



Case Reference: EA/2022/0257
Neutral Citation Number: [2023] UKFTT 341 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Determined on the papers

Decision given on: 29 March 2023

Before

**TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER MS N MATTHEWS
TRIBUNAL MEMBER MR D PALMER-DUNK**

Between

JOHN WINDAS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision:

The appeal is allowed. Decision Notice IC-164057-L4Y0 is not in accordance with the law.

Substitute Decision Notice

Withernsea Town Council cannot rely on section 12(1) of the Freedom of Information Act 2000 (“FOIA”) to refuse the request for information from Mr Windas dated 12 December 2021 (“the Request”).

The Environmental Information Regulations 2004 (“EIR”) apply to the Request and not FOIA because the Request is for environmental information.

Withernsea Town Council cannot rely on the exception in section 12(4)(b) EIR to refuse the Request because it is not manifestly unreasonable.

Withernsea Town Council must within 35 days of the date of promulgation of this Decision either:

- (1) communicate to Mr Windas the information it holds within scope of the first, second, third and fifth parts of the Request, or**
- (2) inform Mr Windas if it relies upon another EIR exception, other than section 12(4)(b), to refuse to communicate that information to him.**

Withernsea Town Council is not required to communicate to Mr Windas any information in response to the fourth part of the Request because no such information is held by the Council.

REASONS

Background and Decision Notice

1. The Appellant was concerned that many of the trees around a local Playing Field were suffering from ash dieback disease and becoming unsafe. He made a request for information under the Freedom of Information Act 2000 (“FOIA”) from Withernsea Town Council (“the Council”) on 12 December 2021 as follows:

“I now wish to address my request for information through the Freedom of Information Act. These are as follow;

[1] A request for a copy of the reports, including recommendations from the persons with whom the TC have been in contact with in relation to the condition and future management of the Playing Field Trees during the past four years, including the East Riding of Yorkshire Council Tree Officer, whom I suggested in earlier correspondence.

[2] Reports, feedback and recommendations involving Town Councillors decision relating to the Tree issues, including copies of the minutes occurred from meetings.

[3] The individual costings and dates from public funds charged by individual contractors who attended the Playing Field over the past 4 years to address work needed on the trees and subsequent reports and recommendations.

[4] A copy of the TC’s maintenance schedule relating to their responsibilities, to include timescales and Health and Safety checks for all of their property responsibilities and to show the occasions when all three outside workers are required to be present to perform the duties.

[5] Copies of the last four Personnel sub committee meetings. I respect personal private information should not be disclosed, but do expect to include the management matters mentioned above and the workload issued staff are presented with.”

[Numbers added by the Tribunal for clarity and reference. The request is referred to in this Decision as “the Request”.]

2. The Council refused the Request under section 12(4) FOIA because it estimated that the cost of complying would exceed the maximum limit of £450 or 18 staff hours.
3. The Council’s decision was upheld on internal review on 10 March 2022. The Appellant complained to the Commissioner.
4. On 16 August 2022, the Commissioner issued Decision Notice IC-164057-L4YO finding that the Council was entitled to refuse to comply with the Request under section 12(4) FOIA. However, the Commissioner found that the Council had failed to meet its obligations under section 16(1) FOIA to provide reasonable advice and assistance to the Appellant and required it to provide him with advice and assistance to submit a request falling within the appropriate limit within 35 calendar days.
5. The Appellant appealed. He complained that the Commissioner had not required the Council to provide evidence to support its cost estimate.
6. In its Response, the Commissioner relied on its Decision Notice and set out the Council’s more detailed estimate of the costs of compliance for each part of the Request, as follows:
 - [1] 1 hour to search manual correspondence files and 2 hours to search emails and electronic files & folders.
 - [2] 1.5 hours to search and analyse property officer reports.
 - [3] 2 hours to search electronic cash books and manual invoices.
 - [4] 1.5 hours to analyse 24 reports from property officers, plus 2 hours to check and analyse job sheet instructions and copy the electronic Town Council Risk assessment, plus 13 hours to establish when three workers were required to work together.
7. The Commissioner submitted that the estimate was reasonable and the appropriate limit exceeded. The Commissioner found on balance that the information requested in [4] was “held” by the Council, despite it being in various sources and not in one “central control document” [paragraph 20 of Decision Notice]. The Commissioner noted from the Council’s estimate that at least some of the requested information could be supplied within the cost limit and encouraged the Appellant to withdraw the appeal and engage with the Council to narrow and refine the Request.
8. In Reply, the Appellant said that he was confused about the process but would “await any non-attendance procedure decision”.
9. All parties consented to this matter being dealt with on the papers and the Tribunal decided that it was fair and in the interests of justice to do so.
10. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 81 pages. Our findings were made on the balance of probabilities.

The Law

11. For the reasons set out in paragraph 22 below, the Tribunal found that the Environmental Information Regulations 2004 (‘EIR’) applied to the Request and not FOIA.
12. Regulation 2(1) EIR provides that:
 - “ “environmental information” is:
 - “any information in written, visual, aural, electronic or any other material form on

- (a) the state of the elements of the environment, such as... soil, land, landscape and natural sites... biological diversity and its components...;
- ...
- (c) measures.. such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)... as well as measures or activities designed to protect those elements...
- (d) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (e) the state of human health and safety..."

13. Regulation 5 EIR provides:

“(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.”

14. Regulation 12(1) EIR provides:

“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.”

15. Regulation 12(2) provides that: “A public authority shall apply a presumption in favour of disclosure.”

16. Regulation 12(4) provides that:

“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;”

17. Grounds for refusing to disclose environmental information under the EIR should be interpreted in a restrictive way.

18. In *Craven v Information Commissioner and DECC* [2012] UKUT 442 (AAC), the Upper Tribunal stated that “in deciding whether a request is “manifestly unreasonable” under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is “vexatious” under FOIA” [paragraph 30].

19. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 AAC, the Upper Tribunal interpreted “vexatious requests” as being manifestly unjustified, or involving inappropriate or improper use of a formal procedure. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority’s staff. The Upper Tribunal stressed the importance of taking a holistic approach. The Upper Tribunal’s approach was broadly endorsed by the Court of Appeal in its

decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider “all the relevant circumstances”.

20. The powers of the Tribunal in determining this appeal are set out in s.58 of 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.
 - (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”
21. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before it. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Analysis

22. The Tribunal found that the Request was for “environmental information” as defined in the EIR. It was for information about the condition and management of trees, maintenance plans and programmes to maintain the trees, including to protect them from disease and protect public safety, and the cost of such measures. The EIR therefore applied to the Request and not FOIA.
23. The Tribunal applied the law as set out in paragraphs 12 to 19 above.
24. There is no equivalent to section 12(1) FOIA in the EIR. However, the burden on a public authority of responding to a request for information is taken into account in considering whether the Request is manifestly unreasonable under Regulation 12(4)(b) EIR.
25. In relation to “burden”, the Tribunal found that the Council and the Commissioner had misinterpreted part [4] of the Request. The Appellant had requested a copy of the Council’s “maintenance schedule”. This was interpreted by the Council as a request for details of work done over the previous 12 months; the time estimate provided by the Council was based on analysing bi-monthly tick sheets completed by property officers when conducting property maintenance checks, and timesheet records.
26. The Tribunal found, taking into account the whole of the Appellant’s letter dated 12 December 2021 and his other correspondence with the Council, that part [4] was a request for a forward looking or planning schedule for future work, not for an analysis of work done. We reached this conclusion for the following reasons:
- a. it is clear from the correspondence that the Appellant feels that the Council is too reactive in its approach to maintaining the trees on the Playing Fields, taking action only when problems are reported, and not proactively;
 - b. the Town Clerk acknowledged in a letter to the Appellant dated 29 November 2021, that due to budget constraints, tree maintenance was conducted only on an ‘ “as needed” basis’;

- c. in the letter of 12 December, the Appellant recommended that members of staff should have a “predicted weekly schedule of the work to be carried out” and quarterly meetings to discuss “forward thinking requirements”;
 - d. in his letter to the Commissioner on 28 March 2022, the Appellant explains that the maintenance schedule should be one document which would be included in “work planning schedules” as an essential management tool; and
 - e. the second part of [4] is for “the occasions when all three outside workers are required to be present”, not when all three workers have been present [our emphasis].
27. The Tribunal found based on the evidence before us that, as anticipated by the Appellant in his notice of appeal, no such forward looking maintenance schedule exists. The Tribunal therefore finds that the Council should have informed the Appellant that it held no information in relation to part [4] of the Request.
28. The parties agree that the information requested in part [5] of the Request is already publicly available; there will be no material burden on the Council in that regard.
29. Based on the Council’s own estimates, the time which it would take the Council to comply with the remaining parts of the Request, parts [1] to [3], is only 6.5 hours. While the FOIA 18 hour threshold does not apply in this case, it is notable that this is now well below that threshold.
30. Turning to the other *Dransfield* factors, the Tribunal found based on the evidence before us that the Appellant’s motive was a genuine concern about the state of the trees around the Playing Fields, and that his Request had a value or serious purpose relating to the protection of the environment and health and safety. His correspondence is polite and acknowledges the financial and other challenges facing the Council and its officers; there is no evidence of harassment of or distress to staff.
31. Taking all this together, and in particular the much reduced burden on the Council of providing the requested information in light of the Tribunal’s interpretation of part [4], we concluded that the Request was not manifestly unreasonable under section 12(4)(b) EIR.
32. The Tribunal allows the appeal and issues the substitute Decision Notice set out at the top of this Decision.

Signed District Tribunal Judge Goodman

Date: 22/03/2023