disclosed by Babergh DC (we understand that this disclosure took place in the course of another appeal involving another member of the flying club) which he (Mr Harris) said had been in his possession for a matter of weeks. The first was a letter from Babergh DC to private investigators dated 27 July 1998 which asked them to observe the airfield on two Sundays and report on aircraft movements (and in particular on which of the two runways was being used on any movement); the second was a letter to the Council from solicitors who were acting for a group of objectors to the airfield dated 18 January 1999 which referred to monitoring having been undertaken recently by the Council. Mr Harris asked in his letter for " … information … relating to monitoring of aircraft movements at my airfield … during 1998 and 1999, undertaken by or on behalf of Babergh District Council." It is reasonable to infer (as the Commissioner appears to have done) that there is (or at least was) a report from the private investigators on flying movements at the airfield on two Sundays in 1998 in the possession of Babergh DC; and we agree with the Commissioner that such a report would comprise environmental information answering to Mr Harris's request.

8. By a letter dated 30 May 2012 Babergh DC refused to supply this information on the basis that the request was "manifestly unreasonable" under regulation 12(4)(b). The Council stated that the request was part of a series which could be seen as harassing them; it stated that they would not revisit the decision to obtain the injunction which had been accepted by Mr Harris; it stated that the requests appeared to be designed to cause disruption and annoyance and had caused a great deal of work; it referred to a haranguing and hectoring style being used in the requests; it said that no action having been taken by any of the requestors in relation to the injunction the requests were being pursued for their own sake and not for any real purpose.

9. Following a review decision upholding the original decision contained in a letter dated 4 July 2012, Mr Harris complained to the Information Commissioner on 24 July 2012. In his decision notice dated 4 March 2013 the Commissioner upheld the Council's position that the request was "manifestly unreasonable" and that the public interest in maintaining the relevant exception outweighed the public interest in disclosing the information. Mr Harris appealed to this Tribunal against the Commissioner's decision notice on 28 March 2013.

<u>The appeal</u>

10. The Tribunal has reviewed the Commissioner's conclusion that Mr Harris's request was "manifestly unreasonable" in the light of all the written material now before us and applying the guidance of the Upper Tribunal in the *Dransfield* and *Craven* cases ([2012] UKUT 440 (AAC) and [2012] UKUT 442 (AAC) respectively). We consider the four broad issues or themes identified by the Upper Tribunal at paras 28 to 39 of the *Dransfield* decision below.

The burden

11. Mr Harris himself had only made one other request for information under the Regulations relating to Nayland airfield before his request of 15 May 2012. The request we are concerned with (at least as we have interpreted it) was well focussed and we do not believe it would have been difficult or onerous to deal with in itself,

notwithstanding that it relates back to 1998/9 and that the Council holds numerous files relating to the matter and is a small Council with limited resources.

12. However, the request must obviously be seen in context. That context includes in particular the planning and litigation history between Mr Harris and the Council (which we consider further below) and the history of other requests for information to which we refer to in para 6 above. So far as the latter is concerned, it is clear that there is a close link between Mr Harris and the members of the flying club (not least because they are presumably his prime customers) and that he obtained the two letters which led to the request in question as a result of a request for information made by one of them. However, we would not be prepared to infer from the evidence that we have seen that Mr Harris (whatever his feelings against the Council) is involved in a concerted attempt with others to harass the Council by making unjustified requests for information. We accept that his request was made because the two letters we refer to in para 7 had come to his attention and that he made it soon thereafter of his own accord.

Motive/purpose

13. We propose to consider the Upper Tribunal's second and third themes together. We accept that, whatever the underlying substantive merits, Mr Harris genuinely believes that the outcome of the planning inquiry was wrong in relation to the use of the Eastern runway and that there has been a miscarriage of justice. He says that the information he is requesting ought to have been disclosed in the course of the planning inquiry and he believes it would have demonstrated to the Inspector that the Council's position was wrong. We accept that his purpose in seeking the information now is to show that there has indeed been a miscarriage of justice and we accept that in itself this must be a legitimate purpose.

14. However, we very much doubt that after all this time Mr Harris has any realistic prospect of successfully challenging either the outcome of the planning inquiry or the injunction. We note that Mr Winders, the Council's planning officer who gave evidence at the inquiry, referred openly at para 6.14 of his witness statement to the

fact that the Council had from time to time investigated the use of the airfield. Although we accept that Mr Harris may well have been forced by cost and circumstances to consent to the final injunction we note again that on its face it was indeed granted "by consent". We bear in mind the strong public interest in finality in litigation.

15. But, having said all that, we nevertheless have a sense of unease in this case because it appears possible that the information Mr Harris is requesting ought to have been, but was not, disclosed to him in the course of the planning inquiry or the litigation. This unease gives rise to a sense that the information ought to be shown to him now, whatever his prospects of using it successfully.

Harrassment etc

16. The Commissioner found that there was "no evidence of any abusive language or haranguing tone" in Mr Harris's request and that it was "not harassing" (see decision notice at para 19). We consider the allegation that Mr Winders was "knowingly dishonest" in Mr Harris's letter of 12 June 2012 asking for a review of the decision to have been completely inappropriate and unfair but we do not think that in context it provides strong evidence of vexatiousness.

Conclusion

17. Looking at the overall picture we have come narrowly to the view that Mr Harris's request cannot be categorised as "manifestly unreasonable" and that the Council and the Commissioner were wrong in so concluding. The crucial points for us are that the request is (a) for one focussed piece of information (b) which Mr Harris has a genuine motive for seeking and (c) which arguably ought to have been disclosed to him in the context of earlier litigation. We therefore allow the appeal and substitute a decision notice requiring the Council to supply the information requested by Mr Harris.

18. We are conscious that our decision is different to that reached by the Tribunal in Mr Bragg's case. Apart from the obvious point that each case will depend on its own

facts and on the evidence placed before the Tribunal we would record four significant differences between the two cases: (a) Mr Harris had made one request while Mr Bragg had made 14; (b) Mr Harris was the landowner who had a direct interest in the litigation with the Council while Mr Bragg's interest was as a member of the flying club; (c) the Tribunal in the Bragg case found that his requests were obsessive and harassing and that he had adopted an "hectoring tone" (see para 30 of the Bragg decision); (d) in this case, we have found that it may be that the information requested ought to have been but was not disclosed to Mr Harris in the course of the planning inquiry or subsequent litigation.

19. We should also say that Mr Harris and others who are dissatisfied with restrictions on the use of the airfield should not regard this decision as giving them a "green light" to use the 2004 Regulations or the Freedom of Information Act 2000 as they see fit. And it may well be that following this appeal the point has been reached in relation to Mr Harris himself where the Council can properly say "enough is enough".

20. This decision is unanimous.

HH Judge Shanks

27 January 2014