First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0257

Date of hearing: 18 February 2020

Before
Judge Stephen Cragg Q.C.

Tribunal members
Alison Lowton
Andrew Whetnall

Between

Justine Greening

Appellant

and

The Information Commissioner

Department for Transport

Respondents

The Appellant appeared in person

The Commissioner was represented by Ms Elizabeth Kelsey

The Department of Transport was represented by Mr Alan Bates

DECISION AND REASONS

1. On 14 October 2018, the Appellant wrote to the Department for Transport (DfT) and requested information in the following terms, in a series of emails timed over seventeen minutes:

Request 1 - E0016566

"Under the Freedom of Information Act 2000 I would like to make a request for the following information:

The advice to Ministers provided on 15 December, 2016 (draft ANPS); 20 October 2017 (revised ANPS); 22 May 2018 (then proposed ANPS), in relation to the draft, revised and ultimately proposed Airports National Policy Statement respectively.

I would also request a copy of the briefing notes and analysis associated with that advice."

Request 2- E0016567

"I would like to make the following information request under the Freedom of Information Act 2000 and Environmental Information Regulations 2004:

- copies of the papers and minutes in relation to the twelve Airport Capacity Programme Boards that have been held since June 2017, per the Departmental Written Parliamentary Question answer 160152 on 6 July 2018;

- copies of the papers and minutes in relation to any Airport Capacity Programme Boards since July 2018"

Request 3 - E0016568

"Under the Freedom of Information Act 2000 and Environmental Regulations 2004 I would like to request:

- copies and minutes of all papers relating to meetings by Ministers, special advisers or officials with Heathrow Airport Limited and its owners since April 2018."

Request 4 - E0016565

"Under the Freedom of Information Act 2000 I would like to make the following request:

- To have copies of the papers and minutes of the cross government steering group and its meetings on 4 September, 2017; 14 September 2017; 10 April 2018; 30 May 2018, referred to in the departmental answer to Parliamentary Question 160720 in 9 July 2018

- To have copies of the papers and minutes of any subsequent meetings of this group subsequent to 30 May 2018."

2. For context, we note that the Appellant was, at the time of the requests, the MP for a constituency potentially affected by the plans for expansion at Heathrow airport, and the Airports National Policy Statement (ANPS) was the announcement by the government that the policy was indeed to add a third runway at Heathrow. She sent the emails from her parliamentary email address. The Appellant told us that the requests were sent on behalf of constituents and were grouped together in a short time as she was dealing efficiently with the requests for information she was making.

3. The numbers attached to the requests 1-4 as set out above were allocated by the DfT when the requests were received. During the hearing the requests were referred to as 565, 566, 567, and 568, and we will use the same shorthand at appropriate points in this decision.

4. DfT responded on 1 November 2018 and refused to provide the requested information. It cited regulation 12(4)(b) EIR – that the requests were manifestly unreasonable - as its basis for doing so. On 6 November 2018 the Appellant explained that the requests had been made on behalf of constituents, and there had been lots of people asking various questions about the decision.

5. Following an internal review DfT wrote to the complainant on 4 December 2018 and maintained its position.

6. The Appellant complained to the Commissioner, and the Commissioner produced a decision notice dated 20 June 2019. The decision notice did not specifically address the issue of whether the requests were manifestly unreasonable. It was also unclear whether the decision notice was dealing with all four requests, or only one. At a previous hearing the Tribunal decided that the decision notice addressed all four requests (and so, therefore, does this appeal), and that the question of whether the requests are manifestly unreasonable should be dealt with as a preliminary issue.

7. The DfT's primary case in relation to the four emails has been that having regard to (a) the likely cost of searching and providing the information and/or (b) the likely diversion of the DfT's personnel resources that would also be involved, then the exception in reg 12(4)(b) EIR is engaged. DfT argues that, when assessing the cost and/or diversion of resources involved, the emails should be considered together or 'aggregated'.

8. The DfT points out that in relation to the FOIA regime there are statutory provisions which deal with the issue as to whether two or more requests for information can be aggregated, but that no such provisions are to be found in the EIR. However, the DfT argues that the Tribunal can still decide that the four emails should be considered together for the purposes of reg 12(4)(b) EIR if doing so appears, in all the circumstances, to be relevant for assessing the reasonableness or otherwise of the information

requests, on the basis of the costs and diversion of resources likely to be involved for the Department in dealing with them.

9. The DfT points out that the Commissioner's guidance on Manifestly Unreasonable requests, at paragraph 24, appears to endorse its position, although we also note that at paragraph 25 the Commissioner urges public authorities not to apply this approach 'indiscriminately or too widely' and 'to be sensible about this issue and to only use [it] when dealing with multiple requests would cause a real problem…there must be an obvious or clear quality to the unreasonableness'.

10. We were also referred, in the DfT's skeleton argument and in the hearing, to the FTT case of *Little v Information Commissioner* EA/2010/0072. This is not binding on us but does consider the issue of taking costs into account under the EIR when considering manifest unreasonableness. The Tribunal noted that:

> 40 …unlike the FOIA, the EIR does not permit a public authority to refuse a request purely on the basis that it is complex or time consuming. It may be surmised from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under the FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which the FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that Recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information.
>
> 41. …when dealing with a request under the EIR, the public authority must bear in mind the presumption in favour of disclosure contained in regulation 12(2). Depending on the facts of the case, this may mean that before treating a request as manifestly unreasonable under regulation 12(4)(b), a public authority must consider whether the time concerns can be addressed by providing some of the requested information. It may, in any event, be difficult for a public authority to successfully refuse a request for being

manifestly unreasonable if parts of it are not.

11. In this case the DfT argues that the information sought in the emails was closely linked in terms of subject matter and the motivation in seeking it. The DfT is of the view that the Appellant was seeking the release of more of the DfT's internal and other documents in relation to the process that led to the designation of the ANPS (which is in the public domain). It is noted that all the emails were sent within a very short period. It is said that there may be overlaps between the material sought in the emails.

12. All in all, the emails are said to have created a compound effect on the DfT's resources, which arose at a time when the department was stretched because of High Court litigation relating to the designation of the ANPS.

13. The Commissioner's approach to this issue, in the written submissions for this hearing is that 'if considered individually [the requests] are not manifestly unreasonable, but the burden they collectively would impose on DfT is such that, when considered together, they are manifestly unreasonable'. The Commissioner confirms that the burden of complying with the requests is the sole basis for her view that the requests are manifestly unreasonable, and there is no other relevant indicator. She is of the view that the four information requests are sufficiently similar and inter-related that it is appropriate to consider them together for the purposes of determining reg 12(4)(b) EIR is engaged. The Commissioner raises similar reasons as the DfT for justifying her approach to aggregation.

The law

14. In this case there is no dispute that the information sought in this case is 'environmental information' as defined in regulation 2 of the EIR.

15. Regulation 5 EIR obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIR. Regulation 12 EIR provides, insofar as relevant:

> "(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–
> ….
> (b) the request for information is manifestly unreasonable".

16. In relation to the guidance on the law, the Upper Tribunal in *Vesco v (1) Information Commissioner and (2) Government Legal Department* [2019] UKUT 247 (AAC) underlined the importance of access to environmental information to enable people to participate in decisions about the environment. The case does not contain any new principles of law but is a useful compendium of case law and legislation. The UT explained that:-

> 13… These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters ("**Aarhus**"), which led to adoption of the Directive. The EIRs are part of the UK's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive (*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 paragraph 8; *The A-G for the Prince of Wales v Information Commissioner and Mr Michael Bruton* [2016] UKUT 154 paragraph 15).

14. It is clear from the extracts from the Directive set out in the governing legislation section above that the purposes of the Directive include guaranteeing rights to access environmental information. Public authorities hold information on behalf of the public, and are to support and assist the public in seeking access to information. As the Court of Justice of the European Union ("**CJEU**") has said:

> "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal". (*Office for Communications v Information Commissioner* Case C-71/10 at paragraph 22).

17. At paragraph 16 of the UT decision it is explained that it is important that all of the tests in the EIR are applied before a public authority decides to refuse to disclose information and that '[i]t is clear from the terms of the Directive and CJEU authority that grounds for refusal of requests for environmental information must be interpreted restrictively'. The UT then sets out the tests to be applied:-

> ….For public authorities to be entitled to refuse a request for environmental information on the basis that it is manifestly unreasonable, a three stage test applies, on the wording of Regulation 12:
>
> Is the request manifestly unreasonable? (Regulation 12(1)(a))
> If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
> Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

18. In relation to whether the request is manifestly unreasonable, the UT explained at paragraph 17 that:-

> 17. …The starting point is whether the request has no reasonable

foundation, that is, 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, judged objectively (*Dransfield v Information Commissioner* [2015] 1 WLR 5316 at paragraph 68, *Beggs v Information Commissioner* 2019 SLT 173 paragraphs 26-29). The hurdle of satisfying the test is a high one. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 at paragraph 28. These are:

(1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being squandered;

(2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious (*Beggs*, paragraph 33);

(3) the value or serious purpose of the request;

(4) the harassment or distress of staff.

19. The UT also commented that this is not an exhaustive checklist.

The hearing

20. At the hearing we heard evidence from Mr Jack Goodwin who is a senior civil servant at the DfT, and is currently the Deputy Director of the Heathrow Division within the Airports and Infrastructure Directorate. Mr Goodwin submitted a statement for the hearing. He has responsibility for overseeing information requests under the EIR and FOIA. His statement is said to support the DfT case for 'aggregation' and to explain what it would have cost the DfT to undertake the searches necessary in relation to each of the four emails, and also the aggregated request.

21. Mr Goodwin explained that Parliament voted in favour of the ANPS in 2018 and the Secretary of State for Transport formally designated the ANPS on 26 June 2018. He said that an 'extensive library of key documents' had been made available online, and that there was a culture of transparency in place.

22. Mr Goodwin explained that the decision to aggregate the emails was taken on the basis that the requests related to the same policy area, had been made by the same requester, had been made in quick succession, and appeared to relate to the ANPS. He thought that the requests would have been more naturally made in a single letter, and were directed at obtaining documents comprised within a single policy-making process leading to the decision to designate contained in the ANPS. The Legal Defence team dealing with the requests, was aware of the aggregation requirements under FOIA (although this was not a FOIA case) thenceforth treated the four emails as one request, at least for the purposes of considering the 'manifestly unreasonableness' test.

23. Essentially, Mr Goodwin's evidence was that initial investigation revealed that a lot of information was within scope of the four requests, but it was the request E0016568 (568) that caused the most difficulty.

24. In relation to request E0016565 (565) Mr Goodwin accepts that, unaggregated, the request was not manifestly unreasonable, and the same was accepted in relation to request E0016566 (566).

25. Request E0016567 related to the minutes and papers of the Airport Capacity Programme Board (ACPB) meetings since 2017 and the initial search revealed about 268 documents. It may have been thought that identifying a set of papers for meetings of a board over a fairly limited time of just over a year, would not cause too much difficulty. However, Mr Goodwin explained that was not, in fact, the case as the electronic filing system contained a large number of drafts, duplicates and emails for each meeting, and a definitive set of papers considered at the meetings could not easily be identified. Mr Goodwin said that a timing exercise on one set of papers was carried out which took 3 hours 50 minutes, which included an initial consideration as to which other exemptions might apply to the information. On that basis, it was calculated that it would take 61 hours to meet request 567 which would be manifestly unreasonable in itself.

26. At the hearing Mr Goodwin said that he had not spoken to the chair of the (ACPB) or any other members with a view to seeing whether the correct papers for the meetings could be more easily identified.

27. In relation to request 568, Mr Goodwin noted that it was framed in very wide terms and covered all contacts between Heathrow Airport Limited (HAL) and any DfT officials, Ministers or special advisers, regardless of subject matter (for a period of about six months). Mr Goodwin says that it would have been a massive exercise and impossible to estimate in advance. He said that even if the request was narrowed (and he said this had been discussed with the Appellant who had not taken up the opportunity to explore the possibility), to only deal with, say, airport expansion, then the scope of the request would still be very large. Even if request 568 were not aggregated then the information request would be manifestly unreasonable.

28. In relation to the public interest test which would need to be applied if we found that the requests were manifestly unreasonable, as well as the burden that would be placed on the DfT at the best of times, Mr Goodwin asked us to take into account the fact that at the time of the request there was a major legal challenge underway about the ANPS and staff were already extremely stretched working on that case. He said that recruiting more staff was not a viable option, given training time and shortness of staff resources in any event.

Discussion and decision

29. We bear in mind that the manifestly unreasonable test is a high one and must be interpreted restrictively.

30. Addressing the tests that need to be applied as set out in cases such as *Dransfield* and *Vesco*, as set out above, it seems clear to us that the requests are made with 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, given that the requests relate to one of the most controversial infrastructure projects in modern times. Although we accept that the DfT had make available a lot of information on line, this does not mean that there is not value or a serious point to the requests.

31. In relation to the motive of the Appellant, we note that the Appellant was an MP with thousands of constituents affected by the decision to designate Heathrow for a third runway. She sent the requests from her parliamentary email address. It seems to us that the fact that an MP is acting in a representative capacity is a matter to take into account, and this was also an issue raised by the Appellant on 6 November 2018 and prior to the DfT's internal review.

32. In relation to the burden on the public authority, it seems to us that taking the approach on aggregation urged upon us by the DfT and the Commissioner, would run the risk of ignoring the aims of the EIR and the underlying EU Directive, and would also be against the presumption in favour of disclosure. It would mean that requests that have been accepted as not imposing an onerous burden on the DfT (especially 565 and 566) would remain unanswered because, when amalgamated with other requests do impose an unacceptable burden.

33. In our view to aggregate the requests in this case would also not be in accordance with the Commissioner's guidance at paragraph 25 where the Commissioner urges public authorities, when considering aggregation, 'to be sensible about this issue and to only use this approach when dealing with multiple requests would cause a real problem…there must be an obvious or clear quality to the unreasonableness'.

34. It is not said that the Appellant has bombarded the DfT with requests over a long period of time: we are considering four emails sent in a single afternoon, when the Appellant explains that she was trying to deal with issues as efficiently as possible, and we accept her account that she was not attempting to circumvent the 'manifestly unreasonableness' standard by sending four emails rather than one request.

35. It seems to us that there is not an unreasonableness which is clear or obvious in this case, and applying the Commissioner's guidance, that the requests should not be aggregated.

36. In addition, in our view not all four requests should be viewed in the same light. Requests 565, 566 and 567 all relate to specific meeting minutes or documents which relate to Heathrow expansion, whereas 568 is a request about all 'copies and minutes of all papers relating to meetings' between government and officials with HAL, about any subject over a six month period. That is a different kind of request to the other three altogether.

37. Even if aggregation is applied, then taking a restrictive approach to the manifestly unreasonable test would lead, in our view, in this case to some of the information being subject to disclosure. It seems to us the case of *Little*, referred to by DfT, especially when read in the context of the *Vesco* UT judgment is relevant here when it states that:-

> 41. …when dealing with a request under the EIR, the public authority must bear in mind the presumption in favour of disclosure contained in regulation 12(2). Depending on the facts of the case, this may mean that before treating a request as manifestly unreasonable under regulation 12(4)(b), a public authority must consider whether the time concerns can be addressed by providing some of the requested information. It may, in any event, be difficult for a public authority to successfully refuse a request for being manifestly unreasonable if parts of it are not.

38. That seems to us to be a sensible way to approach a case even where aggregation applies, where there is a presumption in favour of disclosure: if there are parts of a request, or parts of an aggregated request, which can be disclosed without breaching the 'manifestly unreasonable' test, then that is what should happen.

39. In relation to 565 and 566, it seems that there is no dispute that, viewed separately these requests are not manifestly unreasonable, and even if viewed as part of an aggregated request, constitute parts of that request which are not exempt from disclosure.

40. In relation to 567, the situation is more difficult given the evidence we have heard about the circumstances in which papers are retained, which make it difficult to summon up the particular documents considered at a particular meeting. However, it seems to us that, on balance, a requester should not be penalised where a reasonable request for information is said to be unreasonable because of an unorganised electronic filing system adopted by the DfT. It seems to us that that, again, would fly in the face of the presumption in favour of disclosure, and the intention of the EIR and the underlying EU directive, as explained most recently in *Vesco*, to encourage access to environmental information.

41. However, in relation to 568 we feel we have to take a different approach, given the sheer breadth of the request, as explained by Mr Goodwin in his witness statement and in evidence. The Dft say that attempts to narrow the request have been offered but not taken up, and it is understandable that the DfT would still not be in a position to say exactly what kind of narrowed request would be not be manifestly unreasonable without carrying out considerable work.

42. Our conclusion then is that the requests for the information listed in 565, 566 and 567 are not manifestly unreasonable, but that the request for the

information listed in 568 is so wide as to mean that the burden on the DfT as described by Mr Goodwin does make that request manifestly unreasonable.

43. We do not need to consider the public interest test in relation to requests 565, 566 and 567, but we do in relation to 568. There is clearly a wide public interest in as much information as possible being disclosed about the Heathrow expansion, and this would be in line and advance the policy and values of protection of the environment which underpin the EIR.

44. However, request 568 appears to ask for a wide amount of information, asking as it does for 'copies and minutes of all papers relating to meetings by Ministers, special advisers or officials with Heathrow Airport Limited and its owners' for a period of six months. In those circumstances it is very much in the public interest to take into account the burden on the time and resources of the DfT, and we accept that these have the potential to be enormous. The fact that the DfT was engaged in preparing for a very large legal challenge at the time of the request is something we give limited weight to, but the everyday realities of the work of the DfT cannot be ignored. Mr Goodwin explained in evidence why it was not possible, realistically, just to employ more people to deal with EIR requests. We also take into account, and accept the evidence of Mr Goodwin, that the DfT has a culture of transparency and that a lot of information about the ANPS decision-making process is on line already. In our view, the balance of the public interest comes down in favour of non-disclosure in relation to request 568.

45. During the hearing, it was referred to on a number of occasions that there was still room for the parties to negotiate a narrower formulation of request 568, which could lead to disclosure and we would urge the parties to continue those discussions.

46. We have taken into account and referred to the presumption in favour of disclosure throughout this decision. Request 568 is manifestly unreasonable for the reasons set out above. As broadly expressed, this request would cause the public authority a very considerable amount of work, only part of which would address developments relevant to an additional runway. Applying the presumption in favour of disclosure is not sufficient to dislodge our conclusion that disclosure should be withheld.

Next steps

47. In relation to this preliminary issue we find in favour of the Appellant to the extent indicated in the decision. This decision addresses the preliminary issue of the extent to which the four requests were manifestly unreasonable. Should the Department wish to proceed to substantively redacted disclosure, going beyond standard deletions such as the names of junior officials, the parties are asked to liaise on a timetable and scope for any necessary further stage in this appeal.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 4 March 2020.

Promulgation date 10 March 2020.