FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Appeal Number: EA/2017/0228

ROGER GOOD

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

DECISION

Tribunal Members: Brian Kennedy QC, Mike Jones and Narendra Makanji.

Decision: Appeal allowed.

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") and Regulation 18 of the Environmental Information Regulations ("EIR"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 13 September 2017 (reference FER0666632), which is a matter of public record.

[2] The Tribunal Judge and lay members sat in London to consider the evidence in this appeal on 2 July 2018 and deliberated on 28 August 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Good's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Sedgemoor District Council ("the Council") was correct to characterise Mr Good's request as vexatious.

Chronology:

30 June 2015	Planning permission granted for a pig farm near to Appellant's home
	4 June to 24 Nov 2016 – Appellant makes 18 fresh or amended FOIA requests regarding this planning application
3 April 2017	Subject request for correspondence pertaining to the above planning application
28 April 2017	Refusal, citing s14 (1) FOIA as vexatious
24 May 2017	Internal review upholds refusal under s14 (1)
13 June 2017	Commissioner accepts appeal for consideration
13 Sept 2017	DN upholding the Council's refusal, but finding that the request should have been considered under EIR

Relevant Legislation:

Environmental Information Regulations 2004

Regulation 2

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

Regulation 5 - Duty to make available environmental information on request

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

(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.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Commissioner's Decision Notice:

[4] The requested information is evidently environmental, as it concerns plans to develop land. The Commissioner considered that there was no material difference between a request considered vexatious under s14 FOIA and a request considered manifestly unreasonable by reason of vexatiousness under reg.12 (4)(b) EIR. She referred to published guidance and the decisions in *Craven v ICO and DECC* [2012] UKUT 442 and *APGER v ICO and FCO* [2015] UKUT 0377 (ACC), noting that the same approach is to be taken whether considering this issue under FOIA or EIR. The question to be answered is whether the request had the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

[5] The Council stated that the planning process for the pig farm had been resolved for some time, and the time for appealing that decision had passed. It was the Council's opinion that the Appellant was unreasonably persistent in seeking information relating to the planning application, having made numerous requests for information, four unsuccessful complaints to the Local Government Ombudsman and engaged in lengthy correspondence with the Planning Department, Environmental Services Department, Democratic Services, the Chief Executive's Office and the Monitoring Officer. The Council warned the Appellant that owing to the volume of his requests regarding what they deemed to be a closed planning matter, any further requests would be considered to be vexatious.

[6] The Appellant argued that there was a four-month delay in handling one of his previous requests for information regarding the number of prosecutions for statutory nuisance in the district, and that the information that he eventually obtained would have assisted *"in some way*" his objections to the planning application. He further reiterated his complaints that the Council had poor information rights practices and had failed to make reasonable adjustments for him under the Equality Act.

[7] The Commissioner confirmed that the Appellant's rights had been breached by the inordinate delay in a prior request, but did not find that his ability to make appropriate representations in the planning application were substantially prejudiced by this, nor that it justified "a lengthy campaign of complaints". She was not convinced that knowing the number of relevant prosecutions would be "pivotal" to ensuring that the planning condition remained.

[8] The volume of requests, correspondence and complaints attempting to revisit a settled matter demonstrated to the Commissioner that the Appellant was unreasonably persistent, and that his repeated requests were to be regarded as vexatious requests. When considering the public interest test, whilst acknowledging the inherent argument for transparency and accountability in public authority decisions, the Commissioner found a *"very strong argument"* in protecting public authorities from manifestly unreasonable and burdensome requests. The Council had already engaged in lengthy and time-consuming correspondence with the Appellant, and taking this into account alongside the fact that *"the planning decision cannot be judicially reviewed*" led the Commissioner to conclude that the public interest lay in maintaining the exception.

Grounds of Appeal:

[9] The Appellant posited a number of arguments as to why the Commissioner was mistaken in refusing his appeal.

I – Information not environmental

[10] The Appellant argued that not all of the requested information could be said to fall under the EIR, as the Commissioner had not considered the information. He claimed that FOIA was the appropriate regime.

II – Availability of a judicial review

Contrary to the Commissioner's assertion, the Appellant stated that he had received legal advice to the effect that the planning decision was "definitely judicially reviewable". However, he advised that he had neither the means nor the ability to bring such proceedings, and felt that recourse to FOIA requests was his only means to scrutinise what he felt to be inappropriate decisions. The actions of the public authorities should be scrutinised not only in how they reach their decisions but also in the behaviour and qualifications of its officers.

III – Previous Breaches of FOIA by the Council

[11] The delay in dealing with one of the Appellant's previous requests, compounded by what he perceived to be obfuscation and cover-ups by the Council and its officers, led to the Appellant losing faith in the Council. He contends that the Council suppressed certain information from the official minutes of planning meetings. His recourse to FOIA requests was a result of this distrust rather than any desire to be obstructive or vexatious.

IV – Request not Disproportionate

[12] The Appellant claims that, as a result of the planning approval for the pig farm, he was obliged to spend in excess of £30,000 on alterations to his property in order to sell it. The burden on him has been excessive, and when considering this the burden on the Council is not excessive.

V – Disclosure in the Public Interest

[13] The failure of the Council and its officers to satisfy the Appellant's enquiries means that disclosure is in the public interest to ensure proper scrutiny of decisions.

Commissioner's Response:

[14] The Commissioner referred to the appellate decision of *Dransfield & Craven v ICO* [2015] EWCA Civ 454 which described the distinction between the FOIA and EIR regimes in regards to vexatiousness and manifest unreasonableness as "vanishingly small". She reminded the Tribunal that, according to the Court of Appeal in *Dransfield*, vexatiousness is an "*objective standard...[which] involves making a request which has... no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public*". The purpose of the exception was to "*protect the resources...of the authority from being squandered on disproportionate use of FOIA*".

I – Information not environmental

[15] The Commissioner repeated her conclusions from the Decision Notice, and reiterated that the determination of vexatiousness is treated in the same way across the two regimes.

II – Availability of judicial review

[16] The Commissioner highlighted what she perceived to be inconsistencies in the Appellant's contention that, on the one hand, he could not pursue a judicial review or other challenges of the planning decision, and on the other hinting that he had not exhausted the means of challenge. Initial justification in requests cannot warrant the Appellant pursuing his campaign to the lengths that he has chosen to so do.

III – Previous FOIA Breaches

[17] It is beyond the scope both of the Commissioner and the Tribunal to determine whether a four-month delay in a previous request affected the outcome of a planning application. The Appellant had the opportunity to challenge the decision, and the Ombudsman had reviewed it. The present request was made two years after the approval of the planning application.

IV – Request not disproportionate

[18] Case law suggests that a prior history between the requester and the authority can be a relevant consideration when determining if a request is vexatious. In this instance, the Commissioner found it instructive that the Appellant had not only made so many previous FOIA requests, but that they were in regards to the same or similar subject matter, and concerned a number of complaints to the Council and the Ombudsman. The Council had already provided the Appellant with a substantial amount of information, and taken time in the consideration and review of his previous requests.

V – Disclosure in the Public Interest

[19] While there is a general public interest in transparency, it is apparent that the planning decision has already been the subject of complaints to the Ombudsman, who found no wrongdoing. There is limited interest in further disclosure, which is not sufficient to overcome the significant interest in protecting public resources.

Appellant's Reply:

[20] The Appellant began by conceding that EIR was the appropriate legislative regime under which the request was to be considered. He then refined his grounds of appeal into two headings.

I – Error in consideration of Appellant's motive

[21] The Commissioner erroneously stated that a judicial revue was no longer open to the Appellant; instead, the Appellant drew the Tribunal's attention to CPR 3.1(2)(a) which provides the Administrative Court the discretion to entertain claims submitted after the six-week deadline if there is a good reason to so do, especially if they are of significant public importance. Therefore, should the Appellant be able to discover significant procedural wrongdoing or unlawfulness on the part of the Council, this may be sufficient to ground a judicial review out of time. Without examining the requested material, the Commissioner could not therefore state that it could not assist in the bringing of a judicial review or that the Appellant was 'unreasonably persistent'. Even in the absence of a judicial review, the requested material could potentially open an number of other avenues to the Appellant, in litigation or media exposure.

[22] The Ombudsman had considered the Appellant's complaints, but it is not correct to assert that his findings completely exonerated the Council. The Ombudsman had found some failings on the part of the Council, but neither the Commissioner nor the Appellant know exactly what information the Ombudsman considered. In any event, the breaches of the Appellant's information rights mean that his reticence to accept assurances of the completeness of previous responses is understandable.

[23] The Commissioner also, (the Appellant argues) failed to give sufficient weight to the presumption in favour of disclosure and the inherent weight in the publication of *environmental* information, as elucidated in paragraph 1 of the Directive 2003/4/EC.

II – Request not vexatiousness

[24] The Appellant argued that reg.12 (4) was not engaged, and the Commissioner erred in her Decision when she stated that she would *"need to see clear reasons"* for overturning

the Council's refusal. This runs contrary to the statutory presumption in favour of disclosure and her own published guidance. The burden on the authority would need to be "grossly oppressive" to justify any refusal, and the Appellant argued that his request was tightly drawn and would pose no such burden.

Appellant's submissions to the Tribunal:

[25] The Appellant contended that the Commissioner erred when she considered that there was no benefit to be gained from revisiting the planning matter. He stated there were three potential benefits: finding information to a) challenge the planning decision in a court; b) raise a complaint with the LGO; or c) bring closure to the Appellant's legitimate request which has value.

a) *Court Challenge* – no assertion has been made positively that there exists no correspondence that would ground a judicial review, and the court has a discretion to hear cases out of time;
b) *LGO Challenge* – the LGO criticised the Council for unreasonable delay in investigating the Appellant's complaint, and the conduct of the Council has led the Appellant to believe that the requested correspondence would reveal misconduct in the handling of the application;
c) *Closure* - if the request yields nothing of any significance, the Appellant will then know that there will be no need for him to make future requests.

[26] Acknowledging that the FOIA and EIR regimes deal with the issue of *'vexatiousness'* and 'manifest unreasonableness' in the same way. The material, the Appellant contends, has value, and the factors advanced by the Council and the Commissioner do not tilt that balance away from the presumption of disclosure. While the Council has claimed that the history of interactions with the Appellant has created an undue burden, there is no suggestion that this is a repeat request, and the request has been drafted so broadly so as to reduce the possibility of the need for further requests.

The Tribunal's Findings:

[27] The Tribunal was provided with correspondence sent to the Commissioner, in which the Council laid out it's reasoning as to why it considered the request to be vexatious. In it the Council confirmed that it had not sought clarification about the scope of the request, nor conducted any investigations into whether it was a repeat request. It explained that the Appellant had previously been warned that further requests for information would be considered vexatious, and the request itself appeared to be a 'fishing' expedition designed to damage the Council.

[28] A letter from the public authority dated 7 July 2017 was effectively a pre-warning that any further request would be regarded as vexatious and pre-empted the necessary assessment of the request.

[29] The Tribunal notes that there was no attempt by the Council to establish whether this was actually a repeat request. Page 96 of the Bundle before us demonstrates there was no reasoning to establish this is a repeat request. In fact, on the evidence before us, the Tribunal believes that the subject request is a fresh request.

[30] We do not concur with the Commissioner's assertion that this request has no value. In fact we find it is a request that has value and on a specific subject which, on the evidence before us, has not been the subject of a previous request.

[31] The Tribunal accepts the request has value because the subject is correspondence relating to a specific planning application. We have heard the Appellants personally explain the detail and we are persuaded there is value to this request. He refers to information provided by the LGO to the Appellant at page 581 of the Bundle before us, which appears to reveal that specific instructions to delay the process of investigating the breach of planning control leading ultimately to the grant of permission were given by a planning officer at the Council. It appears this information was not supplied by LGO with the letter that is at page 130 of the Bundle before us. The Council did not provide it to the Appellant. It may provide information that would support a complaint, justify litigation or even end the need for further requests from the Appellant, or others in the circumstances of this subject matter.

[32] It is in the public interest that any possible fault on the part of the public authority in dealing with this planning issue is fully explored. Even though the decision in *Dransfield*

suggests that an authority does not need to consider every part of a request in certain circumstances, we find that this case is not such as would fall into that category. On the evidence before us we do not accept that the request was “manifestly unreasonable”.

[33] We accept and adopt the helpful submissions of Mr Cross, Counsel for the Appellant, dated 1 August 2018 and the comprehensive submissions from the Appellant generally. Accordingly, in the circumstances outlined above, we allow the appeal.

Brian Kennedy QC
Judge of the First Tier Tribunal

Date of Decision: 12 September 2018
Date Promulgated: 13 September 2018