NCN: [2023] UKFTT 821 (GRC)

Case Reference: EA/2022/0221

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: determination on the papers

Heard on: 5 June 2023
Decision given on: 05 October 2023

Before

TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER DAVE SIVERS

Between

EAST WEST RAILWAY COMPANY LIMITED

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) CAMBRIDGE APPROACHES LIMITED

Respondent

Decision: the appeal is Dismissed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0221, set out below, is substituted for the Information Commissioner's Decision Notice reference IC-135969-X0N6 dated 20 July 2022 with regard to: (a) the request for information made to East West Railway Company Limited by Cambridge Approaches Limited (through its solicitors) dated 10 May 2021 (the "First Request"); (b) the correspondence from Cambridge Approaches Limited sent to East West Railway Company Limited dated 20 May 2021 (the "Second Request") and (c) the correspondence from the Member of Parliament for South Cambridgeshire sent to East West Railway Company Limited dated 21 May 2021 (the "Third Request").

Substituted Decision Notice

1. The Second Request was not a request for information for the purposes of the Environmental Information Regulations 2004 or the Freedom of Information Act 2000.

No further steps are required to be taken by East West Railway Company Limited in respect of the Second Request.

2. The Third Request was not a request for information made by Cambridge Approaches Limited, but by a third party. No further steps are required to be taken by East West Railway Company Limited in respect of the Third Request for the purposes of this decision notice.

3. East West Railway Company Limited must reconsider its analysis of the First Request in light of the Tribunal's Decision in case reference EA/2022/0221 and must make a fresh response to the request for information contained in the First Request.

4. Unless the duty to confirm or deny does not arise in accordance with any applicable provision of the Environmental Information Regulations 2004, the fresh response must confirm if further information is held within the scope of the First Request and either disclose it (subject to any applicable redactions of personal data pursuant to regulation 13 of the Environmental Information Regulations 2004) or claim any relevant exceptions to disclosure, other than under regulation 12(4)(b) of the Environmental Information Regulations 2004.

5. East West Railway Company Limited must issue the fresh response within 35 days after the date on which this decision is promulgated.

6. East West Railway Company Limited must, in connection with the fresh response, provide advice and assistance, so far as it would be reasonable to expect it to do so, in accordance with regulation 9 of Environmental Information Regulations 2004.

7. The fresh response will be subject to the rights given under section 50 of the Freedom of Information Act 2000, as applied by regulation 18 of the Environmental Information Regulations 2004, to make a new complaint to the Information Commissioner.

8. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appellant:	East West Railway Company Limited.
CAG:	As referred to in paragraph 23.h.
Commissioner:	The Information Commissioner.
Decision Notice:	The Decision Notice of the Information Commissioner dated 20 July 2022, reference IC-135969-X0N6.
EIR:	The Environmental Information Regulations 2004.

Fees Regulations:	The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
First Request:	The correspondence sent to the Appellant dated 10 May 2021, as referred to in paragraph 10.
FOIA:	The Freedom of Information Act 2000.
Project:	The proposed construction of a railway line linking Oxford and Cambridge via Bicester, Bletchley and Bedford, which was the subject of the Requests.
Public Interest Test:	The test applicable pursuant to regulation 12(1)(b) of the EIR (as set out in paragraph 37).
Requested Information:	The information which was requested by way of the First Request and/or the Second Request and/or the Third Request (as the context permits or requires).
Requests:	The First Request, the Second Request and the Third Request.
Second Respondent:	Cambridge Approaches Limited.
Second Request:	The correspondence sent to the Appellant dated 20 May 2021, as referred to in paragraph 11.
Technical Report:	The Appellant's "Making Meaningful Connections" Technical Report relating to the Project issued on 31 March 2021.
Third Request:	The correspondence sent to the Appellant dated 21 May 2021, as referred to in paragraph 12.
Witness A:	The Appellant's witness, whose written witness statement is referred to in paragraph 67.
Witness 1:	The Second Respondent's first witness, whose written witness statement is referred to in paragraph 70.
Witness 2:	The Second Respondent's second witness, whose written witness statement is referred to in paragraph 72.

2. We refer to the Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Requests and the date of the Second Respondent's subsequent complaint to the Commissioner.

3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This is an appeal against the Decision Notice, which related to all three of the Requests (which were all connected with the Project).

5. The Decision Notice held (in summary) that the EIR applied to all three Requests and that the Appellant was entitled to refuse the Second Request and the Third Request under regulation 12(4)(b) of the EIR on the basis that they were manifestly unreasonable. However, the Commissioner decided that the First Request was not manifestly unreasonable and required the Appellant to issue a fresh response to the First Request.

6. We consider that it is important to stress what is outside of the scope of the appeal. The appeal is not about the merits of the Project, nor the conduct of the Appellant, the Second Respondent or CAG (or any person connected with any of them) in respect of the Project. Any observations and findings we may make in connection with any of those matters are relevant only for the purposes of determining the appeal before us (in accordance with the remit and powers of the Tribunal to which we refer below) and they should not be relied on for any other purposes.

Mode of Hearing

7. The parties consented to the appeal being determined on the papers.

8. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

9. The background to the appeal is as follows.

The Requests

The First Request

10. A firm of solicitors, acting on behalf of the Second Respondent, wrote to the Appellant on 10 May 2021 setting out various comments in respect of the Project and requesting information in the following terms:

"*Request 1: EWR is asked to provide the information constituting the 'high-level environmental appraisal' of the nine Route Alignment Options and the proposed northern approach.*

Request 2: Insofar as it is not covered by request 1, EWR is asked to provide the information upon which it relies in concluding that it is 'confident' that the detailed design for the southern approach can mitigate any impacts on the Wimpole and Eversden Woods SAC. Such information is to include the impacts identified and the mitigations considered.

Request 3: EWR is asked to provide the information constituting the 'operational analysis' on which it relies in concluding that the northern approach proposed in appendix F of the Second Consultation Document would require the provision of a four- track railway in section NA2.

Request 4: EWR is asked to provide the information upon which it relies in concluding that the Shepreth Branch Royston Line could remain as a twin track railway from the new Hauxton Junction to the Shepreth Branch Junction.

Request 5: EWR is asked to provide the information on which it relies in concluding that no 'significant alterations' will be needed to the bridge where the Shepreth Branch Royston Line crosses under the A1301. Such information is to extend (insofar as it has been considered) to both a two and four-track approach to the Shepreth Branch Line and to the grade-separated junction that EWR considers may be needed at Shepreth Branch Junction.

Request 6: EWR is asked to say whether it has assessed the number of properties that would need to be demolished if the portion of the Shepreth Branch Royston Line from the Hauxton Junction to the Shepreth Branch Junction were to require works to increase the number of tracks. If it did undertake such an assessment, it is asked to disclose the information constituting that assessment.

Request 7: EWR is asked to provide any non-public information it holds (provided by Network Rail or others), or any assessment it has itself undertaken, which leads to the conclusion that there may be demand by 2043/2044 for around 24 freight trains per day on the line between Bedford and Cambridge. Such information is to include any quantification of the current freight use of the Shepreth Branch Royston Line and the West Anglia Main Line.

Request 8: EWR is asked to provide any report or other analyses which it holds which caused it to conclude that embankments and viaducts will be required in some form between Cambourne and Hauxton Junction on the southern approach. In doing so, EWR is not asked to provide information concerning the specifics of where and how embankments and viaducts will be used on each route alignment.

Request 9: EWR is asked to provide any engineering long section drawings which it has produced to assess the northern approach. If no such drawings exist, EWR is asked to provide (a) the length of viaduct; (b) length in cutting; and, (c) length on embankment of its comparator northern approach.

Request 10: Insofar as EWR has already undertaken this assessment, EWR is asked to provide a list of the roads which will be permanently severed or otherwise obstructed by each of the Route Alignment Options comprised in the southern approach (Cambourne through to Cambridge station).

Request 11: EWR is asked to provide the information constituting the updated 'cost estimates' provided by Network Rail and Atkins referred to in the Second Consultation Technical Report at 5.4.12, and, if different, the most recent cost estimates produced. Such estimates are not to be limited to the figures, and should (insofar as they exist) include the explanation of the estimates provided by Network Rail and Atkins.

Request 12: EWR is asked to provide the information upon which it relies in concluding that the impacts of the southern approach on the Mullard Radio Astronomy Observatory are 'predicted to be capable of mitigation, subject to detailed design'. Such information is to include the impacts identified and the mitigations considered.".

The Second Request

11. On 20 May 2021, the Second Respondent wrote to the Appellant setting out various concerns about the Project, including the proposed route of the railway line. The letter

also included the following 'requests':

"*Request 1 - EWR Co must extend the consultation period so that it closes on 9 September 2021 at the earliest.*

Request 2 - EWR Co must provide details of how it proposes to analyse consultation responses to overcome the innate bias in question 1 and ensure that it gives sufficient weight to the comments of those who remain concerned by its failure to consult properly and openly on a northern approach and/or who disagree with its assessment that a southern approach is to be preferred.

Request 3 - EWR Co must provide information regarding: (i) the proposed freight capacity of the central section; (ii) how increased freight traffic has the potential to impact the current conclusion that there is no need to provide additional tracks between Hauxton and Shepreth Branch Junction (paragraph 11.1.2 of the Technical Report); (iii) possible mitigation measures in relation to both the noise and air pollution impacts of freight and their cost.

Request 4 - EWR Co must provide comparative journey times from Bletchley to Cambridge and for Bedford to Cambridge

Request 5 - EWR must provide a break down of forecast trips for journey pairs between relevant current and future stations.

Request 6 - EWR Co must provide updated car and coach comparisons for the Oxford to Cambridge comparator on page 42 of the Consultation Document (which is the same as that used in last year's Preferred Route Option Report).

Request 7 - EWR Co must: (i) explain why its proposed southern approach makes sense in relation to passengers who wish to travel east of Cambridge to destinations beyond Ely and, in particular, towards Norwich;15 (ii) explain why it is an appropriate strategic assumption that east of Cambridge journeys will use the line to Newmarket, rather than the connections from Ely, given the significant investment that it appears will be required in the Newmarket line to allow such journeys; (iii) confirm that the line from Cambridge station to Cambridge North and beyond will need four-tracking if and when its services are extended further east or explain why the existing two track configuration will be sufficient in those circumstances.

Request 8 - EWR Co must: (i) provide details of existing freight usage of the Cambridge to Newmarket line; (ii) explain why it is a reasonable strategic assumption that the Cambridge to Newmarket line will be used for freight to go east, rather than the connections from Ely; (iii) provide cost estimates comparing the cost of the necessary upgrade of this line and the cost of the much shorter chord around Ely proposed by CA Ltd (which would enable freight to bypass Cambridge altogether).

Request 9 - EWR Co must provide, for the purpose of the current consultation, artists' impressions of the main structures, and their proposed dimensions, so that residents can understand what is being proposed and its impact on the rural landscape and villages for the purposes of answering question 1 and identifying any mitigating measures they may wish to mention in answer to questions 39 to 41.

Request 10 - EWR Co must: (i) provide a revised comparison of the structures proposed in northern and southern approaches into Cambridge; (ii) explain why they have not used CBRR's proposed trench solution in the current consultation comparisons.

Request 11 - EWR Co must, in particular: (i) confirm that the five properties that it has

identified as likely to require demolition with a southern approach are all residential properties;22 (ii) explain how many of the 39 to 84 properties which it is said may be affected by a northern approach are "homes"; (iii) disclose the number of farms on the southern approach which are impacted, some of which will be rendered uneconomic and all of which will be more expensive to run, in order to provide a fair comparison with the commercial premises impacted on a northern approach; (iv) disclose how many people on the southern approach will lose part or most of their gardens.

Request 12 - EWR Co must disclose whether the Milton junction has been assumed to be grade-separated in each direction.

Request 13 - EWR Co must explain how they have assessed the impact of Thameslink services on the SBR line in respect of the Sponsor's Requirements in: (i) paragraphs 5.3 and 5.4 of Appendix A of the Technical Report (to isolate the wider network from poor performance on EWR and to isolate EWR from disruption on the wider network); and (ii) paragraph 5.1 Appendix A of the Technical Report to allow for anticipated future growth.".

The Third Request

12. On 21 May 2021, the Member of Parliament for South Cambridgeshire wrote to the Appellant setting out a number of questions and comments in connection with the Technical Report, including the following questions:

"*Question 1: EWR asserts that four-tracking is necessary if the line approaches Cambridge from the north. Can you provide detailed reasoning in why you think that this is necessary, in view of the following considerations?*

Question 2: If the EWR were to approach Cambridge from the south and to serve Cambridge North station as suggested in The Technical Document Appendix F § 1.1.10, would that also require four- tracking north of Cambridge station? If not, why not?

Question 3: Does EWR agree that the trench railway system proposed by CBRR could be built for the Fen Crossing section of the northern approach? If so, are the statements in the consultation about embankments and viaducts being the only option for this section correct?

Question 4: Why does the analysis of the northern approach make no reference to the CBRR fen crossing proposal and conclude that the only possible solution is to go over roads and to build the railway high in the landscape when crossing the fens?

Question 5: Why did EWR not describe trench railways in the consultation?

Question 6: Will EWR commit look again at the trench railway solution as part of a full and fair consultation on a northern approach to Cambridge?".

The Appellant's reply and subsequent review

13. The Appellant responded to the Second Respondent's solicitors by letter dated 8 June 2021. It stated that it had consolidated all three Requests and was responding in respect of all of them. The Appellant refused to provide any information. To the extent that the Requests sought non-environmental information, it relied on section 14 of FOIA on the grounds that the Requests were vexatious. To the extent that the Requests sought environmental information, it relied on regulation 12(4)(b) of the EIR on the grounds that the Requests were manifestly unreasonable and that the Public Interest

Test favoured maintaining the exception.

14. The Second Respondent (again, via its solicitors) requested an internal review by letter dated 17 July 2021, setting out various comments.

15. Following an internal review, the Appellant responded by letter dated 24 August 2021. It upheld its original position.

16. The Second Respondent's solicitors contacted the Commissioner on 7 October 2021 to complain about the Appellant's response.

The Decision Notice

17. Following his investigations, the Commissioner decided, by way of the Decision Notice, that:

    a. the three Requests should all have been dealt with under the EIR;

    b. the Second Request and the Third Request engaged regulation 12(4)(b) of the EIR and the Public Interest Test favoured maintaining the exception; and

    c. the First Request was not manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR and therefore the Appellant was not entitled to rely on that exception.

18. The Decision Notice required the Appellant to issue a fresh response to the First Request which did not rely on regulation 12(4)(b) of the EIR.

The appeal

19. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIR, subject to certain modifications.

20. The Decision Notice was given in response to the Second Respondent's complaint to the Commissioner relating to the Appellant's refusal to provide the Requested Information. Whilst the Appellant had referred to both FOIA and the EIR applying to the Requests, the Commissioner decided that the EIR applied to the Requested Information.

21. The appeal was therefore an appeal by the Appellant against the Decision Notice made pursuant to the EIR, in accordance with section 57 of FOIA as applied by regulation 18 of the EIR.

The grounds of appeal

22. The Appellant's appeal related to the determination of the Commissioner in the Decision Notice that the First Request was not manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Appellant did not appeal against the findings of the Commissioner regarding the Second Request and the Third Request. Fundamentally, the Appellant considered that the Commissioner was correct to conclude that the Second Request and the Third Request were manifestly unreasonable but he should have reached the same conclusion in respect of the First

Request.

23. The material points made by the Appellant in its ground of appeal were (in summary) as follows:

    a. The Appellant relied on regulation 12(4)(b) of the EIR in refusing the Requests because it was protecting its resources from the manifestly disproportionate burden and cost that would be entailed by compliance with the Requests. In support of this, the Appellant referred to the limits set out pursuant to the Fees Regulations as a valuable indicator of what Parliament considers to be an appropriate threshold beyond which the burden entailed by a request becomes disproportionate.

    b. The Commissioner erred by focussing excessively on the First Request in isolation in assessing burden. The Commissioner should have given appropriate weight to the history of communications between the Second Respondent and the Appellant, in accordance with the relevant principles in the *Dransfield* case[1].

    c. The Commissioner was wrong to suggest that the public interest in the Requested Information sought by the First Request undermined the Appellant's reliance on regulation 12(4)(b) of the EIR; on the contrary, the existence of some public interest in information which is requested was insufficient to preclude reliance on that regulation.

    d. It was clear from the Decision Notice that the Commissioner did not conclude that the First Request was manifestly unreasonable because he was not satisfied by the evidence provided by the Appellant in support of its position. The Commissioner applied a disproportionate evidential standard, particularly given that the purpose of the Appellant's reliance on regulation 12(4)(b) of the EIR was to avoid an unjustified burden on the public purse. It was therefore inappropriate to require it to provide evidence over and above the 'ample' submissions it provided to the Commissioner as part of his investigations prior to the issue of the Decision Notice.

    e. Even if the First Request were to be viewed in isolation, it was manifestly unreasonable, particularly due to the burden imposed with regard to the number and nature of the requests contained within it. The Appellant estimated that compliance with the First Request alone would require vastly more than 18 hours of work.

    f. That burden was also unjustified having regard to the timing of the First Request: as the Appellant pointed out in its refusal notice, "*documents in support of the on-going non-statutory consultation were published on 31 March 2021, but the [First] Request was not submitted until 10 May 2021*" with the deadline for compliance with the First Request falling too late to make that Request useful for participation in that consultation.

    g. Some of the information sought by the First Request (for example via parts 1 and 11 of that Request) were already in the public domain. Further, much of the information sought by the First Request was intended for future publication in

[1] The relevant principles from the *Dransfield* case are addressed further below.

due course, and at a stage when there will still be sufficient time for the public to participate in consultations and make representations about the relevant aspects of the Project. This diminished the public interest in compliance with the First Request at the time it was made.

h. The history of communications between the Appellant and the Second Respondent and "CAG" (which the Appellant defined as "*Cambridge Approaches Group, an informal grouping of objectors who oppose the Project or parts thereof*"), including the number of previous interactions, was relevant to show that the First Request was manifestly unreasonable. The Appellant estimated that, by the time of the First Request, it had already spent approximately 375 hours of staff time on those interactions. The Public Interest Test plainly favoured maintaining the exception in regulation 12(4)(b) of the EIR, so as to avoid imposing that burden that compliance with the First Request would impose.

i. At least to some extent, the pattern of communications and requests it had received from or on behalf of the Appellant and CAG was designed to cause disruption and annoyance, partly based on inference by reference to the timing and pattern of the Requests. As the Commissioner noted (in paragraph 53 of the Decision Notice) "*the value of the requests was reduced substantially by the manner in which they were submitted*". Additionally, the Decision Notice recorded (at paragraph 43) that the Second Respondent had accepted that the Second Request was not designed to obtain information, but instead to outline opposition to the Project.

j. The Appellant had further, direct, evidence of an intention to cause annoyance and disruption. The Decision Notice had noted (at paragraph 35)[2] that an individual associated with the Appellant and CAG had "*compiled a comprehensive list of various actions that all of us can do to make sure our voice is still heard at EWR. She likened her list of objectives to an annoying mosquito round the head of EWR*". The Commissioner had also noted that the making of information requests was listed as being one of those "annoying" actions. The Commissioner was right to acknowledge that making information requests with a deliberate intent to cause annoyance was an abuse of the legislation (paragraph 49 of the Decision Notice) but he was wrong to suggest (in paragraph 51 of the Decision Notice) that the First Request was unlikely to include an intention to irritate, disrupt or harass by virtue of it being made via solicitors.

24. In support of its appeal, the Appellant provided a witness statement, together with exhibits and annexes (including a schedule of its communications with certain persons and results of keyword searches on the Appellant's email servers), to which we refer below.

The Commissioner's response to the appeal

25. In his response to the appeal, the Commissioner generally relied on the reasons given in the Decision Notice in support of his view that the appeal should be dismissed.

26. The material additional points made by the Commissioner were (in summary) as

[2] The Appellant's grounds of appeal erroneously referred to paragraph 24 of the Decision Notice on this point.

follows:

a. The Commissioner had not placed a 'disproportionate evidential standard' burden on the Appellant. Reliance on regulation 12(4)(b) of the EIR required a careful analysis of all the circumstances, with appropriate supporting evidence.

b. In his investigation prior to the Decision Notice, the Commissioner gave details of what level of information and evidence he would expect to receive from the Appellant, although noted it was ultimately a matter for the Appellant as to how it responded to his enquiries. The Commissioner's guidance on the application of regulation 12(4)(b) of the EIR also made it clear that a suitable level of detail was required from the Appellant to support its reliance on the exception.

c. The limits in the Fees Regulations were only an indicator and only applied to certain specified activities, rather than general request handling. Whilst regulation 12(4)(b) of the EIR may apply if the cost or burden of dealing with a request is too great or oppressive, regulation 7(1) of the EIR also sought to address particularly burdensome requests, allowing a public authority to extend the period for responding if it reasonably believed that the complexity and volume of the information requested meant that it was impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

The Second Respondent's response to the appeal

27. The Second Respondent submitted that the Decision Notice should be upheld in respect of the First Decision. It did not challenge the Decision Notice in respect of the Second Request and the Third Request.

28. The material points made by the Second Respondent were (in summary) as follows:

a. The Decision Notice properly considered whether the burden of each of the Requests was too great and its analysis did not detract from the general assessment of burden and the overall holistic analysis.

b. It was not accepted that the limits in the Fees Regulations was an indicator of unreasonableness but, in any event, its relevance must only be as a point of reference. The limits apply only to certain specified activities (which excludes identifying exempt information and undertaking redactions) and, unlike section 12 of FOIA, the cost of compliance goes to the holistic assessment of manifest unreasonableness for the purposes of regulation 12(4)(b) of the EIR. Further, the exceptions in the EIR must be interpreted restrictively.

c. The Public Interest Test may still require disclosure even if a request is found to be manifestly unreasonable. Even if the Public Interest Test does not require disclosure, the presumption in favour of disclosure under regulation 12(4)(b) of the EIR may still oblige disclosure of the relevant information.

d. The Commissioner did not find (as asserted by the Appellant) that reliance on regulation 12(4)(b) of the EIR would be precluded by the existence of some public interest but rather that this was simply a factor applied as relevant to considering

'the value or serious purpose of the request' and the Public Interest Test.

e. The information sought was (and remained) information which the Second Respondent regarded as important to properly understanding the Appellant's proposals regarding the Project and providing useful feedback to past and upcoming consultations. It was a request prompted by change in circumstances; namely, the release of the 'Making Meaningful Connections' consultation document.

f. The context of this case was unusual when compared to the case law. This case arose in the context of consultation prior to a planning application for a nationally significant infrastructure project. It would be an error to conflate the burden of engagement during a consultation process with burden relevant to whether a request is manifestly unreasonable.

g. There was clearly significant public value in the Requested Information for those living around the proposed route for the Project (and both the Appellant and the Commissioner recognised that the Requested Information has value to the public); this was not a case where the Requests had no reasonable foundation.

h. The First Request arose directly from the 'Making Meaningful Connections' consultation documents issued by the Appellant. The first question in that consultation welcomed comments on the Appellant's assessment concluding that the southern approach was preferable for the Project. The First Request was carefully crafted to ask for information that the Appellant itself relied upon in writing those consultation documents and reaching its conclusion. It was not a fishing expedition nor unreasonably broad in scope; it was a request aimed at the specific information relied upon by the Appellant in reaching its conclusions. As the Appellant was the author of those specific conclusions, it should not be unduly burdensome for it to produce the information it had already processed in coming to those conclusions.

i. The timing of the Requests was not inappropriate. The consultation documents were lengthy, and the Second Respondent is a voluntary organisation with limited time which was also awaiting legal input at the relevant time. In any event, the 'Making Meaningful Connections' consultation is one of a number of consultations which will occur and the Requested Information would be of significant utility for participation in the entire process relating to the Project.

j. The Appellant was wrong to say that some of the information sought via the First Request was already in the public domain but, in any event, if it was there was little or no burden in identifying it.

k. The Appellant was also wrong to say that much of the information sought by the First Request was intended for future publication and that there will still be sufficient time for the public to participate in consultations and make representations relating to the Project. A key issue is the proposed route alignment (which relates to the question asked by the consultation document) and therefore information relating to the choice of alignment was of most value now; at a later stage in the process the Appellant will have limited room to manoeuvre in considering consultation responses and modifying its proposals for the Project.

l. The Second Respondent had not seen evidence underpinning the Appellant's assertion that it had spent 375 hours dealing with previous interactions. The Second Respondent is a group involved with the community around Cambridge, but it is not necessarily associated with all of the people which the Appellant claims it has had interactions with. In any event, the context of such communications is consultation on a nationally significant infrastructure project; interaction is necessary and was invited by the Appellant.

m. The 'Making Meaningful Connections' consultation was released on 31 March 2021 and the First Request was acutely focused on matters arising from that consultation document. Therefore the Appellant was wrong to suggest that communications between January 2020 and May 2021 concerned issues which were very closely linked to those raised by the First Request.

n. The Second Request and the Third Request were focused on expressing concerns about the consultation process, rather than being a request for existing information captured by the EIR (indeed, they were not intended to be requests for information under the EIR or FOIA). In the context of a consultation, such correspondence was part of the engagement process between a proposer and residents and was not unreasonable.

o. There was no intention for the Requests to cause undue annoyance and disruption. At the relevant time, many residents were expressing a community feeling of being ignored in respect of the Project. Whilst "infelicitous" wording was used in the minutes of a meeting (see paragraphs 23.j and 73), that did not detract from the point that this concerned determined engagement in the consultation process. In any event, the views of an individual (who was not a director of the Second Respondent) should not be elided with the Second Respondent.

The Appellant's further written submissions

29. The Tribunal was provided with further 'final' written submissions from the Appellant. Those submissions generally reflected the points made in the Appellant's grounds of appeal. The material additional points made by the Appellant were (in summary) as follows:

a. The Appellant should be entitled to rely on regulation 12(4)(b) of the EIR to refuse the First Request, primarily because of the disproportionate burden that would be imposed by compliance with the First Request.

b. Witness A's witness statement demonstrates the burden caused by the First Request. There was no refuting evidence to call into question that account of the burden.

c. In the context of section 12 of FOIA, there is no duty on a public authority to approach a wide-ranging request by searching up to the relevant costs limit and disclosing whatever it can within that limit - and the same approach should apply to regulation 12(4)(b) of the EIR.

d. Notwithstanding the statement of Witness 1 (see further below), the Appellant maintained that, at least to some extent, the pattern of communications and

requests it received, and continues to receive, from or on behalf of the Second Respondent and CAG was designed to cause disruption and annoyance.

e. Whilst the Decision Notice recorded (at paragraph 43) the Second Respondent's contention that the Second Request was not designed to obtain information, but rather to outline opposition to the Project, the Commissioner nevertheless found (at paragraph 58 of the Decision Notice) that it was irrelevant whether or not the Second Respondent's intention was to request information; the fact was that it did seek information. The information sought in the Second Request (and in the Third Request) overlapped with that sought in the First Request before the Appellant had had a chance to respond to it.

f. Notwithstanding the statement of Witness 2 (see further below), it was not unreasonable for the Appellant to rely on an apparent intention to disrupt and cause annoyance as one relevant factor supporting its reliance on regulation 12(4)(b) of the EIR. The further information provided in the appeal demonstrated that Witness 2 was a participant in a working group involving one of the directors of the Appellant and that the meeting which Witness 2 attended (and noted at paragraph 35 of the Decision Notice) was convened by the Second Respondent and Witness 2 had participated in that meeting on the Second Respondent's behalf. No evidence had been adduced by the Second Respondent that any of its other representatives at that meeting did or said anything to countermand the Witness 2's invitation to cause 'annoyance' or to indicate that it did not represent the Appellant's strategy. Accordingly, aside from the issue of the burden imposed by the First Request, the Tribunal was invited also to give weight to the above as a deliberately disruptive approach by the Second Respondent.

g. The Second Respondent's evidence provided no adequate justification for the delay in the First Request being submitted, after the publication of the consultation document.

The Tribunal's powers and role

30. The powers of the Tribunal in determining the appeal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIR), 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.".

31. For the purposes of the appeal, therefore, the Tribunal's remit was to consider whether the Decision Notices were in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notices should have been exercised differently. In reaching its decision, the Tribunal may review any

findings of fact on which the Decision Notices were based and the Tribunal may come to a different decision regarding those facts.

The law

The relevant statutory framework

32. As a general principle, requests for environmental information held by a public authority are usually to be dealt with under the EIR rather than FOIA. Section 39(1) of FOIA provides:

"*Information is exempt information if the public authority holding it –*

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.".

33. The term 'environmental information' is defined in regulation 2(1) of the EIR as follows:

"*…any information in written, visual, aural, 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;

(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 the 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);".

34. Regulation 5 of the EIR provides individuals with a general right of access to environmental information held by public authorities. It provides:

"*(1)…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.".

35. Accordingly, under regulation 5(1) of the EIR, a person who has made a request to a public authority (such as the Appellant) for environmental information is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIR, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) of the EIR (that is, the wording immediately preceding the extract quoted above) provides:

"*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…*".

36. It is therefore important to note that regulation 5(1) of the EIR does not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in that regulation is subject to certain other provisions of the EIR. Part 3 of the EIR, referred to above, contains various exceptions to the duty to disclose environmental information which has been requested.

37. Within Part 3 of the EIR, regulation 12 is applicable for the purposes of the appeal. So far as is relevant, regulation 12 of the EIR provides:

"*(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.

(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;".

38. Succinctly put, therefore, a public authority may refuse to disclose environmental information which is requested under the EIR if the request is 'manifestly unreasonable' and if, in the circumstances at the time of the refusal, the Public Interest Test favours withholding the information.

39. The term 'manifestly unreasonable' is not defined in the EIR, but has been interpreted by case law, to which we refer below. As we will explain, 'manifestly unreasonable' in the EIR essentially means the same as 'vexatious' in section 14(1) of FOIA. That section provides: "*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*".

40. Regulation 12(1) of the EIR is subject to regulation 12(2) of the EIR, which provides: "*A public authority shall apply a presumption in favour of disclosure.*". Therefore, even where there is a potential exception to disclosure of environmental information which is requested under the EIR, that exception (and the application of the Public Interest Test) is subject to a presumption in favour of disclosure of the information.

41. So far as is relevant, regulation 4 of the EIR provides:

"*(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds –*

(a) progressively make the information available to the public by electronic means which are easily accessible; and

(b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.".

42. Therefore regulation 4(1) of the EIR places a duty on public authorities to progressively publish the environmental information which it holds (other than information which, if it were requested, the public authority would be entitled to withhold pursuant to any applicable exception in regulation 12 of the EIR).

43. The environmental information which is to be disseminated pursuant to regulation 4(1) of the EIR is specified in regulation 4(4) of the EIR, as follows:

"*(4) The information under paragraph (1) shall include at least –*

(a) the information referred to in Article 7(2) of the Directive; and

(b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.".

44. The 'Directive' referred to is the European Directive 2003/4/EC, which was implemented by the EIR. The information referred to in Article 7(2) of that Directive (and hence the information which must be disseminated pursuant to regulation 4(1) of the EIR) includes policies, plans and procedures relating to the environment, reports on the state of the environment, environmental impact studies and data taken from monitoring activities and risk assessments which affect or are likely to affect the environment.

Relevant case law

Environmental information

45. We turn first to case law regarding the definition of 'environmental information' set out in regulation 2(1) of the EIR.

46. It is well established that 'environmental information' is to be given a broad meaning in accordance with the purpose of the underlying European Appellant Directive which the EIR implement (Direction 2004/4/EC). The definition was explained by the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister fur soziale Sicherheit und Generationen*[3] as follows:

"*The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2(a) of Direction 90/3134 a broad one, and it avoided giving*

[3] [2003] All ER (D) 145

that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.".

47. In the case of *Department for Business, Energy and Industrial Strategy v The Information Commissioner and Alex Henney*[4], the Court of Appeal confirmed the appropriateness of a broad approach to defining environmental information, which may include information that is not directly connected to a measure. In that case, Lord Justice Beatson stated:

"…Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole...

It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information… It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision making in a better way. None of these matters may be apparent on the face of the information itself.".

48. *Lord Justice Beatson also explained in the Henney case that identifying the measure which the disputed information is "on" includes applying the definition of 'environmental information' purposively. In essence, the Court of Appeal confirmed that determining whether, in a specific case, information qualifies as 'environmental information' (or, in other words, whether the information can be considered to be 'on' a given measure for the purposes of the definition of 'environmental information') should be decided by reference to the general principle that the EIR, Directive 2003/4/EC and the Aarhus Convention (which that Directive was designed to implement in EU law) must be construed purposively. In turn, this involves considering the purposes which they were trying to achieve. The Court of Appeal provided some general guidance, referring [paragraph 48] to the recitals to the Aarhus Convention and the Directive as a starting point: "They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure.".*[5]

49. Therefore it is clearly established that the definition of 'environmental information' in the EIR should be construed purposively. Lord Justice Beatson also stated in the *Henney* case: *"It is then necessary to consider whether the measure so identified has the*

[4] [2017] EWCA Civ 844

[5] Paragraphs 42-43

requisite environmental impact for the purposes of regulation 2(1).".[6] He went on to state: "*Determining on which side of the line information falls will be fact and context-specific.*".[7]

50. We also remind ourselves that, in his judgment in the *Henney* case, Lord Justice Beatson warned against an "*overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition.*".[8]

51. In summary, therefore, a purposive interpretation is required when considering what 'environmental information' is, but this will also be dependent on the specific facts in any given case. The Upper Tribunal in the case of *Department for Transport and others v Information Commissioner and John Cieslik*[9] put the point as follows: "*…the principle established by the Court of Appeal in Henney and in Glawischnig [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect.*".[10]

52. In very broad terms, there are six fundamental principles which derive from the *Henney* case:

    a. the EIR must be interpreted purposively;

    b. the term 'environmental information' must be read broadly;

    c. a broad construction of that term does not, however, mean there is an unlimited right of access to environmental information;

    d. the focus should be on the statutory language;

    e. the test is not what the information is directly or primarily 'on';

    f. determining 'what a measure is on' may mean looking at the wider context.

Manifestly unreasonable

53. We turn now to case law regarding the term 'manifestly unreasonable' in regulation 12(4)(b) of the EIR. As we have noted, it is not defined in the EIR. In FOIA, there is a parallel term of 'vexatious' and the courts have established that 'manifestly unreasonable' for the purposes of the EIR shares the meaning of that term. In the case of *Craven v Information Commissioner and Department for Energy and Climate Change*[11], Upper Tribunal Judge Wikeley 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" within FOIA. The conceptual structure for decision-making is different, but the outcome will surely be the same, whichever route is adopted. Insofar as a request is for environmental information, it therefore follows that the meaning of the expression "manifestly*

[6] Paragraph 43.
[7] Paragraph 47
[8] Paragraph 52
[9] [2018] UKUT 127
[10] Paragraph 33
[11] [2012] UKUT 442

unreasonable" is essentially the same as "vexatious"…".[12]

54. The Court of Appeal, in the combined case of *Dransfield v Information Commissioner and Devon County Council* and *Craven v Information Commissioner and The Department for Energy and Climate Change*[13], dealt with the appeal from the Upper Tribunal's decision in the *Craven* case regarding the meaning of 'manifestly unreasonable' in the EIR at the same time as another appeal regarding the term 'vexatious' in FOIA. Whilst decided in the context of the facts of the *Craven* case, the Court of Appeal confirmed that to all intents and purposes 'manifestly unreasonable' in the EIR means the same as 'vexatious' in section 14(1) of FOIA.

55. Accordingly, we need to consider the meaning of the term 'vexatious' for the purposes of section 14(1) of FOIA in order to consider the meaning of 'manifestly unreasonable' in regulation 12(4)(b) of the EIR. There is no definition of 'vexatious' in FOIA but guidance on applying that term is given in the decisions of the Upper Tribunal and the Court of Appeal in the *Dransfield* case[14].

56. The judgment of the Upper Tribunal in the case of *CP v Information Commissioner*[15] helpfully summarises the main principles in the *Dransfield* case and relevant extracts from that summary are as follows (omitting, for ease of reference, the paragraph numbers in that summary and the cross-references to the paragraphs in the *Dransfield* case):

"*(i) The Upper Tribunal in Dransfield*

In the Upper Tribunal decision of Dransfield…, the Upper Tribunal gave some general guidance on the issue of vexatious requests. It held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied'…

The test under section 14 is whether the request is vexatious not whether the requester is vexatious. The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA. As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account. The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request.

Four broad issues or themes were identified by Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the

[12] Paragraph 30
[13] [2015] EWCA Civ 454
[14] *Information Commissioner v Devon County Council & Dransfield* ([2012] UKUT 440) and *Dransfield v Information Commissioner and Devon County Council* ([2015] EWCA Civ 454), respectively.
[15] [2016] UKUT 427

request); and (d) any harassment or distress (of and to staff). These considerations were not exhaustive and were not intended to create a formulaic check-list. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.

As to burden…, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. However if the public authority has failed to deal with those earlier requests appropriately, that may well militate against holding the most recent request to be vexatious. Equally a single well-focussed request for information is, all things being equal, less likely to run the risk of being found to be vexatious. Wide-ranging requests may be better dealt with by the public authority providing guidance and advice on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.

A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request.

Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests.

(ii) The Court of Appeal in Dransfield

There was no challenge to the guidance given by the Upper Tribunal in the Court of Appeal. In the Court of Appeal, the only issue relevant to this appeal was the relevance of past requests. Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the Dransfield case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority.

Arden LJ gave some additional guidance…:

> *'In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which 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. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The*

decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available…'

Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor.".

57. The Upper Tribunal took the view in the *Dransfield* case that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. As the Upper Tribunal observed: "*There is…no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.*"[16].

58. In the case of *Cabinet Office v Information Commissioner and Ashton*[17], the Upper Tribunal stated: "*Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument*".[18]

59. That view echoes that of the Court of Appeal in the *Craven* case we have referred to, where Arden LJ stated: "*there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request*".[19]

60. Accordingly, a request for information can be vexatious under FOIA (and consequently manifestly unreasonable under the EIR) purely on the basis of the resource burden placed on the public authority by a request, even if there is a significant public interest in the information requested and there is a 'reasonable foundation' for the request. However, this should be considered in the context of the 'high standard' set by vexatiousness as referred to in the Court of Appeal's judgment in the *Dransfield* case. As noted above, Arden LJ stated that, with regard to the term 'vexatious': "*Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one...*".

61. It should also be noted that the Upper Tribunal in the *Dransfield* case concluded that the purpose of section 14 of FOIA was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*".[20] However, the Court of Appeal in that case qualified that conclusion. Arden LJ stated: "*…I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of*

[16] Paragraph 82
[17] [2018] UKUT 208
[18] Paragraph 27
[19] Paragraph 85
[20] Paragraph 10

FOIA"... For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have…been carefully calibrated.".[21]

62. The *Ashton* case also confirmed the approach in the *Dransfield* case to the effect that the Tribunal should, in assessing the application of section 14 of FOIA (and consequently the application of regulation 12(4)(b) of the EIR), undertake a holistic assessment of all the circumstances. Accordingly, the Tribunal should adopt a rounded approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is manifestly unreasonable.

Evidence

63. The Tribunal read and took account of an open bundle of evidence and pleadings. Within the open bundle were three witness statements; one provided on behalf of the Appellant and two provided on behalf of the Second Respondent.

64. To avoid identifying the witnesses personally in this decision, we refer below to the Appellant's witness as "Witness A" and to the two Second Respondent's witnesses as "Witness 1" and "Witness 2", respectively. We mean no disrespect to any of them in doing so.

65. The Tribunal also read and took account of separate 'final' written submissions provided by the Appellant (referred to in paragraph 29).

66. The Tribunal was also provided with a separate bundle of case law authorities prior to the hearing. It contained a note to the effect that it had been prepared by the Appellant but that no response to its contents had been provided by the Commissioner or the Second Respondent and accordingly it was not an agreed bundle but that the Appellant had included copies of all cases referred to in the Appellant's original refusal notice and the parties' appeal pleadings.

The Appellant's witness evidence

67. The Appellant's witness's statement was given in their capacity as the Appellant's company secretary. Various points were addressed in their written witness statement. Whilst we acknowledge all of the specific points which were made, we summarise relevant issues below.

68. The material points made by Witness A were:

    a. Witness A gave some further background and context to the Project, explaining the nature and scope of the Project and the fact that some information relating to it would be held on its behalf by external consultants which had implications for the Appellant's ability to search for, identify and collate relevant information in response to requests;

    b. There was no "specific information" on "specific conclusions" for the purposes of the First Request; the conclusions instead formed part of the wider "design, development and optioneering" for the Project as a whole;

[21] Paragraph 72

c. They considered that the Requested Information sought by way of the First Request would have limited use in practice were it to be published, especially in the context of the iterative consultation process for the Project (as the consultation period had now closed) and various explanatory material had already been published.

d. The information sought by the Second Respondent was not necessary to enable the public to engage effectively with the Appellant's proposals relating to the Project, to understand them or to provide informed responses to them.

e. The Requested Information sought by the First Request was technical information, which by its very nature was largely inaccessible to those without the relevant experience and expertise to understand it and it would have simply reiterated the already published conclusions. Other respondents had, though, commissioned their own operational analysis and had submitted that. The published conclusions of the operational analysis were all that was necessary to enable effective participation and response in respect of the Project.

f. The designs for the Project relevant to the subject-matter of the consultation in question were provisional pending consideration of the feedback generated in respect of that. It may well be the case that the emerging design of the Project or the Project objectives are changed as a result of that feedback. If so, then the Requested Information sought by the First Request would relate to matters which by then would have been completely superseded.

g. The Appellant had, in connection with the Project, had dealings with individuals connected with the Second Respondent prior to the formation of the Second Respondent as a limited company. This background was relevant to the assessment of the Requests as manifestly unreasonable. (Attached to the witness statement was a document summarising the nature and extent of the historical dealings, including the time expended dealing with them, for the period from 30 January 2020 – which was the date on which the preferred route option for the Central Section of the Project was announced – and 10 May 2021, being the date of the First Request.)

h. It was considered that there was a connection between the Second Respondent and certain other third parties, including Witness 2, and that there was evidence of a deliberate strategy of a campaign in opposition to the Project which was designed to be harassing and vexatious (with reasons given in support of these views).

69. Witness A's witness statement also referred to the searches which had been undertaken to identify information within the scope of the First Request. The key conclusions in that regard were as follows:

a. Approximately 150,000 email items were likely to require retrieval and assessment. On an estimate of 1 minute (on average) per email for checking relevance, this would take around 2,625 hours (in contrast to the 18-hour limit provided for under section 12 of FOIA); this would cost the public purse around £65,000 (using an indicative hourly rate of £25, and in contrast to the £450 limit under section 12 of FOIA).

b. Moreover, if an employee of the Appellant was allocated to that task on a full-time basis (eight hours a day, five days a week) then it would take over 328 working days across 66 weeks to be completed.

c. In addition, there was the significant burden of retrieving and reviewing any other documents containing potentially in-scope information. Just one of the twelve sub-requests from the First Request alone would entail review of a further approximately 30 documents running to around 1,300 pages – and there would be additional documents requiring review in relation to the other eleven sub-requests of the First Request.

d. There would then need to be a process of review and scrutiny for potential exceptions (such as for legal professional privilege or personal data redactions), which may take up to some 7,000 hours (over three years) for the identified emails alone.

The Second Respondent's witness evidence

70. The Second Respondent's first witness's statement was given in their capacity as a director of the Second Respondent. The witness statement set out some background relating to the Second Respondent and the position prior to its formation. It also set out some background to the Project and matters leading up to the First Request, including issues relating to the timing of the First Request.

71. Whilst we acknowledge all of the specific points which were made in Witness 1's statement, the material points (in summary) were:

a. Whilst some informally constituted local action groups arose in respect of the Project and some people from those action groups joined informal working groups established by the Second Respondent (and some individuals and parish councils provided funding to the Second Respondent), the individuals involved in the village-level action groups were not acting on behalf of the Second Respondent or with its approval. Similarly, the Second Respondent was not orchestrating a co-ordinated overall campaign.

b. However, the Second Respondent did accept that it has, at times, played a co-ordinating role - for example, its involvement in parish council questions, in which the Second Respondent may have helped the Appellant by reducing the number of duplicated questions. Nevertheless, it was wrong to attribute to the Second Respondent the actions of all those who share its objections to the proposals relating to the Project.

c. In respect of the First Request, the Second Respondent considered that the Appellant would have the Requested Information (and the witness statement set out a table listing the sub-requests made in the First Request and referenced the consultation material and associated text which supported its view that the Requested Information would be held). In relation to 9 of the 11 sub-requests, the First Request gave explicit references to the Technical Report showing that it was seeking the information which underlay the conclusions in the relevant documents or is implicit in those conclusions. For the other two sub-requests, the First Request was clear that if the Appellant did not have the information it was not being asked to create it. However, if the information did not exist then it

would also have been useful to know that in connection with the Second Respondent's assessment of the information provided in the Technical Report.

d. The information sought in the First Request remains useful for so long as the question of the approach to Cambridge remains open.

e. Witness 1 did not believe that any of the Requested Information was in the public domain at the time of the First Request – and was still unaware of where it is, if it was in the public domain. The Appellant did not direct them to where the information was publicly available. The Second Respondent would not go to the expense of having the First Request prepared by counsel and reviewed and sent by solicitors if it had all the information it considered would be useful to it in assessing the Appellant's proposals.

f. The Second Respondent has formally only ever comprised two people and at the time of the First Request, between them they had made four other information requests. The Second Respondent was not aware that anyone has made any other requests under FOIA or the EIR on its behalf to the Appellant and it has not authorised anyone to do so.

g. The Appellant had referred to 158 interactions with the 'Cambridge Approaches Group' but communications between the Appellant and communities is part of the consultation and engagement relating to the Project and important to planning decisions. The Appellant had invited interactions as part of its public consultation process and it would be unfair to treat those interactions as a negative point to be taken against the Second Respondent as part of the history of its communications with the Appellant for the purposes of assessing the First Request.

h. The Second Respondent has no control over the interactions between others (including participants in the informal working groups which the Second Respondent had established and supporters of the Second Respondent) and the Appellant.

i. The Second Respondent did not make requests for information with the intention of causing disruption or annoyance to the Appellant. The requests it made were because it was seeking information to enable it to assess the Appellant's proposals or conclusions.

j. The purpose of the Second Request, which made no reference to either FOIA or the EIR, was to outline opposition to the Appellant and was aspirational in asking for things that should be produced or should be done. The Second Respondent did not consider itself to be making a request under FOIA or EIR by way of the Second Request.

k. In respect of the Third Request, the questions raised were not intended to be requests under FOIA or the EIR – they were not requests for existing documents but considered to be part of the consultation process. Questions had been provided by the Second Respondent to the local MP following his invitation (to the general public) for issues which he might raise with the Appellant. However, there were some differences between information provided to the MP by the Second Respondent and the content of the Third Request; this was assumed to be

a result of discussions which were also held with the Second Respondent and third parties.

72. The Second Respondent's second witness's statement was given in their capacity as a resident of Great Shelford in South Cambridgeshire, one of the villages which has an informally constituted action group relating to the Project and as a member of one of the working groups referred to in Witness 1's witness statement.

73. The main content in Witness 2's statement related to the meeting in respect of which the Appellant had contended was evidence of an intention to cause annoyance and disruption, which Witness 2 had attended and been quoted in the minutes (see paragraph 23.j). Witness 2 provided some information regarding the background relating up to that meeting and regarding the purpose of that meeting. Whilst we acknowledge all of the specific points which were made in Witness 2's statement, the material points (in summary) were:

    a. Whilst the meeting had been convened by a director of the Second Respondent, Witness 2 had offered to speak at the meeting on their own initiative, when it was mentioned by one of the Second Respondent's directors (not Witness 1) at an earlier working group meeting which Witness 2 was present at. The speech given by Witness 2 at the meeting was prepared without input from that director.

    b. Witness 2 was not offered an opportunity to comment on the minutes when they were originally written. The parts attributed to them were a fair summary of the words they used, but were taken out of context. With hindsight, the phrase "annoying mosquito" was unfortunate and a more accurate reflection of their message would be "determined" and "keep going if you don't get a reply at first".

    c. Witness 2 considered that there would be no doubt that it was clear to all present at the meeting that they were not suggesting that parish councils take actions for the purpose of annoying or disrupting the Appellant. The reason they suggested actions for the parish councils to consider was as set out in the first of the sentences quoted in the minutes; "actions that all of us can do to make sure our voice is still heard at [the Appellant]".

    d. Witness 2 had never made a request to the Appellant under FOIA or the EIR.

Discussion and conclusions

Outline of relevant issues

74. The Appellant and the Second Respondent did not dispute the findings of the Decision Notice in respect of the Second Request and the Third Request. The Second Respondent's position regarding the First Request reflected that of the Commissioner in the Decision Notice. However, the Appellant's grounds of appeal disputed the Commissioner's finding in the Decision Notice that the First Request was not manifestly unreasonable and accordingly that regulation 12(4)(b) of the EIR was not engaged. The Appellant also considered that the Public Interest Test favoured maintaining the exception.

75. For the purposes of the appeal, therefore, the main difference between the Appellant (on the one hand) and the Commissioner and the Second Respondent (on the other

hand) related to the First Request.

76. We remind ourselves, though, of the remit of the Tribunal as outlined in paragraphs 30 and 31 and that the Tribunal is empowered to undertake a 'fresh review' of the Decision Notice and the findings of fact on which it is based.

Analysis and discussion; application of the law

The nature of the Second Request and the Third Request

77. We start by addressing the nature of the Second Request and the Third Request, notwithstanding that they were not the focus of the appeal nor in issue between the parties. This because we think this is a material issue, particularly with regard to the relevance of the Second Request and the Third Request to the question of whether the First Request was manifestly unreasonable.

78. In our view, the Second Request was not in fact a request for information but would be better characterised as correspondence making representations and demands in respect of the Project. Indeed, this was the position of the Second Respondent (see paragraphs 28.n and 71.j). Whilst the Decision Notice recorded that the Second Respondent accepted that the Second Request was not designed to obtain information[22], the Commissioner's view[23] was that the Second Respondent's intention was irrelevant and the Second Request did in fact seek information. We disagree with that assessment. In our view, it is reasonably clear that the purpose of the Second Request was connected with the concerns and feedback relevant to the consultation process in respect of the Project and that most of the 'requests' in the Second Request were not seeking recorded information but were statements or demands relating to the consultation. The Second Request also drew a distinction between it and the First Request, referring to the latter as requests for information pursuant to the EIR and FOIA.

79. That said, we accept that it purported to request information and accordingly we do understand why the Appellant would have treated the Second Request as a formal request for information under the EIR (or FOIA). However, if it was to be treated as a formal request for information under the legislation then the Appellant would have duties to provide reasonable advice and assistance (under regulation 9 of the EIR, or section 16 of FOIA). In this instance, those duties would be relevant in respect of ascertaining the exact nature of the Second Request. Based on the evidence before us, the Second Respondent was clearly of the view that the Second Request was not a request for information under the EIR (or FOIA) and would have made that clear to the Appellant (as it subsequently did to the Commissioner) had the Appellant sought to clarify the nature and purpose of the Second Request at the time it was made, as part of its duties to provide reasonable advice and assistance. Indeed, the Appellant appears to have provided no advice and assistance at all in connection with the Requests.

80. We also note that the Second Request (unlike the First Request) did not refer to FOIA or the EIR and was not addressed to the Appellant's FOIA/EIR Information Team, but instead was addressed to the Chief Executive Officer of the Appellant. The Second

[22] Paragraph 43 of the Decision Notice
[23] Paragraph 58 of the Decision Notice

Request also asked for an extension of time in respect of the consultation period. Whilst we accept that these are not conclusive points in themselves, they provide additional context to the nature of the Second Request as being correspondence related to the Second Respondent's engagement in respect of the Project, as contrasted with the First Request where specific recorded information was sought.

81. It follows from the above that we consider that the Second Request should not have been treated, by either the Appellant or the Commissioner, as a formal request for information under the EIR or FOIA but rather as correspondence relating to the Project and the consultation which was ongoing at that time.

82. The Third Request was written by the Member of Parliament for South Cambridgeshire. As explained by Witness 1, the Second Respondent contacted the MP with regard to various concerns and questions which the Second Respondent had in connection with the Project. The MP subsequently contacted the Appellant setting out certain details of those concerns and questions. Notwithstanding that the relevant concerns and questions emanated from the Second Respondent, we do not think it is appropriate to characterise the MP's correspondence with the Appellant as a request for information made by or on behalf of the Second Respondent. This is because the MP is an independent public office holder and the Second Respondent does not have the power to direct the MP to do its bidding or, to put it more simply, the MP is not under the control of the Second Respondent.

83. We think it is understandable, in the wider context of the Project and the Second Respondent's opposition to aspects of if, that the Second Respondent would contact the local MP regarding its concerns. Moreover, as Witness 1 explained, the MP invited input from the public generally in connection with the Project. However, it does not follow that, just because the Second Respondent provided such input, that the MP was subsequently acting on behalf of the Second Respondent. Indeed, as we have mentioned, the Second Respondent could not force the MP to make representations or raise questions on its behalf. Even if the MP choose to contact the Appellant (which, of course, he did), the Second Respondent would have no control over the content of the MP's correspondence. Any suggestion that the Third Request was sent by the MP on behalf of the Second Respondent would call into question the independence of the MP to act as they consider appropriate. Accordingly, we consider it wrong to characterise the Third Request as being made by the Second Respondent.

84. We acknowledge that the MP stated in the Third Request that questions were being raised "*on behalf of the Cambridge Approaches group*" but we would make two points in respect of that. First, we consider this to be informal nomenclature and not to be taken as a formal expression of the status of the MP actually acting on behalf of the Second Respondent. Second, it is important to note that the MP refers to 'Cambridge Approaches group' and not the Second Respondent (Cambridge Approaches Limited). There is no mention of the Second Respondent anywhere in the Third Request. Indeed, the Third Request specifically refers to "*Comments and Questions from Cambridge Approaches Campaign Group*" (emphasis added). As Witness 1 explained (and as is accepted by the Appellant), there is a wider informal 'group' concerned with the Project, beyond the Second Respondent. In our view, the Third Request was sent by the MP based on feedback he received from that wider group in connection with the Project. This is also consistent with the evidence of Witness 1 that the formulation of the questions in the Third Request differed from those put to the MP by the Second

Respondent and that the MP had received input from other persons in addition to the Second Respondent in respect of the Project.

85. For the above reasons, we find that:

    a. the Second Request should not have been treated as a request for information by the Second Respondent for the purposes of the EIR (or FOIA); and

    b. the Third Request was not a request for information made by or on behalf of the Second Respondent.

86. It follows that we disagree with the Commissioner's assessment in the Decision Notice that the Second Request and the Third Request were both manifestly unreasonable (which was based on his view that they were submitted before the Appellant had had chance to respond to the First Request)[24].

87. Given those findings, the remaining part of this decision focuses on the First Request.

Did FOIA and/or the EIR apply to the First Request?

88. For completeness, we should briefly address the issue of the application of the EIR to the First Request. As we have mentioned, the Appellant relied on section 14 of FOIA to refuse to supply the Requested Information, in addition to its reliance on regulation 12(4)(b) of the EIR. Therefore the Appellant treated part of the Requests as falling within the scope of FOIA, rather than all of the Requests falling within the scope of the EIR. As noted, though, the Commissioner decided that the EIR applied to all three Requests.

89. We agree with the Commissioner that the EIR applied in respect of the First Request. The Requested Information fundamentally related to the Project and associated matters. Given the nature of the Project (which is essentially a major infrastructure project), there is no doubt in our minds that information held by the Appellant relating to the Project comprises information 'on' the environment for the purposes of the definition of 'environmental information' in regulation 2(1) of the EIR. When looked at in the wider context, all of the Requested Information in the First Request relates to matters connected with the Project and we are mindful of the purposive approach which is to be adopted, together with the other factors we have outlined, when considering what is meant by environmental information. Accordingly, we are satisfied that all of the Requested Information within the First Request falls within the scope of the EIR.

Was the First Request manifestly unreasonable?

90. We therefore turn now to the question of whether the First Request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. Given the legal framework which we have outlined above, we consider that the consideration of the four broad issues or themes outlined in the case of *Dransfield* are a useful starting point for our consideration of this issue.

91. We acknowledge that those issues or themes are not exhaustive and are not intended to create a formulaic checklist for the Tribunal to address when considering whether

[24] Paragraph 59 of the Decision Notice

or not the First Request was manifestly unreasonable. However, we recognise that those issues or themes are a helpful tool in considering potentially relevant issues as part of our broad assessment of all the circumstances. In that regard, we considered those issues or themes in our deliberations, but we should stress that we have not been constrained or confined in any way by considering them. On the contrary, we have adopted a holistic approach, taking into account all of the relevant circumstances, and we have been mindful that the fundamental consideration was whether or not the First Request was, essentially, a manifestly unjustified, inappropriate or improper use of the EIR.

92. The first issue or theme from the *Dransfield* case we considered was that of the burden placed on the Appellant by the First Request. Given our findings above regarding the Second Request and the Third Request, we have determined that they should not have been taken into account as combined requests, together with the First Request, for the purposes of assessing the burden of the First Request. For the reasons we have given, the Third Request was not made by the Second Respondent. Whilst the Second Request did emanate from the Second Respondent, this was in the context of engagement in connection with the Project and was not intended to be a request for information under the EIR or FOIA. In our view, that should be treated as distinct from the formal request for information comprised in the First Request and not be taken into account for the purposes of assessing the burden of the First Request. Given the nature and scale of the Project, it is natural and understandable that correspondence will ensue from those concerned about it and, in the circumstances of this case and the evidence before us, we think it would be wrong to conflate the First Request and the Second Request in assessing burden for the purposes of regulation 12(4)(b) of the EIR.

93. It follows from the above (and our findings in paragraphs 85 and 86) that we disagree with the Commissioner's assessment in the Decision Notice[25] regarding the "overlapping nature" of the Requests and that there was "an abuse of the information rights process".

94. Remaining on the issue or theme of 'burden', we do not accept the points made by Witness A regarding the nature and extent of the work which would be required to identify, collate and disclose the Requested Information relevant to the First Request. This is for the following reasons.

95. First, whilst we acknowledge the point made by Witness A that the Requested Information is not all in some convenient 'folder' of documents, the Requested Information all related to conclusions drawn by the Appellant in the 'Making Meaningful Connections' consultation documents it had issued in respect of the Project. In our view, the Appellant must have had the relevant information readily available to it in order to reach those conclusions. Moreover, we consider that, given the importance and significance of those conclusions to the Project (and the wider public interest in the Project), this should be information which the Appellant should be able to identify and collate without too much difficulty, not least because it substantiates those conclusions. In this regard, we agree with the submissions of the Second Respondent that, as the Appellant was the author of those specific conclusions, it should not be unduly burdensome for it to produce the information it had already

[25] Paragraph 51 of the Decision Notice

processed in coming to those conclusions. At the very least, we would expect the Appellant to have some 'key' documents which support those conclusions, without having to do wider searches.

96. Second, we are not satisfied with Witness A's explanations of the searches which they stated would be necessary to try and identify the Requested Information. No suitable explanation was provided as to why searches would be required using the sundry search terms, rather than anything more focussed to the specific items of Requested Information (and especially given the fact that the Requested Information was based on the Appellant's conclusions as referred to in the preceding paragraph). Witness A also did not make any reference to simply speaking to relevant staff members who may have been able to readily locate the Requested Information. Instead, his comments related to undertaking keyword searches of the servers of the Appellant and those of the Appellant's external consultants.

97. Third, the Appellant's grounds of appeal stated that much of the Requested Information sought by the First Request was intended for future publication in due course. If so, then the Appellant must be prepared for that publication and must have the information reasonably accessible for the purposes of that publication. It is difficult to reconcile this with Witness A's assertions about the extreme difficulties involved in trying to locate information within the scope of the First Request if much of it was going to be published anyway. Further, given that it all related to the same conclusions, it would follow that the remainder of the information would also be reasonably accessible.

98. Fourth, the Appellant has a duty under regulation 4(1)(b) of the EIR to take reasonable steps to organise records, with a view to the active and systematic dissemination to the public of relevant environmental information. Linked to that, under regulation 4(1)(a) of the EIR, the Appellant also has a proactive duty to make environmental information available by electronic means that are easily accessible to the public. We comment on this further below. Given the nature of the Project and the scope of the wording of regulation 4(1) of the EIR (including as referred to in paragraph 44), we consider that these duties extend to the Relevant Information.

99. We recognise the point made by the Upper Tribunal in the *Dransfield* case that the purpose of section 14 of FOIA (and consequently regulation 12(4)(b) of the EIR) was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*"[26]. However, the Court of Appeal's qualification to that (as we have noted) is important – namely that such aim is one only to be realised if the high standard set by vexatiousness (or, for current purposes, 'manifestly unreasonable') is satisfied.

100. In our view, a highly material factor in assessing whether or not a public authority's resources are being squandered or otherwise abused by requests for information is whether the public authority was under a separate duty to publish that information and, if so, whether it had indeed done so. A significant part of the Requested Information is information in respect of which the Appellant's statutory duty of dissemination under regulation 4(1) of the EIR applies. The Appellant has, of course, argued that some of the Requested Information is in the public domain, but Witness 1

[26] Paragraph 10 of the Upper Tribunal's judgment in that case.

has stated that he was not aware of where that information was.

101. We are faced with conflicting positions from the Appellant's perspective – on the one hand, it has stated that some of the Requested Information is publicly available and that much of the Requested Information would be published in due course, but on the other hand it has asserted that it would be extraordinarily difficult to identify and collate the relevant Requested Information. On balance, we have concluded that it would be wrong to treat the First Request as being manifestly unreasonable based on the burden of compliance with it, when the Appellant was already intending to publish much of that information and when the Appellant had duties to organise and progressively disseminate relevant information in any event. The alleged burden is, of course, diminished even further when the Second Request and the Third Request are disregarded, for the reasons we have given.

102. Accordingly, to the extent that there is a burden on the Appellant in complying with the Requests, that burden (in respect of a significant part of the Requested Information) is either a burden which already existed as statutory duties pursuant to regulation 4(1) of the EIR or is a burden created, or at least exacerbated, by the Appellant's own making - namely, a failure to discharge those statutory duties (to some degree, at least). In either case, we feel that the issue of the burden placed on the Appellant by the First Request does not justify withholding the Requested Information.

103. We should note that we are aware that the duty under regulation 4(1) of the EIR does not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12 of the EIR. However, in the current case the claimed exception is regulation 12(4)(b) of the EIR, which we find is not engaged (for the reasons above and to follow).

104. Turning to the issue or theme of motive, we are also mindful that consideration of the motive of the requester could be a significant factor in assessing whether a request is manifestly unreasonable in all of the circumstances. We are satisfied that there were proper and appropriate motives behind the First Request, even when considered in the context of the broader dealings between the Second Respondent (or its founding directors) and the Appellant. It is clear to us that the main motivation behind the First Request was connected with seeking transparency and openness in respect of a major infrastructure project which was of significant public interest.

105. Linked to that, and considering the issue or theme of the value or serious purpose of the First Request, the purpose of the First Request was (as we have noted) to seek information relating to certain conclusions drawn by the Appellant in connection with its proposals for the Project. We are therefore satisfied that there was a broader and substantial public interest in seeking the Requested Information (especially given the nature, scale and cost of the Project) and accordingly that there was value in the Requested Information and that it was being sought for genuine purposes. We acknowledge the point made by Witness A that the Requested Information would have limited use in practice were it to be published, but (even if that were the case) we do not consider that this materially diminishes the value in it, including having regard to the interests of openness and transparency regarding the relevant conclusions drawn in connection with the Project. We are also mindful of the Appellant's submissions that it had intended future publication of much of the Requested Information in any event.

106. We also note the point made by the Appellant and the Commissioner regarding the timing of the First Request and the impact they consider this had on the value of the First Request. The Commissioner stated in the Decision Notice[27] that the First Request was submitted twenty-one working days before the consultation was due to close and that even if the Appellant had complied with the First Request on the twentieth working day, that would have only allowed for a single day for all the identified material to have been reviewed before consultation responses were required. In this regard, we would point out that the twenty working day period referred to in regulation 5(2) of the EIR is the latest point at which public authorities are required to respond and that that regulation actually imposes a duty on a public authority to make the information available "as soon as possible". Related to our comments above about the organisation and progressive dissemination of information under regulation 4(1) of the EIR, there appears to be no good reason why the Appellant should not have been able to respond to the First Request before the expiry of twenty working days.

107. The Commissioner also noted in the Decision Notice[28] that he considered that the Second Respondent's solicitors were "*well aware of the EIR compliance timescales and should have advised the [Second Respondent] to factor this in to the timing of the requests*". Again, we make the point that the compliance timescale is fundamentally "as soon as possible". In any event, we do not think that it was appropriate for the Commissioner to comment about what advice should have been given to the Second Respondent by its solicitors, especially when there does not appear to be any evidence regarding what advice was or was not given.

108. We are, of course, conscious that the value of the Requested Information may have diminished given the time that has since elapsed. However, we consider that there is still value in the information for the reasons we have given. In this respect, we agree with the Commissioner's view, in paragraph 56 of the Decision Notice, that the information would still be of value after the consultation had ended. We also note the Appellant's comments that its intended future publication of much of the Requested Information would occur when there would still be sufficient time for the public to participate in consultations and make representations about the relevant aspects of the Project. In our view, that reinforces the fact that there is still value in the relevant Requested Information.

109. We acknowledge that a compelling public interest in the disclosure of information held by a public authority does not necessarily prevail over the issue of the burden involved in complying with a request for the disclosure of that information. As we have mentioned, it was stated in case of *Ashton* that: "*a substantial public interest underlying the request for information does not necessarily trump a resources argument*" and likewise in the Craven case: "*there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request*". In other words, even if there is considerable public interest in the information which is the subject of a request, that does not (of itself) take precedence over, or override, any consideration that there is a such a burden placed on a public authority by the request that it might be manifestly unreasonable wholly or partly because of that burden. However, for the reasons we have given, we do not consider that the burden imposed by the First Request was

[27] Paragraph 54 of the Decision Notice
[28] Paragraph 55 of the Decision Notice

significant in its own right.

110. With regard to the issue or theme of any harassment or distress associated with the First Request, the first point we would make is that it was framed in an appropriate and professional manner; no improper or abusive language was used. We do not disagree with the Appellant's position that the Commissioner was wrong to suggest (in paragraph 51 of the Decision Notice) that the First Request was unlikely to include an intention to irritate, disrupt or harass by virtue of it being made via solicitors. However, there is nothing in the First Request to indicate anything other than this being a genuine request for information. We also do not accept the Appellant's assertions that it had direct evidence of an intention to cause annoyance and disruption. It is common ground between the Appellant and the Second Respondent that there is a wider campaign group which is objecting to aspects of the Project. Participants in that group may share the views of the Second Respondent or may have provided funding to it, but it does not mean that their other actions are taken under its instruction or with its authority. Contrary to the Appellant's assertions, we have seen no evidence which shows that to be the case. Therefore we consider that it is wrong to take into account the actions of others as factors in assessing whether the First Request was manifestly unreasonable. We have also seen no other evidence to demonstrate any harassment by, or any improper motivations or actions of, the Second Respondent in connection with any of the Requests.

111. For all of the reasons we have given, in our view the First Request was not manifestly unreasonable. Therefore, as the exception in of regulation 12(4)(b) of the EIR is not engaged, there is no need for us to go to apply the Public Interest Test.

Closing summary

112. We have had regard to the four issues or themes referred to in the *Dransfield* case, reminding ourselves that they are for guidance only and are not intended to create a formulaic checklist for the Tribunal. Crucially, we have adopted a holistic approach and reminded ourselves that ultimately the fundamental question before the Tribunal is whether or not the First Request was manifestly unreasonable in all of the circumstances, as a "disproportionate, manifestly unjustified, inappropriate or improper use" of the EIR. We find that it was not, for all of the reasons given.

Final conclusions

113. For all of the reasons we have given, we conclude that the Commissioner was correct to conclude that the First Request was not manifestly unreasonable and accordingly that regulation 12(4)(b) of the EIR was not engaged in respect of the First Request.

114. However, we consider that the Commissioner was wrong to conclude that the Second Request and the Third Request were manifestly unreasonable, for the reasons we have given.

115. We therefore dismiss the appeal but make the Substituted Decision Notice above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 29 September 2023

Promulgated:

Date: 05 October 2023